

1 IN THE UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 NORTHERN DIVISION

4 JUAN ROMAGOZA ARCE, JANE) Docket No.
DOE, in her personal capacity) 99-8364-CIV-HURLEY
5 as Personal Representative of)
the ESTATE OF BABY DOE,)
6)
Plaintiffs,)
7 vs.) West Palm Beach,

Florida

) July 2, 2002

8 JOSE GUILLERMO GARCIA, an)
individual, CARLOS EUGENIO VIDES)
9 CASANOVA, an individual, and) VOLUME 5
DOES 1 through 50, inclusive,)
10)
Defendants.)

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14 COURT REPORTER'S TRANSCRIPT OF
15 TESTIMONY AND PROCEEDINGS HAD BEFORE
16 JUDGE DANIEL T. K. HURLEY

16

17 APPEARANCES:

18 For the Plaintiffs: JAMES GREEN, ESQ.
PETER STERN, ESQ.
19 BETH VansCHAACK, ESQ.

20 For Defendant: KURT KLAUS, ESQ.

21

22 Court Reporter: Pauline A. Stipes, C.S.R., C.M.

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23

24 PAULINE A. STIPES

1 THE COURT: Good morning, everybody.
2 Mr. Marshal, would you bring in the jury,
please?
3 I wanted to alert counsel I have passed out
what
4 we've listed as draft one, and you will notice there are
5 three versions of the command responsibility. One from
6 the version that was given in the Ford case, a second
that
7 was the Plaintiffs' request, and a third that is another
8 draft. We can talk about this later.
9 (Thereupon, the jury returned to the
courtroom.)
10 THE COURT: Let me turn to the Plaintiffs and
ask
11 you to call your next witness.
12 MR. STERN: May it please The Court, the
13 Plaintiffs call Michael McClintock.
14 THE COURT: Mr. McClintock, if you would come
up
15 to the witness stand and make yourself comfortable.
16 I need to tell you that the microphone there
has
17 a short pickup range, so if you pull that chair up to
the
18 desk area, you will be more comfortable.
19 Sir, would you begin by raising your right
hand?
20 MICHAEL McCLINTOCK, PLAINTIFFS' WITNESS SWORN.

21 THE COURT: Sir, would you please begin by
22 introducing yourself to the members of the jury? Would
23 you tell them your full name, and would you please spell
24 your last name for the court reporter?

25 THE WITNESS: My name is Michael McClintock,

1 M-C-C-L-I-N-T-O-C-K.

2 THE COURT: Thank you.

3 Counsel, you may proceed.

4 DIRECT EXAMINATION

5 BY MR. STERN:

6 Q. Good morning, Mr. McClintock.

7 Where do you live?

8 A. I live in New York.

9 Q. Are you here this morning to testify about the
amnesty

10 practice of reporting human rights abuses to the
Government

11 in El Salvador?

12 A. Yes, I am.

13 Q. What is your profession, Mr. McClintock?

14 A. I am a human rights monitor and advocate and I have
15 been working for non profits in this field for a little
16 more than 28 years.

17 Q. Where do you currently work?

18 A. I am working for the Lawyer's Committee For Human
19 Rights based in New York.

20 Q. What do you do there?

21 A. I am deputy program director responsible for the
22 organization's overall program which looks at justice
23 issues, workers' rights, refugee protection, a full range
24 of human rights issues.

THE COURT: Could I ask you to stop for just a

1 minute?

2 BY MR. STERN:

3 Q. How long have you worked at the Lawyer's Committee
For
4 Humans Rights?

5 A. I am coming into my fourth week right now.

6 Q. Where did you work before the Lawyer's Committee?

7 A. Since 1994, I worked for Human Rights Watch.

8 Q. What does Human Rights Watch do?

9 A. Human Rights is actually the largest human rights
of
10 based organization, and covers actually a broader range
11 human rights issues than the Lawyer's Committee. I was
12 deputy program director there and had particular
13 responsibility -- I was supervisor for Africa, Europe,
14 Central Asia, and four years for the Middle East. I
15 covered children's rights and often stepped in and worked
16 with the women's rights division, a full spectrum human
17 rights organization.

18 Q. To give us a little more detail, what in particular
19 does human rights do in the regional areas that you
20 mentioned in general terms?

21 A. One example was -- that I was very much involved in
22 was setting up a program with Russian Partner
groups
23 Organizations, local, non governmental human rights

24 to look at torture in the former U.S.S.R.

25 MR. KLAUS: Objection; relevancy.

1 THE COURT: I will overrule the objection. You
2 may proceed.

3 THE WITNESS: We were looking for torture in
the
4 criminal justice system, not torture persistent, but
5 torture in general. The book was on torture in the
6 Russian criminal justice system, a series of discussions
7 with Russian officials, and we think some progress
towards
8 stopping these practices in the Soviet Union.

9 Another example, I spent a lot of time working
on
10 Central African disasters. We set up field officers in
11 Burundi and Rwanda. We produced I think the best most
12 comprehensive study in the genocide in Rwanda, and we
had
13 people on the ground. We tried -- one of the major
14 concerns in Central Africa was keeping our counterparts
15 alive. We were very much working with local human
rights
16 activists who were trying to monitor human rights abuse,
17 and to take action.

18 BY MR. STERN:

19 Q. Where did you work before you went to Human Rights
20 Watch?

21 A. For the 20 years before Human Rights Watch I worked
22 for Amnesty International. I worked mainly out of London

23 where the international headquarters is based. I spent a
24 lot of time traveling, but the home base was London.

25 Q. Were you working for Amnesty International in London

1 in the time period 1979 through 1983?

2 A. That is right, I started in 1974.

3 Q. In the '79 through '83 time period, what were your
4 specific responsibilities at Amnesty International?

5 A. I was a researcher on Latin America with special
6 responsibility for Central America.

7 Q. Would you tell us more about what your job
8 responsibilities involved in that capacity?

9 A. Amnesty is a membership organization, it has a
million
10 members now and had half a million members in 1983, with
11 national offices in 41 countries. The strongest sections
12 were United States and some of the European sections.

13 My job was to be part of the research department, in
14 what Amnesty calls research department, was about both
fact
15 finding and about action. Generating membership action
16 about people in trouble.

17 So, what -- I was hired because I knew the region, I
18 spoke Spanish, and I was someone who could work with
local
19 human rights organizations, partners of amnesty groups to
20 identify prisoners of conscious -- political prisoners
who
21 Amnesty should have been working for to look at patterns
of
22 human rights abuse such as torture.

23 I was a fact finder, but I was also someone who is
24 expected to prepare material for a membership, and for a
25 public through which attention could be brought to really

1 severe human rights problems.

2 Q. We are going to be dealing with a lot of questions
3 today about Amnesty International. Could you take a step
4 back and tell the jury when that organization was
founded,
5 and what the objectives of that organization are?

6 A. Dates back to 1961 when a British barrister Peter
7 Benenson had a group of friends, some of them lawyers, a
8 lot of ordinary people, and was very much concerned about
9 what he read in the paper, newspaper every morning. And
he
10 read about Russian dissidents being locked up for what
they
11 said, or sometimes for what they didn't say even. He was
12 concerned with imprisonment of --

13 MR. KLAUS: Objection; lack of personal
14 knowledge.

15 THE COURT: I will overrule the objection. You
16 may proceed.

17 THE WITNESS: He was concerned with
imprisonment
18 in the colonial territories of Portugal, United Kingdom
19 itself -- he is a British lawyer -- and around the
world.
20 And he decided that there were a lot of people -- when
21 people were imprisoned unjustly because of their ideas,
22 people who hadn't advocated violence, people who were

23 simply in jail for their ideas, there should be an
24 international movement to call for their release.

25 And he was a great organizer. He wrote a full

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1 page article which he published in the London Press and
2 simultaneously in the U.S., in France, and Germany, and
3 think in several other countries which basically set out
4 the problem. There is a problem of what he called
5 prisoners of conscience, people detained for their
6 conscientious views all over the world in all kinds of
7 political situations, left and right, middle,
8 undetermined.

Amnesty

9 And he called for people to meet together -- he
10 called a meeting, basically, through the newspapers, and
11 within a year there were little groups called Amnesty
12 International, groups all over North America and Western
13 Europe. And you could say in a nutshell what did
14 stand for, I really came into the picture in 1970 when I
15 first started dealing with Amnesty before I was employed
16 by Amnesty.

the

torture

from

17 You could say Amnesty International calls for
18 release of prisoners of conscience, people who have not
19 used or advocated violence and calls for an end of
20 all over the world. Those were the basic plans, and
21 there amnesty grew until it is what it is today. It is
22 over a million members. I think over 100 countries have

23 Amnesty members, and it seems to work.

24 Q. What is the structure of Amnesty International as an
25 organization?

1 A. There is one international headquarters, and that is
2 in London. Today it has about 340 staff. When I started
3 it had 44. I was one of two researchers covering Latin
4 America. It works through what we call -- I say we,
5 because I am still a member of Amnesty International,
6 although I don't work for Amnesty.

a 7 It has a system of national sections so the U.S. has
8 national headquarters in New York, regional offices in
9 Atlanta, and all over the country, really, and this is
10 replicated in Western Europe, Canada and Australia, and a
11 lot of other third world countries. The structure is
12 national office, regional office. And a lot of groups of
13 Amnesty members which don't have offices, they have
14 somebody's basement or living room. This is a recreation
15 model of humans rights activism.

16 Q. Where does Amnesty National get its finding?

17 A. From 1961 founders were concerned with the
18 independence of the organization, so they made a rule
from
19 the start. No Government money, no U.N. money, no
European
20 Union money, zero. And that was a safeguard and it was
21 based on the conviction that ordinary people would want
to
22 be part of this organization, and would fund it.

23 And so it is based on a lot of kind of direct mail

can 24 that people get in this country. People with shaking a

25 looking for donations in public places.

1 Q. Does Amnesty International have any particular
2 political orientation?

3 A. Again, this is something built into the structure
and
4 the statute of the organization from the start. There
was
5 an awareness early on that some people wanted only to
work
6 for prisoners in one sector of the world, one political
7 sphere. The idea was to build in a political balance.
8 That meant an Amnesty group in Iowa would be assigned
cases
9 of political prisoners. They would be one from the left,
10 one from the right, one Russian descent, one Chilean
11 political prisoner. They wouldn't be allowed to take up
12 the Chilean prisoner or Turkish prisoner, it was built
in,
13 that lasted.

14 Again, the point was Amnesty did not want to break
up
15 into a lot of solidarity groups with a particular
political
16 color, it wanted to be independent, and it had to be
17 impartial to be effective.

18 Q. You mentioned the issue of torture. How and why did
19 that become a particular concern of Amnesty
International?

20 A. Well, what we found in researching political
prisoners

21 was that many of them were tortured, and we found that
22 torture was a common thing around the world. And in
cases
23 with a political coloration to them it was endemic, it
was
24 something that you had to address, you couldn't just call
25 for people's release, people who shouldn't be in jail,
but

1 you had to recognize and make some kind of -- take some
2 kind of action to deal with what happened to them before
3 they were released, what happened to them right after
they
4 were detained.

5 Q. Why did Amnesty focus on torture as opposed to, say,
6 extrajudicial killing or murder by repressive forces?

7 A. Well, torture was something the world had already
8 recognized, something which was unacceptable. It was
9 something after World War II, universal declaration of
10 human rights actually was a statement of the whole world
11 community. Torture was unacceptable. U.S. law has
12 forbidden torture for a long time, most of the world made
13 torture a crime.

14 But what we found that wasn't in countries in which
15 political prisoners were taken, it was a crime, but it
16 wasn't punished. It was the normal thing. So we found
17 this as a prime objective.

18 Q. Now, you mentioned Amnesty's membership structure,
and
19 I am going to ask you about specific examples later,
about
20 you in general terms. How did Amnesty try to work on
21 behalf of torture victims around the world using its
22 membership?

23 A. Well, in the early days of Amnesty, action was very

they

24 slow. You were talking about people -- you could say

25 were safe in jail, we had prisoners in jail for 20 years,

1 and had an Amnesty group adopt them throughout that 20
2 years. And they would meet every month in someone's
living
3 room, usually, and they would write letters to the
4 Government, always very polite letters, saying please, we
5 think this is a terrible mistake, you don't mean to keep
so
6 and so, won't you let them go.

7 And sometimes they were released more quickly, and
8 that was a success story. But with torture, we knew from
9 experience, from research that action for victims of
10 torture had to be really quick. Usually torture happens
in
11 that first week after detention. It is not something
where
12 we had the leisure to send a case out to a group in Iowa
or
13 Nebraska with a view to them waiting until their next
14 meeting and talking about it, and figuring out what they
15 want to do and writing a letter. Months later some
letter
16 would drift off to a far off land saying please be nice
to
17 this prisoner.

18 So, when -- it was the early '70's, around '74, '76
19 that a major effort was made to regear the organization's
20 capacity through new membership structures and new action
21 capacity to deal with a kind of human rights emergency
that

22 really required instant action, we called it the Urgent
23 Action Network, and we developed something we called the
24 Urgent Action.

25 Q. At some point, did the notion of disappearance also

1 become a focus for Amnesty International?

2 A. Disappearance was something we had experienced in
3 South America, really, after 1976. And we had some
4 experience of disappearance in El Salvador, Nicaragua and
5 Guatemala around the same time. It was most serious in
6 Argentina in the first years of the '70's.

7 What is a disappearance? It is when someone is
8 detained, but the authorities deny holding the
individual.

9 Someone is scooped up. And often for our action purposes
10 we wanted witnesses that it was official detention,
usually

11 troops, police, who detain someone. The family would go
to
12 the courthouse and say where do you have Joey, and the
13 court might ask the police. The police say, oh, we don't
14 have him, and the military say we don't have him, but we
15 knew they did. We needed something to move fast for that
16 as well.

17 Q. What was Amnesty International's goal in addressing
a
18 case of disappearance?

19 A. The goal was not to demand their release, it was to
20 demand they acknowledge to be in custody. Usually what
we
21 said, please tell us where they are detained and either
22 bring them to trial or release them.

23 So the point was not to make a judgment on whether
24 these people should be in jail or not, it was really to
25 show -- to tell a Government that we know you have

someone

1 and that if anything happens to them, you will be held
2 accountable, and we would put them on notice, really,
that
3 this is a case of concern to us. No one should be
4 tortured, no one should be killed in jail. That was the
5 prime issue, wasn't release them, it was just show them.
6 Q. I would like to shift the focus of attention to El
7 Salvador.

8 When did El Salvador become an important area of
9 interest for Amnesty International?

10 A. Well, I first went there, really the first
exploratory
11 mission, a little more than a week in 1976. El Salvador
12 was a fairly low level concern at that time. We had some
13 disappearances. We had some people detained on charges
of
14 involvement in violent opposition groups. We had cases
of
15 torture. We had some killings.

16 We were talking in the dozens at the time, and my
17 purpose really wasn't intensive research at that time, it
18 was really to establish a basis for ongoing work in the
19 future, and that meant working with local human rights
20 monitors, talking about methodology, talking about
21 communications lines, giving people my home phone and
22 telling them they could call me collect if there was an
23 urgent need.

1980

24 It was really -- it was really late '79 and early

25 that Amnesty really had began to make El Salvador a

1 priority.

your
2 Q. You mentioned the phrase urgent action earlier in
3 testimony, and I would like to try and walk through the
4 urgent action, the preparation of an urgent action in
some
5 detail.

6 How did an urgent action prepared by Amnesty
7 International begin?

8 A. Well, often it began with a phone call, an expensive
9 long distance phone call or a telegram or Telex, which is
before
10 something which is sort of like a dinosaur now, but
11 the fax, the only way to communicate rapidly in writing
is
12 a Telex, a big typewriter where you really had to push
the
13 keys down very hard, and it made a ticker tape. It is
very
14 much like sending a telegram, but something which
15 businesses would have in their office. Amnesty offices
had
16 them as the basis for rapid communication.

17 You would make a tape, a ticker tape and then you
put
18 it through and it would send it on the telephone wires,
and
19 it would be received by every -- really simultaneously
you

time. 20 could send it to like 40 Amnesty offices at the same

and 21 So the same time we tried to make sure that our friends

22 our partners in places like San Salvador had a Telex

23 machine, so they had a Telex machine in the archdiocese

offices 24 office in San Salvador and there were several other

25 around the country that had Telex as I recall.

which
1 So it goes both ways. We would receive a Telex
2 would set out the basics of an emergency situation, or we
3 would receive a midnight phone call, and there were a lot
4 of midnight phone calls. And what we would want would be
5 basically who, what, when, where, and possibly why. We
6 would want to know, and again, our counterparts, people
we
7 knew and trusted in countries where things were
happening,
8 would know what information we needed to be able to do
9 something.

10 This was the name of an individual in trouble. You
11 had to have a name. If you had their age and profession,
12 all the better, but you had to have the name. You had to
13 have a report of what happened to them and it had to be
an
14 official action, or something we thought was an official
15 action.

16 So, you have Joe Bogus, the name, reported detained
on
17 such and such a street corner at such and such a time in
18 such and such a place. If you then know he is a leader
of
19 the teachers' union in a country in which people
disappear
20 or are killed for being a member of a union, and in which
21 detainees face torture, that would be a prima facia, on
the

one
22 face of it. You say that is an action we could do with
this
23 condition. If it is three weeks old, we wouldn't use
it
24 speedy network. It is too expensive. And the person --
25 would be too late, probably. If it was within a couple

1 days, if it was fresh information and we thought we could
2 have an effect and within someone's -- within protection
3 for someone, we would do it.

4 Q. You and your staff in London actually prepared the
5 urgent notices; is that correct?

6 A. Yes, yes, we did.

7 Q. Focusing specifically for the moment on the sources
of
8 your information, what were the individuals or groups
that
9 were giving you the information that you then turned into
10 urgent action notices in El Salvador.

11 MR. KLAUS: Objection; lack of foundation, lack
12 of personal knowledge.

13 THE COURT: Well, let me stop for a second.
The
14 purpose of this testimony is simply to show that there
15 were communications in this instance from an
international
16 organization to people in the Government of El Salvador?

17 MR. STERN: That is correct, Your Honor.

18 THE COURT: Okay. Ladies and gentlemen, I was
19 thinking about this, also in terms of some of the other
20 testimony that we had had, so let me take a second if I
21 might.

22 In our case, as you know, we have three
23 individual Plaintiffs, and what the jury is ultimately

24 going to have to decide is whether either or both of the
25 Defendants, whether they bear any responsibility, any

1 liability for what happened to one or more of the
2 Plaintiffs. In other words, when someone brings a
3 lawsuit, they are contending -- in this case, each
4 Plaintiff is contending that one, and in some instances
5 both of the Defendants, bear some responsibility for
6 happened to them.

what

7 Okay. And the Defendants -- the Plaintiffs are
8 largely relying upon a legal theory that is called the
9 Doctrine of Command Responsibility and I am going to
10 about that in much greater detail.

talk

11 But one of the issues in applying that Doctrine
12 is whether a military commander knew or should have
13 that people under that person's command were engaging in
14 acts of torture or human rights violations.

known

15 So, this testimony is being presented for the
16 issue of notice, that is, was notice being given to the
17 Defendants in this case as to allegations of what was
18 taking place. So the issue is not necessarily the
19 truthfulness of it, but rather what was being said, what
20 notice was being given to put someone on notice because,
21 you see, ultimately the jury in this case is going to

have

22 to look at the testimony of Dr. Romagoza, the testimony

of

23 Professor Mauricio, and the testimony of Ms. Gonzalez.
24 Number one, decide, is that true. Did those things
happen
25 to them. If they did, do either of the Defendants in
this

1 case bear any responsibility for that.

2 So the issue of notice to the Defendants of
3 allegations of torture or human rights violations, that
is
4 something that you may consider because it is going to
go
5 to the issue of notice. Okay.

6 So, with that, let us proceed. I will overrule
7 the objection.

8 BY MR. STERN:

9 Q. Mr. McClintock, while you were at Amnesty
10 International in 1979 to 1983 time frame, did you ever go
11 to El Salvador to meet with individuals or organizations
12 that were reporting information to you in your base in
13 London?

14 A. The story really begins with 1976, which is when I
15 spent the most time in El Salvador and met with most of
the
16 people I would be dealing with over the next five to ten
17 years. I stopped briefly in El Salvador in '79. I was
not
18 myself in the country in '81 to '83. It was in '84. I
was
19 meeting people in neighboring countries around that time.

20 The 1976 trip was to make contact with people I knew
21 were doing human rights work in El Salvador. Most of
them
22 related to the Catholic Church, but some from Protestant

23 Churches, some were independent human rights monitors.

our 24 And it was also, as was our norm, this was part of

25 general making contact with a country, and so we were

with
rights
anyone

1 trying to see all parts of the society. So I did meet
2 government ministers and talked frankly about human
3 issues. And how Amnesty International works, it was an
4 introductory thing. I met newspaper editors because the
5 media is something we also follow in human rights
6 monitoring. I met trade union leaders and basically
7 who had an interest in human rights issues or should have
8 an interest.

among
committed
exchange

9 And most important was working with the established
10 human rights office under the umbrella of the archdiocese
11 of San Salvador. These were people that were Jesuits
12 them and these were very serious people and very
13 to human rights issues, and part of my job was to
14 the experience from throughout the region in monitoring
15 everything from torture and disappearance to political
16 imprisonment in the broad sense.

in

17 And so, for example, I took with me copies of
18 questionnaires we prepared essentially for use anywhere
19 the world, what we call data questionnaires, and I had
20 copies in Spanish of our material and also material from
21 the relatives of the disappeared organizations in the

22 southern part of South America.

23 And what came out of this was that it already in the

24 late '70's, that the church human rights people and the

25 private human rights monitors had systems of
documentation

1 and they had a protocol which they followed which was
2 something we worked out with them that when they had a
3 human rights complaint, it shouldn't been a casual
affair.

4 And some of them were Jesuits, it was a very formal
affair
5 in some ways.

6 Their rule was they wanted the source to be a direct
7 witness, to be a family member or to be personal friend
of
8 the victim of whatever happened. Often it was the victim
9 themselves who could provide the data for the
questionnaire
10 after release, for example.

11 The legal aid office of the Archbishop had a
12 questionnaire with 22 categories of information. Again,
13 this was in line with our Amnesty International format
for
14 information. It gave basics, name, birthday, profession.
15 It also had provision for what people were wearing when
16 they were last seen, which turned out to be very
important
17 when people disappeared and bodies were found. And a lot
18 of people wore light blue trousers or purple socks, and
19 this turned out to be very important in identifying the
20 body.

21 More important, perhaps in terms of documenting
human

22 rights abuse, particularly when these were cases which
23 could lead to prosecutions, which could lead to
24 international action by the Organization of American
25 States, for example, was that the questionnaire asked

very

1 precisely what legal measures have you taken to establish
2 the situation, to seek a remedy, to seek compensation for
a
3 wrong done.

4 So it would list -- it would include documentation
5 concerning every visit to a courthouse, every visit to a
6 police station looking for someone's lost son.

7 The other standard operating procedure for the legal
8 aid office was to do a habeas corpus position for every
9 detainee, and that meant you would have a document from a
10 court establishing that you were trying to find someone
in
11 custody, and that someone was denied. So this became
very
12 important later when the numbers went up from dozens of
13 people a year disappearing into hundreds and later tens
of
14 thousands.

15 Q. Just for the record, what are the Jesuits that you
16 mentioned?

17 A. This is a Catholic religious order which had a very
18 important presence in Central America. Ten years after
the
19 period we are talking about ended, it was a group of
Jesuit
20 priests at the Central American university, Jesuits are a
21 teaching order, so a lot of Jesuits are university
teachers

22 and run schools. The murder of the Jesuits in 1989 --

23 MR. KLAUS: Objection.

24 THE COURT: I sustain the objection.

25 MR. STERN: I will move on, Your Honor.

1 BY MR. STERN:

2 Q. Also, for the record, what was the name of the
3 Catholic Church organization under the Archdiocese you
4 mentioned?

5 A. It was a legal aid office.

6 Q. Okay. And based on your experience and training as
a
7 human rights worker, did you regard the reports that you
8 were receiving from these organizations about human
rights
9 abuses in El Salvador as reliable?

10 A. Yes, I did. And a test of the reliability was often
11 that they would receive reports from other sources at the
12 same time, from the private Human Rights Commission which
13 had its own operation, and from the church people, and
14 often we would get a phone call or something from a
private
15 citizen telling us the same case.

16 Q. So in London you receive information from the
17 organizations that you described in El Salvador. What
does
18 Amnesty International then do with that information?

19 A. Well, if it is a question of fear of torture, fear
of
20 disappearance or killing, and we think it is solid
21 information, we have the basic elements of a case, the
22 name, place, the who, the what. We had a team of three,

23 sometimes four working on El Salvador which I coordinated
24 in those years. We had a standard format in order to use
25 our urgent action machinery. We had to keep it short

1 because the actions went out by Telex.

2 So what we would do would be condense the story of
3 what happened into one or two paragraphs which would
4 usually go on one side of one sheet. We would have a
5 paragraph of background information. For example, it is
6 important if you are going to ask members to act because
7 fear of torture, you want to give them some context why
8 think it is a very strong possibility that someone in
9 detention will be tortured, so you have a paragraph on
10 background.

11 You would then turn over the sheet, if it is the
12 printed version, and you would tell them what -- for
13 instance, the basic information would be the name, what
14 happened to them, they were reported detained on such and
15 such a street, by, and whom.

16 The other side, you say what do you want to be done.
17 Because this was an urgent situation, we would ask for
18 telegrams, express letters or Telexes for those who had
19 access to them to be sent to officials in the country in
20 question.

21 Q. How long did it typically take you to air one of
22 urgent actions regarding torture?

23 A. If we had information fresh off the telephone or

of
you

these

24 Telex, this would be our top priority and stop everything
25 else. It could be a turnaround of two hours, three
hours.

1 Again, the idea was to make it simple, to bash out the
2 story, put it on the ticker tape and then to send it out.
3 And the fresher the information, the more we knocked
4 ourselves out to get the material off quickly.

5 Q. And from London, to whom does the urgent action go
to?

6 A. Well, in those years we had 41 national offices. We
7 had members in other countries, but 41 countries have
8 really strong amnesty structures, and most of them have
9 Telexes. So we would Telex the message to those national
10 offices, and for the U.S., there was -- there were also
11 regional offices which would get the Telex at the same
12 time, and there was an urgent action coordinator in
13 Boulder, Colorado who would get it at the same time.

14 These offices would immediately do something. It
15 could mean they would call -- do some phone calls to the
16 Embassy in their own country, and maybe to their own
17 government, so the U.S. secretaries would call the State
18 Department saying so and so reported detained, could you
do
19 something.

20 At the same time they set in motion something you --
21 we call the telephone tree and that is basically you call
22 ten people and each of them would call ten people, you
give
23 them the basics, and say get a telegram off today. Just

24 the basics, John Brown reported detained, San Salvador,
25 concern with treatment, full stop. That would often be

the

1 gist of it. Get it to the Government to get them aware
2 that someone knows John Brown has been detained.

3 Q. Did this telephone tree result in the sending of any
4 letters or other forms of contacting to the government of
5 El Salvador?

6 A. Yes. This was the real strength. The first way was
7 40 messages from -- basically people in offices, like me.
8 And that would be the sort of holding action --

9 MR. KLAUS: Objection; lack of foundation, lack
10 of personal knowledge.

11 THE COURT: You are talking about, in other
12 words, whether Mr. McClintock knows the end result of
13 what
13 would happen?

14 MR. KLAUS: Yes.

15 THE COURT: I sustain the objection and allow
16 counsel to establish that if you can.

17 BY MR. STERN:

18 Q. Mr. McClintock, in the course of your work at
19 Amnesty
19 International in the '79 through '83 time period, did you
20 receive evidence that members of the government or
21 military
21 of El Salvador had received communications from Amnesty
22 International's members regarding individuals who were
23 detained?

24 A. Yes. Many times.

25 Q. And what form did that evidence take?

sent
1 A. Well, often it took the form of copies of letters
2 by them to the groups who sent the messages.

or
3 Q. Would you receive copies of those letters in London
4 through other organizational mechanisms of Amnesty
5 International?

member
6 A. Yes. That was a routine. Every urgent action
7 was requested to send copies of the letters sent and
8 received to the international headquarters.

the
9 Q. Did you ever have any discussions with members of
10 government of El Salvador about this issue of receipt of
11 communications from members of Amnesty International
around
12 the world?

met
13 A. This was a standard thing. We would hear when we
14 with diplomats from El Salvador in London or when
15 Amnesty -- when my colleagues would meet with diplomats
in
16 Washington or in Bohn, or in Paris --

17 MR. KLAUS: Objection; non-responsive.

18 THE COURT: No, I will permit that.

19 MR. KLAUS: Lack of personal knowledge,
hearsay.

20 THE COURT: I sustain the last objection and
ask

aware

21 you to go back and establish that Mr. McClintock is

22 of this information.

23 BY MR. STERN:

24 Q. Mr. McClintock, did you personally receive word from

25 the members of the government of El Salvador that

1 communications had been received by them from Amnesty's
2 members around the world?

3 A. Yes. I could elaborate on that.

4 Q. What sort of --

5 A. Well, at the Embassy in London, but also for example
6 in December -- I think it was November, 1980, the general
7 assembly of the Organization of American States met at

its

8 headquarters in Washington, and I had a meeting with the
9 foreign minister of El Salvador, Fidel Chavez Mena, and

my

10 direction was to express our concerns to Mr. Chavez Mena,
11 and he was very clearly aware we were bombarding the
12 country with letters and telegrams. And this was a
13 to him, and he also was clearly concerned with the issues
14 we were raising.

concern

15 MR. STERN: If I may approach to hand the

witness

16 an exhibit, Your Honor.

17 THE COURT: Yes.

18 BY MR. STERN:

19 Q. Mr. McClintock, I handed you a one page document

from

20 Plaintiffs' Exhibit 400. Without discussing the

substance

21 of the document, can you identify what it is, please?

22 A. This is the printed form of an urgent action appeal.

23 Q. What is the date on the document?

24 A. 13 May 1981.

25 Q. Is this a document prepared by you or under your

1 supervision at Amnesty International's offices in London?

2 A. Yes, it is.

3 Q. Okay.

4 MR. STERN: Your Honor, at this time I would
ask

5 that this page from Exhibit 400 be moved into evidence,
6 and that I be permitted to publish it to the jury.

7 THE COURT: May I see it, please?

8 Is there any objection to what is marked
9 Plaintiffs 400?

10 MR. KLAUS: Objection; hearsay, lack of
personal
11 knowledge. It is based on hearsay. Being offered for
the
12 proof of the fact asserted, and based on hearsay.

13 THE COURT: Hold on just a second, if you
would.

14 Ladies and gentlemen, let me again come in, and
I
15 want to talk to you as another example.

16 Do you remember last week we talked about, and
involved
17 there was testimony about two young men who were
18 in some type protest near the American Embassy in San
19 Salvador and there was testimony that they had been
20 apprehended, and then there was a question about them
21 disappearing?

this

22 Now, I want to be very clear. In this case,

23 case is not a case for holding either General Garcia or

of

24 General Vides liable for that -- for the disappearance

25 those two individuals, okay? That testimony was offered

1 and received simply for the fact that there was an
2 allegation that two people had been apprehended and
3 disappeared and that protests were made. So it was
4 offered for the purpose of notice, because one of the
5 issues in this case is the issue whether, number one,
6 military or police units under the command of either or
7 both of the generals were engaging in this kind of
8 activity, did the generals know about it, and either
9 to punish their subordinates, and so on.

fail

10 Again, these are issues we are going to talk
11 about in great detail at the end of the case.

12 Now, I am going to overrule the objection and
13 receive this exhibit into evidence over objection. And
14 talks about a particular event. I am talking about the
15 first part dealing with the allegation that people were
16 arrested by the security forces.

it

17 I am not receiving it for the truth of the
18 asserted. Not for whether it is in fact true that these
19 people were arrested, but rather for the purpose of
20 establishing whether notice was in fact being conveyed
21 this instance by an international organization to
22 of the government of El Salvador, that there were

matter

in

leaders

23 allegations that these types of events were in fact
24 happening.

notice 25 So I am admitting this for the purpose of

consider, 1 so that ultimately the jury is going to have to
happened 2 is there any liability in this case for whatever
because 3 to Dr. Romagoza, Professor Mauricio, Ms. Gonzalez,
4 ultimately the jury is going to have to decide, number
5 one, was there torture to one or more of the Plaintiffs.
6 If there was, was it done by subordinates of either
do 7 General Vides or General Garcia. And if that is true,
for 8 either or both of the generals bear any responsibility
9 that because they were not -- did they know about it, or
10 were they failing to punish there troops for that type
11 activity and so on.

12 We will talk about that in much greater detail.
13 So I want to come back here again. With respect to this
14 exhibit, I am not admitting it for the truth of what is
15 set forth, but I am admitting it for the limited purpose
16 so the jury can evaluate were communications being sent
to 17 responsible officials in the government of El Salvador
18 indicating that people were in fact being summarily
taken 19 off the streets, disappearing, and so on.

20 So I am admitting it for the limited purpose of
21 notice of these accusations.

is 22 MR. KLAUS: I have an additional objection, it
23 misleading and confusing to the jury. Could I go
sidebar? 24 THE COURT: Yes.
25 (Sidebar discussion on the record.)

1 MR. KLAUS: It contains misstatements of fact.
2 This list wasn't published by the Army, it was published
3 by a private organization, number one.

official
4 Number two, this isn't what went to any
5 in El Salvador, this goes to the members of Amnesty
6 International. It is not communicated -- I think you
7 misinformed the jury. This isn't communicated to the
8 officials of El Salvador, this is communicated to the
9 members of Amnesty International.

10 THE COURT: Okay.

was
11 MR. KLAUS: This is just not true. This list
12 published by a private organization. We already had
13 evidence of that.

14 THE COURT: What do you want to do, remove that
15 one paragraph?

16 MR. STERN: Your Honor --

17 THE COURT: Just a minute.

18 MR. KLAUS: Yes, remove that. Could I voir
dire
19 on it?

20 THE COURT: Let me ask you, what do you want to
21 remove? That one paragraph?

22 MR. KLAUS: This is definitely wrong, and I
don't
23 know if this is true or not.

referring 24

THE COURT: When you say this, you are

25 to the second paragraph?

1 MR. KLAUS: One, two, three, four -- the one
that
2 begins with "on 27 November" I think it is misleading
and
3 confusing.

4 MR. STERN: First, Your Honor, general is
5 concerns, the concerns raised by counsel, it has been
6 addressed by Your Honor's instruction that it is not to
be
7 received for the truth of the facts at issue. I will
not
8 publish these two paragraphs if that is a concern. My
9 goal is to show the jury that these individuals were the
10 subject of an urgent action, and General Garcia was
listed
11 as an addressee.

12 We already had testimony that these appeals
13 resulted in a large volume of mail to the recipients or
14 members of the government of El Salvador, so we think
this
15 is an important link in the chain of establishing notice
16 to the government of El Salvador, and that is our
purpose
17 in using it.

18 THE COURT: I am going to find that the
19 prejudicial effect of the paragraph that begins "An
20 apparent death list", that the prejudicial effect of
that
21 outweighs its probative value because that suggests that

22 the Army had a list of 138 people, and so on, nuns and
23 human rights activists, university rectors and so on.

24 As counsel for the Plaintiff indicated, the
25 purpose of this is simply to show the type of action,

1 urgent action message that was sent out, and the first
2 part, for instance, deals with the arrest of three
3 particular people on May 13, 1981 at a particular
4 location.

5 Then there is a paragraph in there again by way
6 of background that discusses the arrest or apprehension
of
7 the FDR leaders. We already had testimony about that.
8 This is simply coming in for an illustration of the kind
9 of message that went out. And as suggested, what is
10 significant is that the two names that are listed, that
is
11 suggesting that the Amnesty International recipients
then
12 write to President Duarte and Defense Minister Garcia,
13 who, of course, is one of the Defendants.

14 So, I think the issue of whether someone really
15 followed up on it, you know, and sent the letter to
16 General Garcia as opposed to President Duarte, you know,
17 that is an issue of fact that the jury is going to have
to
18 decide having listened to the general practice. The
fact
19 that they know that people did in fact -- you are right,
20 we don't have anyone who stood at general Garcia's house
21 and saw the message arrive, but I think that is an issue
22 of fact. At the appropriate time we will redact and

23 remove the paragraph that begins apparent death list.

Garcia 24 MR. STERN: For what it is worth, General

25 admitted in deposition and discovery responses that he
did

1 receive messages --

2 THE COURT: Well, you can bring that out at the
3 appropriate time. We all understand the issue of notice
4 is terribly important. You can't prove these things
5 always by direct evidence, so you have to look at
6 circumstantial evidence. And when you look at pattern
and
7 practice of the way things are done, I think this is a
8 legitimate link in that chain. I do think the
prejudicial
9 impact of that one paragraph outweighs the probative
10 value, and I think we can redact that and take it out.

11 MR. STERN: For purposes of publishing this on
12 the screen, perhaps I could ask the technician to
13 highlight this portion of the document without showing
the
14 entire document, and we will remove this section.

15 THE COURT: You might want to go down and tell
16 him what we have done.

17 MR. GREEN: We can show the jury.

18 THE COURT: Show him everything, except at the
19 appropriate time we want to put a piece of paper over
20 this. When the hard copy goes back, we want to make
sure
21 that is redacted.

22 MR. STERN: I have one other document like this

I

23 that directs appeals to be sent to General Vides. What
24 will do is hand that to opposing counsel and give him a
25 chance to look at it. If he has similar concerns, I

1 propose to deal with it the same way.

2 (After sidebar.)

3 THE COURT: Ladies and gentlemen, simply so the
4 record is clear, Plaintiffs' Exhibit 400 is received
into
5 evidence over objection, and subject to another ruling
by
6 The Court. So you may proceed.

7 Again, ladies and gentlemen, let me make sure I
8 am emphasizing this to you, I am not receiving it for
the
9 truth of what is set forth in it but for the purpose so
10 you can evaluate the purpose of whether notice is being
11 given of this allegation, notice to responsible
12 individuals in the Salvadoran government.

13 MR. STERN: Thank you.

14 (Plaintiffs' Exhibit 400 received in evidence
15 over objection.)

16 MR. STERN: First, could I ask that the portion
17 of the document above the dotted line, three quarters of
18 the way up the page be highlighted, please.

19 BY MR. STERN:

20 Q. Mr. McClintock, getting back to the urgent action
21 document, what is going on here? Can you tell us about
the
22 subject of the urgent action?

23 A. Right. The heading is always the reason for concern

24 and here we have put fear of torture, extrajudicial
25 killing.

1 Q. And who were the individuals named; if you know?

Carcamo,

2 A. Anna Margarita Gasteazoro, Eleuterio DeJesus

3 and Rafael Barrera, and we did misspell Margarita.

4 Q. And I notice a number above the word El Salvador on
5 the left-hand side of the page. What is that number?

6 A. UA118 stroke 81, 181st urgent action of the year
1981.

7 It is a unique number so any follow-up action on her
8 case -- on these three cases would have that same number.

9 MR. STERN: Could I ask the technician to
10 highlight the next three full paragraphs, please?

11 BY MR. STERN:

12 Q. What was Amnesty International's specific concern
13 regarding these three individuals? If you would read
those

14 paragraphs.

Carcamo,

15 A. Anna Margarita Gasteazoro, Eleuterio De Jesus

16 Rafael Barrera were arrested by security forces on 13 May
17 1981 at the Institute of Social Studies in San Salvador.

18 I could jump to the bottom line which is the reason
of
19 simple reported arrest is of concern. It says, "There
has
20 since been no news of the whereabouts of these three
people
21 and there is grave concern for their safety."

22 Q. Based on this urgent action, what was the political
23 orientation of those three individuals?

24 MR. KLAUS: Objection; lack of personal
25 knowledge.

1 THE COURT: You may answer if you know. If you
2 know of your own personal knowledge.

that

3 THE WITNESS: This is an exceptional case in
4 I did know at the time and I know now these were members
5 of a social Democratic party. Anna Margarita was
6 who had been a representative, who had traveled around
7 Europe, she was well-known in the Nordic countries and
8 Germany as a social democrat, as a member of the legal
9 political party. And so there was a concern that other
10 members of this political party had been killed in El
11 Salvador the previous year, so there is a particular
12 concern.

someone

in

13 MR. STERN: If I could ask the technician to
14 highlight the portion of the document that begins with
15 line recommended action and down to the final date of
16 action.

the

the

17 Thank you.

18 BY MR. STERN:

19 Q. What was Amnesty International asking its members to
20 do about the detention of these three individuals?

21 A. Well, telegrams or letters directing the authorities
22 to take immediate measures to do three things, to insure

an

23 the physical safety of the three, to disclose their place
24 of detention, and thirdly, and this was very unusual for

them

25 urgent action, to release them. We only said release

of
we
1 because these were known quantities, these were members
2 the legal nonviolent opposition, as far as we knew, and
3 had many sources about their -- about these cases.

4 Q. Now, the urgent action requests that Amnesty
5 International members send telegrams or express letters
6 individuals. Who are those individuals?

7 A. The first person was Jos, Napoleon Duarte who was
8 President of the Junta. He was the civilian at the head
9 the government. The second was Colonel Jos, Guillermo
10 Garcia, Minister of Defense and Public Security.

11 Q. Is that the General Garcia in our courtroom today?

12 A. Yes, it is.

13 Q. Now, were you involved in determining the
14 representatives of the Salvadoran government and military
15 forces to whom appeals were to be sent?

16 A. Yes.

17 Q. And why did you select Colonel, now General Garcia
18 one of the individuals to whom Amnesty's members should
19 direct their letters?

20 A. Well, the Salvadoran government itself put General
21 Garcia at the top of their authority's list concerning
the

22 Army and security forces, and so we wanted to -- the
23 purpose of this selection was to have, appealing to
someone
24 with authority to make things right, and with authority
25 over the forces we felt were responsible for the
detention

1 which had not yet been acknowledged.

2 Q. I have another exhibit for you.

3 I handed you a copy of Plaintiffs' 288,

4 Mr. McClintock.

5 Is this another urgent action sent by Amnesty's
6 headquarters in London to its members?

7 A. Yes.

outweighs

8 MR. KLAUS: Again, objection. Lack of personal
9 knowledge, based on hearsay, prejudicial effect
10 probative value.

11 THE COURT: Could I see it? Do you know that
12 this was sent out yourself, sir?

13 THE WITNESS: Oh, yes.

14 THE COURT: Okay. Let me take a look at it.

15 MR. STERN: If it please The Court, I would be
16 happy not to elicit any testimony about or publish the
17 section headed background information.

the
and

18 THE COURT: Okay, why don't we do that. Again,
19 this is 288. I am going to overrule the objection and
20 admit 288 into evidence over objection in that redacted
21 form. And I am doing it again simply on the issue of
22 notice. That is, was notice being given to members of
23 government of El Salvador regarding these allegations,

24 so I will redact out the background information section

25 but allow the remainder of it to be received into

evidence

1 over objection.

2 So 288 is received into evidence but over
3 objection.

4 MR. KLAUS: With the redaction.

5 THE COURT: As redacted, yes. Uh-huh.

6 (Plaintiffs' Exhibit 288 received in evidence
7 over objection.)

8 MR. STERN: I think it should be up in just a
9 moment, Your Honor.

10 THE COURT: That is fine, take your time.

11 MR. STERN: If I could ask the technician to
12 highlight the area above the broken line at the top.

13 BY MR. STERN:

14 Q. What does this urgent action relate to,
15 Mr. McClintock?

16 A. This is a fear of torture or disappearance.

17 Q. And what is the date on the document?

18 A. 16 July 1981.

19 MR. STERN: I would like the technician to
20 highlight the next three paragraphs, please.

21 BY MR. STERN:

22 Q. In this instance, could you please read these
23 paragraphs to -- if you would read these paragraphs,
24 please.

the 25 A. "Amnesty International is gravely concerned about

three
reports
accompanied
too
still

1 safety of Dolores Alas Jimenez, aged 37 and mother of
2 children aged 13, four, and three. And Ana Elizabeth
3 Flores, a university student aged 23. According to
4 received by Amnesty International, both women were seized
5 three p.m. on 6 July 1981 by plain clothes men
6 by uniform members of the National Guard and National
7 Police in the vicinity of the sports ground in San
8 Salvador. And Elizabeth Flores was passing by as Dolores
9 Jimenez was being pushed into a white Toyota car, Toyota,
10 it says, car without number plates. It is believed she
11 was seized because she had witnessed the abduction of
12 Senora Alice Jimenez. Both women are reported to be
13 alive but to have been ill treated.

14 Q. Does Amnesty International have concern about the
15 witnesses named?

16 A. Yes, they do.

17 MR. STERN: May I ask you to highlight
18 recommended action?

19 BY MR. STERN:

to

20 Q. Here, what was Amnesty International asking members
21 do?

22 A. We are asking members to express grave concern at

23 reports of the detention and to urge that all possible
24 measures be taken to insure their physical safety, and
that
25 they be immediately released unless charged and brought

1 before a court of law.

2 Q. Okay.

3 MR. STERN: I would like the technician to go
to the next page, please.

4 BY MR. STERN:

5 Q. Up at the top, does the document list individuals to
6 whom appeals were to be sent, Mr. McClintock?

7 A. Yes, it does.

8 MR. STERN: I would like the technician to
9 highlight the name and address at the top right, please.

10 BY MR. STERN:

11 Q. Who is the individual named in the highlighted
portion on the green, Mr. McClintock?

12 A. Colonel Carlos Eugenio Vides Casanova, Director
13 General of the National Guard.

14 Q. Is that the General Vides Casanova here in our
15 courtroom today?

16 A. Yes, it is.

17 MR. STERN: I have another exhibit to hand up
to you.

18 BY MR. STERN:

19 Q. Mr. McClintock, I believe you testified about this
20 earlier, let me ask you about it again.

24 Did Amnesty International members ever receive
25 responses from members of the Salvadoran government or

1 military to their appeals?

2 A. Many received written responses from members of the
3 government, yes.

4 Q. And in the normal course, would you see or would
5 copies of those responses be maintained by Amnesty
6 International in its records?

7 A. Yes, they would be.

8 Q. Can you identify for us what the document is that we
9 handed you, Plaintiffs' Exhibit 404?

10 A. This is a letter dated 27 March 1980 from Mr. Ralph
M.
11 Wardell from Omaha, Nebraska with his home address, and
it
12 is to him. And it is thanking him for his concerns about
13 Escamilla Martinez.

14 Q. Who is the signatory of the letter?

15 A. Signed Colonel Carlos Vides Eugenio Casanova, the
16 general.

17 MR. STERN: I would ask that Plaintiffs' 404 be
18 received into evidence.

19 THE COURT: Is there any objection to
Plaintiffs'
20 404?

21 MR. KLAUS: No objection.

22 THE COURT: Plaintiffs' 404 will be received
into
23 evidence without objection.

24 (Plaintiffs' Exhibit 404 received in evidence
25 without objection.)

1 MR. STERN: Could I have the first page on the
2 screen, please?

3 BY MR. STERN:

4 Q. Is this the document you have been telling us about?

5 A. Yes, it is.

6 MR. STERN: If I could ask the technician to
7 highlight the signature block, please.

8 BY MR. STERN:

9 Q. Is that, what appears on the letter as Colonel Vides
10 Casanova's signature on the letter?

11 A. Yes.

12 MR. STERN: If I could have the next page of
the document, we have an English translation.

13 Okay. I would like to ask the technician to
14 highlight the portion extending from esteemed sir down
to the second paragraph.

15 BY MR. STERN:

16 Q. Could you read for us the text of General Vides
17 Casanova's letter, please?

18 A. "Esteemed sir, attentively I address you thanking
you for your interest in Mr. Euclides Escamilla Martinez. At
19 the same time allow me to inform you that the archives of
20 this institution have been meticulously reviewed having
21
22
23

24 verified that Mr. Escamilla Martinez does not appear
25 registered as detained in this security body. We regret

1 that unfounded news are spread internationally as real
2 facts. On our part be assured that we will diligently
3 continue our investigations on whereabouts of said
person.

4 Again, I thank you for your interest. I subscribe."

5 Q. Is there sometimes letters that are received from
6 members of the military forces in responses to appeals?

7 A. Yes.

8 Q. Are there instances in which amnesty members did not
9 receive response to their appeals?

10 A. Yes, there were.

11 Q. We've discussed urgent actions in some detail,
12 Mr. McClintock. I would like to ask you -- let me first
13 ask you something else.

14 In the 1979 to 1983 time period, approximately how
15 many urgent actions were sent out by Amnesty's
headquarters
16 in London to Amnesty's members?

17 MR. KLAUS: Objection; relevancy.

18 THE COURT: I will overrule the objection.
Would
19 you give me the time frame?

20 MR. STERN: 1979 through '83.

21 THE COURT: All right.

22 MR. KLAUS: Objection; lack of foundation.

23 THE COURT: That is too broad an objection.
What

24 do you mean by that?

25 MR. KLAUS: They sent out urgent actions --

1 THE COURT: What is missing in the foundation
2 that you think needs to be there?

3 MR. KLAUS: Regarding El Salvador.

4 THE COURT: Yes, I thought that was implicit in
5 the question.

6 MR. STERN: Let me make it implicit.

7 BY MR. STERN:

8 Q. In the '79 through '83 time period, Mr. McClintock,
9 you were in charge of sending out urgent actions
regarding

10 El Salvador; is that correct?

11 A. I was.

12 Q. And in that time period, approximately how many
urgent

13 actions did amnesty send out to its members focusing on
14 events in El Salvador?

15 A. About 175.

16 Q. And in your role at Amnesty International, did you
17 ever attempt to determine how many letters to suggested
18 addresses any given urgent action appeal would generate?

19 A. Yes, we have an evaluation system to see whether
this

20 was a waste of postage, really, and that was partly to
see

21 how many had been sent, and what happened to the people

22 afterwards. The best count, I think, was done by the
U.S.

23 secretaries which was pretty well organized, and they
24 promised us that they had about 5,000 letters and
telegrams
25 sent for every case.

into 1 Q. So, in the U.S. one urgent action would translate
2 5,000 letters --

3 A. That's right.

4 Q. -- to the Salvadoran government?

5 A. That is right.

6 Q. In addition to Amnesty members, were urgent actions
7 sent to any other organizations or bodies?

routinely 8 A. We routinely sent it to the press, often it
9 went to the Inter-American Commission on Human Rights,
10 which is the human rights body of the Organization of
11 American States. It went to the U.S. Commission on Human
12 Rights. We sent it to the U.S. government, we thought
some
13 function might be played, and national offices sent them
to
14 their own governments.

15 Q. Do you know whether El Salvador is a member of the
16 Organization of American States?

17 A. Yes, it is.

18 Q. I would like to ask you a few more questions about
19 Amnesty International's activities in London. In
addition
20 to directing urgent action, did Amnesty International
take
21 additional reporting tasks?

we

22 A. Certainly. Urgent action was really one instrument
23 use. We also produced memoranda to the government and to
24 the international organizations it was part of. Often to
25 the United States government as a source of good offices.

1 We published reports for the general public, and we often
2 did so in the main languages of the amnesty movement,
3 English, Spanish, Dutch, German and French.

4 Q. When you say these reports went to the government,
are
5 you referring to the government of El Salvador?

6 A. Yes.

7 Q. How specifically were they transmitted to the
8 government of El Salvador?

9 A. Well, everything went via the Embassy of El Salvador
10 in London as a starting point. We would often send
11 separately through the post, through the mail directly to
12 San Salvador, but the established diplomatic route was
13 through the diplomatic pouch by the Embassy.

14 MR. STERN: If I may approach with another
15 exhibit for Mr. McClintock.

16 THE COURT: Mr. Stern, we are at a point where
we
17 need to take a break for the mid-morning recess, why
don't
18 we stop, we will take a 15 minute break, and when we
come
19 back, we will come back to you and return to this
exhibit.

20 MR. STERN: That is fine, Your Honor.

21 THE COURT: Let's take a break for 15 minutes.

22 (Thereupon, a short recess was taken.)

23 (Thereupon, trial reconvened after recess.)

24 THE COURT: Mr. Marshal, would you bring the
jury

25 in, please?

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

2 THE COURT: Ladies and gentlemen, please be
3 seated. When we stopped, we were in direct examination.
4 I will turn back to Mr. Stern and I think we were about
to
5 refer to another exhibit.

6 BY MR. STERN:

7 Q. Mr. McClintock, I refer you to Exhibit 689. Do you
8 recognize what 689 is?

9 THE COURT: I don't have it.

10 MR. STERN: Let me hand you up a copy.

11 THE WITNESS: Yes, I recognize the document.

12 BY MR. STERN:

13 Q. Is this a document prepared by you or under your
14 supervision at Amnesty International offices in London?

15 A. Yes, it is.

16 Q. Was this particular report transmitted to the
17 government of El Salvador by the Salvadoran Embassy in
18 London as you testified previously?

19 A. Yes.

20 MR. STERN: Your Honor, at this time I request
21 Exhibit 689 be admitted into evidence for the purpose of
22 showing Salvadoran's notice regarding the items set out
in
23 the report.

receipt 24

THE COURT: Is there any objection to the

25 of Plaintiff's 689?

personal 1 MR. KLAUS: Objection; hearsay, lack of
2 knowledge, and foundation and predicate for the findings
3 set forth.

4 THE COURT: May I see 689?

5 MR. KLAUS: Misleading, confusing, probative
6 value outweighed by prejudicial effect.

the 7 THE COURT: All right. I am going to sustain
8 objection and I am doing so for this reason: This is a
9 case that seeks to hold two particular people liable for
10 particular acts. The fact that notice was sent, and, of
11 course, at this point simply it was sent to the
Government
12 of El Salvador, is not specific enough.

13 Secondly, I also find that the prejudicial
14 impact
15 of the document outweighs its probative value, so for
16 those reasons I am going to sustain the objection and --
17 sustain the objection to Plaintiffs' 689.

18 MR. STERN: Your Honor, may I be heard on this
19 at
20 sidebar?

21 THE COURT: Yes, I will hear you later on that.
22 Unless there is some particular showing that this
particular document was sent to either General Vides or
General Garcia, if you have evidence of that.

of 23 MR. STERN: We don't have that particular type
would 24 evidence, Your Honor. There are other points that I
held 25 like to raise in support of having the document being

1 admissible.

2 THE COURT: I will be happy to hear you.

3 (Sidebar discussion on the record.)

4 MR. STERN: Your Honor, I think the main point
5 that I would make that is we have had testimony and we
6 will have additional testimony that the Defendants here
7 essentially are the government of El Salvador. They are
8 extremely connected to the government. To say the
9 goes to the government is virtually the same thing.

notice

10 We also have had deposition testimony and
11 responses to request for admission from both Defendants
12 that indicate that they received reports from Amnesty
13 International. And with all due respect, I think the
14 Defendants are trying to have it both ways. If they
15 they heard from Amnesty International, we ought to be
16 to establish what it was that Amnesty International was
17 telling them.

admit

able

18 THE COURT: I agree, if you can establish that.
19 I think you have to tell me that General Garcia received
20 this knowledge.

21 MR. STERN: That particular notice?

22 THE COURT: That particular notice. I agree we
23 are dealing with a very small governing group, but I

think

24 we want to be extra careful here. We are ultimately
25 seeking to hold two members of the government liable for

of 1 actions committed by -- allegedly committed by members
2 military or police forces.

3 And I think when you deal with this type public
4 notice by an international body, which, by the way, is
5 very detailed in terms of the allegations in it, I think
6 gentlemen we either need to pin it down to show that these
7 admitted that they received this before it ought to come
8 in evidence. I think its prejudicial impact outweighs
9 probative value.

10 MR. KLAUS: My client will stipulate they
11 did received letters from Amnesty International, and they
12 did what they did with them. They will testify what they
13 as a result of them, but not this.

14 THE COURT: Anything else?

15 MR. GREEN: Should we talk about the -- you
16 want me to go into the deposition?

17 MR. STERN: Please.

18 MR. GREEN: General Vides' deposition testimony
19 reports is a little more ambiguous. He does admit letters from
20 the Amnesty International. General Garcia admits
21 reports from Amnesty International, page 134. There were

is 22 such as Amnesty International and ACLU, and the answer

23 yes.

24 THE COURT: Did you tie it to this report?

Amnesty 25 MR. GREEN: That is the only report that

1 sent out during this period.

2 MR. STERN: There were other reports, I simply
3 make the report. Detail cuts in our favor rather than
4 against us, if the point is what they know. Detail
should
5 be precisely what we ought to be able to put before the
6 jury. They have denied many things. The fact that
7 Amnesty International and other groups were putting
before
8 them very specific allegations anticipating many of the
9 arguments we expect them to make in this case, we think
10 has great value to the jury.

11 THE COURT: Okay, I am going to adhere to my
12 ruling.

13 (After sidebar.)

14 BY MR. STERN:

15 Q. Mr. McClintock, I want to go back. You indicated
that
16 approximately 175 urgent actions were sent out by the
17 London headquarters. In response of each of those
actions,
18 on the order of 5,000 letters was generated to the
19 Salvadoran government by Amnesty members in the United
20 States.

21 Can you give us a ballpark figure how many letters
22 that means the Salvadoran government received from
23 Amnesty's members?

24 MR. KLAUS: Objection. Beyond the scope of his
25 knowledge.

1 THE COURT: Let me hear the question if you
2 would.

3 MR. STERN: I am asking the witness -- I ask
that
4 the witness give us a ballpark figure how many letters
5 based on his personal experience and work in Amnesty's
6 London office were sent by Amnesty's members in the
United
7 States to members of the government of El Salvador.

8 THE COURT: I think we already covered that.

9 MR. STERN: I have no further questions, Your
10 Honor.

11 THE COURT: Okay. Cross examination?

12 MR. KLAUS: Thank you, Your Honor.

13 CROSS EXAMINATION

14 BY MR. KLAUS:

15 Q. Mr. McClintock, anyone can be a member of Amnesty
16 International, correct?

17 A. Yes.

18 Q. You pay your membership fee?

19 A. Yes. Some countries don't have a membership fee.

20 Part of your membership is to raise money as part of the
21 group. In this country it is a membership fee.

22 Q. You send out mailings and ask if you want to join?

23 A. Yes.

24 Q. What countries don't have membership fees?

25 A. Some of the European countries in which there is a

1 very strong group structure, and so membership is
2 determined by your participation and letter writing,
3 really.

4 Q. Okay. Who supports them financially?

5 A. These are ordinary people, this is a spare time
6 activity. That is the definition of a member.

7 Q. It is a grass roots organization, membership is
grass
8 roots?

9 A. That's right, that's right.

10 Q. So they are supported by donations of members, or
does
11 international support -- like who pays postage?

12 A. The other way around. The members support the
13 international. They raise money from their community to
14 pay for postage, or they pay it out of their own pocket.

15 Q. You said that you first got involved back in 1970.
16 What were you doing in 1970?

17 A. I was a college student and I was -- in my
university
18 work, I was focusing on the situation in Mexico and I was
19 looking into issues of political movement and torture in
20 Mexico. And I knew Amnesty was interested in the issue
of
21 torture.

22 Q. Where did you go to undergraduate school, from what
23 year to what year?

24 A. Ohio University from '68 to '72.

25 Q. And did you go to law school? Are you a lawyer?

Latin

1 A. I am not a lawyer. I am trained in history and
2 America studies.

3 Q. Okay. Do you have a Master's Degree or Ph.D.?

4 A. I have a Master's in Ibero American studies from the
5 University of Wisconsin.

6 Q. Now, basically the way I understand the procedures
7 regarding El Salvador, and this is -- if this differs
from
8 your procedures with the rest of the worlds, can you let
me
9 know?

10 You had reporters or members in El Salvador who
would,
11 if they observed what they thought was a violation of
human
12 rights, they would report it to Amnesty International?

13 A. Well, it's not quite the way it is. We had partner
14 organizations, and we had people familiar with Amnesty
who
15 would write us letters, but it wasn't Amnesty members in
--
16 one of our rules was that Amnesty members don't work in
17 their own country. And we would occasionally send people
18 to El Salvador other than myself as well as to
neighboring
19 countries to interview refugees.

20 Q. But the urgent actions, they came from where in El
21 Salvador, legal aid of the archdiocese?

22 A. Many of them did. We ideally try to triangulate
23 information. We get information from more than one
source.
24 Sometimes we make a phone call to fill in the missing
link,
25 but a lot of it came through the legal aid office.

1 Q. Was an effort made to verify your source of
2 information?

3 A. The source, definitely.

4 Q. So, if you got a report from the legal aid of the
5 archdiocese in El Salvador, would you ask them where they
6 got it?

7 A. We wouldn't, no. We would not.

8 Q. So if I was an opposition member and came in and
gave
9 a report, and went out by Legal Aid Society, you would
get
10 it, depending on its contents you would publish an urgent
11 action? Or what other things did you do with information
12 you received?

13 A. A lot of it we filed because there was too much
coming
14 in. Again, we counted on legal aid to screen the cases
for
15 seriousness and get the information, and to only send
16 material through -- by either call us or send it through
17 Telex. In a case in which there was a concern of life or
18 physical safety, so it was based -- basically is someone
19 detained or not.

20 Q. So you counted on legal aid to screen the
information
21 they received before they passed it on to you?

22 A. Yes, we did.

23 Q. Who were the people working in legal aid during that
24 time period from '79 to '83?

25 A. It was a number of people who pretty much stayed the

1 same with some of them fleeing the country. Some of them
2 getting out of the monitoring business.

3 Q. How many people had access to the Telex?

4 A. Oh, three, four, maybe five.

5 Q. Did you know those people personally?

6 A. Yes.

7 Q. Now, you visited El Salvador in '76 for a week. Who
8 did you speak to there?

9 A. I spoke to people -- I spent most of the time in the
10 archdiocese office. I spent a weekend at the country
house

11 of the minister to the President. I visited some of the
12 newspaper editors. I talked to some trade union people.

13 But it was mainly centered around the ministry of the
14 presidency which was my official contact with others in
the

15 government and the archdiocese office.

16 Q. Who was president in '76?

17 A. I can't even remember.

18 Q. Who was the minister whose house you spent the
weekend

19 at?

20 A. I can't remember his name. He was out of government
21 within two years.

22 Q. Did you ever meet with General Garcia or General
23 Vides?

24 A. No.

25 Q. Did you ever contact them directly during the time

1 period from '79 to '83?

2 A. Personally, no. No.

3 Q. Why not?

4 A. Because we work on a system of going through
channels,

5 so if a letter went from the secretariat, it would be

6 signed by the secretary general, and I was not in El

7 Salvador at the time or I would have done that. But it

8 wasn't -- it wasn't the way we would make appeals, we
would

9 do it through national offices with some going direct

from

10 London, but mostly through the national offices.

11 Q. Who was the secretary general of Amnesty
International

12 at that time?

13 A. Thomas Hammerberg.

14 Q. Hammerberg?

15 A. Hammerberg, a Sweed.

16 Q. And was he stationed in London?

17 A. He was in London, yes.

18 Q. Did you have a representative of Amnesty
International

19 in El Salvador at that time?

20 A. No, we didn't.

21 Q. Why not?

22 A. We didn't work that way.

23 Q. Okay. Now, you went back to El Salvador in '80?

24 A. I went -- I was there in '84, just briefly.

25 Q. Okay. Did you stay, or were you just a stop over?

1 A. It was just a stop over.

2 Q. At the airport? At the airport?

3 A. Yes.

4 Q. Did you meet with anyone?

5 A. I had a couple meetings.

6 Q. With whom did you meet?

7 A. I think it was people from the archdiocese office.

8 Q. Okay.

9 A. We did send a forensic doctor from Canada and a
10 Spanish judge in June, 1983, which was a mission I
11 organized. Again, I didn't go myself. And we had a team
12 of three go to Honduras and Costa Rica in 1981 to

interview

13 refugees. And in October, 1984, we had another forensic

--

14 a medical specialist go to look at evidence of torture,

but

15 I was -- I was the desk guy.

16 Q. Okay. Now, your testimony was during that time

period

17 from 1979 to 1983, there were 175 urgent actions

regarding

18 El Salvador?

19 A. I didn't count 1979 when I went through my own

files.

20 I counted from January 1980 to June 1983, and that was

175.

21 And that didn't include other kinds of actions.

22 Q. Right. What other kind of actions are there?

23 A. We had -- urgent actions are for emergencies. For

24 longer term cases of disappearance, for example, we had

25 another network which dealt with all of Central America

1 which went to a smaller number of groups. There were a
2 thousand urgent action participants, there were about 400
3 amnesty groups participating in Central America network,
4 and this was basically following up longer term cases.

5 Q. Was that where in the local group or individual
member

6 of a local group would adopt a prisoner, so to speak?

7 A. We didn't adopt because we weren't doing prison
8 conscience work. We were doing bring them to court or
9 release them to work. So it is -- within amnesty there

is

10 a big distinction about someone who really shouldn't be

in

11 jail, and people who should be treated humanely.

12 Q. Did you keep a record of responses from the El
13 Salvadoran government to Amnesty International or to its
14 members?

15 A. We did do follow-ups through the urgent action
network

16 reporting on responses from officials in El Salvador.

Some

17 of the actions give a paragraph, for example, response to

get

18 the Anna Margarita case that we mentioned, when we did

in

19 a letter back, that was summarized with a quote from it

20 a follow-up circular.

21 Q. That went back out over the urgent action network?

22 A. Through the network to all the membership.

23 Q. Did you total up how many responses you got to the

24 urgent actions?

25 A. I haven't done that. Often there were form letters,

1 the same group in Omaha would get the same letter, same
2 Texas, the group in Denmark.

3 Q. Because they are responding to the same urgent
action?

4 A. Of course, they are responding to a lot of people.

5 Q. How many urgent actions went out during that time
6 period for the whole world?

7 A. Probably about 800. I am not sure. El Salvador was
a

8 little part of this.

9 Q. Does Amnesty International still use this urgent
10 action method?

11 A. Yes, it does.

12 Q. Have there been any urgent actions in the last year
13 that you know of?

14 A. I am not in the urgent action network, but I know
that

15 it is still going and I know Amnesty has done a lot in
16 Chesnia, Russia, through the Amnesty urgent action work.

I
17 don't know about Latin America.

18 Q. Have there been any urgent actions held by the
United
19 States government in the last year?

20 A. I don't think so.

21 Q. Have there been any prisoners held by the government
22 of El Salvador in the last year?

23 A. I have no knowledge of that.

24 MR. STERN: Objection; irrelevant and asked and

25 answered.

1 THE COURT: I will permit it.

2 BY MR. KLAUS:

3 Q. Before you left Amnesty International, what was your
4 position?

5 A. Position was finishing my Master's dissertation and
6 babysitting my stepson, and I did translation of Spanish
7 pay the bills.

8 Q. You weren't in the urgent action?

9 A. No.

10 Q. When did you stop being in the urgent action group?

11 A. I was not in the urgent action group, that was a
12 structure. I was in the division of the international
13 secretariat from '74 to around '86 when I spent a year of
14 deputy research. And at the time of Tiananmen Square in
15 China, I spent time in the Asian division for two years.

16 turned toward other parts of the world toward the end of
17 the '80's.

18 Q. What is your position for Lawyer's Committee For
19 Rights?

20 A. I am the new program director, a new position,
21 to the executive director. I am responsible for all the
22 program areas. I am also responsible for trying to raise

to

I

Human

second

23 funds for the organization with fund raising
professionals,

24 but I have quite a large --

25 Q. Going back to Amnesty International, I see in the

1 preamble in the letter Exhibit 811 and Exhibit 288, it
2 states Amnesty International opposes by all means
3 infliction of death penalties. Does that include death
4 penalties here in the United States?

5 A. That includes death penalties which are illegal,
where
6 people are just taken and shot, and also includes
judicial
7 death penalty. It is a position that was taken by the
8 international counsel, the representative body of
Amnesty,
9 I think in the early '80's. So it is what is known as an
10 abolitionist organization. It is a line that you can't
11 have enough safeguards to make the death penalty safe
12 around the world.

13 Q. Well, says infliction of the death penalty. It
14 opposes the death penalty per se?

15 A. Yes.

16 Q. Whether it has --

17 A. Yes, yes. That is the idea.

18 Q. So when someone in the United States is sentenced to
19 death and they are going to be executed, does Amnesty
20 International send out an urgent action?

21 MR. STERN: Objection; irrelevant.

22 THE COURT: I sustain the objection.

23 THE WITNESS: Amnesty takes action --

24 THE COURT: Hold on a second. Let's go on with
25 the next question.

the

1 BY MR. KLAUS:

2 Q. Amnesty International manifests its opposition to

3 death penalty no matter where it is carried out?

4 A. Are you talking '79 through '83?

5 Q. No, from '84 when it adopted that stand to present.

6 MR. STERN: Objection, Your Honor. The witness
7 is not employed by Amnesty International at present.

8 THE COURT: If you know, you can answer.

9 THE WITNESS: Amnesty is against the death
10 penalty, I know that.

11 BY MR. KLAUS:

12 Q. Do they take action on a regular basis?

13 A. Sure, sure.

14 Q. You are still a member?

15 A. Yes. I am still a member.

16 Q. How much are the dues for the U.S.?

17 A. \$25.00, last time I paid up, less -- that is the
18 minimum.

19 MR. KLAUS: If I may have a minute.

20 THE COURT: Yes, uh-huh.

21 MR. KLAUS: Thank you.

22 THE COURT: Redirect examination?

23 REDIRECT EXAMINATION

24 BY MR. STERN:

25 Q. Mr. McClintock, opposing counsel asked you some

1 questions about Amnesty Internationals use of reporting
2 from the archbishop's office in San Salvador in the 1989

--

3 MR. KLAUS: Objection; misleading.

can.

4 THE COURT: Let me make this suggestion if I

5 I say this not necessarily because of this question, but
6 in reflecting just on our procedure last week, I think
7 maybe the lead-ins we should dispense with and deal only
8 with questions.

9 Let me go back to Mr. Stern.

10 MR. STERN: Thank you, Your Honor.

11 BY MR. STERN:

12 Q. Is it your testimony, Mr. McClintock, that Amnesty
13 International made use from reporting from the archbishop
14 of San Salvador's office in preparing urgent actions?

15 A. Yes.

16 Q. In the 1979, '83 time period?

17 A. Yes.

me

18 Q. And I believe I asked you this question before, let
19 restate it. Did you regard that reporting as reliable?

20 A. Yes.

of

21 Q. And are we talking -- when you say legal aid office
22 the Archbishop's office, is that an organization also
23 called Socorro Juridico?

24 A. It was, and changed its name to Tutela Legal.

25 Q. Are you able to spell Socorro Juridico for us?

1 A. S-O-C-O-R-R-O, J-U-R-I-D-I-C-O.

2 Q. And how about Tutela Legal?

3 A. T-U-T-E-L-A, L-E-G-A-L. They mean the same thing.

4 Q. Thank you.

5 Why did Amnesty International regard the reporting
of
6 those organizations as a reliable basis of the reporting
of
7 urgent actions?

8 A. We had a lot of confidence in the people. We met
9 them, sometimes people came to London, sometimes I met
10 people in New York, Costa Rica, and my colleagues met
them,
11 the same people in San Salvador or in neighboring
12 countries. So we had a constant communication in
updating,
13 and one of the principles we all understood pretty well
is
14 the principle not ever crying wolf. To cry wolf is a way
15 to make any kind of intervention ineffective, to act on
16 false information.

17 So we were very careful and we only acted through
this
18 particular mechanism on a very small percentage of the
19 cases.

20 Q. Opposing counsel also asked you some questions about
21 your own contact to the Defendants regarding abuses, and
22 you gave some testimony on that.

23 What -- did Amnesty International perceive some
24 advantage to generating letters through a membership
25 organization as opposed to centrally?

1 A. Yes, this was the principle of the organization from
2 the start, that it was ordinary people speaking out for
3 ordinary people, for forgotten prisoners, and to have all
4 the letters come from a bureaucrat, and I suppose in one
5 sense I was a bureaucrat, an office worker, but a nicer
6 gloss.

7 It can be written off as one little office somewhere
8 in London, but if you are getting letters from someone, a
9 volunteer in Mexico City or Brussels, or Luxembourg or
10 North Dakota, and you are getting lots of things all over
11 the place, it gives a weight which some specialists or
12 experts just not going to compare to.

13 So it was a very deliberate thing. It was really --
14 the other aspect of this was, it was like outriggers in a
15 way, or a way to spread attention from many quarters.

Our

16 material also went to members of Congress, to church
17 organizations, people who worked with Amnesty without
18 part of the Amnesty structure, letters from U.S. Congress
19 person, there is some Congress women who were important
20 raising cases. It weighed more than Mike McClintock in
21 London.

being

in

22 MR. STERN: Thank you very much.

23 I have no further questions, Your Honor.

24 THE COURT: May Mr. McClintock be excused from
25 his subpoena?

1 MR. STERN: Yes, Your Honor.

and

2 THE COURT: Mr. McClintock, you may step down
3 be excused from your subpoena.

4 (Witness excused.)

5 THE COURT: The Plaintiff may call your next
6 witness.

Professor

7 MR. GREEN: At this time, we will call
8 Jos, Garcia.

9 THE COURT: Professor Garcia.

10 Professor, if you would come up to the witness
11 stand, sir, and make yourself comfortable.

tell

12 Professor Garcia, please be seated. I must

pull

13 you the microphone has a short pickup range. If you
14 the chair up to the desk area, you will be more
15 comfortable. If I may ask you to raise your right hand.

16 JOS GARCIA, PLAINTIFFS' WITNESS SWORN.

17 (Witness sworn through interpreter)

jury?

18 THE COURT: Professor Garcia, would you please
19 begin by introducing yourself to the members of the
20 Would you tell them your full name, and would you please
21 spell your last name for the court reporter?

22 THE WITNESS: My name is Jos, Luis Garcia. My

23 name is spelled G-A-R-C-I-A.

24 THE COURT: Thank you.

25 Counsel, you may proceed.

1 DIRECT EXAMINATION

2 BY MR. GREEN:

3 Q. Sir, where do you live?

4 A. I live in Buenos Aires, Republic of Argentina.

5 Q. Sir, do you speak English?

6 A. Very little.

7 Q. Have you ever studied in the United States?

8 A. Yes. 30 years ago.

9 Q. Would you feel more comfortable if we conducted this
10 examination in Spanish?

11 A. Yes. Perfectly.

12 Q. Could you tell the ladies and gentlemen of the jury
13 what leadership and command positions you have held
within
14 the Argentine military?

15 A. I am a calvary colonel of the Army of the Republic
of
16 Argentina.

17 Q. Are you on active duty?

18 A. No, I am retired.

19 Q. Have you ever taught military command structure and
20 command responsibility to officers of any military
service?

21 A. Yes.

22 Q. Have you ever studied in the United States?

23 A. Yes.

24 Q. Where and for what?

25 A. I studied at Fort Knox, State of Kentucky in the

from 1 United States. In the Armored School of North America
2 July, 1961 to July, 1962.

3 Q. What rank were you at the time?

4 A. I was a major.

5 Q. Where did you receive your undergraduate studies?

I 6 A. I went to the National Military College in Argentina
7 and I went the to the post graduate military school where
8 became general staff officer. The Army also sent me to
9 the -- to study economics at the University in Buenos
Aires 10 where I got a degree in programming and economic
11 development.

12 Q. Can you tell the ladies and gentlemen of the jury
13 which courses you took at the Superior War College that
14 would have relevance to your testimony today?

15 A. Well, basically we studied how to establish basic
16 military structures in military establishments, how they
17 should function in accordance with international as well
as 18 national law, and what the obligations are of the
19 commanders at the highest military levels in carrying out
20 the high and very important responsibility of the -- the
21 state gives them in those commands.

College 22 Q. Sir, have you ever taught at the National War

23 in Argentina?

24 A. I was professor at the National War College of

25 Argentina for 14 years and I was also a professor at the

1 Superior War College and I also taught courses at the
2 Superior Naval College.

3 Q. Who were you teaching at the National War College?

4 A. The National War College is the Superior War College
5 of Argentina, and the students are already colonels, Navy
6 captains, and Air Force commodores.

7 Q. What percentage of your former students who were
8 colonels, Navy captains, and commodores in the Air Force
9 are now generals, admirals or brigadiers in the Argentine
10 military?

11 A. You can estimate 45 to 50 percent.

12 Q. The United States has a National War College. What
is
13 the -- how is the function of the Argentine National War
14 College similar to or different from the United States
15 military's National War College?

16 A. Yes, they are similar. They are concerned with
issues
17 at the highest levels of military science in their
country.

18 Q. At the Argentine National War College, what courses
19 did you teach colonels, Navy captains and Air Force
20 commodores that would be relevant to your testimony
today?

21 A. I was a major professor at a subject entitled
national
22 defense.

23 Q. And what did national defense include?

24 A. The structure -- national structure in terms of

25 national defense takes the national military defense

1 structures and establishes how the command structure
should
2 work. It establishes what the obligations are of the
3 superior officers in those terms as well as it
establishes
4 relatively obligations of the superiors in how to
maintain
5 discipline and functions for national defense.

6 Q. Why is it important for military to have a command
7 structure?

8 A. Well, it is very important. As we said, the state
9 puts in the hands of commanders an enormous amount of
10 power, and that is not at the disposal of the civilian
11 population. And, therefore, very strict norms of
behavior
12 have to be set to govern superiors and rigidly
established
13 boundaries that cannot be exceeded in the exercise of
14 command. And those boundaries that must not be exceeded
15 are set by national law as well as military statute.

16 And should command not be carried out in a
disciplined
17 and orderly manner, as well as, of course, obedience on
the
18 part of the subordinates within this legal framework,
that
19 would make an armed force, an armed body into a band of
20 armed criminals with neither moral nor ethical
boundaries.

21 Q. May I call you Professor Garcia?

22 A. I have been a professor for 14 years, I taught in 14

23 different universities in Argentina regarding this
subject

24 and others.

25 Q. Okay. Professor Garcia, let's go back for a minute
to

many 1 your role as a military commander, as a colonel. How
2 men did you command?

3 A. I was in charge of a calvary regimen. I had
4 approximately 2500 men.

5 Q. Okay. Were there lieutenant colonels, majors,
6 lieutenants, all the way down the hierarchy?

7 A. Yes. This whole military structure, two lieutenant
8 colonels, five majors, eight captains. Between first
9 lieutenants, second lieutenants, I had about 60 officers,
10 maybe 300 non commissioned officers, and the rest, of
11 course, were enlisted men.

12 Q. Professor Garcia, what matters are you here to offer
13 your expert opinion about?

14 MR. KLAUS: Objection to the form of the
15 question.

16 THE COURT: I don't think it suggests an
answer.

17 I will permit that question.

18 THE WITNESS: Yes, I am going to try to explain
19 how a command structure should work, what the command
20 structures are, what the relative dependencies are which
21 make it work, what are the duties and obligations of
22 superiors, what the duties and obligations of
subordinates
23 are, how the chain of command should work, how military

24 discipline should work, and how an permanent information
25 chain should work permanently between command and

1 subordinates.

2 BY MR. GREEN:

3 Q. Could you explain -- I am not sure I understood the
4 translation.

5 Could you please explain the role of information
6 flowing up and down the chain of command in any kind of
7 military chain structure?

8 A. Yes. It is a basic function of these structures
9 through which superiors issue orders and through them

they

10 communicate their intentions, their decisions and at the
11 same time from the lowest level they receive up to their
12 level whatever questions, whatever needs are those of
13 people who are under them and that acts as a lubricant so
14 the organization will function with no problems and with
15 friction.

no

16 Q. Professor Garcia, have you ever served as a military
17 expert -- military command structure expert in the past?

18 A. Yes.

19 Q. When was the first time?

20 A. The first time was in 1984 in the Republic of
21 Argentina.

22 Q. What kind of case was that?

23 A. It was a trial the government of Argentina
instituted

24 against the commanders of military Junta during the dirty
25 war in Argentina from 1978 through 1983.

1 Q. What was the dirty war?

the

2 A. The dirty war was the effort -- illegal effort on
3 part of the military to take civilian power in Argentina
4 during that period, a system where the military would
5 persecute civilians for their ideas, which persecution
6 didn't end without act of violence, rather it included
7 kidnappings, torture, murder and all kinds of actions
8 against the dignity of the person.

9 Q. What kind of court was that, military court or
10 civilian court?

11 A. Civil court.

12 Q. And who were the people charged in that case?

can.

13 THE COURT: Let's move on to this case if we

14 BY MR. GREEN:

15 Q. What was the subject matter of your testimony in the
16 Argentine case?

17 THE COURT: Let's stay with the issues of this
18 case if we might.

19 MR. KLAUS: Your Honor, we stipulate he is an
20 expert on command structure.

21 THE COURT: All right. You may proceed.

22 BY MR. GREEN:

23 Q. What was the next time you testified as a military
24 command expert?

THE COURT: Let me stop you for a minute.

to

about

1 Defense stipulated the professor is an expert and able
2 testify. Let's move to testimony.

3 MR. GREEN: Your Honor, this involves El
4 Salvador.

5 THE COURT: Okay. Let's move to testimony
6 this case.

7 BY MR. GREEN:

8 Q. Professor Garcia, did you ever become familiar with
9 the El Salvadoran armed forces command structure?

10 A. Yes.

11 Q. And when was that?

12 A. The first time was in El Salvador in 1991.

13 Q. And what role did you play in that case?

14 MR. KLAUS: Objection; relevancy.

15 THE COURT: Sustained.

16 BY MR. GREEN:

17 Q. In learning about -- what did you learn about the El
18 Salvadoran armed forces command structure in that case?

a

have

or

19 THE COURT: Wait a minute. Let me stop you for
20 minute. We will not talk about any other cases. You
21 a right to go into the credentials of the witnesses, but
22 let's avoid other cases if we might, whether Argentina

23 anyplace else.

24 BY MR. GREEN:

25 Q. Professor Garcia, you have been asked to provide

1 expert testimony in this case. What were you asked to
do?

2 A. I was asked to establish how the command structure
of
3 the armed forces of El Salvador worked during the period
4 between 1979 and 1983, to determine the responsibility
5 stipulated by the laws of the country as well as military
6 regulations, to observe how the armed forces of El
Salvador
7 were organized in accordance with the laws current or in
8 force at the time, how it actually and in reality
9 functioned, what the duties of all of the military
officers
10 at all hierarchal levels were, what they were supposed to
11 know, what did they actually do, and lastly, how the
legal
12 military system worked throughout the period in question.

13 Q. Did you also evaluate what corrective actions were
14 taken or could have been taken by superiors when their
15 subordinates did not act according to the norms
established
16 by superiors?

17 A. Yes. That is included in the previous point I
18 mentioned, which are what other duties, or what were the
19 duties of superiors as pertains to the compliance as to
20 what did they actually and in fact do.

21 Q. Did you produce any reports in preparation for your
22 testimony here?

23 A. Yes.

24 Q. Which reports?

25 A. Yes. I started with the political Constitution of

the

1 Republic of El Salvador which sets forth the fundamental
2 ordinance basis for national defense. Then I took the Army
3 for the period, the Code of Military Justice, the
4 procedural penal code of El Salvador. I also took into
5 account the reports that were current at the time in
6 United question from different organizations to include the
7 Nations, Organization of American States, with a special
8 interest on the way human rights may or may not have been
9 violated against the citizens of this country.

10 I also took into account other reports such as those
11 produced by United States Ambassador for the period. I
12 also took into account reports by members of Congress of
13 the United States of America who visited El Salvador and
14 were able to observe all types of events.

15 I also studied special reports created by
16 organizations involved in the protection of human rights,
17 such as those by Amnesty International, also the report
18 war ordered by the United Nations on the situation of civil
19 in this country, the periods between 1980, 1992.

20 I also refer to sources friendly as may be the
21 reports generated by other agencies, as well as by other reports
22 generated by other organizations involved with human

for

23 rights -- interpreter corrects himself -- organization

24 human rights in El Salvador among others.

25 Q. Did you review any other international treaties?

1 A. Yes.

2 Q. Which ones?

3 MR. KLAUS: Objection as to relevancy.

4 THE COURT: I beg your pardon?

5 MR. KLAUS: Objection as to relevancy. He is a
6 command structure expert, not a human rights expert.

that

7 THE COURT: I will permit that to the extent

that

8 it is relevant, and, of course, counsel needs to show

9 it is relevant.

10 MR. GREEN: Let me step back a second.

11 BY MR. GREEN:

12 Q. Professor Garcia, when you were teaching command
13 structure and command responsibility at the National War
14 College in Argentina, and in other military training
15 programs in Argentina, did you consider international
16 treaties on human rights?

17 THE COURT: Let me stop you for a minute so you
18 understand the basis of my ruling.

19 It must be established that the information
20 relied upon must be of a type that is reasonably relied
21 upon by all experts in that particular field.

22 MR. GREEN: I --

basis

23 THE COURT: I wanted you to understand the

premise 24 of my ruling. The first is the general, specific
25 that is information generally relied upon by experts in

1 the field, and then in fact Professor Garcia did himself
2 look at it and relying upon it in arriving at his expert
3 opinion.

4 BY MR. GREEN:

5 Q. Professor Garcia, do you and other experts on
military
6 command structure and command responsibility consider or
7 rely upon international treaties on human rights in
8 teaching or writing about command structures and command
9 responsibility?

10 A. Yes, it is basic and fundamental. And all of this
11 begins to take shape based on the international Geneva
military
12 conventions. Let's start by setting out norms for
13 officers in order to humanize the war efforts. To avoid
14 abuses not only against people who have nothing to do
with
15 the conflict, but also for those who are participating in
16 the conflict become prisoners, surrender or are injured.

17 This started for major conflicts such as wars
between
18 nations, but since after that wars became internal and
took
19 place between natives of one given country, Geneva had to
20 create additional protocols to protect inhabitants of one
21 single country who were confronting each other.

22 This is seen after the Second World War where the

new

23 world became witness to the atrocities committed by the
24 Nazis in Europe and the Japanese in the Far East, when
25 elements and new treaties are generated that regulate

1 relations between people under these circumstances.

2 The first one is the famous treaties of London known
3 as -- it is known because it tried all of the German war
4 criminals, which sets forth a new series of norms to
5 protect the rights of innocent persons as well as those
6 the combatants. It is also known commonly as the Treaty
7 Nuremberg.

8 After the end of the war we also have the Tokyo
9 treaties where also people are tried for abuses both
10 against civilians as well as combatants, and their final
11 objective was when it comes to that enormous fire power
12 that we military people own. It was so that the people
13 aren't involved in the armed conflict, to prevent them
14 being assassinated, raped and subjected to all types of
15 torture.

16 Q. Professor Garcia, could you slow down a little bit?

17 A. These treaties were signed by all nations. El
18 Salvador also signed these treaties, not only the Geneva
19 convention and protocols but the Nuremberg and Tokyo
20 treaties and handed them responsibility of protecting
21 individuals against all types of -- against all types of
22 abuses that may be perpetrated by those who were in

power.

23 These treaties were signed by all countries of the
24 world as well as by El Salvador. This is why I tell you
25 the international treaties establish basic and
fundamental

1 processes for the appropriate management of a command
2 structure. And there is no military school in the world
3 that doesn't start out by teaching, by starting with the
4 cadets and more importantly with the officers, they start
5 by teaching them what the international laws are that
6 regulate any military procedure in the face of such a
7 violent act that is war.

8 And they try to prevent me from going beyond that
9 framework of protecting human rights, the rights of
peoples
10 which are basically a very important subject that would
11 allow me to explain the functioning of a command
structure
12 here.

13 Q. Professor Garcia, do these principles set forth in
14 Nuremberg and Geneva, and the other treaties you mention,
15 applied both in times of war and in times of peace?

16 A. They are of obligatory and permanent application at
17 any period of time.

18 Q. And do they apply to both civilians and soldiers?

19 A. For all involved, both civilian as well as military
20 inhabitants.

21 Q. Did you also review the American Convention on Human
22 Rights?

23 A. Yes, within the international treaties I also
24 evaluated the Inter-American Human Rights Treaty of which

it 25 the republic of El Salvador is a signatory or has signed

the 1 as well as covenants established by United Nations for
2 protection of human rights and later on those that are
3 included in Salvadoran law and Salvadoran military
4 regulations for the period in question.

5 Q. Professor Garcia, do you know Colonel Mejano?

6 A. Yes.

7 Q. And who is Colonel Mejano?

8 A. Colonel Mejano was a member of the revolutionary
9 government Junta that sets itself up in the government of
10 El Salvador in 1979.

11 Q. Did you speak with him concerning the subject matter
12 of your testimony today?

of 13 A. I have spoken to him not only on the subject matter
important 14 my testimony for today, but he also became a very
15 point of reference for me in another expert testimony
the 16 assignment I had in El Salvador in 1991, as well as in
17 formation of an association of military officers --

18 MR. KLAUS: Objection, objection; hearsay.

and 19 THE COURT: Let me stop for a minute. Ladies
20 gentlemen, you've noticed throughout the trial that when
21 people have been what we call fact witnesses, in other
22 words, if they come to court and tell you what they say

23 they have seen and they have heard, they are not allowed
24 to tell you what other people have said. And the whole
25 reason for that is that the other person is not here,

the

1 other person can't be cross examined.

2 Now, the rules, if you will, are a little bit
3 looser when you have someone who is coming to testify as
4 an expert, because experts are allowed to rely upon the
5 type of information that experts in that field generally
6 rely upon. However, when someone has relied upon other
7 information, that's not offered for the truth of the
8 matter asserted, but it is simply to allow you to know
9 what the witness has relied upon in arriving at his
10 opinion.

11 It is the witness' testimony regarding his
12 opinion that is being offered into evidence, so you can

--

for

13 you are able to know what he has relied upon, but only
14 the purpose of evaluating his opinion, that is to decide
15 whether the jury will accept the opinion testimony of
16 the witness.

the

17 Okay.

18 So, I think the question only, so far, is, have
19 there been discussions, and the answer is yes.

20 So let's go on now with the next question.

21 Actually maybe this is an appropriate time to
22 stop, because we are getting to the lunch hour, and I
23 would like to have a chance to talk with counsel for a

24 minute.

25 Ladies and gentlemen, why don't we stick to the

1 schedule we have been following. Why don't we plan to
2 take a break and let's plan to come back at quarter of
two
3 and we will come back and continue on with the
professor's
4 testimony at that time.

5 So let's take a break until quarter of two.
6 (Thereupon, the jury retired from the
courtroom.)

7 THE COURT: Professor, let me allow you to step
8 down. We will come back at quarter of two and come back
9 to your testimony.

10 Thank you.

11 Ladies and gentlemen, please be seated for a
12 moment.

13 Mr. Green, are you moving now beyond this into
14 substantive testimony?

15 MR. GREEN: Yes, Your Honor. The next area of
16 questioning will be what was the military command
17 structure in El Salvador.

18 THE COURT: Okay. I wanted to check with you.
19 You do not intend to go into conversations that the
20 witness had with Colonel Mejano?

21 MR. GREEN: No, except I intend to elicit
22 testimony where basically when Professor Garcia reviewed
23 the documents, and learned what he had learned in the

to 24 Jesuits trial, he had some additional questions to try
25 understand how different provisions of Salvadoran law

1 interacted with others in terms of the actual, how the
2 command structure actually worked, how it functioned in
3 reality.

4 THE COURT: Can you give me an example what it
is
5 you are talking about?

6 MR. GREEN: Well, there is a particular
question
7 about what happened to Colonel Mejano himself. One of
the
8 issues here is effective control. When this general,
9 General Garcia, decided to try to defuse the reformist
10 opposition, he did so by utilizing a number of
11 discretionary tools that he had within his control as
12 Minister of Defense, within his powers of Minister of
13 Defense, such as transferring people to remote outposts,
14 sending them overseas. One of the things we hope to
15 establish is with respect to the death squad members who
16 are operating within the Army, National Guard or
National
17 Police, even if General Garcia did not have absolute
proof
18 that they were, there was enough smoke to justify him in
19 using some of the discretion that he actually had,
20 transferring people to a remote outpost, and that is
what
21 General Garcia did with respect to his political
22 opponents.

23 THE COURT: Let me make sure I understand what
24 you are saying.

25 One of the things you would like to bring out

is

Minister 1 that the witness having studied the powers of the
2 of Defense and the practices, perhaps associated that
3 post, that in addition to the normal types of promotions
4 one thinks of, or assignments perhaps throughout the
5 country, you are suggesting that the Minister of Defense
6 had some authority to -- and I think we have had some
7 testimony about this earlier with respect to Major
8 D'Aubuisson, whether he should be posted as the military
9 attach, in some foreign country.

10 And you are saying that is one of the
11 authorities, or one of the powers that was reposed in
the 12 Minister of Defense?

13 MR. GREEN: Yes.

14 THE COURT: Is that something written in
15 documents, or one of the powers that is a more
traditional 16 power, but nonetheless is part of the authority of the
17 Minister of Defense?

18 MR. KLAUS: We stipulate --

19 MR. GREEN: It is a more traditional power,
Your 20 Honor.

21 THE COURT: And so you are saying for the
witness 22 to be able to testify about this, he spoke with Colonel

23 Mezano to gather some information about the power of the
24 Minister of Defense?

25 MR. GREEN: Number one, he will say it is a

1 traditional power, and number two, that was an actual
2 power that was exercised by General Garcia in trying to
3 dissipate or spread out the reformist officers who were
4 least nominally led by Colonel Mejano. As Your Honor
5 recall --

6 THE COURT: Let me tell you what my concern is,
7 and I think we ought to be careful here.

8 I am looking at a series of cases, for instance
9 United States versus Rollins, 862 F.2d, 1282, a 1989
10 decision of the Seventh Circuit, or United States versus
11 Affleck, A-F-F-L-E-C-K, 776 F.2d, 1451, a 1985 decision
12 the Tenth Circuit, and there are others.

13 As I started to mention before, an expert is
14 allowed to come to court and testify, and when one is
15 looking at what the expert has relied upon, the Tenth
16 Circuit has pointed out information relied upon by a
17 particular expert must be the type reasonably relied
18 by all experts in a particular field, and that is what
19 were talking about whether an expert in military command
20 structure would normally look at and study international
21 treaties.

22 The second item, information relied upon by the

23 expert must be used in forming the expert's opinion. In
24 other words, he really was to have looked at that.

25 And third, the information relied upon by the

1 expert to form his opinion need not be admissible in
2 itself.

when

3 I think we need to be very careful, though,
4 someone in the process of forming expert opinion has
5 looked at bodies of knowledge that would generally have
6 been looked at and probably has gone a step, too, beyond
7 that. And it is kind of like dealing in field research.
8 When you study presence, you go out and see what is
9 happening.

really

10 It seems to me if you look at the command
11 structure, you look at the written documents, and I
12 suspect every country has traditions, norms, and customs
13 that are very significant and you can't learn about that
14 by just reading material. You need to go out to the
15 officers involved in command structure to see how it
16 works.

getting

17 My concern is when we go beyond that and
18 into a specific officer what may have happened
19 specifically to him, I think we need to be very careful
20 we get far down that line so this doesn't become a
21 pipeline for putting in what would otherwise be
22 inadmissible hearsay.

as

23 So I ask you to guard your process in that. I

a

24 think we are fine where we are, and that is why I became

25 little bit concerned, especially when we started getting

1 into the issues of the Argentine trials. I thought they
2 were not relevant or maybe some of the other trials that
3 have existed. I ask you to be careful in terms of how
you
4 are phrasing your questions.

5 MR. KLAUS: If I may, Your Honor, we will
6 stipulate that he had the power to transfer people, and
he
7 did transfer people. We are going to have a problem if
he
8 tries to inquire as to his motives for transferring
9 people. He is not a political expert, he can't begin to
10 pretend to know the reasons why General Garcia
transferred
11 specific officers to specific posts. And for him to
12 speculate on that goes way beyond the scope of his
13 expertise.

14 And that is a dangerous area. They are going
to
15 mix up his expertise as to his political opinions versus
16 his opinions on command structure.

17 THE COURT: I will allow the Plaintiffs to
decide
18 obviously whether they want to accept your stipulation.
I
19 don't think a party by offering to stipulate can
20 effectively prevent the other side from developing the
21 body of knowledge. I think your point, though, is well

22 taken.

23 Someone may well be an expert on the powers of

24 the commander, but when you get into why was a
particular

25 command decision made, why does someone, for example,
the

1 decision or consideration of whether Major D'Aubuisson
2 should be taken out of the country at a particular time.
3 There are probably lots of reasons that go into that,
and
4 one needs to be very careful when we are getting into
5 something that may be beyond, you know, an expert's
6 opinion, beyond something upon which an expert can form
an
7 opinion.

8 So let's take this step by step. As I
understand
9 it, what we have is a person who by background, teaching
10 experience, by study of international treaties, and so
on,
11 is talking about the role and responsibility and command
12 structure, what commanders are supposed to know and what
13 they would do in informing themselves, in making
decisions
14 and what they are supposed to do when allegations of
clear
15 violations of treaties and human rights abuses come to
16 their attention. I assume that is where we are going,
17 what is expected of commanding officers in order to
18 fulfill their command responsibilities.

19 Let's take it step by step. I have a feeling
it
20 might be easier for everybody, Mr. Green, if you ask the
21 questions. I know the professor, and I realize, by the

language

22 way, it is difficult when we are dealing from one
23 to another, there is a tendency for someone to go ahead
24 and speak. I think if the questions are more direct, I
25 think they will lead the witness and probably avoid some

1 of the concerns that are voiced.

2 MR. GREEN: I will try to ask slightly more
3 leading questions.

4 THE COURT: I am not suggesting you want to ask
5 leading questions, I am suggesting you ask more
questions.

6 That is, if you ask the question, Professor Garcia will
7 respond and stay focused and take him into what area you
8 are taking him in. Let's go step by step.

9 I realize it is difficult when we are having
10 everything translated, particularly when you have an
11 expert who is used to speaking, suggesting this is an
area

12 you would like to talk about as opposed to a specific
13 question. Maybe if you spoke to the professor and
14 suggested that he also wants to limit himself to your
15 question, understanding that you are going to follow-up
16 with another question and another after that.

17 MR. GREEN: Yes, Your Honor.

18 One matter briefly. In terms of his expertise,
19 and all the jury knows is that he testified in Argentina,
20 he is testifying now, and I -- in light of Your Honor's
21 earlier ruling, I don't want to go into the details of
the
22 case in Argentina or --

23 THE COURT: Let me stop you for a minute. I
want
24 to make sure you understand my ruling. I am not
limiting
25 you in qualifying him as an expert. You have a right to

1 bring out he testified in 20 trials or taught for 14
2 years, or held this rank or that. Where I think we
cross
3 the line is where we start getting into the details and
4 allegations of those trials.

5 Certainly the situation in Argentina, while
there
6 may be some similarities regarding the allegations, they
7 are all have specific on country by country, and I think
8 the potential for confusion outweighs any benefit. I
want
9 to be clear in establishing a person as an expert, you
10 have a right to go in and establish the range of his
11 expertise, number of times he testified, and anything
else
12 he may have done, things he has written or speeches he
may
13 have given, national or international panels he may have
14 appeared before, things like that. Please don't feel
15 limited in any way in that regard.

16 MR. GREEN: I am very clear with Your Honor's
17 ruling with respect to Argentina, Italy and Spain, and
18 United Nations. There is one thing I was trying to
19 develop with him about he learned -- his first exposure
20 really to El Salvador command structure was in preparing
21 to testify in the case against the officers who were
held
22 responsible for murdering the Jesuit priests in 1989.

23 That is when he developed his initial base of knowledge.

24 All I want to do is elicit some brief testimony

25 about that is where he first became exposed to command

going 1 structure in the El Salvadoran armed forces without
2 into any details about the case.

3 THE COURT: I think we ought to avoid the case
4 and talk about the fact that he had an opportunity to
5 study this particular command structure because he was
6 apparently going to testify in it, and therefore, spent
7 time, you know, and certainly go into the amount of time
8 and whatever other activities he engaged in to

familiarize

I 9 himself with the military situation in El Salvador. But
10 think we need to be careful that we don't get into the
11 facts of particular cases for several reasons. There
are 12 all kinds of potential pitfalls if we start doing that.

13 So I think the better way would be to see if we
14 could avoid the details of the cases without in any way
15 limiting questioning about the time he spent, and the
16 effort he expended to familiarize himself with a
17 particular military apparatus because I think, if you
18 will, the other side of that is the suggestion that
19 military command structures may differ from country to
20 country, and so the degree to which he did study a
21 particular country becomes very significant. That he is
22 just not operating off general principles, but trying to
23 verify those principles are in fact correct in El

24 Salvador. That is what pertains or they don't, and he
25 understands the nuances as to why they don't and what

has

1 been substituted.

2 MR. GREEN: One last point concerning the prior
3 El Salvadoran case that was prosecuted in El Salvador,
4 was tendered and certified as an expert in that case by
5 the government of El Salvador, at least by The Court in
6 that case, and I would like to bring that out.

7 THE COURT: Well, you know, you think about it.
8 It is a regular -- I see, you want to establish that the
9 entity trying to certify him was in fact the government?

10 MR. GREEN: Yes.

11 MR. KLAUS: That is fine, as long as he doesn't
12 get into --

13 THE COURT: When you think about it, it is
14 regularly established and usually a perfunctory question
15 when somebody comes in, have you testified as an expert,
16 yes, I have, how many times and what courts, so on, so
17 forth. I am not sure that goes too far beyond it.

18 You do get on thin ice when you get into what
19 party was offering you. Sometimes a party is not a
20 plaintiff expert, but they testify for the plaintiff as
21 well as the defendant. And the issue becomes well, who
22 hired you here. You see the thing where somebody brings
23 out, have you been retained by this law firm before,

that

24 is similar. You want to establish it was the government

25 of El Salvador itself who sought to have him testify, I

1 don't think there is anything wrong with that.

2 MR. GREEN: To correct that, I think it was the
3 Jesuits who retained him, and The Court certified him as
4 an expert.

5 THE COURT: I see. It is simply a party
retained
6 him, and having been retained, the court accepted that
he
7 was qualified by background, experience and training?

8 MR. GREEN: Right. And I will not get into a
9 nuance of the Salvadoran justice system, but he became -
-
10 experts have a different role.

11 THE COURT: Yes, yes, okay. All right.
Anything
12 else we need to talk about?

13 MR. KLAUS: No. I don't have a problem with
14 bringing up that he testified as an expert in El
Salvador
15 in a case regarding command structure and responsibility
16 in 1991. But beyond that --

17 THE COURT: Well, again, I think if we ask
18 specific questions -- and that is the other reason for
19 specific questions, if the questions are specific, and
if
20 you do have an objection, you then have the opportunity
to
21 raise it when the question is asked. That is another

22 reason to adhere to that format.

23 Okay. Let's take a break. We are going to
24 resume quarter of two and continue on with the direct
25 examination.

1 (Thereupon, a recess was taken at 12:45 p.m.)

1:45

2 (Thereupon, trial reconvened after recess at
3 p.m.)

4 MR. GREEN: Your Honor, one moment. A minor
5 scheduling.

30

6 The good news is I think we are streamlining
7 things a bit. The bad news is, I think we anticipated
8 to 40 minutes more from Mr. McClintock, and in light of
9 Your Honor's ruling, we were not able to get into that.

the

I

an

10 And in terms of Professor Garcia, I anticipated
11 probably 30, 40 minutes more of discussion of some of
12 other cases which I can't get into now. The reality is
13 expect to conclude with Professor Garcia in an hour to
14 hour and a half which would be followed by, I don't know
15 how long cross examination is, but frankly, we will have
16 run out of witnesses --

17 THE COURT: Do you have a sense of the cross
18 examination, Mr. Klaus?

19 MR. KLAUS: Probably a half hour.

20 THE COURT: Is there any other witness we could
21 move to?

22 MR. GREEN: We just had a witness arrive from

up,

23 Washington. To be perfectly candid, we could put her
24 and waste the jury's time, but we could streamline her
25 considerably if we had the night to prepare her.

1 THE COURT: Why don't we see where we are. I
2 think we need to use the jury's time. Let's see how we
3 are going. If there is somebody else, that would be
4 helpful.

5 MR. GREEN: May I confer with my co-counsel?

6 Your Honor, our other expert who has arrived
has
7 been out of the country for some time now. She is I
think
8 on a different time zone. We could begin with Professor
9 Karl and just begin her and go --

10 THE COURT: Background, expertise, things like
11 that. Why don't we wait and play it by ear. If we get
12 toward the end of the afternoon, we can stop. If we are
13 mid-afternoon we need to forge ahead if we can.

14 MR. GREEN: I wanted to bring it to Your
Honor's
15 attention.

16 THE COURT: Okay.

17 MR. GREEN: Should I have Professor Garcia?

18 THE COURT: Yes. Thank you.

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

20 THE COURT: Ladies and gentlemen, please be
21 seated. When we stopped for the luncheon break, we were
22 in direct examination, so I will turn back to Mr. Green
23 and allow him to proceed.

24

Mr. Green.

25

1 BY MR. GREEN:

2 Q. Professor Garcia, have you testified as an expert on
3 military command structure and command responsibility in
4 any countries other than Argentina?

5 A. Yes.

6 Q. Which countries, which jurisdictions?

7 A. In El Salvador, in Haiti, and in Italy.

8 Q. And in the Haitian case, who were you an expert for?

9 A. I was appointed military expert by the United
Nations
10 and the Organization of American States in a combined
11 fashion to assist the judge who was trying the case of
12 massacre that was called the Massacre of Raboteau, the
13 interpreter would spell for the record R-A-B-O-T-E-A-U,
14 Raboteau.

15 That was attributed to the dictatorship of General
16 Sadras (phonetic) in Haiti, as well as to other members
of
17 the --

18 MR. KLAUS: Objection; relevancy.

19 THE COURT: Let's go forward if we can. What
20 would be the next question?

21 BY MR. GREEN:

22 Q. And with respect to the other case that you
testified
23 as an expert in El Salvador, were you accepted as an
expert

24 witness on military command structure in that case?

25 A. Yes, yes. I was in the courtroom and I provided

1 testimony.

2 Q. One minor detail here, Professor Garcia, are you in
3 any way related to General Garcia, the Defendant in this
4 case?

5 A. No. No. It is the first time I've seen him.

6 Q. Professor Garcia, before lunch you testified about
7 having reviewed Salvadoran law and military regulations
in
8 order to evaluate El Salvadoran armed forces command
9 structure. You also testified that you spoke with
Colonel
10 Mejano. Why did you speak with Colonel Mejano?

11 A. I spoke to Colonel Mejano because I wanted to be
sure
12 that my studies of the command structure in El Salvador
and
13 its way of functioning in the years 1979 through 1983
were
14 a exact reproduction of the reality as well as about the
15 particularities that took place around that time.

16 Q. Professor Garcia, what was the military command
17 structure in El Salvador in the period 1979 to 1983?

18 A. If you will allow me, I will assist my memory by
using
19 a chart that shows the organizational chart of the armed
20 forces, national armed forces.

21 MR. GREEN: May I have a moment?

22 Mr. Stern, I believe there is a pointer on the

23 table.

24 THE WITNESS: In accordance with the law, this

25 was the organizational chart of the armed forces of El

1 Salvador in the year 1979. Based on the Salvadoran
2 Constitution, the commander in chief of the armed forces
3 would be the President of the republic. The President
of
4 the republic didn't exist in 1979 because there was a
5 revolutionary government Junta that managed power in
that
6 country at that time. So instead of the President, it
was
7 the Junta that had the -- that were the commanders in
8 chief for the armed forces.

9 The Constitution considers that among its
10 articles that the President of the republic in the event
11 of war or of an internal war, as a result of the fact
that
12 usually it is a civilian who holds the position of
13 President of the republic. He may delegate upon an
14 officer who calls the rank of general the position of
15 commander general of the armed forces. This would be a
16 level, shall we say, that the President creates in order
17 to have a relationship with the entire armed forces. He
18 would be the connection.

19 The true commander of the armed forces is the
20 Minister of Defense, to whom the law assigns all
21 responsibilities of creation and management of the armed
22 force and this line denotes the relationship of command
23 and dependency.

24 The relationship of command and dependency
25 continues below the Minister of Defense with an

1 organization known as the general staff of the armed
2 forces. This is a general staff just like any other
3 general staff around the world which holds within it a
4 personnel department known as G-1 and intelligence
5 components known as G-2. Another one for operations
known
6 as -- operations is G-3, logistics component known as G-
4.
7 And it also has a component known as G-5 which deals
with
8 general matters or civilian matters depending on the
9 organization.

10 This organization has a commander which is the
11 commander of the general staff, and it also has a
12 secretary in command.

13 This organization's mission is to transform or
14 receive the orders as issued from the general command
15 through the Minister of Defense and to convert them into
16 orders that go to the subordinate commands, and they
look
17 over or oversee the compliance of those orders.

18 The general staff of the armed forces following
19 this line, the Commander General, the Minister of
Defense.
20 Of these three, depend these units, the Army, which were
21 deployments or garrisons. The Air Force, the National
22 Navy, the National Guard, which is a militarized
security

Treasury

23 force. The National Police which also depends on the
24 general staff of the armed forces, and the known
25 Police.

1 All of these elements represent the troops, the
2 soldiers, those in the field. These are the
organizations
3 for execution. They execute the orders that come from
the
4 President, Minister of Defense, and the Commander of the
5 general staff. Holding this position was the gentleman
at
6 that time, Colonel Garcia. At this post the then
Colonel
7 Vides Casanova. These are the two positions of
conduction
8 and responsibility that each had at that time.

9 Q. In terms of the military command structure, and the
10 military hierarchy, was there a separation between the
11 activities of the military forces, and those of the
12 security forces?

13 A. No, they were all militarized core.

14 Q. And who were responsible for all of those sectors?

15 A. They all depended on the Minister of Defense.

16 Q. Would this particular command structure be
considered
17 unusual?

18 A. No.

19 Q. Professor Garcia, you testified that this was the
20 command structure that was on paper as reflected in
21 Salvadoran law?

22 A. Yes.

23 Q. And that the Commander in Chief was the President of
24 the republic?

25 A. That is what the law said, but in the absence of the

1 President, it was the revolutionary Junta.

2 Q. Who, based on your expert opinion, had the real
power,

3 real military power in El Salvador in 1979?

4 MR. KLAUS: Objection. Goes beyond the scope
of

5 his expertise. Calls for a political opinion.

6 MR. GREEN: I withdraw the question.

7 THE COURT: All right.

8 BY MR. GREEN:

9 Q. You testified that you reviewed various Government
10 cables.

11 THE COURT: Could I stop you for a second so I
12 understood the last question?

13 Professor Garcia, in saying you reviewed
14 governmental cables, are those internal cables to the
15 government of El Salvador?

16 THE WITNESS: I don't understand the question.

17 THE COURT: Let me go back to Mr. Green, then.

18 BY MR. GREEN:

19 Q. I am going to ask some other questions.

20 THE COURT: Okay, all right.

21 BY MR. GREEN:

22 Q. Who was in the revolutionary government Junta at the
23 time?

24 A. There were two colonels and three civilians.

25 Q. With respect to the two colonels who were in the

1 governmental Junta at the time, were either of them field
2 commanders?

3 A. At that time they were not. They were colonels,
they
4 only held hierarchal position, they did not exercise
5 effective command of the troops.

6 Q. Who was the -- who was in the Comandancia Armada?

7 A. The revolutionary government Junta appointed a
8 position, Colonel Gutierrez, G-U-T-I-E-R-R-E-Z.

9 Q. Was Colonel Gutierrez an engineer?

10 MR. KLAUS: Objection. Beyond the scope of his
11 knowledge. Relevancy.

12 THE COURT: I will overrule the relevancy
13 objection. Do you know of your own knowledge whether
14 Colonel Gutierrez was an engineer by background? Have
15 your studies shown you that?

16 THE WITNESS: Yes. I studied Colonel Gutierrez
17 CV as well as Colonel Mejano's CV as well as the
gentlemen
18 here present.

19 Yes, he was an engineer.

20 BY MR. GREEN:

21 Q. Do you as a professor in command structure and
22 responsibility know what is the significance of having an
23 engineer in the position of Comandancia General de la
24 Fuerza Armada?

25 A. He has no capacity to exercise effective command of

1 the troops.

2 MR. KLAUS: Objection. Beyond the scope of his
3 knowledge, speculation. No predicate, no foundation.

You

4 THE COURT: I will overrule that objection.

5 can handle this by cross examination.

6 You may proceed.

as

7 THE WITNESS: I was saying he did not exercise
8 the command over troops, combatant troops. He was a
9 specialist in engineering, therefore, his job was more

10 a liaison between Minister of Defense rather than to
11 exercise --

12 MR. KLAUS: Objection; no foundation.

13 THE COURT: I will overrule that. You may
14 proceed.

15 THE WITNESS: -- rather than exercise effective
16 command.

17 BY MR. GREEN:

cables?

18 Q. Have you reviewed any United States government

19 A. Yes.

cables

20 Q. Have you reviewed any United States government
21 that indicate who had the real military power in El
22 Salvador at that time?

23 MR. KLAUS: Objection; calls for a hearsay

24 answer.

25 THE COURT: I sustain the objection.

1 BY MR. GREEN:

2 Q. Did you review any United States government cables
3 that addressed who actually exercised military command in
4 El Salvador from 1979 to 1983?

5 MR. KLAUS: Objection; same grounds.

6 THE COURT: Same ruling, subject to the ruling

I

7 made earlier today. You need to establish that as a
8 predicate.

9 MR. GREEN: Okay.

10 BY MR. GREEN:

command

11 Q. Professor Garcia, in evaluating how a military
12 was structured on paper versus how it functioned in
13 reality, do you and other experts rely on government
14 and other contemporaneous documents?

cables

15 A. Yes.

16 Q. Based upon your review of United States government
17 cables --

whether

18 THE COURT: Let me stop you for a minute. You
19 asked the general a question regarding governmental
20 cables. You now need to address the distinct and
21 there is a distinction between cables internal to the
22 government of El Salvador as opposed to cables of
another

23 government, in this case, United States government,
24 whether those are materials that someone studying the
25 subject would look at.

1 BY MR. GREEN:

2 Q. Professor Garcia, with respect to the government
3 cables, I would like to direct your attention
specifically
4 to United States government cables. Were the
observations
5 of the United States government officials who were on the
6 scene in El Salvador at that time period --

7 MR. KLAUS: Objection to the form of the
8 question; leading.

9 THE COURT: Let me hear the entire question if
I
10 might first.

11 BY MR. GREEN:

12 Q. As a military command structure expert, do you and
13 other military command structure experts commonly rely on
14 government cables such as those from the United States
that
15 evaluate who was exercising real command in determining
who
16 was evaluating -- who was exercising real command?

17 A. Yes, as well as upon other things.

18 Q. What other things did you also consider and do other
19 military command structure experts consider in
evaluating,
20 forming opinions as to who is exercising real command?

21 A. Among other things, upon the real behavior as
22 evidenced by documents from the time period generated by

23 the government of El Salvador and testimony of people who
24 were eyewitnesses, and some of them protagonists at the
25 highest level on information that comes not only from

1 reports from the Embassy of the United States, but also
2 from the intelligence services of the United States of
3 material that has been declassified, and placed available
4 to me at some given time, among other things.

5 Q. Professor Garcia, based upon your review of all that
6 information, based upon your understanding that Colonel
7 Gutierrez who held the position of commandancia general
de
8 la Fuerza Armada, did you form an opinion who exercised
9 real command and control in El Salvador from 1979 to
1983?

10 MR. KLAUS: Objection; calls for an opinion not
11 based on sufficient facts.

12 THE COURT: I will overrule the objection. You
13 may proceed.

14 THE WITNESS: Yes.

15 MR. KLAUS: Also objection, based on none of
16 those documents mentioned in his expert report that he
was
17 going to rely on for his opinion.

18 THE COURT: Let me see the report.

19 MR. GREEN: If I may approach.

20 THE COURT: Yes. I will overrule the
objection,
21 and you may proceed.

22 Excuse me, for the record, let the record
reflect

23 The Court has looked at a copy of the expert report that
24 was furnished in discovery in this case.

25 You may proceed.

1 THE WITNESS: What was the question?

2 BY MR. GREEN:

3 Q. Based on review of all of that information, you
4 indicated you formed an opinion as to who in the command
5 structure exercised military command over the subordinate
6 troops and forces in El Salvador from 1979 to 1983?

7 A. Yes.

8 Q. Who was that?

9 A. It was the Minister of Defense.

10 Q. General Garcia?

11 A. The current General Garcia who at the time was
Colonel
12 Garcia.

13 Q. Professor Garcia, as a military commander, what kind
14 of information, what sources of information would you
rely
15 upon in determining what troops under your command were
16 doing?

17 MR. KLAUS: Objection; relevancy as to what he
18 did.

19 THE COURT: I sustain the objection. Let me
20 allow Mr. Green to rephrase the question.

21 BY MR. GREEN:

22 Q. Professor Garcia, as a military command expert, what
23 kind of information would a military commander rely upon
in

24 exercising his or her duties?

25 A. In the first place, whichever information comes from

1 my own command structure.

2 Second, if I am at the head of any of these
3 organizations, let's say, for example, as the Minister of
4 Defense, I receive information from the general staff of
5 the armed forces which it produces through its
intelligence
6 component, the G-2, the obligation of which is to
maintain
7 me permanently and constantly informed as pertains to all
8 kinds of events that may take place in my area of
9 responsibility.

10 In addition, anything that happens at this level
11 (indicating), these gentlemen who head each one of these
12 organizations, they have the obligation to inform of
these
13 things to the general staff, which through the chain of
14 command proceeds to inform me of what is happening at
each
15 place.

16 By the same token, let's say, for example, the
17 National Guard, whoever is at the head of this
18 organization, the National Guard, has a series of units
19 that respond to his command, and that are deployed in the
20 field throughout the territory of the country, that
21 maintain direct contact with the population. They are in
22 direct contact with a potential enemy if there were one
to

23 exist, and each one of these all the way down to the last
24 soldier who depends or reports to him, reports through
what
25 is known as his chain of command that informs the
commander

1 of the National Guard who informs the general staff, who
2 lastly informs me.

3 I would throughout this entire structure and
following
4 the same channels, I have all of those below me, I
maintain
5 them informed, I do the returned trip. Not only of what
I
6 know do I inform them, but also whatever I receive from
the
7 presidency of the nation or the general command.

8 This is a continuous activity that keeps everyone up
9 to date as to what is taking place. Intelligence
10 information is a fundamental element for the correct
11 functions of any armed force. If I don't know what is
12 going on, I cannot make decisions and I cannot issue
13 orders. I cannot correct anomalies, and I never end up
14 having effective command.

15 And I cannot allow this to take place, because if I
am
16 a general or a colonel in charge of the entire armed
force,
17 I can never say that I don't know what is going on
because
18 that is recognizing that my entire chain of command both
on
19 the way down as well as on the way up has failed, and
that
20 I have not made timely measurements or measures --

21 interpreter corrects himself -- measures to correct the
22 situation that will extract me from the situation of
23 ignoring everything or from finding out what people say
24 from what newspapers say, or for whatever I am told by
25 Embassy of XYZ country.

or

the

1 It is elemental in military command. This goes way
2 beyond the task of an expert witness, this is a matter of
3 common sense. This is the rule that you even use when
you
4 are regulating your own family nucleus.

5 That would be the first part, which is to say, which
6 is to say information that comes from my own structure,
7 which should always be the most reliable. After that,
8 let's continue with this level here --

9 Q. What other information would you say the Minister of
10 Defense considers and relies upon in either forming
11 strategy or directing, supervising your troops?

12 MR. KLAUS: Objection. Not relevant what he
13 would do.

14 THE COURT: Let me ask Mr. Green if he would
15 please rephrase the question.

16 BY MR. GREEN:

17 Q. As a military command structure expert, what other
18 kinds of information should a military commander
exercising
19 his duties under the command responsibility doctrine
20 consider and act upon?

21 A. We are using the case of Minister of Defense. We
22 first said that it is your own structure. Within that
23 structure there are specific intelligence organizations,

of

24 the permanent mission of which is to collect information

25 all sorts concerning potential enemies on the terrain, on

of 1 your own troops, on the general activity within the zone
2 operations where you are the commander.

3 These are the well-known intelligence elements of
4 whichever military organization has use and that generate
a 5 daily, weekly or monthly report depending on the
6 regulations that I set forth from this position, and that
7 period depends or responds to the needs of the country
8 during a period of time, and this information alerts me
in 9 a timely manner of things that could be damaging to my
10 command or my exercise of command.

11 And this allows me to take the preventative measures
12 to prevent this from falling apart. And that is why I
13 place this in second position. First is your structure,
14 and then is the specific intelligence organizations
within 15 your unit.

16 Q. As a military command structure, should a military
17 information come from non military or security forces?

18 A. Yes, so long as they are reliable.

19 Q. What would be some examples of information that you
20 would receive from outside the military command
structure?

21 A. I would say, for number one, I would say information
22 that comes from the United Nations organization that has

23 specific organizations that cover all of the countries of
24 the world, that generate reports specifically on human
25 rights situations in each one of those countries.

of
from

1 In addition to the United Nations, the Organization
2 American States. In addition reports that come to me

3 Embassies of those countries that are truly my friends.

4 Q. Would the United States back during that time have
5 been considered a friendly country to the country of El
6 Salvador?

7 MR. KLAUS: Objection; goes beyond the scope of
8 his expertise.

9 THE COURT: No. I will permit the witness to
10 answer that question.

11 THE WITNESS: Yes. In addition to the reports
12 come
13 coming from countries that are friendly, reports that
14 of
15 from world wide organizations that denounce things that
16 comes
17 are taking place in my country and that affect my orbit
18 give
19 influence and responsibility. As well as that which
20 from the press, be it written, oral, televised which
21 its daily reports. As well as from those recognized
22 persons in politics, religion and culture within my
country who may come to my office to tell me, look, this
is happening and that's happening. That's what I call
reliable information.

22 BY MR. GREEN:

23 Q. What about information that comes from acknowledged
24 Democratic parties within the country?
25 A. Yes. I have mentioned the relevant people in

1 politics, otherwise, yes.

2 Q. Okay. Have you read the letter of January 31, 1980
3 from the Christian Democratic party to the revolutionary
4 government Junta?

5 THE INTERPRETER: Counsel, please repeat the
6 date.

7 MR. GREEN: January 31, 1980.

8 THE WITNESS: Yes.

9 MR. GREEN: Your Honor, this document is
already

10 in evidence, Plaintiffs' Exhibit 499.

11 THE COURT: Thank you.

12 MR. GREEN: If I could have Plaintiffs' Exhibit
13 499, R-3536 brought up on the screen, please.

14 Your Honor, I don't know if we need to dim the
15 lights. I am going to spend a few minutes on this
16 exhibit.

17 THE COURT: All right.

18 MR. GREEN: Highlight the date, addressee and
19 first paragraph.

20 MR. KLAUS: Objection; no proper predicate.

21 THE COURT: I think the question was whether he
22 had reviewed this letter.

23 MR. KLAUS: That was the initial question.

24 THE COURT: What is your objection?

MR. KLAUS: He is not qualified to comment on

1 this letter.

2 THE COURT: Let me hear the next question and I
3 will entertain an objection if there is one.

4 BY MR. GREEN:

5 Q. Professor Garcia, you testified as a military
command
6 expert that in terms of information --

7 THE COURT: Let me stop you and ask counsel not
8 to ask a leading question.

9 BY MR. GREEN:

10 Q. Professor Garcia, have you reviewed this letter --

11 MR. KLAUS: Objection; asked and answered.

12 THE COURT: Let's go ahead, please.

13 MR. GREEN: I haven't finished my question, I
am
14 trying to phrase it.

15 THE COURT: All right.

16 BY MR. GREEN:

17 Q. Professor Garcia, in forming your opinions in this
18 case, did you review this document in order to establish
19 what kind of information was made available to the
Minister
20 of Defense during the time period in question?

21 A. Yes.

22 Q. As a military command expert, what was the
23 significance to you of this letter in determining what
kind

24 of information was made available to General Garcia as a
25 Minister of Defense as of January 31, 1980?

1 A. I want to make a small caveat. I have a translation
2 of this letter that has served me well for my
evaluations.

3 As you can see, this letter is not addressed to General
4 Garcia, but it is addressed to the members of the
5 revolutionary government Junta, which is to say that it
was
6 not addressed to the general who is present here.

7 But I have also acknowledge from the initial
8 deposition provided in this case by General Garcia in
which
9 he accepts that he learned of the contents of this
letter,
10 which is to say that even though the letter is not
11 addressed to him as a member of the hierarchy, he
12 acknowledges that he knew of the contents of this letter.

13 And that is why I want to respond with more precision in
my
14 position as an expert witness as provided by this court.

15 Q. Was General Garcia a member of the high command of
the
16 armed forces of El Salvador?

17 A. He was a member, yes.

18 Q. And does this letter request that General Garcia
19 himself take specific actions?

20 A. Yes.

21 Q. Directing your attention now to this letter, could
you

22 please tell the jury what the significance of this letter
23 is to you as a military command expert?

24 A. This letter carries out a series of very grave
25 accusations accusing the personnel that depended or were

1 below me --

2 Q. When you say me, who are you referring to?

3 A. I am referring to the position of Minister of
Defense.

4 -- of having repeatedly violated and without cause
as

5 well as throughout the entire territory of my
jurisdiction

6 violated the rights of people, violated the human rights.

7 MR. GREEN: Can we go to the second slide, page

8 3536?

9 BY MR. GREEN:

10 Q. Could you please advise the jury what the
significance

11 of the factual recital here is?

12 MR. KLAUS: Objection, Your Honor. It is
hearsay

13 and needless presentation of cumulative evidence. The

14 letter is in evidence, it is hearsay. He has no way of

15 verifying reliability of the facts, of the allegations
in

16 the letter.

17 THE COURT: All right. Let me stop for a
minute.

18 If I understand the question, the question asks

19 the witness to give us his opinion as to A, the

20 significance of having received a letter like that and

21 then what obligations, if any, would be imposed upon the

22 Minister of Defense.

23 Is that the question that is pending?

24 MR. GREEN: Yes, Your Honor.

25 THE COURT: All right. Let's proceed if that

is

1 the question.

2 THE WITNESS: Shall I answer?

3 BY MR. GREEN:

4 Q. Yes.

5 A. Yes. They were very grave denunciations made here
6 that affect my command responsibility and the signer, or
7 signators to this letter were persons who deserved trust
8 my command.

9 As a proof of that, I can say that one of the
10 signators by the name of Napoleon Duarte, N-A-P-O-L-E-O-
11 last name, D-U-A-R-T-E, a short time after this letter,
12 became a member of the revolutionary Junta and shortly
13 after that he was appointed President of the republic by
14 this very same group who carried out the military coup
15 d'etat. More trustworthy than the leader of a political
16 party that was collaborating with the military process is
17 almost impossible, and that is where the importance that
18 would get as Minister of Defense upon receiving this
19 letter, and that I would carry out a series of measures
20 established in law and military regulations.

21 Q. Professor Garcia, how many specific instances of
22 repression or violations of human rights were documented

by

N,

he

I

as

in

23 this letter?

24 MR. GREEN: If we can go to page 3537.

25 THE WITNESS: 19.

1 BY MR. GREEN:

2 Q. And what specific kinds of violations are alleged in
3 these 19 instances?

4 A. In general they each have their own particularities.
5 Members of the armed forces are accused of having
6 systematically violated human rights of persons. Not
7 directly involved in the operations of an internal war
8 was being carried out in El Salvador, but simple
9 inhabitants whose only crime was that of thought.

that

10 MR. GREEN: Can you blow up paragraph number
11 three on page two?

12 BY MR. GREEN:

13 Q. For instance, what does this allegation indicate to
14 you as a military command expert?

15 A. Can everyone read what it says? Otherwise I will
16 read

17 This case number three speaks of Jos, Mejia and
18 Francisco Ventura. These were two university students

who

19 were captured exactly in front of the Embassy of United
20 States of America which is located in a very central area
21 of the city. And it was also an Embassy of a government
22 that was friendly and that was collaborating with me.

23 And there, in front of the Democratic -- Christian

24 Democratic party that shortly thereafter would provide a

25 President for the country, witnesses went there to sign

and

1 say that it was members of the National Guard who were at
2 the time under the command of then Colonel Vides
Casanova.

3 Q. Professor Garcia, where is the United States Embassy
4 in the country of El Salvador?

5 A. It is located in a very central point.

6 Q. Which city?

7 A. In El Salvador.

8 Q. Which city in El Salvador?

9 A. In the capital city of the republic.

10 Q. And where was general, then colonel, later General
11 Garcia's offices?

12 A. In the city of San Salvador.

13 Q. And where was General Vides Casanova's National
Guard
14 headquarters at the time?

15 A. In the city of San Salvador.

16 Q. As a military commander, would you consider the
17 abduction of university students in front of the United
18 States Embassy to be in a remote area of the country?

19 A. No.

20 MR. GREEN: Can we go to paragraph number six?

21 BY MR. GREEN:

22 Q. Professor Garcia, as a military command structure
23 expert, what concerns, if any, would you have about this
24 kind of allegation?

25 A. In this case, it is the case of a regidor --

1 interpreter would spell for the record R-E-G-I-D-O-R -- a
2 member of the government of El Salvador at the time and
in
3 the state of Libertad, a state that comprised the
republic
4 of El Salvador and he was a member of the Christian
5 Democratic party who went to his party headquarters to
6 denounce what had taken place. You can see the
7 denunciation that appears here. They took him to the
8 cemetery, beat him with the butts of their rifles for no
9 cause, and he was also threatened with his death if he
10 denounced what had happened to him.

11 As we said in the beginning, when there is no
12 discipline and no control of commanders over the
structure,
13 these elements with their heavy fire power become armed
14 bands that are very dangerous.

15 Q. Professor Garcia, I notice there are a number of
other
16 instances listed on that page. If we can go to the next
17 page, which is R-3538, paragraph 14, please.

18 Professor Garcia, as a military command expert, what
19 significance, if any, would you place on this allegation?

20 THE COURT: Could I stop you for just a second,
21 because I think it is important that we come back here.

22 If I understand it properly, Professor Garcia
has

23 been called as an expert in the military command
structure

24 and an expert in the obligations of the military
commander

25 when presented with this kind of information. So, in

1 other words, I take it the question that you are putting
2 to the witness is, if this type of information was
3 presented to a military commander, then what? What is
the
4 question you are asking?

5 MR. GREEN: What I am going to do is get to
what
6 the Christian Democrats requested of the government at
the
7 end of this recitation of 19 separate incidents. I can
go
8 there right now.

9 THE COURT: Handle it any way you like, but I
10 want to make sure the jury understands that the premise
of
11 the question as I understand it is, because, obviously,
I
12 think everybody also understands that Professor Garcia
has
13 no personal knowledge of these events.

14 The question, I think, is, if information like
15 this is presented to a military commander, what are the
16 obligations that are then placed on a military commander
17 to either look at this or investigate it or take
18 appropriate actions. But I hope everybody understands
19 that in going through these paragraphs as we have, there
20 is no suggestion that the professor has personal
knowledge

was

21 about it himself. He is here to testify that if this

22 presented to a military commander, what should the

23 military commander have done.

24 Let me go back to Mr. Green and allow him to

25 phrase the next question.

1 BY MR. GREEN:

2 Q. Professor Garcia, as a military command structure
3 expert, and as an expert on command responsibility, what
4 significance would a military commander have placed on
the
5 allegations in paragraph 14 and what should a military
6 commander do in the face of such an allegation?

7 THE COURT: Can I stop you for a second just to
8 rephrase that?

9 I think the question is: Should this have been
10 significant to a military commander and what should a
11 military commander have done if presented with this type
12 accusation.

13 THE WITNESS: I shall answer the judge's
14 question. I as a military commander in light of such
15 reliable denunciation as the ones that we are analyzing,
I
16 would immediately make use of the obligations that are
17 established in the military code of justice for the
period
18 what they -- what those articles assign to my level.

19 Each command level that we have explained today
20 has legal responsibilities within the military justice
21 system, which is to say Minister of Defense has his at
his
22 level, the chief of the general staff has his, director
of

23 the National Guard has his, and also a commander of a
24 garrison has his, all the way down here. The code to
each
25 one assigns legal responsibilities, to investigate
crimes

1 and misdemeanors.

2 These denounced facts are crimes.

3 Q. When you say denounced facts, are you referring to
the
4 allegations, the 19 allegations?

5 A. Yes. I am referring to what we have been reviewing
up
6 until this time. At the level of the Minister of Defense
7 where all of these denunciations arrived, the Minister of
8 Defense of El Salvador, he was at the head of all of the
9 legal responsibilities that immerge from the code of
10 military justice. And he could order investigations
11 throughout the entire command structure from his own
level
12 all the way to the smallest facts, these alleged
13 denunciations, all crimes.

14 The first step was to order the corresponding
15 investigation. That is how military justice works, it
16 doesn't make arbitrary or take arbitrary measures. That
is
17 what the military code of justice said for that time in
El
18 Salvador. I assign an investigative official for that
19 investigation or file. He provides me with the
conclusions
20 of his investigation and in accordance with what the
21 advocate general of the armed forces reports to me --
when

22 I say me, I am speaking of the Minister of Defense -- I
23 then order not that this be turned over to a military
24 tribunal.

25 If the military tribunal has not been convened, and

I

1 am facing a very grave situation, for example, I am
2 provided with an option by that code of creating a new
3 military tribunal at that very moment immediately and
4 anywhere within the territory of the republic, and this
is
5 stated specifically in that code for the cases of
6 violations of human rights, which is the contents of
these
7 allegations.

8 So military court begins to function at that time
9 where the accused are provided with all of the options as
10 those are provided to the two accused in this courtroom,
11 evidence is provided as in any other court and a ruling
is
12 handed down.

13 Q. Based upon your reading of these Defendants'
14 depositions, did General Garcia ever order an
investigation
15 as to any of the 19 specific incidents alleged in the
16 Christian Democrat letter?

17 MR. KLAUS: Objection, Your Honor. He needs a
18 formal basis. He is referring to the deposition. Could
19 we have a page and line?

20 THE COURT: I think the question, though, is,
21 based on the documents that the witness has had the
22 opportunity to study, which obviously include
depositions

whether 23 in this case, I think the question is being asked
24 he has an opinion as to whether General Garcia ever
question. 25 ordered an investigation, and I will permit that

1 THE WITNESS: No.

2 BY MR. GREEN:

3 Q. In your opinion as a military command structure
expert
4 and expert on military command responsibility, did
General
5 Garcia fail to do his duty by not ordering an
6 investigation?

7 A. Yes.

8 Q. He failed to do his duty?

9 MR. KLAUS: Objection; asked --

10 THE COURT: I am sorry?

11 MR. KLAUS: Asked and answered.

12 THE COURT: Sustained.

13 BY MR. GREEN:

14 Q. Professor Garcia, are you familiar with the
proposals
15 made by the Christian Democratic party in this letter
based
16 upon the 19 specific instances set forth?

17 A. Yes.

18 MR. GREEN: If we could go to page 3542, which
I
19 believe would be on page eight of the Spanish version.

20 If we can expand, I guess it would be paragraph
21 3.2A.

22 BY MR. GREEN:

23 Q. What did the Christian Democrats propose that the
24 revolutionary government Junta and the high command do?

25 A. The proposals were on two levels. One were of
general

1 policy directed to the revolutionary Junta, that if this
2 commission of violations of human rights was a policy of
3 the revolutionary government, it proposed that the
4 revolutionary Junta change its policies as pertains to
the
5 exercise of power as a government.

6 And the second level of the proposal were of a
7 military character, and these were directed directly to
the
8 level of the Minister of Defense and his subordinates.

And
9 in these proposals, they say what the minimum measures
are
10 that should be imposed within the structure of the armed
11 forces in order that this continuous violation of human
12 rights cease, to provide discipline to the troops and
13 eliminate those people who are reticent to the compliance
14 with orders and that therefore affected the prestige of
the
15 institution and as well as that of the country.

16 In summary, that is the contents of these proposals
17 after the 19 allegations of each one of the violations.

18 Q. Were there any specific recommendations concerning
19 giving instructions, high command giving instructions to
20 subordinates about respect for human rights?

21 A. Yes.

22 MR. GREEN: Page 3543. I believe this would be

23 on page eight of the Spanish version.

24 THE WITNESS: Yes, I will find it.

25 MR. GREEN: Could we expand one through four,

1 please?

2 BY MR. GREEN:

3 Q. As a military commander, command structure expert,
4 would a military commander be obligated under the
Doctrine
5 of Command Responsibility and the various international
6 treaties you testified about --

7 THE COURT: Let me stop you for a second. I
will
8 ask you to rephrase the question and ask you to use some
9 other term. At some point I will need to instruct the
10 jury on the legal requirements in this case on the
11 Doctrine of Command Responsibility, and I think we are
12 mixing them up.

13 I think what you are asking, though, if I
might,
14 when presented with these kinds of requests under the
15 obligations that are inherent on a military commander,
and
16 let me go forward with that. Okay.

17 BY MR. GREEN:

18 Q. Professor Garcia, when presented with these kinds of
19 requests, would it be incumbent upon a military commander
20 to issue the kinds of express prohibitions requested by
the
21 Christian Democrats in this letter?

22 A. Yes. In addition to the pertinent investigation we

I

23 spoke of earlier, immediately, and at least preventively,

series

24 would carry out these measures, and I would adopt a

25 of punishments throughout the chain of command.

1 It cannot be, for example, that the allegations be
2 leveled against the National Guard, and that the National
3 Guard commander knows nothing about this. And that if
the
4 director of the National Guard doesn't advise me in a
5 timely manner that my command is affected in such a way,
6 so, information failed, and I may not allow that
7 information fail not even for one second, and I may not
8 allow for even one second that command responsibility be
9 violated at each one of the levels or any of the levels
10 leaving reliable political party such as this one was, as
11 far as I am concerned, comes to give me the background,
me,
12 the commander, background of the procedures of my
13 subordinates.

14 This is inadmissible.

15 Q. Professor Garcia, if you could look through items
one
16 through four of these directives, and following that
items
17 five through eight.

18 MR. GREEN: Could we bring up the next four
19 paragraphs?

20 THE WITNESS: Yes.

21 BY MR. GREEN:

22 Q. Professor Garcia, based upon your review of the
23 documents and deposition testimony in this case, did

24 General Garcia adopt or order any of these directives or
25 prohibitions that were requested by the Christian

1 Democratic party?

2 A. I found none of that throughout my entire
evaluation.

3 Q. Moving on, did the Christian Democratic letter name
4 any specific troops or security personnel who the
Christian

5 Democratic party believed engaged in human rights abuses?

6 A. Yes.

7 Q. I believe that would be on page ten of the Spanish
8 translation?

9 A. Yes.

10 MR. GREEN: And can we bring up page 3544,
11 please? Can we highlight the top half?

12 BY MR. GREEN:

13 Q. This letter demands removal of a number of specific
14 individuals in the National Guard and the military.
Based

15 upon your review of the evidence in the deposition of
16 General Garcia, did he remove any of these individuals in
17 response to this request from the Christian Democratic
18 party?

19 MR. KLAUS: Objection; misleading, confusing.

20 THE COURT: Legal objections are what?

21 MR. KLAUS: Misleading, confusing.

22 THE COURT: The question is misleading or
23 confusing?

24 MR. KLAUS: Yes. According to the documents,
25 only two documents that he looked at, whether General

two 1 Garcia did something, how can he tell from looking at
2 documents.

3 THE COURT: I will overrule that and you can
4 cover that on cross examination.

5 You may answer the question, sir.

6 THE WITNESS: As a consequence of this letter?

7 BY MR. GREEN:

8 Q. Correct.

9 A. No.

10 THE COURT: Mr. Green, I think we need to stop
11 for the mid-afternoon recess. Why don't we take a break
12 for 15 minutes. We will come back and continue on.

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

14 THE COURT: Let me allow the professor to step
15 down from the witness stand.

16 Let me just take a second. There are certain
17 documents that are in evidence, and they say whatever
they
18 say.

19 Now, whether the allegations in those documents
20 are true obviously depends on other evidence and other
21 testimony, but my suggestion would be that -- and I want
22 you to obviously handle this the way you like, but my
23 suggestion would be that you call the professor's

question 24 attention to the statement and then pose whatever

25 it is you are posing, because as I tried to point out to

one 1 the jury, I don't think there is any question, and no
2 is suggesting that the professor himself made an
3 independent investigation as to whether these
allegations 4 are true.

is 5 But I take it that the thrust of the testimony
6 that if a military commander were presented with this
type 7 of allegation considering its source and nature of the
8 allegation and so on, what is the expert's opinion as to
9 what a commander in that situation would be obligated to
10 do. In other words, to conduct an investigation if the
11 reports were credible to punishment, so on, so forth.

12 I think we will move more appropriately, and I
13 think we will also avoid any problems of suggesting that
14 there are any kind of independent investigations made by
15 Professor Garcia, because what the Plaintiff is asking
of 16 the professor, what is his opinion, if this happened,
what 17 is your opinion a military commander should have done,
and 18 based on your research of the records, was anything like
19 that done.

20 That is what you are saying, and defense is
21 pointing out and questioning adequacy of the
informational

22 basis that the professor may be relying on to make his
23 judgments or render those opinions.

24 I think that we need to keep focused because
the
25 mere fact that he is an expert doesn't allow him to
simply

1 start getting into factual issues.

2 He is really giving his opinions that if these
3 facts were presented, what should someone have done. I
4 think that is what it is you are seeking to do, is it
not?

5 MR. GREEN: Yes, and actually we will be moving
6 into specific Army regulations and constitutional
7 provisions.

8 THE COURT: Let me come back to one other
thing.

9 I don't think it is intentionally, I think what you are
10 talking about is what is the conception in the military
11 command structure, what does the commanding officer have
12 to do and so on. I want to be careful not to use the
term

13 Doctrine of Command Responsibility. Doctrine of Command
14 Responsibility may be different than what a military
15 commander -- so on. That is a legal document where
16 someone seeks to hold someone liable for doing or not
17 doing something.

18 What you are really talking about is what does
19 the military command structure require military
commanders
20 to do consistent with treaty, treaty obligations, human
21 rights obligations, all obligations that the professor
22 contends all military commanders are obligated to do.

23 What does a military commander have to do when
confronted
24 with this allegation or that allegation. I think it
would
25 help us move forward.

1 Does that address the concerns you have,
2 Mr. Klaus?

of
3 MR. KLAUS: Yes. Most of them I can take care
4 in cross examination. I think it is confusing to the
jury
5 that they may take these allegations as being true. I
6 will deal with that on cross.

7 THE COURT: Okay. Let's take a 15 minute break
8 and come back and go right back to direct examination.

9 By the way, does this alleviate the concern you
10 have in terms of where we are right now?

11 MR. GREEN: It is taking a lot longer than I
12 anticipated.

for
13 THE COURT: All right. We will take a break
14 15 minutes.

15 (Thereupon, a short recess was taken.)

16 (Thereupon, trial reconvened after recess.)

17 THE COURT: Ladies and gentlemen, please be
18 seated.

19 When we stopped, we were in direct examination,
20 so I will turn back to Mr. Green and allow him to
proceed.

21 Mr. Green.

22 BY MR. GREEN:

was 23 Q. Professor Garcia, I believe before we broke that I
the 24 asking you about the naming of specific individuals by
responsible 25 Christian Democratic party that were felt to be

1 for some of the human rights violations.

Colonel

2 Based upon your review of the documents and
3 depositions in this case, have you heard the reason

4 Garcia made in his depositions for not having recommended
5 the suggestion made by the Christian Democratic party in
6 their January 31, 1980 letter?

7 A. Yes.

8 Q. What were those reasons?

first

9 A. He gave some reasons that were somewhat general,
10 by saying that he had little memory of having received or
11 read the letter, and then by saying that it seemed to him
12 that as a result of this letter or some other letter a
13 meeting had been held that included all of the commanders
14 to determine whether there were any measures that could
15 implemented in order to prevent these violations of human
16 rights.

be

17 And at that meeting one of the participants, one of
18 the participating commanders rose and said that if any of
19 the measures that were proposed by this letter were
20 implemented or some other letter that the gentleman does
21 not recall, there would be a military coup in 24 hours.
22 That is what General Garcia states in his deposition.

23 Q. Under Salvadoran Army regulations, can a military

24 commander justify his failure to act or his failure to
25 command because he is afraid of how his troops will

react?

1 A. I would like to answer that question with the
contents
2 of the military code of justice in a very short reading
if
3 I am allowed. Let me get that out.
4 We are talking about number 357 of the ordinance --
5 375 -- that in very short lines expresses what I am about
6 to say.
7 MR. KLAUS: Your Honor, before he refers to it,
8 can I be given a copy of it?
9 THE COURT: Do you have an extra copy of this
for
10 opposing counsel?
11 THE WITNESS: The ordinance is in the hands of
12 all of the members in this court. If you would like a
13 copy of mine, I will provide that, too.
14 THE COURT: Let's see if we have a copy for
15 opposing counsel.
16 MR. KLAUS: I would ask before he be allowed to
17 read from it, that he identify it and authenticate it.
18 MR. GREEN: I can show Mr. Klaus mine.
19 BY MR. GREEN:
20 Q. Go ahead.
21 A. Article 375.
22 THE INTERPRETER: The interpreter requests that
23 counsel provide the interpreter the official
translation.

24 Article 375 the interpreter will read into the
25 record.

1 "Any officer who is in command or any other
2 person who finds himself alone at the head of troops, it
3 will be proof of deficient spirit and command inadequacy
4 for him to say that he was not able to keep his troops
5 under his orders; that he, by himself, was unable to
6 control so many persons and any other such excuses
7 intended to exculpate him for the excesses of his men or
8 for their cowardice in war actions; because he who
9 commands, from the moment he is placed at the head of
his troops, must assure obedience in everything, and inspire
10 bravery and contempt for risks.

12 "Within that said ordinance under Article 9 it
13 says: Legal orders from superiors must be complied with
14 by subordinates with no observations by them nor any
type of complaint, with no hesitancy and no muttering, and
15 they may nevertheless make a claim if there were reason for
16 such a claim upon having complied with those orders."

18 THE COURT: May I interrupt you for a moment?
19 Could I see counsel sidebar, please?

20 (Sidebar discussion on the record.)

21 THE COURT: We have just gotten a note from the
22 day care center where Ms. Essler, juror number two's,
23 daughter is. They are concerned the baby is getting a

24 rash all over and refusing to drink milk. I should call

25 Ms. Essler up and let her know and see what she feels

she

day 1 needs to do. I don't have a problem recessing for the
2 if we need to do that in terms of accommodating her in
3 terms of what she has done. Is that all right?

4 MR. GREEN: Yes.

5 THE COURT: Ms. Essler, would you come up for a
6 second?

7 We just received this note, and we wanted to
8 share it with you to see what you think we should do.

9 A JUROR: They are going to want me to go.

10 THE COURT: Do you want us to stop now so you
11 could go down to see what is going on? Is this a boy,
or 12 girl?

13 A JUROR: Boy. He was crying a lot yesterday
in 14 day care. He seemed fine this morning.

15 THE COURT: I think it is important that maybe
16 you need to go down. What we will do is stop for the
day 17 and maybe you could give me a call in the morning. I
want 18 you to know, we very much want you to be here, we
19 realized -- we talked about this. And let's see what is
20 going on, and hope everything is okay. It might be a
21 minor thing.

22 Let me take a second and I will do that. You
can

23 sit down.

24 (After sidebar.)

25 THE COURT: Ladies and gentlemen, we have just

Essler's 1 gotten a note from the day care center where Ms.
2 son is, that there may be a little bit of a problem, and
3 we want Ms. Essler to be able to attend to it.

4 We were talking earlier about the fact that we
5 were heading ahead of schedule, we slowed down a little
6 bit, but we were concerned in any event. I think in
order
7 to accommodate Ms. Essler we want to stop. We hope
8 everybody is going to be fine, but I ask Ms. Essler to
9 give me a call in the morning to let me know how things
10 are going.

11 Let me remind the jury about the general jury
12 instructions. I think you understand, we are
progressing
13 into the case, you want to be careful, don't look at any
14 T.V., newspapers, anything that deals with the matter.
15 You want to be careful, don't let anyone talk about the
16 case, don't let anyone talk with you.

17 We will plan to resume at 9:30 tomorrow
morning,
18 and we will go back to the professor's direct testimony
at
19 that time and continue along. We will recess early and
20 reconvene tomorrow morning at 9:30 and we will continue
on
21 with the testimony.

22 Let me allow the jury to step out.

23
courtroom.)

(Thereupon, the jury retired from the

24

THE COURT: Professor, because you are in the

25

midst of testifying, could I ask you please not talk to

testimony?

when

and

moment

talk

let's

jury

1 any of the lawyers about the substance of your

2 Certainly you can talk about any other matters. And

3 you come back tomorrow morning, we will go back and

4 continue with the direct examination, finish on that,

5 then turn to cross examination.

6 Let me allow you to step down, and take a

7 to gather your documents.

8 THE WITNESS: Thank you.

9 THE COURT: Please be seated, ladies and
10 gentlemen.

11 Have counsel had an opportunity to look at the
12 proposed jury instructions? Would that make sense to
13 talk about them, or is it too early?

14 MR. GREEN: I think we can talk generally about
15 them. I know there are a couple matters that we need to
16 discuss among ourselves.

17 THE COURT: Okay. Before we turn to the jury
18 instructions, then, why don't we, as we have before,
19 let's make a list if there are any other matters including
20 jury instructions, any matters the Plaintiff has that we need
21 to put on the agenda.

exhibit,

22 MR. STERN: One small item regarding an

23 Your Honor.

24 THE COURT: Okay. How about defense?

like

25 MR. KLAUS: Scheduling. Your Honor, I would

1 to know their witnesses.

in

2 THE COURT: All right. Why don't we take them
3 reverse order. Scheduling is obviously the easiest.

4 Mr. Green, where do you think you are in the
5 direct examination of Professor Garcia? How much more
6 time do you think you have?

to

7 MR. GREEN: I think I have another 45 minutes
8 perhaps an hour.

9 THE COURT: Okay. Maybe an hour for the
10 Plaintiff. How about the cross, do you have a sense of
11 the length of the cross examination?

12 MR. KLAUS: An hour, hour and a half.

witness.

13 THE COURT: Okay. Who would be the next

14 MR. GREEN: Ms. Popkin.

15 THE COURT: Who would be the person after
16 Ms. Popkin?

17 MR. GREEN: Professor Karl.

18 THE COURT: Okay.

yesterday,

19 MR. KLAUS: I spoke to Ambassador Corr

20 and I told him to be here on the 15th. I thought that
21 would be -- that is the Monday.

22 THE COURT: Monday the 15th?

23 MR. KLAUS: Yes. Figuring based on the

24 representations last week, you would go until the 9th or
25 10th, and I would have a day or two with the generals

and

1 then Ambassador Corr, and I could finish with the
2 generals, if I am going to call any of them for
rebuttal.

3 THE COURT: We obviously slowed down because of
4 translation and everything else. Mr. Green, my
5 recollection was you felt if all went well, that the
6 Plaintiffs might conclude their case on Tuesday the 9th.
7 Does that still seem doable?

8 MR. GREEN: I think still a pretty good
estimate.

9 THE COURT: If the Plaintiffs were to conclude
on
10 the 9th, and defense started on the 10th, does the 15th
11 still sound like it is an appropriate target date.

12 MR. KLAUS: Yes, because even if I am not done
13 with the other witnesses, I thought we could --

14 THE COURT: You would be willing to interrupt
and
15 take the Ambassador out of turn to accommodate his
16 schedule?

17 MR. KLAUS: Yes, if that is agreeable.

18 THE COURT: We tried to do that, and said we
19 would do it for other witnesses. I think that is a
20 reasonable request.

21 Why don't I turn to Mr. Stern for the issue on
22 the exhibit.

23 MR. STERN: Yes, Your Honor, during examination

exhibit, 24 of Mr. McClintock we introduced one page from an
25 Exhibit 400, and consensus seems to be the best way to

exhibit 1 handle this is to designate the one page as a new

2 and introduce that exhibit rather than dealing with
3 things --

4 THE COURT: How is it marked?

5 MR. STERN: The new page would be marked 811.

6 THE COURT: What about 400, did that come in?

7 MR. KLAUS: No.

8 MR. STERN: It is part of a batch of documents
9 marked 400. Rather than take a page out of that, we
10 thought it would make sense to create a new one.

one 11 THE COURT: All right. What we will do is
12 correct the record so 400 has not been offered nor
13 received. And how would you mark the new exhibit, the

14 page exhibit?

15 MR. STERN: I think we propose to put a sticker
16 on it that says 811.

17 THE COURT: 811. My records indicate the
18 previous exhibit was received into evidence over
19 objection. Is there any objection to this?

my 20 MR. KLAUS: No, no. That makes sense. I have
21 same objections as originally stated.

evidence 22 THE COURT: You want this received into
23 over objection?

24

MR. KLAUS: Yes.

25

objection?
THE COURT: You want to preserve your

1 MR. KLAUS: Yes.

2 THE COURT: 811 having been received into
3 evidence over objection as previously stated.

4 (Plaintiffs' Exhibit 811 received in evidence
5 over objection and Plaintiffs' Exhibit 400 was
6 withdrawn.)

7 MR. STERN: It will be redacted, Your Honor.

8 give

THE COURT: Thank you very much. I want to
9 you back -- 689 was offered, I think I have the original
10 or a copy, let me give that back to you. And we want to
11 indicate that the objection was sustained on that so
12 won't go back to the jury, and I ask that you keep that
13 separate.

that

14 draft

The effort was simply to give us a working
15 that we could look at, and I thought it would be helpful
16 to lay out in that draft, and I didn't mean to exclude
17 Defendants' version, I just couldn't lay my hands on it,
18 but what we have is an effort to draft an instruction
19 based on the Doctrine of Command Responsibility from the
20 decision of the United States Court of Appeals for the
21 Eleventh Circuit in Ford versus Garcia and that is what
22 the first one is meant to be. It is an effort to do

the

that.

23 The second is the instruction as given in the
24 Ford case, and the third is the instruction as drafted
by
25 the Plaintiff I think in the May 11th submission,
because

1 I think there were two submissions, and I think you felt
2 May 11th was your second effort at it having the benefit
3 of the copy of the Eleventh Circuit's opinion.

4 Do you want to talk about this or do you want
to
5 wait?

6 MR. GREEN: We would like an instruction on
7 depositions.

8 THE COURT: Sure. Why don't you -- there is
9 probably a standard on that.

10 MS. VansCHAACK: We submitted it with our
11 original.

12 THE COURT: All right. We will add that, that
is
13 no problem. I assume there is no objection, that cuts
14 both ways.

15 MR. KLAUS: That is fine.

16 THE COURT: Depositions are to be treated as
17 though the persons testified in court.

18 MR. GREEN: If I could defer to minds greater
19 than mine.

20 MS. VansCHAACK: Just preliminary observations,
21 based on a quick look I was able to give this at lunch,
22 The Court's language goes a long way towards teaching of
23 the Eleventh Circuit in the Ford case, and standard of
the

24 command responsibility in the ad hoc tribunals.

25 At this point there are some technical

meat
Plaintiffs
relate

1 suggestions I would make before getting into the real
2 of the instruction that would make sure that the
3 instruction better reflects the claims that the
4 have brought this particular formulation appears to
5 only to the Torture Victim Protection Act. With respect
6 to two of the Plaintiffs not U.S. citizens, we have
7 additional claims under the Alien Tort Claims Act.

8 THE COURT: Do they differ?

limited
detention,

9 MS. VanSCHAACK: The torture victims are
10 to the claims for torture and extrajudicial killing.
11 Under the Torture Victim Protection Act we have only
12 torture claims. Alien Tort Claims Act allows for claims
13 for relief for any tort in violation of the laws of
14 nation. It is a broader range. And arbitrary
15 and cruel and degrading treatment.

16 THE COURT: We need to define each of those
17 terms.

18 MS. VanSCHAACK: That is right.

can

19 THE COURT: Let's take a second and see if we
20 sketch this out.

21 Why don't we start with Dr. Romagoza. What
22 claims are being brought by Dr. Romagoza?

23 MS. VanSCHAACK: His claims proceed only the
24 Torture Victim Protection Act. The only claim is for
25 torture.

1 THE COURT: Dr. Romagoza against one or both
2 Defendants?

3 MS. VanSCHAACK: Both Defendants.

4 THE COURT: Okay.

5 MS. VanSCHAACK: Both Professor Mauricio and
6 Gonzalez have claims for torture and arbitrary
detention,
7 crimes against humanity, and CIDT.

8 THE COURT: Hold on a second, if you would.
9 Let's turn to Ms. Gonzalez.

10 MS. VanSCHAACK: Ms. Gonzalez claims against
both
11 Defendants, and Mr. Mauricio only against General Vides
12 Casanova. General Garcia retired at the point at which
he
13 was detained.

14 Given this sort of a patchwork --

15 THE COURT: Professor Mauricio claims only
16 against General Vides.

17 MS. VanSCHAACK: That is right.

18 THE COURT: You pointed out Ms. Gonzalez claims
19 under the Torture Victim Protection Act.

20 MS. VanSCHAACK: As well as the Alien Tort
Claims
21 Act.

22 THE COURT: And Professor Mauricio?

23 MS. VanSCHAACK: The same, under both statutes,

24 by virtue of the fact they are not U.S. citizens.

25 THE COURT: Let's talk about this for a second.

1 We have, torture would certainly deal with
2 alleged beatings, infliction of physical pain, so on, so
3 forth. Although a predicate for torture might be
illegal
4 detention under the Tort Claims Act, you are asking for
5 arbitrary detention?

6 MS. VanSCHAACK: Yes, separate and apart from
the
7 actual physical harm.

8 THE COURT: What else?

9 MS. VanSCHAACK: Allegation of crimes against
10 humanity.

11 THE COURT: What do you think that encompasses?

12 MS. VanSCHAACK: Crimes against humanity are
13 constellation of acts unlawful when committed in a wide
14 spread or systematic attack against civilian population.
15 The idea is there is a campaign of civilian population
16 torture when they are committed within the context of
that
17 act.

18 THE COURT: Is it your view an individual
person,
19 take Ms. Gonzalez as an example, she would have a claim
20 for arbitrary detention? Let's put the crimes against
21 humanity aside for a second. What other claim would be
22 made under Alien Tort Claims Act?

23 MS. VanSCHAACK: Supports claims for torture,

24 obviously, and we've alleged in our Complaint cruel and
25 inhumane degrading treatment, which exists on the

1 ingredient of torture, it could be unlawful under the
2 rubric of cruel and degrading treatment.

3 THE COURT: Let me put this out and ask you to
4 think about this for a minute. Nobody has to make a
5 decision today, but something to reflect on.

6 I think in any lawsuit, we see it all the time
in
7 civil lawsuits, people start out, lawyers, trying to be
as
8 conservative as possible to preserve everything. People
9 plead the world and make judgment calls as you go on
down
10 the line.

11 Have the Plaintiffs given any thought to
12 abandoning their claims under the Alien Tort Claims Act
13 and limiting their claims to the claims for torture?

And
14 I say that, it seems to me that to the degree to which
we
15 can, to simplify matters to the jury, it would make
sense,
16 the claims that are made are obviously enormously
serious.

17 In other words, listening to the testimony we haven't
18 heard from Ms. Gonzalez yet, but certainly having
listened
19 to Mr. Green's opening statement that detail that, it
20 would seem to me that if someone were going to recover,
21 the recovery under one would be coextensive with the

22 other.

23 And I just wonder while on a theoretical basis

24 there are multiple grounds, whether it might make sense
at

25 some point if the Plaintiffs are disposed to do that, to

or
1 have one basis and whether that would simplify matters
2 not. I would ask you just to think about it.

some
3 It sounds to me in this case that might make
4 sense, and I only say that because at some point,
5 obviously, we are going to need to get beyond the legal
6 claim to the concept of damages, and I would imagine
there
7 would be one -- I don't know, you probably thought this
8 through yourselves, but I assume ultimately there would
be
9 one line for compensatory damages.

10 Now, we would have to specify what are the
11 matters that can be considered in determining whether
that
12 claim has been proved and whether moneys can be awarded.
13 And then there is discussion of punitive damages as
well.

14 I want to suggest to you there may be, in a case like
this
15 there may be some benefit to simply considering whether
16 one basis is appropriate in that they are all so
serious,
17 and that it would seem to me that an award under one
would
18 probably be coextensive with an award under another
19 theory, I don't know. I am sure you have been
reflecting
20 on that.

21 MS. VanSCHAACK: We have been considering that.

22 It is something we would like to reserve.

23 THE COURT: Absolutely. You know, when you are

24 talking about allegations as serious as someone saying

25 they were tortured, beaten, or so on, I would think that

under 1 if the jury were to find for the Plaintiff, an award
2 one basis would be coextensive with any other. I think
3 the -- obviously, and it was true in the Ford case, that
4 the tough issues are the legal issues of responsibility
5 and so on.

going 6 I thank you for pointing this out. We are
7 to have to come back and take a look at it. If we have
8 to, we will need to go in and define those separate
bases. 9
for 10 And for instance, it occurs to me if someone is asking
11 damages greater than the damages they suffered
12 for instance, under the concept of crimes against
13 humanity, if that is something more than that which they
14 suffered, although they may be alleging that they are
15 simply the person who is the victim in a wider spread
some 16 campaign. Let me ask you to reflect on that, and at
17 point we will obviously be in a position to make that
18 judgment call.

you 19 Are there any other observations or thoughts
20 have? Does it make sense to use one of these as a
try 21 starting point or -- I simply thought it made sense to

point

21 to use the Eleventh Circuit's opinion as a starting
22 because we obviously on both sides want to have a
23 statement of the law that is neutral and has been
24 approved, and therefore we don't do anything that would
25 imperil the verdict.

1 MS. VanSCHAACK: I think it does make sense to
2 use The Court's proposed instruction to do the tweaking
3 here and there. The fact that you started from scratch
4 with the opinion as your template makes a lot of sense.

both
5 THE COURT: I thought it made more sense for
6 of you to offer that.

7 Mr. Klaus, do you have a view what you want to
8 start from?

9 MR. KLAUS: I think that is a good starting
10 point. I have a couple comments right off the bat. You
11 want those?

12 THE COURT: If you would like to make them.

13 MR. KLAUS: Under effective command.

14 THE COURT: Yes.

15 MR. KLAUS: The second sentence, you mentioned
16 presumption, I don't think there is presumption.

17 THE COURT: Are you looking at The Court's
18 instruction?

19 MR. KLAUS: Yes. You have on page six.

20 THE COURT: Yes.

21 MR. KLAUS: I don't think there --

22 THE COURT: You are suggesting the word
23 presumption should be removed?

24 MR. KLAUS: Yes.

THE COURT: I think that is correct. I think

1 that is what the Eleventh Circuit's opinion teaches in
2 terms of we are all familiar with the Title Seven
analogy
3 of shifting burdens of proof, and it seemed to me in
4 reading the Eleventh Circuit's opinion in the Ford case,
5 The Court did indicate that certainly the burden of
6 production or burden -- I guess it is called the burden
of
7 production -- anyway, that may shift and so on, but it
is
8 not appropriate to instruct the jury.

9 They cite the Wal*Mart case, Dudley versus
10 Wal*Mart, where one of the judges literally went through
11 the prima facie case and how the burden shifts and so
on,
12 and The Court said that is so confusing that it doesn't
13 help the jury. My recollection is The Court urged trial
14 courts not give this business on presumptions.

15 I do think that probably has to come out. I
16 would ask you to look at it and we will all take a look.

17 MR. KLAUS: The sentence thereafter, we dispute
18 that the Defendants exercised formal command over all of
19 the -- there is testimony, we don't have the identity --

20 THE COURT: Can I tell you what I think that is
21 meant to say? In this case it is undisputed that
General
22 Garcia and General Vides exercised a formal command
within

23 the armed services of El Salvador. In other words, you
24 remember that in the Ford opinion and in the
international
25 tribunals, there has been a great deal of discussion
about

1 de jure and de facto authority. In Bosnia you had
people
2 who were clearly military commanders but held no rank or
3 office. When you looked at what was happening, no
4 question those people had de facto authority over
military
5 forces. I think all it is meant to suggest is that it
is
6 undisputed in this case that General Garcia and General
7 Vides were in fact legitimate military commanders.

8 MR. KLAUS: Maybe if it is worded like that,
but
9 the way it is worded --

10 THE COURT: I will flag that as a problem area
11 and go back and see if we can get more language that
12 perhaps deals with what is disputed and not disputed.

13 MR. KLAUS: We are not sure who the
subordinates,
14 who the individuals who actually perpetrated atrocities
or
15 torture were. We are not sure that they were
16 subordinates, they may have been subordinates to someone
17 else, like the Bosnian cases where they had a guy
holding
18 himself out as some kind of military commander, he was a
19 commander and he had troops, but he wasn't part of any
20 government.

21 THE COURT: Well, of course, in this case, just

22 coming back, and I need to go back and look at the
23 testimony, and you may not be prepared to stipulate to
24 something like this, and I understand it, but the
25 testimony, for instance, from Professor Mauricio was

that

1 he was held at the National Police headquarters. And I
2 think the testimony from Dr. Romagoza was that he was
3 held, and I thought it was the National Guard
4 headquarters.

5 Now, certainly these are questions of fact that
6 the jury is ultimately going to have to decide, I am not
7 asking you to stipulate to matters that you feel you
8 don't want to do. We want to be careful that the jury
9 instructions remain neutral and state the law properly.

10 Any other observations of matters we helped to
11 look at?

12 MR. KLAUS: No. We are at a good starting
13 point.

14 THE COURT: Do you feel comfortable in using
15 the first proposal, The Court's proposed instruction as a
16 starting point to do drafting from?

17 MR. KLAUS: Yes. My proposed jury instructions
18 didn't were the jury instructions from the Ford case. You
19 miss them, that is what they were.

20 THE COURT: Why don't we do this, why don't we
21 use what is marked court instructions new as the basis,
22 the template, and let's make whatever changes to these.
That doesn't restrict anybody, if there is anything you

that. 23 want to add wholesale or paragraphs, feel free to do
as 24 Let's put the other two aside and try to build on this
25 the instruction.

1 Now, again, I think the Plaintiffs point out
that 2 if the Plaintiffs ultimately decide that they do want to
3 go forward on the two different statutes, we definitely
4 are going to have to go back and define some of those
5 terms. And I think we can easily do that, but I think
6 probably there is a judgment call that the Plaintiffs
have 7 to make as to what they want to do in that regard.

8 How about compensatory damages, is that
9 adequately set forth for you?

10 MS. VanSCHAACK: I haven't done a line by line,
11 but both formulation of compensatory and punitive
damages 12 looks like good start.

13 THE COURT: Emotional pain, physical
14 disfigurement, physical pain. Why don't we use that as
a 15 beginning point. If anyone feels anything else needs to
16 be added, we will do that.

17 What about punitive damages, are all three
18 Plaintiffs seeking punitive damages in the case?

19 MR. GREEN: Yes.

20 MS. VanSCHAACK: Yes.

21 THE COURT: Do you all feel that is the correct
22 standard, wanton and reckless?

23 MR. GREEN: We believe also deliberate

24 indifference. I have not studied the punitive aspect.

25 THE COURT: I wondered in thinking about it if

we

1 ought to look at the Title Seven standard. There is a
2 standard acknowledging reckless indifference to the
rights
3 of somebody -- language about protected rights. I
wonder
4 if that better fits in with this kind of situation.

5 MR. GREEN: And Carry and 1983 cases talk about
6 deliberate indifference as well. We contend there is
7 deliberate indifference.

8 THE COURT: We need to look at that again so
9 everybody feels comfortable that the law is properly
10 stated on that. There are two or three sources that we
11 can look at, 1983 actions, restatement on Title Seven,
12 punitive damages, and come up with language that you
feel
13 is adequate to the issues in this case.

14 Are there any special instructions being
15 requested by the defense that are not in?

16 MR. KLAUS: I don't know, Your Honor. I raised
17 some affirmative defenses, most of them are frankly
legal
18 defenses, and I will be raising them by motion.

19 THE COURT: I thought you raised most of your
20 legal defenses in various motions, and that is why I
21 didn't address them here. If you feel there are some
that
22 remain that need to be addressed, if you could just
alert

23 me to that, I will go back and take another look. I
24 didn't mean to simply bypass them.

25 MR. KLAUS: No, I thought about it over the

1 weekend. I am not sure if I am entitled to an
2 instruction, most of them come as legal defenses. Like,
3 you know, statute of limitations, that is a matter -- I
4 don't know if that is a matter for a jury to consider.

It

5 has been raised. It is in my pretrial catalog, raised
6 the pleadings, and raised by the evidence. I would like
7 the jury to be able to decide that.

by

8 THE COURT: Well, it is my recollection that if
9 there are disputed facts on those kinds of issues, that
10 they are jury questions. In other words, there are
11 defenses that have gone to the jury where the facts are
12 disputed because The Court can't resolve disputed facts.
13 I ask that you take a look at that. If you seriously
14 think there is something that has a factual component to
15 it, and we might handle that by either a question to the
16 jury or some other way, but I wasn't aware of anything
17 along those lines.

and

18 So, if you do, if you would take a look at it
19 let us all know and we can look at it and get everybody
20 least thinking about that issue as to what that is

at

there.

21 MR. GREEN: My experience has been the statute
22 limitations arise in a medical malpractice case where a

of

23 physician affirmatively misled someone to a diagnosis to

24 indicate tolling or --

25 THE COURT: They are rare, but there are issues

1 where venue is a defense, and there are instructions on
2 that. It asks for a specific question. And I think
that
3 could probably exist on statute of limitations if it is
--
4 I hate to cite this, but I think it is one we are all
5 familiar with. Do you remember -- I think it was shown
in
6 the movie the Civil Action and in the book on it where
the
7 jury was asked to determine the time frame when some of
8 the material had seeped and so on.

9 And when you think about it, what that was was
a
10 statute of limitations defense, I think. There can be
11 some situations where something like that comes up, we
12 ought to explore it and see for sure what it is and
decide
13 whether it is appropriate, but it ought to start with
the
14 defense asking for it so we can focus in on what it is.
15 If it is not there, it is not there.

16 MR. KLAUS: The other one, failure to exhaust
17 remedies, available remedies, it has been raised.

18 THE COURT: You raised it as a legal defense,
and
19 I ruled on it. The question is whether you want to
pursue
20 that, and if you do, how you want to put that to the
jury

21 if that is a matter for the jury.

22 MR. KLAUS: Basically, I did prepare -- I don't

23 have copies, but I did prepare initially instructions
that

24 incorporated that, and basically they track the language

25 in the statute of the Torture Victim Protection Act.
The

1 action commenced within ten years. Now, I don't know if
2 they are going to be entitled to an instruction
regarding
3 equitable tolling. Professor Mauricio testified that he
4 wanted to sue General Vides from 1983.

5 THE COURT: Why don't you give some thought to
6 that, and if you want these specific instructions, we
are
7 going to have to sit down and do some drafting. I think
8 the same people answer to that, yes, there probably does
9 have to be an instruction on equitable tolling, but the
10 question is whether that is for the jury or The Court.

My
11 suspicion is equitable tolling is for The Court.

12 This is the first time we are approaching this
in
13 jury instructions. In the Ford case we dealt with all
of
14 those as legal matters.

15 MR. KLAUS: There were different facts there.

16 THE COURT: Yes, yes, I understand that. But
for
17 instance, and I haven't researched it, but it would seem
18 equitable tolling is clearly a matter for The Court.

19 You want to give some thought what you do want
20 to raise, and if you do, I ask you to draft something
and
21 pass it out so we can take a look at it, think about it,

22 and give some reflection to it.

23 Okay. Anything else we need to discuss?

24 Does anyone have anything else you would like

to

25 alert anyone to or problem issues you see?

1 MS. VanSCHAACK: A question for The Court.

2 How would you like to proceed? Would you like
3 something in writing reacting to the language we propose
4 or do you want to keep it at the oral level?

5 THE COURT: No. I would suggest we use this as
6 the starting point and prepare some written changes, and
7 just to be sure, you might use bold type or whatever you
8 want to use to show what is different.

9 And let's use that so we all have something and
10 enough copies for everybody, and let's do some drafting.
11 But to give everybody first a chance yourself to reflect
12 on what it is you would like or the problem you see, and
13 what we are trying to address.

14 MS. VanSCHAACK: Should we submit a brief with
15 that?

16 THE COURT: No. No. Why don't we deal here in
17 the evening, and someone can point out the problem you
18 are trying to deal with, and how you suggest it be
19 approached.

20 MS. VanSCHAACK: Okay.

21 THE COURT: I would suggest we try to deal with
22 issues one at a time, if we can. That is, let's get the
23 command responsibility instruction behind us if we can,
24 because that has always been one of the central legal
25 doctrines in the case, and let's move on to some of the

1 other issues we have been discussing, damages.

2 instruction,
they,

3 Do we have the right punitive damage

4 are their affirmative instructions, if so, what are
5 they,

6 and how do they have to be spelled out, and have we

7 correctly addressed the law on those issues.

8 MR. GREEN: Your Honor, one thing I have been

9 doing is running a readability level scan on jury
10 instructions and other items. Would it be possible for
11 us

12 to have a disk, if we bring in a floppy disk for Your

13 Honor?
14 THE COURT: Sure. I think we ought to swap
15 disks

16 back and forth, it is easier for both of us, sure.

17 Are there any other matters we need to discuss?

18 All right. Then, why don't we recess -- let's

19 talk about this -- I have one other thing I need to

20 mention to you.

21 Let's talk about this.

22 What shall we do tomorrow if our juror -- if

there is a real problem and she needs to stay at home?

MR. GREEN: We have a real problem with

Ms. Popkin, she is here now, and --

THE COURT: My suggestion, and I know we all

today

23 don't want to do this. I really felt we had to stop
24 to accommodate someone who has given so much of her time
25 to this process, but I think and would urge you that we

1 need to forge ahead.

2 That is why we selected a jury larger than six
so
3 if there were an emergency, we can go forward. I think
4 that we ought to do that. I hate to lose anybody, but I
5 think that Ms. Essler, by the way, was completely candid
6 with us as I recall during jury selection process,
7 indicating she had a child in day care, and if a problem
8 developed, that was the only difficulty she foresaw.

9 So why don't we wait and hear what happens in
10 the morning, but is it agreeable to both sides, if for
11 some reason Ms. Essler cannot be here, that we move
12 forward.

13 MR. KLAUS: Yes.

14 MR. GREEN: Yes.

15 THE COURT: I wanted to share with you a note
16 that I received from one of the jurors, and I didn't
17 respond in any way. It wasn't with a particular
witness.

18 At some point I will have to.

19 It is what is the difference between a document
20 that is objected to and an objection that is overruled,
21 and a document accepted into evidence over objection.

22 We need to tell the jury there is no
difference,
23 if it is received it is in evidence, it can be
considered.

24 If it is not in evidence, it can't be considered.

25 Okay.

1 MR. KLAUS: That is fine.

and

2 THE COURT: All right. We will be in recess
3 reconvene at 9:30 tomorrow morning.

4 (Thereupon, trial was recessed at 4:30 p.m.)

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I N D E X

WITNESSES FOR THE PLAINTIFFS

Direct Cross Redirect Recross

MICHAEL McCLINTOCK	726	778	789
JOS GARCIA	794		

E X H I B I T S

Plaintiffs' Exhibit 288	764
Plaintiffs' Exhibit 400	757
Plaintiffs' Exhibit 404	767
Plaintiffs' Exhibit 811	871

