

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CAE NO: 99-8359 CIV-HURLEY

WILLIAM P. FORD, for and on)
behalf of THE ESTATE OF ITA C.)
FORD, JULIA CLARKE KEOGH,)
for and on behalf of THE ESTATE)
OF MARY ELIZABETH CLARKE,)
also known as MAURA CLARKE,)
JAMES KAZEL, for and on behalf)
of THE ESTATE OF DOROTHY)
KAZEL, and MICHAEL R.)
DONOVAN, for and on behalf of)
THE ESTATE OF JEAN DONOVAN,)

Plaintiffs,)

vs.)

JOSE GUILLERMO GARCIA, an)
individual, CARLOS EUGENIO)
VIDES CASANOVA, an individual,)

Defendants)
_____)

**DECLARATION OF M. CHERIF BASSIOUNI IN SUPPORT OF PLAINTIFFS'
MOTION FOR A NEW TRIAL**

I, M. Cherif Bassiouni, submit this Declaration in support of the Plaintiffs' motion for a new trial in the above-entitled matter, pursuant to 28 U.S.C. 1746. [

1. I am Professor of Law at De Paul University, Chicago, Illinois; President of the International Association of Penal Law; President of the International Institute of Higher Studies in Criminal Sciences; and President of the Association Internationale de Droit Penal. I am the author of *Crimes Against Humanity in International Law* (Kluwer Law International 1999) and have written extensively on international criminal and humanitarian law.

2. In 1993 I was appointed Chairman of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, and between 1992 and 1993 I served as the Commission's Special Rapporteur on Gathering and Analysis of the Facts. During the Diplomatic Conference on the Establishment of an International Criminal Court, which took place from June 15 to July 17, 1998, I served as Chairman of the Conference's Drafting Committee. A copy of my *curriculum vitae* is attached to this Declaration.

3. It is my opinion that the duty of a military commander properly to exercise control over his troops, and to take the necessary and reasonable measures within his power to prevent or repress torture and extrajudicial killing by troops under his command, derives, under international law, directly from his *de jure* command authority over such troops, that is, his command authority to give orders to his troops (whether such orders are transmitted directly or through intermediate subordinate commanders) when the commander is exercising such command authority in a military organization pursuant to the accepted regulations and procedures of such organization.

4. International law contemplates that there can be situations in which the law will impose the same duties on persons exercising *de facto* command because of their position or status, including non-military commanders, who do not have formal legal authority to command the troops committing such crimes, or whose line of command does not include such troops but whose position and status make that person a recognized leader. However, a prosecutor's or a plaintiff's showing that a commander had *de jure* command authority (as such term is defined in paragraph 3) over the troops in question is, as a matter of law, a showing that such commander had "effective command" over his troops, and, subject to certain narrow exceptions such as described in paragraph 6 below, no further showing of *de facto* control is necessary for the prosecutor or plaintiff to have satisfied his burden of proving that the commander was charged with the duty to control his troops.

5. In international instruments, the use of the term "effective command," as, for example, in Article 28(a) of the Rome Statute of the International Criminal Court, represents an intent to include certain *de facto* commanders within the reach of the statute; the phrase is not intended to impose an additional test of *de facto* control over commanders whose *de jure* command authority has been proven. Issues regarding the degree to which circumstances at the time prevented the commander from successfully fulfilling his duty to control his troops are relevant to a fact-finder's evaluation of the reasonableness of the measures taken by the commander to bring his troops under control, but are not properly addressed in the legal determination of the commander's "effective command."

6. In cases of *de jure* commanders, once the prosecutor or plaintiff has satisfied the initial burden of demonstrating the commander's effective command, as described above, the law contemplates that the commander may, under certain narrow circumstances, counter this evidence by showing that the commander did not at the time of the crimes in question exercise *de facto* control for reasons relating to his personal situation. Such a showing could relate, for example, to evidence that the commander may have had his command for too short a period of time for him to be able to carry out his duties to control his troops; or that the troops in question did not in fact fall under the commander's line of command; or that the commander was at the relevant time medically incapacitated for reasons beyond his control (thus excluding, for example, self-induced intoxication or drugged condition).

7. In the absence of the kind of circumstances described in paragraph 6, the commander may not assert that he is excused from his duty to prevent, repress and punish criminal activity by his troops on the grounds that his troops were not under his actual control so long as they remained within or under his chain of command. The law considers that the commander retains effective command, and the duties that it entails, even under circumstances in which he may have lost actual control of his troops, and the law requires him to take all necessary and reasonable steps within his power to regain such control.

8. In a command responsibility case, whether criminal or civil, once the prosecutor or plaintiff has shown that a commander knew, or under the circumstances should have known, that troops under his effective command were committing torture or extrajudicial killing, and produced evidence that the commander has not taken necessary and reasonable steps calculated, under the circumstances, to bring such activities to an end and to sanction those who committed them, the burden shifts to the commander to persuade the fact-finder that he took all necessary and reasonable measures, given the specific factual conditions at the time, to prevent his troops from continuing acts of torture and extrajudicial killing, to punish those who committed them, and to prevent such acts from recurring.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 21, 2000.

M. Cherif Bassiouni