

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JUAN ROMAGOZA ARCE,
NERIS GONZALEZ, CARLOS MAURICIO, and
JORGE MONTES,

Plaintiffs,

v.

JOSE GUILLERMO GARCIA, an individual,
CARLOS EUGENIO VIDES CASANOVA, an
individual, and DOES 1 through 50, inclusive,

Defendants.

Case No. 99-8364-CIV-Hurley
Magistrate Judge Lynch

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
ON DEFENDANTS' *DE JURE* COMMAND AUTHORITY,
OR, ALTERNATIVELY, FOR DETERMINATION OF
ACTS WITHOUT SUBSTANTIAL CONTROVERSY

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF UNDISPUTED FACTS	2
ARGUMENT	5
I. RULE 56 PERMITS THIS COURT TO FIND AS A MATTER OF LAW THAT DEFENDANTS POSSESSED <i>DE JURE</i> COMMAND AUTHORITY	5
II. A MILITARY COMMANDER CAN BE LIABLE FOR ACTS COMMITTED BY SUBORDINATES UNDER HIS <i>DE JURE</i> COMMAND AUTHORITY	6
A. The Doctrine Of Command Responsibility Requires A Showing Of Command Authority, <i>Mens Rea</i> , and <i>Actus Reus</i>	7
B. A Showing Of <i>De Jure</i> Command Authority Satisfies The First Element Of The Command Responsibility Doctrine As A Matter Of Law	8
III. THE FACTS ARE UNDISPUTED THAT DEFENDANTS EXERCISED <i>DE JURE</i> COMMAND AUTHORITY OVER MEMBERS OF THE MILITARY AND SECURITY FORCES	9
IV. IF THIS COURT DENIES PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, IT SHOULD NONETHELESS DETERMINE UNDER RULE 56(d) THAT DEFENDANTS POSSESSED <i>DE JURE</i> COMMAND AUTHORITY OVER THE SALVADORAN MILITARY AND SECURITY FORCES	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

<i>Application of Yamashita</i> , 327 U.S. 1 (1946).....	7, 10
<i>Barker v. Norman</i> , 651 F.2d 1107 (5th Cir. 1981).....	5
<i>Blackford v. Action Prods. Co., Inc.</i> , 92 F.R.D. 79 (W.D. Mo. 1981).....	5, 12
<i>Bolick v. Brevard County Sheriff's Dep't.</i> , 937 F. Supp. 1560 (M.D. Fla. 1996).....	5
<i>Cohen v. Board of Trs. of the Univ. of Med. and Dentistry of New Jersey</i> , 867 F.2d 1455 (3d Cir. 1989).....	12
<i>DiSandro v. Makahuena Corp.</i> , 588 F. Supp. 889 (D. Haw. 1984).....	5
<i>Forti v. Suarez-Mason</i> , 672 F. Supp. 1531 (N.D. Cal. 1987).....	9, 10
<i>Gillette v. Delmore</i> , 886 F. 2d 1194 (9th Cir. 1989).....	12
<i>In re Hillsborough Holdings Corp.</i> , 176 B.R. 223 (M.D. Fla. 1994).....	12
<i>Jeffery v. Sarasota White Sox, Inc.</i> , 64 F.3d 590 (11th Cir. 1995).....	5
<i>Lies v. Farrell Lines, Inc.</i> , 641 F.2d 765 (9th Cir. 1981).....	5
<i>Meek v. Metro. Dade County</i> , 805 F. Supp. 958 (S.D. Fla. 1992).....	6
<i>Occidental Fire & Casualty Co. of North Carolina v. Cont'l Bank, N.A.</i> , 918 F.2d 1312 (7th Cir. 1990).....	11
<i>Paul v. Avril</i> , 901 F. Supp. 330 (S.D. Fla. 1994).....	9, 11
<i>Scott Paper Co. v. Taslog, Inc.</i> , 638 F.2d 790 (5th Cir. 1981).....	6, 11
<i>Warner v. United States</i> , 698 F. Supp. 877 (S.D. Fla. 1988).....	6, 11
<i>Xuncax v. Gramajo</i> , 886 F.Supp. 162 (D. Mass. 1995).....	8, 10

STATUTES AND RELATED MATERIALS

Alien Tort Claims Act, 28 U.S.C. §1350	1
Torture Victim Protection Act, 28 U.S.C. §1350 note	1
Federal Rule of Civil Procedure 56	1, 5, 6, 11
TVPA Senate Report, S. Rep. No. 249, 102d Cong., 1st Sess. 9 (1991)	8

OTHER AUTHORITIES

Claud Pilloud <i>et al.</i> , <i>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</i> (1987)	9
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts June 8, 1977, 1125 U.N.T.S. 3	9
Timothy Wu & Yong-Sung Kang, <i>Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law</i> , 38 HARV. INT'L L. J. 272 (1997)	7
W. J. Fenrick, <i>Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia</i> , 6 DUKE J. COMP. & INT'L L. 103 (1995)	8
U.S. Dept. of Army Field Manual No. 27-10, <i>Responsibility of Acts of Subordinates in the Law of Land Warfare</i> , ¶ 501 (1956)	7

Pursuant to Federal Rule of Civil Procedure ("FRCP" or "Rule") 56(a) and Local Rule 7.5, Plaintiffs move this Court for partial summary judgment, seeking a determination that Defendants possessed *de jure* command authority over members of the Salvadoran "Military Forces" (Infantry, Navy, and Air Force) and "Security Forces" (National Guard, National Police and Treasury Police), and that, accordingly, Plaintiffs have satisfied the first element of the doctrine of command responsibility with respect to each Defendant. As grounds, Plaintiffs state that there are no genuine issues of material fact on this issue and so Plaintiffs are entitled to judgment as a matter of law. In the alternative, Plaintiffs seek a determination under FRCP 56(d) that the fact of Defendants' exercise of *de jure* command authority over members of the Military and Security Forces is without substantial controversy and shall be deemed established.

This Motion is based on the following Memorandum of Law, the accompanying Statement of Material Undisputed Facts, Plaintiffs' Notice of Filing Exhibits, all pleadings and papers filed in this action, and upon such other matters as may be presented to the Court at the time of hearing.

INTRODUCTION

This is a civil action for compensatory and punitive damages for torts committed in violation of international and domestic law. Plaintiffs, refugees from El Salvador now living in the United States, instituted this action under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, against Defendants Jose Guillermo Garcia ("Defendant Garcia"), Minister of Defense and Public Security of El Salvador from approximately October 1979 to April 1983, and Carlos Eugenio Vides Casanova ("Defendant Vides Casanova"), Director-General of the National Guard of El Salvador from approximately October 1979 to April 1983, and subsequently Minister of Defense and Public Security of El Salvador from 1983 to 1989. Plaintiffs allege that under the doctrine of command responsibility, Defendants are responsible for the harms inflicted on them by members of the Salvadoran Military and/or Security Forces.

The three elements of the doctrine of command responsibility are that (1) a military superior possessed *de jure* command authority over those responsible for committing specified unlawful acts; (2) the military superior knew, or should have known, that subordinates were committing, had

committed, or were about to commit unlawful acts; and (3) the military superior failed to take all reasonable and necessary measures to prevent such unlawful acts or punish the offenders. As discussed below, the undisputed evidence shows that Defendants were in positions of *de jure* command authority over members of the Salvadoran Military and Security Forces from 1979 through 1983, when the violations complained of occurred.

Because there is no genuine issue of material fact as to the Defendants' *de jure* command authority over members of the Military and Security Forces, Plaintiffs are entitled to judgment as a matter of law as to the first element of the doctrine of command responsibility. Such a determination by this Court will leave Plaintiffs with the burden of proving the second and third elements of this doctrine at trial—i.e., that Defendants knew, or should have known, of abuses by subordinates, and failed to take all reasonable and necessary measures to prevent abuses or punish offenders.

Based on the undisputed facts, even if this Court denies summary judgment as to the first element of the doctrine of command responsibility, it should determine that there is no substantial controversy regarding the fact of Defendants' possession of *de jure* command authority over subordinates in the Military and/or Security Forces, and should find that this fact is established for purposes of trial.

STATEMENT OF UNDISPUTED FACTS

From December 1979 to January 1992, the people of El Salvador were engulfed in an internal conflict in which as many as 75,000 people are estimated to have been killed. Throughout this period, the Salvadoran Armed Forces (including the Military and Security Forces) employed numerous counter-insurgency and terrorist methods illegal under Salvadoran and international law—including arbitrary detention, kidnapping, torture, and murder—in order to control the Salvadoran population and intimidate and eliminate perceived and/or actual opponents of the Salvadoran government. The hostilities and oppression did not come to a formal conclusion until a Peace Agreement was negotiated under the auspices of the United Nations and signed on January 16, 1992. Plaintiffs in this action were the victims of international law violations at the hands of members of the Military and Security Forces during the periods in which Defendants were in command of these forces.

It is undisputed that Defendants Garcia and Vides Casanova held the respective positions of Minister of Defense and Public Security and Director-General of the National Guard during 1979-1983. *See* Plaintiffs' Statement of Material Undisputed Facts ("Statement of Facts"), filed herewith, ¶¶ 1, 17. Both Defendants were appointed to their respective positions by persons in authority to do so. *Id.* ¶¶ 1, 17. The Salvadoran Military and Security Forces were organized and administered according to a strict chain of command. *Id.* ¶¶ 5-6, 22, 25-27. This hierarchy is clearly reflected in an organizational chart that Defendant Garcia admitted was an accurate reflection of the Salvadoran command structure. *Id.* ¶ 6; Plaintiffs' Notice of Filing Exhibits ("Notice of Exhibits"), filed herewith, Ex. H. Members of the Salvadoran Armed Forces underwent military training in the proper functioning of this chain of command. Statement of Facts ¶ 25. Orders proceeded from persons of authority down through the chain of command to the appropriate subordinate for implementation. *Id.* ¶¶ 5, 22. In this system, military superiors were responsible for ensuring that their orders were properly executed and for disciplining offenders. *Id.* ¶¶ 26-28. Superiors were also required to remain aware of the actions of their subordinates and to act upon various sources of information about their subordinates. *Id.* ¶ 9. Further, subordinates were required to report up the chain of command about significant events, such as when troops discharged their firearms, detained a civilian or were involved in acts of torture. *Id.* ¶ 6.

In their respective positions of authority within the hierarchy of the Salvadoran Military and Security Forces, Defendants Garcia and Vides Casanova were empowered to issue orders to, and to discipline, subordinate members of these Forces. *See id.* ¶¶ 2-7, 13-14, 19, 22, 27-28, 30. In 1981, Defendants Garcia and Vides Casanova (and a third Colonel) were promoted to the rank of General in the Salvadoran Armed Forces. *Id.* ¶¶ 15, 20.

Defendant Garcia

Defendant Garcia conceded that as of approximately 1981, his "effective control" over the Armed Forces was "total." Statement of Facts ¶ 7. As Minister of Defense and Public Security and a member of the Salvadoran High Command from October 19, 1979 to April 19, 1983, Defendant Garcia occupied a position of command responsibility over members of the Military and Security Forces. *Id.* ¶¶ 2-7, 13-15; Notice of Exhibits, Ex. A (Garcia Chronology). This authority empowered

Defendant Garcia to issue orders to all members of the Military and Security Forces directly or through intermediate commanders; to inspect and discipline troops; and to approve or reject appointments, demotions, transfers and dismissals of subordinates. Statement of Facts ¶¶ 4, 11, 13. Defendant Garcia also had the authority to establish and staff military tribunals and courts martial. *Id.* ¶ 12.

As a member of the Salvadoran High Command, Defendant Garcia was responsible for formulating military strategy concerned with the defense of the government and for enforcing the laws with respect to the Armed Forces. *Id.* ¶¶ 2, 4, 10. Defendant Garcia worked closely with the Revolutionary Junta and, as Minister of Defense and Public Security, was charged with designing and implementing military strategy. *Id.* ¶¶ 4, 10. Defendant Garcia regularly received intelligence reports about the activities of the opposition and he utilized these reports to design military strategy. *Id.* ¶ 10. Further, Defendant Garcia worked with the Joint Chiefs of Staff (the *Estado Mayor*) to repress espionage, sabotage and subversion. *Id.* ¶ 5.

Defendant Vides Casanova

Defendant Vides Casanova was Director-General of the National Guard from October 19, 1979 to April 18, 1983, when he replaced Defendant Garcia as Minister of Defense and Public Security, a position Defendant Vides Casanova held until approximately 1989. Statement of Facts ¶ 1; Notice of Exhibits, Ex. G (Vides Casanova Chronology). In these capacities, Defendant Vides Casanova occupied positions of command authority within the hierarchy, first, over the National Guard, and then over all Military and Security Forces. *Id.* ¶¶ 19, 22-23, 28-30.

As Director-General of the National Guard, Defendant Vides Casanova received orders from either Defendant Garcia or the military members of the Revolutionary Junta, as communicated through the Joint Chiefs of Staff. *Id.* ¶ 21. Defendant Vides Casanova was responsible for ensuring that all National Guard facilities, including detention centers, ran properly. *Id.* ¶ 23. If a subordinate received a report of abuses of authority by other Guardsmen, it was the duty of the subordinate to bring this report to Defendant Vides Casanova's attention. *Id.* ¶ 28. When he was promoted to the Minister of Defense and Public Security, he became a member of the High Command and assumed the functions and powers formerly held by Defendant Garcia. *Id.* ¶¶ 29-30.

Defendant Vides Casanova's position as Minister of Defense and Public Security in the High Command empowered him to accept, reject, or modify requests from the Joint Chiefs of Staff (the *Estado Mayor*); and approve decisions to transfer, demote, or discharge subordinates. *Id.* ¶ 30. Defendant Vides Casanova also had the authority to convene military tribunals and courts martial. *Id.*

ARGUMENT

I. RULE 56 PERMITS THIS COURT TO FIND AS A MATTER OF LAW THAT DEFENDANTS POSSESSED *DE JURE* COMMAND AUTHORITY

Summary judgment is appropriate where a party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). "A moving party discharges its burden on a motion for summary judgment by 'showing' or 'pointing out' to the Court that there is an absence of evidence to support the non-moving party's case." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (11th Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Under Rule 56, the moving party may discharge its burden "with or without supporting affidavits." *Jeffery*, 64 F.3d at 593. When a moving party has discharged its burden, "the non-moving party must then 'go beyond the pleadings,' and by its own affidavits or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Bolick v. Brevard County Sheriff's Dep't.*, 937 F. Supp. 1560, 1564 (M.D. Fla. 1996) (citation omitted).

Here, this Court may grant summary judgment for Plaintiffs on the limited issue of Defendants' *de jure* command authority. Under Rule 56, "summary judgment may be proper as to some causes of action but not as to others, or as to some issues but not as to others, or as to some parties but not as to others." *Barker v. Norman*, 651 F.2d 1107, 1123 (5th Cir. 1981) (emphasis added); see FRCP 56(a) (a party "seeking to recover upon a claim, counterclaim, or cross-claim" may move for "a summary judgment in the party's favor upon all or any part thereof"). "It is clear that Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim." *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981) (citation omitted); *Blackford v. Action Prods. Co.*, 92 F.R.D. 79 (W.D. Mo. 1981) ("The award of summary judgment on a portion of a claim is clearly covered by the words of Rule 56(a)"). In *DiSandro v. Makahuena*

Corp., 588 F. Supp. 889, 892 (D. Haw. 1984), the court articulated the rationale for granting summary judgment on a single, key issue, such as *de jure* command authority:

Summary judgment is available to decide purely legal issues. It is appropriate to decide a few limited issues by summary judgment, even if those issues are not entirely dispositive of any one claim. Summary judgment can thus serve to set the issues for trial. The fact that less than an entire claim is settled by the summary judgment ruling does not vitiate the court's jurisdiction to decide the issue.

(citations omitted).

Alternatively, under Rule 56(d), if a Court "finds that summary judgment is inappropriate because there are genuine issues of material fact to be tried, it 'shall if practicable ascertain what material facts exist without controversy' and enter an order specifying those facts." *Scott Paper Co. v. Taslog, Inc.*, 638 F.2d 790, 796 n.4 (5th Cir. 1981). Here, such material facts "without substantial controversy" (FRCP 56(d)) include the fact of Defendants' *de jure* command authority. The purpose of Rule 56(d) is to "salvage some results from the judicial effort involved in the denial of a motion for summary judgment." *Warner v. United States*, 698 F. Supp. 877, 879 (S.D. Fla. 1988) (citations omitted). Partial summary judgment under Rule 56(d) "is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case," and accordingly "[t]his adjudication accelerates litigation by framing and narrowing triable issues, and by eliminating, before trial, matters that contain no genuine issue of material fact." *Meek v. Metro. Dade County*, 805 F. Supp. 958, 963 (S.D. Fla. 1992) (citations omitted).

II. A MILITARY COMMANDER CAN BE LIABLE FOR ACTS COMMITTED BY SUBORDINATES UNDER HIS *DE JURE* COMMAND AUTHORITY

Under the doctrine of command responsibility, a military commander can be held criminally or civilly responsible for unlawful acts committed by subordinates even though the commander did not directly participate in the commission of the actual offenses. Broadly stated, a commander is liable where he knew, or should have known, of abuses being committed by subordinates but failed to take all reasonable and necessary measures to prevent or punish such offenses. The theory underlying this well-established doctrine is that the superior is in the best position to prevent violations of the laws of war, which have as their fundamental goal the prevention of unnecessary

suffering in a time of war. Because military commanders are in positions of great public trust and responsibility, the law imposes on them a duty to prevent and punish abuses committed by subordinates under their *de jure* command. See generally, Timothy Wu & Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 290 (1997).¹

In this action, Plaintiffs allege that under the doctrine of command responsibility, Defendants are legally responsible for the violations of international law they suffered (*viz.*, torture; crimes against humanity; arbitrary detention; and cruel, inhuman and degrading treatment or punishment) at the hands of members of the Military and Security Forces.

A. The Doctrine Of Command Responsibility Requires A Showing Of Command Authority, *Mens Rea*, and *Actus Reus*

It is well established under U.S. and international law that the doctrine of command responsibility contains three elements that must be proved by Plaintiffs by a preponderance of the evidence. Plaintiffs must demonstrate:

First, that the individuals who committed the unlawful acts alleged were under the *de jure* command authority of each Defendant;

Second, that Defendants knew, or should have known, that persons under their command had committed, were committing, or were about to commit unlawful acts; and

Third, that Defendants failed to take all reasonable and necessary measures to prevent or repress the commission of unlawful acts by subordinates or to investigate and punish the actual perpetrators. *Application of Yamashita*, 327 U.S. 1, 14-16 (1946); U.S. Dept. of Army Field Manual No. 27-10, *Responsibility of Acts of Subordinates in the Law of Land Warfare*, ¶ 501 (1956) (providing for responsibility for commanders for crimes committed by subordinates).

When all three conditions are met—*de jure* command authority, *mens rea*, and *actus reus*—a commander can be found liable for international law violations committed by subordinates. See

¹ For the Court's convenience, secondary and other authorities are contained in Plaintiffs' Appendix of Authorities, filed herewith.

generally W. J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia* ("International Law Problems"), 6 DUKE J. COMP. & INT'L L. 103, 124 (1995).

B. A Showing Of *De Jure* Command Authority Satisfies The First Element Of The Command Responsibility Doctrine As A Matter Of Law

To satisfy the first element of the doctrine of command responsibility, Plaintiffs must show that Defendants Garcia and Vides Casanova possessed *de jure* command authority over the Salvadoran Military and Security Forces, and the National Guard, respectively, such that the members of these forces were within the Defendants' chain of command. Specifically, satisfying this element of the doctrine of command responsibility requires a showing that the Defendants possessed the legal authority to issue orders to, and to discipline, the direct perpetrators.²

Cases under the TVPA and the ATCA clearly reflect the central role of *de jure* command authority within the doctrine of command responsibility.³ For example, in *Xuncax v. Gramajo*, 886

² As one commentator has observed, in order to invoke the doctrine of command responsibility, it must be shown that "the persons committing the offense were under the command of the accused, that is, the accused had the authority to issue orders to them not to commit illegal acts and the authority to see that the offenders were punished . . ." Fenrick, *International Law Problems*, 6 DUKE J. COMP. & INT'L L. at 124.

³ The legislative history of the TVPA, and by extension the ATCA, references the *Yamashita* precedent and directs courts to international standards of command responsibility in determining the liability of commanders. See *Xuncax v. Gramajo*, 886 F.Supp. 162, 172 n.2 (D. Mass. 1995) ("The legislative history of the TVPA also casts light on the scope of the Alien Tort Claims Act."). This legislative history further underscores that *de jure* command authority serves as the basis for establishing the first element of the doctrine of command responsibility:

The legislation [the TVPA] is limited to lawsuits against persons who ordered, abetted, or assisted in the torture. It will not permit a lawsuit against a former leader of a country merely because an isolated act of torture occurred somewhere in that country. However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—*anyone with higher authority who authorized, tolerated, or knowingly ignored those acts* is liable for them.

S. Rep. No. 249, 102d Cong., 1st Sess. 9 (1991) (emphasis added) (footnote omitted).

F.Supp. 162 (D. Mass. 1995), the court found that the defendant commander was liable under the ATCA and TVPA where he "was aware of and supported widespread acts of brutality committed by personnel *under his command* resulting in thousands of civilian deaths." *Id.* at 172-73 (emphasis added). Likewise, in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1537-38 (N.D. Cal. 1987), the court found that the direct perpetrators were "agents, employees or representatives" of the defendant acting pursuant to a "policy, practice or pattern" of the Army under defendant's command. In *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994), a critical step in the court's reasoning was the finding that "[a]ll of the soldiers and officers in the Haitian military responsible for the arbitrary detention and torture of plaintiffs were employees, representatives, or agents of defendant Avril"⁴

III. THE FACTS ARE UNDISPUTED THAT DEFENDANTS EXERCISED *DE JURE* COMMAND AUTHORITY OVER MEMBERS OF THE MILITARY AND SECURITY FORCES

The undisputed facts, including numerous admissions by Defendants in deposition and during sworn trial testimony, show that Defendants possessed *de jure* command authority over the Salvadoran Military and Security Forces. Accordingly, this Court should find that Plaintiffs have satisfied the first element of the doctrine of command responsibility as a matter of law.

Defendants have admitted that they occupied positions of high authority within the hierarchy of the Salvadoran Armed Forces. Statement of Facts, ¶¶ 2, 6-7, 11-15, 19-23, 28-30. They have also admitted that the Salvadoran Military and Security Forces operated according to a strict chain of command whereby orders of superiors were transmitted to the appropriate subordinates for

⁴ United States precedent is also consistent with international standards for command responsibility. See, e.g., *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 U.N.T.S. 3, 42-43, at Article 86-7. The International Committee of the Red Cross ("ICRC") Commentary on the Protocol makes clear that the term "commander" in Article 87 encompasses persons in command "at the highest level to leaders with only a few men under their command." Claud Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), ¶ 3553. In addition, this Commentary states that "the superior concerned must be the superior of that subordinate." *Id.* ¶ 3543. The term "superior" applies to any superior in a "line of command" who has "a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control." *Id.* ¶ 3544. El Salvador ratified the Protocol on November 23, 1978. See <http://www.icrc.org>.

implementation. *Id.* ¶¶ 5-6, 22, 25-27. Defendants testified that by virtue of their positions, they were empowered to issue orders to subordinates and to discipline offenders. *Id.* ¶¶ 5, 22, 26-28. In their testimony, they admitted that they were responsible for informing themselves of the activities of their subordinates. *Id.* ¶ 9. They also admitted that they received reports from the field detailing the activities of subordinates and of the opposition and had a duty to act upon those reports. *Id.* ¶ 9, 10. Further, they admitted that under Salvadoran law, Ministers of Defense were empowered to convene military tribunals and courts martial and to accept or reject requests for appointment, demotion or discharge of subordinates. *Id.* ¶¶ 4, 12-13, 27, 30.

Defendant Garcia admitted that his "effective control" over the Armed Forces was "total." *Id.* ¶ 7. Specifically, he testified that as Minister of Defense and Public Security and as a member of the Salvadoran High Command, he was responsible for designing and implementing Military strategy in consultation with the Revolutionary Junta, and for working with the General Chief of Staff to repress espionage, sabotage and subversion. *Id.* ¶¶ 4, 5, 10. Likewise, Defendant Vides Casanova, as Director-General of the National Guard and then Minister of Defense and Public Security, testified that he was charged with ensuring that all National Guard facilities—including detention centers—ran smoothly and with following up on reports of abuses of authorities received from subordinates and others. *Id.* ¶¶ 23, 28. Defendant Vides Casanova also testified that he and his predecessor, Defendant Garcia, played, as Minister of Defense and Public Security, an important role in demoting, transferring, or discharging military officers or soldiers. *Id.* ¶ 30.

These undisputed facts establish that Plaintiffs have carried their burden as to the first element of the doctrine of command responsibility. All members of the Military and Security Forces were "under the command of" Defendants Garcia and Vides Casanova while Defendant Garcia held the position of Minister of Defense and Public Security and while Defendant Vides Casanova was Director-General of the National Guard. *See Yamashita*, 327 U.S. at 14 (finding the direct perpetrators to be "members of [Yamashita's] command"); *see also Xuncax*, 886 F. Supp. at 172-73; *Paul*, 901 F. Supp. at 335; *Forti*, 672 F. Supp. at 1541. Indeed, both Defendants occupied "the highest position[s] of authority" within the Salvadoran Armed Forces, clearly satisfying the requirement of *de jure* command authority. *Forti*, 672 F. Supp. at 1537-38 (citation omitted).

Based on these undisputed facts, this Court should find that Defendants occupied positions of *de jure* command authority over members of the Military and Security Forces, and that Plaintiffs have thus established the first element of the doctrine of command responsibility as a matter of law.

IV. IF THIS COURT DENIES PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, IT SHOULD NONETHELESS DETERMINE UNDER RULE 56(d) THAT DEFENDANTS POSSESSED *DE JURE* COMMAND AUTHORITY OVER THE SALVADORAN MILITARY AND SECURITY FORCES

Even if this Court finds that a trial is necessary regarding the first element of the command responsibility doctrine, it should determine that the fact of Defendant Garcia's and Defendant Vides Casanova's *de jure* command authority over the Salvadoran Military and Security Forces and the National Guard, respectively, is "without substantial controversy." FRCP 56(d). At trial, consequently, the fact of Defendants' *de jure* command authority should "be deemed established, and the trial . . . conducted accordingly." *Id.*

In light of the undisputed facts, Rule 56(d) requires a factual finding of Defendants' *de jure* command authority. Rule 56(d) is an "important aspect of federal summary judgment procedure," *Scott Paper*, 638 F.2d at 796 n.4, the purpose of which is to streamline litigation following denial of a summary judgment motion. *Warner*, 698 F. Supp. at 879. Indeed, at least one court has held that "Rule 56(d) imposes a compulsory duty on the court considering the summary judgment motion to specify the uncontroverted material facts." *In re Hillsborough Holdings Corp.*, 176 B.R. 223, 233 (M.D. Fla. 1994).

Here, Plaintiffs' theory of liability is based on the doctrine of command responsibility. This doctrine contains a requirement of command authority over subordinates. Because the undisputed evidence shows that Defendants occupied the respective positions of Minister of Defense and Public Security and Director-General of the National Guard, a factual finding that they possessed *de jure* command is appropriate because it will "narrow the issues in the case, advance the progress of the litigation and provide the parties with some guidance on how they proceed with the case." *Warner*, 698 F. Supp. at 880; see also *Occidental Fire & Casualty Co. of North Carolina v. Cont'l Bank, N.A.*,

918 F.2d 1312, 1320 (7th Cir. 1990) (pursuant to Rule 56(d), district court "may issue an order, similar to a pretrial order, listing the facts that are not in dispute").⁵

Specifically, this Court should find the following facts with respect to the issue of *de jure* command authority:

(1) During 1979-83, Defendant Garcia was the Minister of Defense and Public Security of El Salvador.

(2) In his capacity as Minister of Defense and Public Security, Defendant Garcia was empowered to command the Military and Security Forces of El Salvador. Pursuant to accepted regulations and procedures, Defendant Garcia was also empowered to issue orders to subordinates in these Forces, including orders not to commit illegal acts.

(3) In his capacity as Minister of Defense and Public Security, Defendant Garcia was empowered to discipline subordinates in the Military and Security Forces.

(4) During 1979-83, Defendant Vides Casanova was the Director-General of the National Guard of El Salvador.

(5) In his capacity as Director-General of the National Guard, Defendant Vides Casanova was empowered to command the National Guard of El Salvador. Pursuant to accepted regulations and procedures, Defendant Vides Casanova was also empowered to issue orders to his subordinates in the National Guard, including orders not to commit illegal acts.

(6) In his capacity as Director-General of the National Guard, Defendant Vides Casanova was empowered to discipline subordinates in the National Guard.

⁵ Courts have held that "[t]he duty to sift the issues under Rule 56(d) is in no way inconsistent with the duty to award judgment on 'all or part' of a claim under Rule 56(a). A Rule 56(d) order may be issued as part of a summary judgment determination under Rule 56(a), or in cases in which no judgment is warranted, but certain material issues have been decided." *Blackford*, 92 F.R.D. at 80. In addition to listing facts, determinations under Rule 56(d) may also resolve mixed questions of law and fact, or legal issues. See *Gillette v. Delmore*, 886 F.2d 1194, 1198-99 (9th Cir. 1989) (granting partial summary judgment on grounds that phone call is not constitutionally protected speech); *Cohen v. Board of Trs. of the Univ. of Med. and Dentistry of New Jersey*, 867 F.2d 1455, 1467 (3d Cir. 1989) (determination that job classification system and seniority system violated law is "classic example of Rule 56(d) relief").

CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment as to the first element of the doctrine of command responsibility, *i.e.*, that Defendants possessed *de jure* command authority over members of the Military and Security Forces.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to
KURT R. KLAUS, JR., ESQ., 3191 Coral Way, Suite 502, Miami, FL 33145, this 6 day of
February, 2001.



Attorney