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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.

Civil Action No. 99-8364 CIV-HURLEY
Magistrate Judge Lynch

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PROPOSED JURY INSTRUCTION ON COMMAND RESPONSIBILITY AND IN OPPOSITION TO DEFENDANTS' PROPOSED JURY INSTRUCTION ON COMMAND RESPONSIBILITY

INTRODUCTION

The parties filed proposed jury instructions on April 19, 2001 pursuant to the Court's March 29, 2001 Order on Trial Preparation. This Memorandum of Points and Authorities specifically addresses disputed issues on the proper standard for command responsibility. Plaintiffs urge the Court to adopt Plaintiffs' standard, which—as set forth in greater detail below—is required by the seminal command responsibility case under United States law, *In re Yamashita*, 327 U.S. 1 (1946), and subsequent caselaw applying the doctrine and the *Yamashita* precedent. Further, it is also consistent with the domestic law of supervisory liability for failure to prevent or punish abuses by subordinates in the face of constitutional violations.

In particular, Plaintiffs' formulation of prong one of the doctrine of command responsibility correctly directs the jury to consider whether the direct perpetrators of the acts in question were the subordinates of Defendants. This requires a showing that the Defendant commander exercised *de jure* command over the direct perpetrators of the acts in question. Second, Plaintiffs' instruction on the *mens rea* requirement of the doctrine of command responsibility makes clear that in order to trigger the Defendant commander's duty to act, Plaintiffs must demonstrate that the Defendants were on notice that subordinates were committing, or had committed, abuses. It is not necessary for Plaintiffs to demonstrate that the Defendant commanders knew or should have known that Plaintiffs themselves would be, or had been, targeted for abuse. Defendants' proposed instruction is ambiguous on this point, potentially leading to confusion within the jury or inviting the jury to hold Plaintiffs to a higher standard of proof than is required under the doctrine.

Defendants' formulation of the first and second prong of the doctrine of command responsibility erroneously employs the term "effective command." The inclusion of the term "effective" risks confusing the jurors, conflating their inquiry in the first and third prongs of the doctrine, and suggesting that they must undertake an additional factual inquiry, not required by law, in order to satisfy the first prong. Additionally, Defendants' delegation instruction is inapposite to the case at hand and is incorrectly formulated as a matter of law.

For these reasons, Plaintiffs respectfully request that the Court adopt their formulation of the doctrine of command responsibility as it appears in the Joint Submission on Jury Instructions.

ARGUMENT

I. PLAINTIFFS' PROPOSED COMMAND RESPONSIBILITY INSTRUCTION REFLECTS THE PREVAILING LEGAL STANDARD

It is well established under United States law that the doctrine of command responsibility contains three elements that must be proved by a preponderance of the evidence. Specifically, Plaintiffs must demonstrate:

First, that the individuals who committed the unlawful acts were subordinates of the defendant commanders ("prong one");

Second, that the defendant commanders knew, or should have known, that the defendant commander's subordinates had committed, were committing, or were about to commit unlawful acts, such as the human rights abuses suffered by the plaintiffs ("prong two"); and

Third, that the defendants failed to take all reasonable and necessary measures to (a) prevent or stop subordinates from committing such abuses, or (b) punish the subordinates ("prong three"). *In re Yamashita*, 327 U.S. 1, 14-16 (1946); U.S. Dept. of Army Field Manual No. 27-10, *Responsibility for 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—subordination, *mens rea*, and *actus reus*—a commander is liable for specific international law violations committed by subordinates. *See 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).[1]

The United States Supreme Court expressly approved this standard in *In re Yamashita*, 327 U.S. 1 (1946). In *Yamashita*, the Supreme Court held that a U.S. Military Commission had applied the proper legal standard for command responsibility in convicting a former Commanding General of

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[1] All non-standard authorities are available in Plaintiffs' Book of Authorities filed concurrently herewith.

the Fourteenth Army Group of the Imperial Japanese Army and Military Governor of the Philippines. The Supreme Court confirmed that the laws of war impose upon an army commander "a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery." *Id.* at 14-5; *see also id.* at 16 ("These provisions [of the Hague and Geneva Conventions on the Laws of War] plainly imposed on petitioner … an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.").

Since *Yamashita*, numerous cases have relied on the *Yamashita* command responsibility standard to find military leaders legally responsible for the unlawful acts of their subordinates when such superiors knew or should have known about such acts and failed to take all reasonable and necessary measures to prevent such acts or punish the offenders. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (finding the principle of command responsibility to be "well accepted" in United States law and citing *Yamashita* with approval); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (citing *Yamashita* with approval). Indeed, Congress specifically invoked *Yamashita* when it enacted the Torture Victim Protection Act (TVPA).[2] According to the Senate's Report: "[I]n *In re Yamashita* … the Supreme Court held a general of the Imperial Japanese Army responsible for a pervasive pattern of war crimes committed by his officers when he knew or should have known that they were going on but failed to prevent or punish them. Such 'command responsibility' is shown by evidence of a pervasive pattern and practice of torture, summary execution or disappearances." S. Rep. No. 249, 102d Cong., 1st Sess. at 9 (1991); *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 171-2 (D. Mass. 1995) (citing *Yamashita* and noting consistency

[2] Plaintiffs also allege claims under the Alien Tort Claims Act ("ATCA"). The legislative history of the TVPA provides an interpretative guide to the ATCA. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 172 n.2 (D. Mass. 1995) ("[T]he legislative history of the TVPA also casts light on the scope of the Alien Tort Claims Act.").

between *Yamashita* and the TVPA as evidenced by the statute's legislative history). In addition, variations on this standard have been codified in numerous multilateral instruments and treaties.[3]

These sources and Plaintiffs' proposed instruction make clear that the elements of the doctrine of command responsibility are met in logical sequence. The first step is to show that the direct perpetrators of the acts alleged were subordinates of the defendant commander. If this element is met, the second inquiry turns on whether the defendant commander is under a duty to act with respect to subordinates. If the defendant commander knows or should know that subordinates generally are committing, or have committed, unlawful acts, then the defendant commander is considered to be on notice and has a duty to act. Third, if the defendant commander is under a duty to act, then the finder of fact must determine whether the defendant commander has done all that was reasonable and necessary under the circumstances to prevent, stop or punish abuses by subordinates. Where the defendant commander has failed to adequately discharge this duty, he is liable for specific acts committed by subordinates.

II. PLAINTIFFS' FORMULATION OF PRONG ONE CORRECTLY DIRECTS THE JURY TO DETERMINE WHETHER THE DIRECT PERPETRATORS OF THE ACTS IN QUESTION WERE SUBORDINATES OF THE DEFENDANTS

Plaintiffs' proposed instruction directs the jury to determine whether the "forces who committed the human rights abuses suffered by the plaintiffs were subordinates of the defendants." *See* Joint Submission on Jury Instructions at 18. This instruction accurately states prong one of the doctrine, which requires Plaintiffs to show that the direct perpetrators of the acts of torture and other

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[3] *See, e.g.*, Article 86-7, 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; Article 7(3), Statute of the International Criminal Tribunal For The Former Yugoslavia ("ICTY"), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/807 (1994); Article 6(3), Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 48th Sess., 4353rd mtg., U.N. Doc. S/RES/955 (1994); Article 28, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

human rights abuses alleged by them were subordinates of defendants Garcia and Vides Casanova.[4] *See* U.S. Dept. of Army Field Manual No. 27-10, *Responsibility for Acts of Subordinates in the Law of Land Warfare*, ¶ 501 (1956) ("military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control."). The necessary showing here is that Defendants possessed the legal authority to issue orders to, and to discipline, the direct perpetrators of the acts in question—in other words, that Defendants exercised *de jure* authority over their subordinates.[5] *See United States v. Brandt* ("Medical Case"), II TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 186, at 212 (1950) ("the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war."). This authority can arise from a formal delegation pursuant to law, rank, or assignment.[6]

Cases under the TVPA and the ATCA clearly reflect the central role of *de jure* command authority within the doctrine of command responsibility. For example, in *Xuncax*, 886 F. Supp. at 172-73, the court found that the defendant commander, the former Minister of Defense of Guatemala, was liable under the ATCA and TVPA where he "was aware of and supported widespread acts of

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[4] Specifically, prong one of the instruction should direct the jury to consider whether the members of the National Guard, National Police and Army that abducted and tortured Plaintiffs were subordinates of Defendants.

[5] The International Committee of the Red Cross 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.

[6] As one commentator, a Senior Legal Advisor in the Office of the Prosecutor of the ICTY, 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.

brutality committed by personnel *under his command* resulting in thousands of civilian deaths. Gramajo refused to act to prevent such atrocities." (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," the former military dictator of Haiti.

The legislative history of the TVPA further underscores that a finding of *de jure* command authority serves to establish 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). The TVPA legislative history cites *Forti* with approval, noting that the district court there properly determined that "although Suarez Mason was not accused of directly torturing or murdering anyone, he was found civilly liable for those acts which were committed by officers under his command about which he was aware and which he did nothing to prevent." *Id*.

The applicable legal precedent thus establishes that prong one of the jury instructions on command responsibility should be framed in terms of the defendant commander's *de jure* authority over the direct perpetrators of the alleged acts. Accordingly, Plaintiffs' proposed instruction properly

instructs the jury to consider whether the direct perpetrators of the acts in question were subordinates of Defendant.[7]

III. THE DOCTRINE OF COMMAND RESPONSIBILITY DOES NOT REQUIRE PROOF THAT THE DEFENDANT COMMANDER KNEW OR SHOULD HAVE KNOWN OF THE SPECIFIC HUMAN RIGHTS ABUSES SUFFERED BY THE PLAINTIFFS

Plaintiffs' proposed instruction makes clear that to satisfy prong two of the doctrine of command responsibility, "it is not necessary that the defendants knew or should have known that the plaintiffs themselves would be or were the victims of human rights abuses at the hands of specific subordinate forces." *See* Joint Submission on Jury Instructions at 18 (emphasis in original). This instruction accurately reflects the law: a defendant commander is liable when he knows or should know that subordinates were going to commit or had committed international law violations of the type experienced by the plaintiffs. This notice that abuses are occurring triggers a defendant commander's duty to act to prevent violations and punish perpetrators. Without Plaintiffs' proposed clarification of prong two, the jury may misinterpret this element to require Plaintiffs to adduce evidence that the defendants knew or should have known that the Plaintiffs themselves would be, or had been, targeted for abuse.

It is uncontested that under the doctrine of command responsibility, Defendants' knowledge of abuses by subordinates may be actual or constructive. *See* Joint Submission on Jury Instructions at 21 and 27.[8] The doctrine's disjunctive *mens rea* standard would be meaningless if it were necessary

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[7] Defendants' proposed prong one of the doctrine of command responsibility would require the plaintiffs to demonstrate that "persons under defendant's effective command had committed, were committing, or were about to commit torture and extrajudicial killing." *See* Joint Submission on Jury Instructions at 18. This formulation confuses prongs one and two of the doctrine. Properly stated, prong one focuses on whether the direct perpetrators of the acts in question are subordinates of the defendant commanders—*not* whether subordinates generally were committing or had committed abuses. The commission of abuses by subordinates is the subject of prong two, which addresses the defendant commander's knowledge—either actual or constructive—that subordinates were committing abuses.

[8] Constructive knowledge can be shown where violations are so numerous, widespread or systematic that a defendant should have known of abuses or that knowledge on the part of the Defendant can be inferred. In this regard, the United Nations Commission of Experts on the Former

(Footnote continues on following page.)

1 for Plaintiffs to show that Defendants knew or should have known that Plaintiffs themselves would
2 be, or had been, targeted for abuse. This fundamental principle finds expression in the litigation
3 brought against Ferdinand Marcos, the former President of the Philippines under the ATCA. *See In
4 re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994). In this set of
5 consolidated cases, Marcos was found liable to a class of plaintiffs for acts of torture, disappearance,
6 and summary execution committed by troops under his command. The Ninth Circuit approved the
7 District Court's jury instruction on command responsibility, which notably did not require a showing
8 that Marcos knew or should have known that subordinates were committing or had committed
9 violations against the specific plaintiffs in the case. *Hilao*, 103 F.3d at 776-778. Indeed, since the
10 case was a class action involving approximately 10,000 class members, it would have been
11 impracticable if not impossible for the plaintiffs to demonstrate that Marcos knew of each and every
12 act of violence complained of. Rather, the Ninth Circuit found Marcos liable where there was
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14 (Footnote continued from previous page)
15
16 Yugoslavia has identified a number of factors that are relevant to determining whether a commander knew, or should have known, of unlawful acts committed by his subordinates. These include:
17
18 1) The number of illegal acts;
19 2) The type of illegal acts;
20 3) The scope of illegal acts;
21 4) The time during which the illegal acts occurred;
5) The number and type of troops involved;
6) The geographic location of the acts;
7) The widespread occurrence of such acts;
8) The modus operandi of similar acts;
9) The location [and position] of the commander…

22 *See* United Nations, Security Council, Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council, U.N. Doc. A/1994/674, at 17. Liability will also attach where the
23 circumstances are such the defendant was willfully blind to such abuses. *See* XI TRIALS OF WAR
24 CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS ("The Hostages Case") 1260 (1950) ("An
25 army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither he will ordinarily be permitted to
26 deny knowledge of happenings within the area of his command when he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit
27 himself to get out of touch with current happenings in the area of his command during wartime.").
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evidence Marcos knew or should have known that his subordinates were engaging in a pattern or practice of human rights violations of the type suffered by the particular plaintiffs. *Marcos*, 25 F.3d at 776 (finding Marcos liable "if Marcos knew of *such* conduct by the military and failed to use his power to prevent it.") (emphasis added).

Likewise, in *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994), a court of this district found that the former military leader of Haiti bore "personal responsibility for a systematic pattern of egregious human rights abuses in Haiti during his military rule" and for "the interrogation and torture of each of the [six] plaintiffs in this case." *Paul*, 901 F. Supp. at 335. However, the court did not require the plaintiffs to demonstrate that the defendant knew or should have known that the six plaintiffs would be targeted. Rather, it was sufficient that the defendant knew of the existence of a widespread or systematic attack against the civilian population perpetrated by "soldiers and officers in the Haitian military" that "were employees, representatives, or agents of defendant Avril…" *Id.* *See also* *Xuncax*, 886 F. Supp. at 171 (finding the former Minister of Defense of Guatemala "personally responsible for ordering and directing the implementation of the program of persecution and oppression that resulted in the terrors visited upon the [nine] plaintiffs and their families.").

Plaintiffs need not demonstrate that Defendants knew, or should have known, that a particular Plaintiff would be, or had been, targeted. Rather, in order to satisfy prong two of the doctrine of command responsibility, it is sufficient that Defendants knew or should have known that subordinate forces were committing or had committed abuses of the type suffered by Plaintiffs. Plaintiffs' proposed instruction provides an important clarification for the jury in this regard that should be adopted.

IV. DEFENDANTS' PROPOSED COMMAND RESPONSIBILITY INSTRUCTION SIGNIFICANTLY MISSTATES THE LAW

A. Plaintiffs Need Not Show That Defendants Exercised "Effective" Command Over The Direct Perpetrators Of The Acts In Question In Order To Satisfy Prong One

Defendants' proposed prong one of the doctrine of command responsibility would require Plaintiffs to demonstrate that subordinates were under "defendant's effective command." *See* Joint Submission on Jury Instructions at 18. Because any requirement that Defendants' command be

"effective" improperly conflates the jurors' inquiry regarding prong one and prong three, Defendants proposed instruction should be rejected. As noted above, *see supra* at Section II, prong one requires evidence that the direct perpetrators of the acts in question are subordinates of the defendant commander. It is the third prong, by contrast, that addresses the question of whether the defendant satisfied his duty as a commander to undertake measures to prevent abuses and to punish subordinates. *See Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) ("international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of … atrocities.").

Accordingly, once a plaintiff has shown that a defendant commander had *de jure* authority over the subordinates in question, no further showing of *de facto* control is necessary for the plaintiffs to have satisfied the burden of proving that the commander was charged with the duty to control his subordinates. *See supra* section II. It is only where a defendant commander does not exercise formal command authority over subordinates that the question of the defendant's "effective command" becomes applicable. *See infra* Section IV.B. In other words, the issue of subordination in prong one can be established in two independent ways—by virtue of *de jure* command or *de facto* control. The degree to which relevant circumstances prevented a *de jure* commander from successfully fulfilling his duty to prevent or punish abuses by subordinates is relevant to prong three—*i.e.,* the fact-finder's assessment of the reasonableness of the measures taken by the commander defendant in order to bring his subordinates under control.

B. The Term "Effective Command" As It Appears In International Instruments Is Relevant To *De Facto* Commanders, Rather Than *De Jure* Commanders

Defendants' proposed instruction on "effective command" is inappropriate because the issue of "effective command" only arises where the commander has *de facto*—but not *de jure*—control over subordinates. It is in this regard that the term "effective" appears in the command responsibility provisions of the statute of the proposed International Criminal Court. *See* Article 28(a), Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) ("ICC Statute"). This formulation of the doctrine recognizes that international law contemplates that there can be situations

1 in which the law will impose the same duties to prevent and punish violations by subordinates on
2 persons exercising *de facto* as opposed to *de jure* command over subordinates. *See* W.J. Fenrick,
3 "Analysis and Interpretation of Elements" of Article 28 of the ICC Statute, *in* OTTO TRIFFTERER (ed.),
4 COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVERS'
5 NOTES, ARTICLE BY ARTICLE, 518 (1999), ("Forces under the effective command and control of a
6 commander are forces which are subordinate to the commander in either a *de jure* or *de facto* chain of
7 command and to which the commander may give orders ... transmitted directly or through
8 intermediate subordinate commanders. … The subjective incompetence of a particular commander is
9 not a basis for an argument that forces were not under his or her effective command and control.").
10 Individuals exercising *de facto* command are those who lack the formal legal authority to
11 command subordinates, or whose line of command does not include such troops, but whose position
12 or status make that person a recognized or effective commander of subordinates. The notion of *de*
13 *facto* command may also arise in situations of civil war in which breakaway republics declare their
14 "independence" and establish their own "militaries" or where paramilitary units are operating outside
15 of the formal military structure. In such scenarios, individuals who exercise "effective command"
16 over subordinates committing abuses are deemed *de facto* commanders and, like *de jure*
17 commanders, are legally responsible for the conduct of their subordinate forces.
18 In this way, the term "effective" in the ICC Statute extends the doctrine of command
19 responsibility to that category of commanders that exercises *de facto* command over subordinates.
20 As such, the inclusion of the term "effective" is not meant to impose an additional test of *de facto*
21 command where *de jure* command has already been demonstrated. *See supra* Section II. Rather, the
22 two concepts of *de jure* and *de facto* command are disjunctive, and there is no need to show both in
23 order to hold a defendant commander liable for abuses by subordinates. *See* Fenrick, *International*
24 *Law Problems*, 6 DUKE J. COMP. & INT'L L. at 124 (noting that a superior may be liable for an offense
25 committed by his subordinates as a result of the superior's failure to act reasonably to prevent such
26 acts if *either* "the persons committing the offense were under the command of the accused, that is, the
27 accused had the authority to issue orders to them not to commit illegal acts and the authority to see
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that the offenders were punished; *or* the persons committing the offense were under the *control* of the accused, that is, …the [superior possessed] the ability to prevent them from committing illegal acts and the ability to see that the offenders were punished.") (emphasis added).

Because this is a case involving *de jure* commanders, the inclusion of the qualifier "effective" in the formulation of prong one as Defendants have proposed threatens to confuse the jury and require them to undertake an additional, significantly different factual inquiry than the law demands. In applying prong one of the doctrine of command responsibility to the case at hand, the jurors must determine only whether the direct perpetrators of the acts in question were subordinates of Defendants. *See supra* Section II. If so, and if they are satisfied that Defendants had notice—either actual or constructive—of abuses by subordinates, then the jury must evaluate whether the defendant commanders properly discharged their duty to prevent or punish abuses by taking all necessary and reasonable measures in this regard. Here, where Defendants' command authority is *de jure*, there is no separate legal requirement of *de facto* control, and Defendants' proposed instruction must therefore be rejected.

C. Defendants' Proposed Instruction On Delegation To Subordinates Or To Civil Authorities Is Inapposite To The Present Case And Is Incorrect As A Matter Of Law

1. Defendants' Proposed Delegation Instruction Is Not Appropriate For The Case At Bar

Defendants urge the inclusion of a broad delegation instruction has been cut and pasted from the instructions utilized in *Ford v. Garcia*, without considering the unique aspects of that case. *See* Joint Submission on Jury Instructions at 28. That case presented a wholly different factual situation than the situation at bar. Specifically, whether the defendants had fulfilled their command responsibility for the churchwomen's murders by delegating the investigation of the crimes to subordinates and to the Salvadoran courts was an intrinsic and fundamental aspect of the case from its inception. In that complaint, the plaintiffs indicated that the defendants had ordered an investigation of the murders of the four American churchwomen. *See Ford v. Garcia*, Compl. ¶¶ 72, 73, 75. Accordingly, one issue confronting the jury was whether the defendants sincerely intended that their subordinates pursue the investigation or whether the investigation was thwarted or a sham.

Further, five members of the Salvadoran National Guard were eventually convicted and sentenced to thirty years in prison in a Salvadoran criminal proceeding. *See Ford v. Garcia*, Compl. ¶¶ 76, 77. Again, the *Ford* jury had to evaluate evidence concerning the reasonableness of the defendants' reliance on the Salvadoran courts to conduct a fair and impartial investigation and to address fully the involvement of superior officers in the crimes.

As a result, in order to assist the *Ford* jury in analyzing evidence concerning the defendants' allegations that they fulfilled their obligation to investigate the murders of the churchwomen through the means described above, the Court appropriately included a specific instruction on the issue of delegation. In the case at bar, however, the issue of specific delegation to subordinates or civilian authorities is irrelevant.

Indeed, according to prong three of the doctrine of command responsibility, once having actual or constructive notice that human rights abuses have occurred or are occurring, commanders are obligated to take all reasonable and necessary measures to prevent or stop their subordinates from committing such abuses or to punish the subordinate-perpetrators. *See supra* Section I. If Plaintiffs establish that Defendants failed to fulfill this obligation, Defendants may raise an affirmative defense, based on adduced facts, that they did undertake measures in fulfillment of this aspect of their command obligation. In this regard, they may seek to show that they properly and reasonably delegated this responsibility to subordinates or to civil authorities. However, the law of command responsibility substantially constrains this form of delegation. *See infra* Section IV.C.2. Consequently, the inclusion of Defendants' proposed delegation language in the jury instructions would only confuse the jury, confound the issues at trial, and conflate Defendants' affirmative defenses with the legal standard for command responsibility.

2. The Defendants' Proposed Jury Instruction On Delegation Is Incorrect As A Matter of Law

Defendants' proposed jury instruction on delegation should also be rejected on the ground that it misstates the law. A commander can never entirely absolve himself of his ultimate responsibility for the actions of his subordinates. This is the essence of the jurisprudence of the International Military Tribunals at Nuremberg and Tokyo. *See generally* UNITED NATIONS WAR CRIMES

COMMISSION, THE TRIAL OF THE GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY (1946) (finding German civilian and military leaders criminally responsible for crimes against humanity committed by German military forces during WWII, including Hermann Wilhelm Göring, General of the Nazi SS and President of the Reichstag; Rudolf Hess, General in the Nazi SS and Successor Designate of the Fuhrer; Wilhem Frick, General in the Nazi SS and Reich Minister of the Interior; Karl Dönitz, Commander-in-Chief of the German Navy; and 20 others); THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 49,773 – 49,853 (John Pritchard, ed.) ("IMTFE") (finding Japanese civilian and military leaders criminally responsible for crimes against humanity committed by Japanese military forces during WWII, including Kenji Dohiara, General in the Japanese Military; Shunroko Hata, Minister of War from 1939-40; Koki Hirota, Prime Minister and Foreign Minister; Sheishiro Itagaki, Army Officer and Minister of War; and many others). These cases, affirmed in a number of the subsidiary trials of commanders by the Allied Powers, confirmed that commanders, both civilian and military, must hold sacred their duty to prevent war crimes and crimes against humanity. An essential component of this norm is the requirement that commanders punish perpetrators so that it is clear to subordinate troops that wrongdoing will not be tolerated. To allow commanders to delegate their responsibilities to subordinates without retaining any continuing duty in order to insulate themselves or their subordinates from liability would be directly contrary to the long-standing doctrine of these cases and would eviscerate the doctrine. *See* IMTFE at 49,656 (noting that the "court-martial of one company commander was so insignificant and inadequate as corrective measure in view of the general disregard of the laws of war of those in charge of prisoners of war … as to amount to condonation [sic] of their conduct.").

In the International Military Tribunal for the Far East ("Tokyo Tribunal") prosecution of Japanese Foreign Minister Koki Hirohita, the defendant was found guilty for having "disregarded his legal duty to take adequate steps to secure the observance and prevent breaches of the law of war." *Id*. at 49,788 – 92. After receiving reports of atrocities in Nanking, China, Hirota contacted the War

1 Ministry, which assured him the atrocities would cease. But because reports of atrocities continued
2 for at least a month subsequent to this, the tribunal found that Hirota

3 was derelict in his duty in not insisting before the Cabinet that immediate action be
4 taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances, which he knew were not being
5 implemented while hundreds of murders, violations of women and other atrocities were being committed daily. His inaction amounted to criminal negligence.

6 *Id.* at 49,791.

7 In the *Felmy* decision in the "Hostages Case," the Tribunal emphasized the inadequacy of
8 measures undertaken by the defendant commander. XI TRIALS OF WAR CRIMINALS BEFORE THE
9 NÜRNBERG MILITARY TRIBUNAL 1309. While the defendant recommended that an officer in charge
10 of a regiment accused of massacres be subject to "disciplinary action," the Tribunal found this form
11 of punishment—a method of trying minor offenses—to be inadequate, and further, that the
12 commander failed to follow up to see what action was actually taken. *Id.* ("he [Felmy] seems to
13 have had no interest in bringing the guilty officer to justice"). In the *Lanz* decision, also part of the
14 "Hostages Case," Lt. General Lanz was convicted for failing to prevent the killing of hostage and
15 reprisal prisoners. The Tribunal held that "the unlawful killing of innocent people is a matter that
16 [always] demands prompt and efficient handling by the highest officer of the any Army." *Id.* at 1311.
17 Likewise, in the *Rosenberg* decision at the International Military Tribunal at Nuremberg, the
18 defendant was found guilty despite the fact that, on occasion, he had objected to atrocities committed
19 by his subordinates. The Tribunal emphasized that he, nonetheless, stayed in office until the end
20 even though he knew the excesses were continuing.[9]

21 Similarly, in the prosecution before the Tokyo Tribunal of Foreign Minister Shigemitsu, the
22 Tribunal premised the defendant's guilt in part on his failure to prevent and punish criminal acts. The
23 Tribunal concluded that, given the circumstances at the time, Shigemetsu should have been
24 suspicious that the treatment of prisoners was "not as it should have been." IMTFE at 49,831. The
25

26 [9] Judgment of the International Military Tribunal, Trial of German Major War Criminals,
27 available at http://www.yale.edu/lawweb/avalon/imt/proc/judrosen.htm.

28

Tribunal found that, under the circumstances, "He took no adequate steps to have the matter investigated, although he as a member of government, bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning in order to quit himself of responsibility which he suspected was not being discharged." *Id.*

As has been reaffirmed in U.S. military law, even if a commander directs a subordinate to investigate atrocities, he cannot completely delegate, and thus cannot be absolved of, his responsibility to investigate unlawful acts committed by subordinates. As the U.S. Army Field Manual indicates, "[t]he commander is responsible for all that his staff does or fails to do. He cannot delegate this responsibility. The final decision, as well as the final responsibility, remains with the commander." U.S. Dept. of Army Field Manual No. 101-5, *Staff Responsibilities and Duties*, at 4-1 (1997). Similarly, the Field Manual states that "ultimate authority, responsibility and accountability rest wholly with the commander," although a commander may delegate specific authority to staff officers within their spheres of competence. U.S. Dept. of Army Field Manual No. 101-5, *Command and Staff Relationships*, at 1-1 – 1-2 (1997); *see also* Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 165 (2000) ("Although commanders can delegate authority to subordinate leaders to accomplish a mission or a task, the commander can never delegate the responsibility that comes with command.").

Thus, Defendants' jury instruction regarding delegation misstates the law. The instruction states that a commander "may be relieved of the duty to investigate and punish" through the use of a civilian investigative authority or "may fulfill his duty to investigate and punish" through delegation to a subordinate. As demonstrated above, a commander can never fully absolve himself of his command duty, which includes the prevention and punishment of abuses by subordinates. A commander is under an ongoing and continuous obligation to investigate and punish all perpetrators of each and every instance of wrongdoing, or to ensure that subordinates who committed abuses are genuinely punished. To ignore certain instances of wrongdoing, to selectively punish only certain perpetrators, or to delegate the responsibility of punishment without follow-up does not fulfill a commander's legal obligation. Defendants' misconstruction of the law in this regard is fatal to a fair

assessment by the jury of the relevant evidence regarding Defendants' fulfillment of their duty to prevent, stop and punish wrongdoing.

Further, Defendants' proposed qualifications in the instructions do not go far enough to assure that the jury will have an understanding of the legal duty required of the defendant commanders to fulfil their obligations under prong three of the doctrine of command responsibility. Defendant's proposed instruction merely emphasizes that the investigation must be in good faith and the commander may not impede or frustrate the work of the delegatee. However, the correct restatement of that requirement is that the commander can only allow an investigation that (1) satisfies the commander's legal obligation and (2) is conducted in a manner that is consistent with an intent to bring perpetrators to justice. The law is clear that a commander may not use an external or internal investigation to shield himself, others or perpetrators from responsibility, and he may not conduct an investigation in name only.

V. PLAINTIFFS' PROPOSED STANDARD IS CONSISTENT WITH DOMESTIC LAW STANDARDS OF SUPERVISORY LIABILITY

When United States courts have confronted supervisory liability in domestic scenarios, they have defined a standard of liability with elements that are analogous to those of the standard of command responsibility espoused by Plaintiffs here. Cases regarding the failure of a defendant to train, supervise or punish officials in the face of constitutional violations thus support Plaintiffs' proposed instructions.

For example, in the case of supervisor liability for constitutional violations in the workplace, a plaintiff need not demonstrate that a supervisor or superior had knowledge of the specific acts in question. It is sufficient that the plaintiff demonstrate an unreasonable risk that the subordinate would commit the *type* of constitutional violation complained of against someone *like* the plaintiff. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (finding that supervisory liability under Sec. 1983 may be established where the supervisor had actual or constructive knowledge that a subordinate was engaged in conduct that presented an unreasonable risk of constitutional injury to citizens like the plaintiff and the supervisor's response to the violation was so inadequate as to show deliberate indifference to or tacit authorization of the offensive practices). Where there are

1 widespread abuses, a supervisor is placed on notice of the risk of such violations and is liable where
2 she fails in her duty to supervise subordinates or intervene to prevent future violations. *See Braddy v.*
3 *Florida Dep't of Labor & Empl. Sec.*, 133 F.3d 797, 802 (11th Cir. 1998); *see also, e.g., Young v. City*
4 *of Atlanta*, 59 F.3d 1160, 1172 (11th Cir. 1995) (holding that need for more training may be so
5 obvious where a pattern of constitutional violations exists and the inadequacy so likely to result in a
6 violation of constitutional rights that policymakers are liable for subsequent violations).
7 As under the doctrine of command responsibility, the law of supervisory liability assigns
8 responsibility to supervisors who fail to either prevent or punish violations by their subordinates.
9 *See, e.g., Spencer v. Doe*, 139 F.3d 107, 112 (2d Cir. 1998) (finding liability where (1) the
10 supervisory official, after learning of the violation, failed to remedy the wrong; (2) the supervisory
11 official created a policy or custom under which unconstitutional practices occurred or allowed such a
12 policy or custom to continue; or (3) the supervisory official was grossly negligent in managing
13 subordinates who caused the unlawful conditions or event).
14 A supervisor and/or a municipality is liable for failure to prevent future violations where such
15 failure has evolved into a custom on the part of the supervisor and/or municipality. *See, e.g.,*
16 *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985). "Although not necessarily
17 adopted by a person or body with rulemaking authority, customs can become so settled and
18 permanent as to have the force of law." *Id.* (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-
19 691 (1978)). Persistent failure to take sufficient disciplinary action against subordinates can give rise
20 to the inference that a municipality has ratified conduct, thereby establishing a custom, for which it
21 will be held liable. *Id.* at 1443 (citing *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983)); *see*
22 *also Eddy v. City of Miami*, 715 F. Supp. 1553, 1556 (S.D. Fla. 1989) ("[A] police chief who
23 persistently fails to discipline or control subordinates in the face of knowledge of their propensity for
24 improper use of force thereby creates an official custom or *de facto* policy actionable under §
25 1983.").
26 To avoid liability, a supervisor and/or municipality must show that he/it took reasonable steps
27 to abate widespread abuses. *See Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995).
28

1 Liability attaches where the supervisor and/or municipality knew of reasonable ways to reduce the
2 risk of potential harm from a widespread practice, but knowingly declined to take such measures.
3 *See id.; see also LaMarca v. Turner*, 995 F.2d 1526, 1541 (11th Cir. 1993) (finding that supervisor
4 failed to ensure that his direct subordinates followed his policies and failed to implement specific,
5 low-cost measures). A supervisor may be liable for disregarding "alternative means" or interim
6 measures reducing the risk of violence where such interim measures are reasonable. *See Hale*, 50
7 F.3d at 583-4 (citing *LaMarca*, 995 F.2d at 1536).
8 As these cases demonstrate, Plaintiffs' jury instruction on command responsibility parallels
9 the standards developed under domestic law to address cases where supervisors failed to train
10 subordinates or to correct or punish gross constitutional violations.

11 **VI. CONCLUSION**

12 Plaintiffs' case rests on the doctrine of command responsibility. Although this doctrine may
13 be alien to the experience of United States jurors, it is of paramount importance in the world's efforts
14 to bring the rule of law to bear on commanders who fail to adequately prevent or punish human rights
15 abuses committed by subordinates. Accordingly, it is crucial that the jury instructions in the instant
16 case be legally accurate and comprehensible.
17 The doctrine of command responsibility rests on an understanding that military commanders
18 are in a position of great public trust and responsibility and are in the best position to prevent and
19 punish the commission of offenses by subordinates. In this way, the doctrine recognizes that military
20 commanders are society's "last line of defense" against the human rights violations that characterize
21 the case at bar. Smidt, 164 MIL. L. REV. at 167. It is thus fair and just to impose on such leaders a
22 legal duty to prevent and punish atrocities committed by individuals under their command.
23 Additionally, the doctrine of command responsibility exercises a potent deterrent function by
24 promoting vigilance on the part of military commanders to prevent and punish violations of
25 international law by individuals under their command. Indeed, military commanders have voluntarily
26 assumed or retained their positions of authority such that it can be assumed that they have knowingly
27
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acquiesced to the duties imposed on them under international law by virtue of their positions of authority.

Accordingly, Plaintiffs respectfully request this Court to adopt Plaintiffs' proposed instruction on command responsibility as discussed above and as set forth in the Joint Submission on Jury Instructions in order to ensure that the instruction into line with United States law and the relevant legal precedent.

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Respectfully submitted,

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