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13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA

15 J. DOE,
16
17 Plaintiff,
18 v.
19 ALVARO RAFAEL SARAVIA;
and DOES 1-10 inclusive,
20 Defendants.

Case No.: CIV. F-03-6249 OWW LJO
**APPLICATION FOR DEFAULT
JUDGMENT BY COURT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION**
DATE: AUGUST 24-27, 2004
COURTROOM: 2
JUDGE OLIVER W. WANGER

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APPLICATION FOR DEFAULT JUDGMENT

Plaintiff Doe hereby files this Application for Entry of Judgment against defendant Alvaro Rafael Saravia Merino (“Saravia”). Defendant has not appeared in this action and has not communicated with or responded to plaintiff since the initiation of this action. Substitute service was effected on September 15 and October 18, 2003, by leaving a copy of the papers with the owner of 2401 Manor Oak Drive, Modesto, California 95355, the address at which defendant Saravia had been residing and at which he is continuing to receive mail, and by mailing the papers to defendant Saravia at that address.

Based on proof of this substituted service, the Court noted defendant Saravia in default by Order of the Clerk dated April 13, 2004.

Plaintiff is entitled to judgment against defendant on account of the claims pled in the Complaint, namely: violation of the law of nations, including the prohibition against extrajudicial killing and crimes against humanity, and for violation of the prohibition against extrajudicial killing under the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

Plaintiff respectfully requests that the Court enter judgment against defendant and grant relief to plaintiff in accordance with the evidence to be presented at the evidentiary hearing scheduled for August 24 through 27, 2004.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The assassination of Oscar Arnulfo Romero y Galdamez, Archbishop of San
4 Salvador and a leading figure in the struggle for human rights in El Salvador, is one of the
5 most notorious crimes in the history of Latin America. Because not a single person has
6 been held legally responsible for this crime, it is also a constant and painful reminder for
7 thousands if not millions of Salvadorans and others around the world of the power and
8 persistency of impunity. This case begins a modest effort to counter impunity with
9 accountability and, ultimately, it is hoped, justice.

10 Archbishop Romero was assassinated on March 24, 1980 while celebrating mass in
11 the Chapel of the Hospital of Divine Providence. Plaintiff, a relative of Archbishop Romero
12 (who has obtained an Order from the Court permitting this action to be brought under the
13 pseudonym J. Doe for reasons of personal safety), seeks default judgment on the claims that
14 Captain Alvaro Rafael Saravia Merino (“Saravia”) is liable for ordering, conspiring to
15 commit, and aiding and abetting the Archbishop’s assassination in violation of the law of
16 nations, including the prohibition against extrajudicial killing and crimes against humanity,
17 under the Alien Tort Claims Act, 28 U.S.C. § 1350 (the “ATCA”), and for violation of the
18 prohibition against extrajudicial killing under the Torture Victim Protection Act, Pub. L.
19 No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note) (the “TVPA”). This
20 Court has jurisdiction over this action under the ATCA and 28 U.S.C. § 1331.

21 By Order dated April 13, 2004, defendant Saravia was found in default, and the
22 Court has scheduled a hearing on August 24 though August 27, 2004 for the presentation of
23 evidence in support of plaintiff’s claim for compensatory and punitive damages.

24 **II. STATEMENT OF FACTS**

25 **A. Procedural History.**

26 On September 12, 2003, plaintiff filed a complaint against defendant Saravia for
27 violations of the ATCA and the TVPA for his role in the assassination of Archbishop
28 Romero. Substitute service was effected on September 15 and October 18, 2003 by leaving

1 a copy of the papers with the owner of 2401 Manor Oak Drive, Modesto, California 95355,
2 the address at which defendant Saravia had been residing and at which he is continuing to
3 receive mail, and by mailing the papers to defendant Saravia at that address.

4 Based on proof of this substituted service, the Court noted defendant Saravia in
5 default by Order of the Clerk dated April 13, 2004. *See* Declaration of Nicholas W. van
6 Aelstyn in Support of Plaintiff J. Doe’s Application for Default Judgment (“van Aelstyn
7 Decl.”), Exhibit A.

8 **B. Background.**

9 **1. Defendant Saravia.**

10 Defendant Saravia is a Salvadoran citizen and is a resident of the city of Modesto in
11 Stanislaus County, California. Saravia previously served as a captain in the Salvadoran Air
12 Force. In 1979, he resigned or was discharged from the military, and from that time worked
13 closely with Major Roberto D’Aubuisson. D’Aubuisson, at the direction of and in
14 conjunction with elements of the Salvadoran armed forces and far right Salvadoran civilians
15 inside and outside of El Salvador, founded the far right political movement Frente Amplio
16 Nacional (the “FAN”) and the far right political party Alianza Republicana Nacionalista
17 (“ARENA”), and organized “escuadrones de la muerte,” or “death squads,” paramilitary
18 organizations composed of civilians and military figures that systematically carried out
19 politically-motivated assassinations and other human rights abuses in El Salvador.
20 Complaint ¶¶ 4, and 11-13. Saravia was an active member of these death squads. *Id.*

21 **2. Archbishop Romero: A Voice For Peace in El Salvador.**

22 Archbishop Romero was appointed Metropolitan Archbishop of San Salvador on or
23 about February 3, 1977. This was a period of growing political tension in El Salvador in
24 which the military and security forces, and associated paramilitary groups, began engaging
25 in a pattern of massive human rights abuses. By the early 1980’s, as many as 1,000 civilians
26 were being murdered each month. Complaint ¶ 7.

27 During his tenure as Archbishop, Romero became an outspoken critic of the
28 increasing human rights abuses being committed by the Salvadoran armed forces. His

1 weekly homilies, broadcast nationally by radio, regularly exposed grave human rights
2 violations committed by Salvadoran military and security forces. These weekly sermons
3 captivated the Salvadoran people, and Archbishop Romero quickly became the most
4 prominent figure in the struggle for human rights in El Salvador. Archbishop Romero was
5 widely viewed as the voice of the oppressed as he advocated for the interests of the
6 Salvadoran poor and those victimized or affected by the violence being committed by the
7 armed forces. Complaint ¶ 8.

8 As a result, the Salvadoran military and security forces came to perceive Archbishop
9 Romero as a threat. He received death threats throughout the winter of 1979 and early
10 1980. On March 10, 1980, a briefcase containing a bomb was found behind the pulpit of
11 the church at which Archbishop Romero had said mass the day before. The mass had been
12 held on behalf of Christian Democratic Party leader and Chief State Counsel Mario Zamora,
13 who had been murdered at his home shortly after the FAN publicly accused Zamora of
14 being a member of “subversive” groups. Complaint ¶ 9.

15 On March 23, 1980, Archbishop Romero delivered a sermon telling soldiers, “In the
16 name of God, in the name of this suffering people whose cry rises to heaven more loudly
17 each day, I implore you, I beg you, I order you: Stop the repression.” The next day
18 Archbishop Romero was killed by a sniper’s bullet while performing mass in the Chapel of
19 the Hospital of Divine Providence. No person has been criminally prosecuted for this
20 politically-motivated and state-sponsored assassination. Complaint ¶ 10.

21 **3. Major D’Aubuisson’s Death Squads.**

22 Following a 1979 *coup d’etat* led by reformist junior officers in the Salvadoran
23 armed forces, a number of officers identified with the Salvadoran far right resigned from the
24 military and security forces. These officers included Major D’Aubuisson and Defendant
25 Saravia. Prior to leaving the Salvadoran armed forces in 1979, D’Aubuisson held a high
26 position in ANSESAL, the Salvadoran national intelligence agency which coordinated with
27 intelligence units in all branches of the Salvadoran military and security forces and
28 conducted surveillance against Salvadoran civilians. Upon his departure, D’Aubuisson,

1 with the apparent permission of active military officers, took extensive ANSESAL
2 intelligence files including investigative files on thousands of Salvadoran civilians.
3 Complaint ¶ 11.

4 Following his departure from official military duty, and at the direction of and/or
5 with the financial and logistical support of the Salvadoran armed forces and far right
6 Salvadoran civilians inside and outside El Salvador, Major D’Aubuisson organized and
7 began to lead a network of paramilitary groups or cells composed of then-active and former
8 military officers and civilians dedicated to carrying out acts of political violence. At the
9 direction of and/or with the financial and logistical support of the Salvadoran armed forces
10 and far right Salvadoran civilians inside and outside El Salvador, D’Aubuisson
11 simultaneously sought to create a public facade for these violent activities through a far
12 right political movement under the banner of the FAN and, later, the ARENA party.

13 Complaint ¶ 12.

14 Paramilitary groups organized by D’Aubuisson, known as “escuadrones de la
15 muerte,” or “death squads,” participated in a widespread and systematic assault against
16 Salvadoran civilians in conjunction with the Salvadoran armed and security forces that
17 included intimidation, assault, abduction, torture, summary killings, and disappearances.
18 These groups targeted individuals perceived as members or sympathizers of moderate and
19 left wing political parties or guerrilla organizations, and groups and individuals who
20 focused on the needs of farmers, workers, and the poor. Victims included labor activists,
21 students, members of the clergy, farmworkers, villages in conflict zones, and leaders,
22 officials, and members of various political parties, including the Christian Democratic
23 Party, the Social Democratic Party and the Democratic Revolutionary Front.

24 Complaint ¶ 13.

25 In or about early 1980, Major D’Aubuisson, Defendant Saravia and other far right
26 military and civilian members of a group close to Major D’Aubuisson met to discuss and
27 plan the executions of Archbishop Romero and other prominent civilian leaders perceived
28 to be opponents of the Salvadoran armed forces. Defendant Saravia made arrangements to

1 obtain weapons, vehicles, and other material necessary for these actions. Complaint ¶ 14.

2 **4. Assassination of Archbishop Romero.**

3 On or about March 24, 1980, Major D'Aubuisson, Defendant Saravia and others
4 gathered at the home of a D'Aubuisson supporter in San Salvador and decided to carry out
5 the assassination. Complaint ¶ 15.

6 Defendant Saravia coordinated the group. Among other things, he ordered his
7 personal driver to take a car and transport the assassin to the murder site by following
8 another car to the Chapel of the Hospital of Divine Providence. After the assassin shot and
9 killed Archbishop Romero, Saravia's driver returned the assassin to the home from which
10 they had departed earlier in the day. Upon returning to that location, the assassin informed
11 Saravia, who was present, that the mission had been accomplished. Saravia then took the
12 assassin inside the house. Later, Saravia notified Major D'Aubuisson that the group's plan
13 to assassinate Archbishop Romero had been accomplished. Saravia also delivered a sum of
14 money, which earlier had been provided to him to pay the assassin, to the assassin or his
15 agent. Complaint ¶¶ 16, 17.

16 In furtherance of the conspirators' plan, design, and scheme to assassinate
17 Archbishop Romero, National Police and other government officials charged with
18 investigating the assassination failed to conduct a timely investigation, failed to collect and
19 preserve material evidence, and failed to identify witnesses or take their statements. Just
20 three days after the assassination, the investigating judge to whom the Romero case had
21 been assigned, Judge Atilio Ramirez Amaya, was forced to flee the country after an attempt
22 was made to kill him in his own home. Additionally, a witness, who had entered the Chapel
23 of the Hospital of Divine Providence just after the assassination and witnessed the
24 assassin's flight, was kidnapped and remains disappeared. Complaint ¶ 18.

25 **5. Investigations Into The Assassination Of Archbishop Romero.**

26 The United Nations Commission on the Truth for El Salvador and the Inter-
27 American Commission on Human Rights conducted separate extensive investigations into
28 the assassination of Archbishop Romero. The U.N. Truth Commission found that Saravia

1 was “actively involved in planning and carrying out the assassination” because he was in
2 charge of the operation and was involved in paying the assassin’s fees. The Inter-American
3 Commission concluded that the State of El Salvador violated Archbishop Romero’s right to
4 life. In fact, the Inter-American Commission found that, “In 1980 and 1981, death squad
5 operations were frequently coordinated with the Armed Forces. The clandestine nature of
6 their actions made it possible to cover up the state responsibility and to create an ambience
7 of total impunity for the killers.” Furthermore, “the death squads incorporated active
8 members of the state security forces in their ranks and had the support of the corresponding
9 official institutions.” The Commissions both concluded that the Salvadoran government
10 conspired to cover up responsibility for the assassination. Complaint ¶ 19.

11 Defendant Saravia left El Salvador in or about 1985 and first arrived in the United
12 States in or about 1985 or 1986. In 1987, a Salvadoran court initiated a criminal proceeding
13 against Saravia for his alleged role in Archbishop Romero’s assassination and requested his
14 extradition from the United States. Saravia was detained in south Florida on immigration
15 grounds while the extradition proceeding remained pending. In 1988, under questionable
16 circumstances, the Supreme Court of El Salvador ruled that the arrest order and extradition
17 request for Saravia were invalid. The U.N. Truth Commission found that the Salvadoran
18 Supreme Court “played an active role that served to hinder the extradition from the United
19 States and later imprisonment of former Capt. Saravia in El Salvador.” After the extradition
20 request was withdrawn, Saravia posted bond and was freed from detention. He has lived
21 freely in the United States since that time. Complaint ¶ 20.

22 No person has ever been held criminally responsible, let alone prosecuted, for
23 Archbishop Romero’s assassination. Complaint ¶ 21.

24 **6. Democracy Begins To Take Hold in El Salvador.**

25 Following U.N.-supervised elections held pursuant to the Salvadoran Peace Accords,
26 the first democratically-elected government took office in El Salvador on June 1, 1994.
27 Prior to that time, the military and security forces held enormous power, and any person
28 who leveled allegations against active or former members of the military not only risked

1 reprisal but also the futility of confronting an institution that consistently and vigorously
2 denied that human rights abuses were committed by its members and obfuscated
3 investigations into those abuses. Even after the Salvadoran security forces were disbanded
4 pursuant to the Peace Accords, Salvadoran courts were still unable or unwilling to hear
5 most claims for human rights violations against individuals for alleged involvement in
6 financing, ordering, assisting, or carrying out death squad killings, including the
7 assassination of Archbishop Romero. Even today, survivors of torture and relatives of
8 killings committed by Salvadoran death squads and the armed forces as far back as the
9 1970's and early 1980's have declined to bring claims in El Salvador or elsewhere against
10 the individuals responsible for fear of violent reprisals. Complaint ¶ 22.

11 **III. ARGUMENT**

12 **A. Defendant Has Been Noted In Default; Plaintiff Is Therefore Entitled To** 13 **Relief On All Claims.**

14 It is well established that upon a party's failure to plead or otherwise defend an
15 action in federal court, the party is deemed to admit every well-plead allegation of the
16 complaint except those relating to damages. *Bender Shipbuilding & Repair Co., Inc. v. The*
17 *Vessel Drive Ocean V.*, 123 F. Supp. 2d 1201, 1208 (S.D. Cal. 1998); *see also United*
18 *States v. Woody*, 1999 U.S. Dist. LEXIS 9088 (E.D. Cal., June 2, 1999). In other words, the
19 entry of default conclusively establishes a defendant's liability. *Adriana Int'l Corp. v.*
20 *Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990); *Bender Shipbuilding & Repair*, 123 F. Supp
21 2d at 1208; *Taylor Made Golf. Co., Inc. v. Carsten Sports, Ltd.*, 175 F.R.D. 658, 661 (S.D.
22 Cal. 1997); *United States v. Wight*, 2001 U.S. Dist. LEXIS 22785 (E.D. Cal., Dec. 14,
23 2001). Here, the facts establish plaintiff's claims of extrajudicial killing in violation of the
24 TVPA and extrajudicial killing and crimes against humanity in violation of the ATCA.

25 Where the amount claimed is not for a sum certain, judgment is to be entered by the
26 Court. Fed. R. Civ. P. 55(b). Plaintiff's claim here is not for a sum certain; plaintiff is
27 therefore entitled to judgment by the Court only upon proof of its damages. *Id.* Plaintiff
28 will present such proof to the Court at a hearing previously scheduled for August 24-27,

1 2004.¹

2 **B. Plaintiff Is Entitled To Relief For Its Claims Under The TVPA and**
3 **ATCA.**

4 **1. Defendant Is Liable Under The TVPA.**

5 The TVPA “‘establish[es] an unambiguous and modern basis for’ federal claims of
6 torture and extrajudicial killing.” *Sosa v. Alvarez-Machain*, __ U.S. __, 2004 WL 1439873,
7 *21 (June 29, 2004) (citing H.R. Rep. No. 102-367, pt. 1, p.3 (1991) (modification in
8 original)). Under the TVPA,

9 2.(a) An individual who, under actual or apparent authority, or color of law, of
10 any foreign nation –

11 . . .

12 (2) subjects an individual to an extrajudicial killing shall, in a civil action, be
13 liable for damages to the individual’s legal representative, or to any person
14 who may be a claimant in an action for wrongful death.

15 28 U.S.C. § 1350 (note 2). Extrajudicial killing is defined as “a deliberate killing not
16 authorized by a previous judgment pronounced by a regularly constituted court affording all
17 the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* at
18 § 3(a). The TVPA also requires that a plaintiff exhaust “adequate and available” local
19 remedies, and provides a ten-year statute of limitations. *Id.* at § 2(b) and (c).

20 Plaintiff has established defendant Saravia’s liability under the TVPA.² Plaintiff
21 alleged that Saravia played a significant role in Archbishop Romero’s assassination, which
22 was plainly not authorized by any previous judgment of a court. The default establishes the
23 following facts: Saravia “coordinated the group [and] . . . ordered his personal driver to
24 take a car and transport the assassin to the murder site by following another car to the
25 Chapel of the Hospital of Divine Providence.” After the assassination, Saravia “took the

26 ¹ Plaintiff also intends to present evidence corroborating the facts supporting liability
27 alleged in the Complaint.

28 ² [UNDER SEAL]

1 assassin inside the house[,] and [I]ater, Saravia notified Major D’Aubuisson that the group’s
2 plan to assassinate Archbishop Romero had been accomplished. Saravia also delivered a
3 sum of money, which earlier had been provided to him to pay the assassin, to the assassin or
4 his agent.” Complaint ¶¶ 15, 16. Saravia’s liability for the assassination was also
5 recognized by the United Nations Commission on the Truth For El Salvador. *Id.* ¶ 19.

6 Although Saravia was not the shooter, his role in coordinating and planning the
7 assassination is sufficient to establish liability under the TVPA. In *Tachiona v. Mugabe*,
8 216 F. Supp. 2d 262, 270 (S.D.N.Y. 2002), the court found members of Zimbabwe’s ruling
9 party liable under the TVPA for “organiz[ing] targeted violence against political opponents
10 and their families and supporters, assassinations and assassination attempts, kidnappings,
11 tortures, rapes, beatings, mass destruction of property, and mob riots in a consistent and
12 focused campaign of terror designed to crush political opposition to ZANU-PF.” Other
13 cases have found defendants liable for authorizing or directing torture or killings. *See, e.g.*,
14 *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). Defendant Saravia’s role in directing,
15 organizing and facilitating the assassination of Archbishop Romero is sufficient to establish
16 liability under the TVPA.

17 Defendant also is liable for aiding and abetting in the commission of the extrajudicial
18 killing of Archbishop Romero. As explained by the Court in *Mehinovic v. Vuckovic*, 198 F.
19 Supp. 2d 1322 (N.D. Ga. 2002), the TVPA encompasses the liability of accomplices:

20 United States courts have recognized that principles of accomplice liability
21 apply under the ATCA to those who assist others in the commission of torts
22 that violate customary international law. Similarly, the Senate report on the
23 TVPA notes that that statute is intended to apply to those who “ordered,
24 abetted, or assisted” in the violation.

25 Principles of accomplice liability are well-established under international law.
26 Relevant international conventions explicitly provide that those who assist in
27 the commission of acts prohibited by international law may be held
28 individually responsible.

[Under the International Criminal Tribunal for the Former Yugoslavia], it is
sufficient that the accomplice knows that his or her actions will assist the
perpetrator in the commission of the crime.

Id. at 1355-56 (footnotes omitted); *see also Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL

1 319887 (S.D.N.Y. 2002) (“the Court finds that the language and legislative history of the
2 TVPA supports liability for aiders and abettors of torture and extrajudicial killings.”).

3 Plaintiff has alleged, consistent with the TVPA, that defendant Saravia performed his
4 major role in the assassination of Archbishop Romero “under actual or apparent authority,
5 or color of law.” *See Kadic*, 70 F.3d at 245 (plaintiff “must establish some governmental
6 involvement in the torture or killing to prove a claim”) (quoting H.R. Rep. No. 102-367, at
7 5 (1991)). Here, plaintiff alleged that the death squad responsible for planning and carrying
8 out the assassination of Archbishop Romero operated “with the financial and logistical
9 support of the Salvadoran armed forces and far right Salvadoran civilians inside and outside
10 El Salvador.” Complaint ¶¶ 12-14. Citing the Report of the Inter-American Commission,
11 plaintiff also alleged that, “In 1980 and 1981, death squad operations were frequently
12 coordinated with the Armed Forces. The clandestine nature of their actions made it possible
13 to cover up the state responsibility and to create an ambience of total impunity for the
14 killers.” Furthermore, “the death squads incorporated active members of the state security
15 forces in their ranks and had the support of the corresponding official institutions.”
16 Complaint ¶ 19. Both the Inter-American Commission and the Truth Commission
17 concluded that “the Salvadoran government conspired to cover up responsibility for the
18 assassination.” *Id.* These facts are sufficient to establish that defendant Saravia acted under
19 “actual or apparent authority, or under color of law” in carrying out the assassination of
20 Archbishop Romero.

21 **a. Exhaustion Of Remedies.**

22 When foreign remedies are “unobtainable, ineffective, inadequate, or obviously
23 futile,” exhaustion of remedies is generally not required. *Xuncax v. Gramajo*, 886 F. Supp.
24 162, 178 (D. Mass. 1995). Plaintiff has established that no legal remedy was available in El
25 Salvador. Plaintiff plead that in 1987, a Salvadoran court initiated a criminal proceeding
26 against Saravia for his alleged role in Archbishop Romero’s assassination and requested his
27 extradition from the United States. Then, “[i]n 1988, under questionable circumstances, the
28 Supreme Court of El Salvador ruled that the arrest order and extradition request for Saravia

1 were invalid. The U.N. Truth Commission found that the Salvadoran Supreme Court
2 ‘played an active role that served to hinder the extradition from the United States and later
3 imprisonment of former Capt. Saravia in El Salvador.’” Complaint ¶ 20. Plaintiff also pled
4 that “Even after the Salvadoran security forces were disbanded pursuant to the Peace
5 Accords, Salvadoran courts were still unable or unwilling to hear most claims for human
6 rights violations against individuals for alleged involvement in financing, ordering,
7 assisting, or carrying out death squad killings, including the assassination of Archbishop
8 Romero. Even today, survivors of torture and relatives of killings committed by Salvadoran
9 death squads and the armed forces as far back as the 1970’s and early 1980’s have declined
10 to bring claims in El Salvador or elsewhere against the individuals responsible for fear of
11 violent reprisals.” Complaint ¶ 22.

12 In addition, defendant Saravia likely is covered by the amnesty law that El Salvador
13 adopted after the conclusion of the Civil War, and thus appears to be immune to criminal
14 prosecution even if extradited back to El Salvador today. And under Salvadoran law, civil
15 claims of this kind can be asserted only in conjunction with a criminal case. *See*
16 Declaration of Josefa Noya Novais in Support of Plaintiff’s Application for Default
17 Judgment (“Novais Decl.,” an English translation of which is set forth at van Aelstyn Decl.,
18 Exhibit C) at ¶¶ 2-6 and 14. These facts are sufficient to establish that plaintiff has met any
19 requirement to exhaust local remedies.

20 **b. Statute Of Limitations.**

21 Although the statute of limitations under the TVPA is 10 years, it was tolled here
22 because a plaintiff could not safely bring this action. This is underscored by the fact that
23 plaintiff has brought this claim as J. Doe, and continues to fear reprisals. The inability to
24 bring a claim as a result of a fear of retaliation is sufficient to toll the limitation period under
25 the TVPA. In *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987)
26 (reconsideration granted in part by *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal.
27 1988) on other grounds; the *Forti* decisions’ analogy to 42 U.S.C. § 1983 superseded by
28 TVPA as stated in *Papa v. U.S.*, 281 F.3d 1004, 1012 (9th Cir. 2002)) the court recognized

1 the appropriateness of equitable tolling “where extraordinary circumstances outside
2 plaintiffs’ control make it impossible for plaintiff to timely assert his claim.” *See also*
3 *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001); *Doe v.*
4 *Unocal Corp.*, 963 F. Supp. 880, 897 (C.D. Cal. 1997) (opinion vacated on other grounds
5 by *Doe v. Unocal Corp.*, ---F.3d ---, 2003 WL 359787 (9th Cir. Feb. 14, 2003)). By liberally
6 applying the equitable tolling doctrine to claims by victims of human rights violations, the
7 federal courts have created a flexible and expansive doctrine that “promote[s] the policy of
8 providing a forum for claims of violations of internationally recognized human rights.”
9 *Forti*, 672 F. Supp. at 1548.

10 In light of this standard, the facts alleged in the Complaint are sufficient to toll the
11 statute of limitations. Following U.N.-supervised elections held pursuant to the Salvadoran
12 Peace Accords, the first democratically-elected government took office in El Salvador on
13 June 1, 1994. Even after the Salvadoran security forces were disbanded in accordance with
14 the Peace Accords, Salvadoran courts still were unable or unwilling to hear most claims for
15 human rights violations against individuals for alleged involvement in financing, ordering
16 assisting, or carrying out death squad killings, including that of the assassination of
17 Archbishop Romero. Even today, survivors of torture and relatives of the victims of
18 killings committed by Salvadoran death squads and the armed forces as far back as the
19 1970's and early 1980's have declined to bring claims in El Salvador or elsewhere against
20 the individuals for fear of violent reprisals. Complaint ¶¶ 22.

21 **2. Plaintiff Is Entitled To Significant Damages Under The TVPA.**

22 Courts have awarded significant compensatory and punitive damages for
23 extrajudicial killing under the TVPA. *See Tachiona v. Mugabe*, 216 F. Supp. 2d at 267-68.
24 In that case, the Court awarded \$2,500,000 in compensatory and \$5,000,000 in punitive
25 damage for extrajudicial killing. In reaching that decision, the Court cited the following
26 award of other Courts: *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496,
27 at *3 (S.D.N.Y. Apr. 9, 1996) (awarding compensatory damages including \$500,000 in pain
28 and suffering and awarding \$1,000,000 in punitive damages to each relative of a victim and

1 \$5,000,000 to each victim for torture and murder under the TVPA and ATCA); *Mehinovic*,
2 198 F. Supp. 2d at 1358- 60 (awarding \$10,000,000 in compensatory and \$25,000,000 in
3 punitive damages to each victim for torture, cruel and inhumane treatment, arbitrary
4 detention, violations of the law of war and crimes against humanity under both the TVPA
5 and ATCA; as well as assault and battery, false imprisonment, intentional infliction of
6 emotional distress and conspiracy under Georgia law); *Xuncax*, 886 F. Supp. at 198-200
7 (awarding \$3,000,000 in compensatory damages to one victim but declining to award
8 punitive damages because the torture and murders had occurred prior to the passage of the
9 TVPA).

10 Plaintiff will present evidence at the hearing on its motion for default judgment in
11 support of the request for damages, which are in the range of the cases cited above.³

12 **3. Defendant Is Liable Under The ATCA.**

13 **a. *Sosa v. Alvarez-Machain.***

14 Until very recently, the Ninth Circuit’s controlling pronouncement on the ATCA was
15 *Alvarez-Machain v. U.S.*, 331 F.3d 604 (9th Cir. 2003) (*en banc*). As Plaintiff advised this
16 Court at the case management conference, the Supreme Court granted certiorari in that case.
17 On June 29, 2004, the Court overturned the Ninth Circuit’s decision finding a valid cause of
18 action for plaintiff Alvarez-Machain. However, the Court unanimously held that the ATCA
19 provides jurisdiction over a “modest number of international law violations with a potential
20 for personal liability.” *Sosa*, 2004 WL 1439873 at *18.

21 The ATCA states:

22 The district courts shall have original jurisdiction of any civil action by an

23
24 ³ The Court in *Xuncax*, 886 F. Supp. at 200, refused to award punitive damages
25 under the TVPA based on conduct by the defendant that occurred prior to the passage of the
26 statute in 1991. Citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the *Xuncax*
27 Court noted that, “Retroactive imposition of punitive damages would raise a serious
28 constitutional question.” Because plaintiff here also brings claims for extrajudicial killing
and crimes against humanity under the ATCA, even if *Xuncax* is correct, the Court may
award punitive damages under the ATCA. See *Kadic v. Karadzic* 70 F.3d 232, 241 (2d Cir.
1995) (“[t]he scope of the Alien Tort Act remains undiminished by enactment of the Torture
Victim Act.”).

1 alien for a tort only, committed in violation of the law of nations or a treaty of
2 the United States.

3 28 U.S.C. § 1350.

4 When the ATCA was enacted in 1789, the international law violations recognized
5 under the common law included violation of safe conducts, infringement of the rights of
6 ambassadors, and piracy. A majority of the Court found, however, that the “international
7 law violations” recognized by federal common law did not remain frozen in 1789. “We
8 assume, too, that no development in the two centuries from the enactment of § 1350 to the
9 birth of the modern line of cases beginning with *Filartiga v. Pena-Irala* has categorically
10 precluded federal courts from recognizing a claim under the law of nations as an element of
11 common law; Congress has not in any relevant way amended § 1350 or limited civil
12 common law power by another statute.” *Sosa*, 2004 WL 1439873 at *19 (citation omitted).

13 In *Sosa*, the U.S. Drug Enforcement Agency (“DEA”) had approved the abduction of
14 plaintiff Alvarez-Machain from Mexico in order to stand trial in the United States for a
15 DEA agent’s torture and murder. The Court rejected Alvarez-Machain’s claim for arbitrary
16 arrest brought under the ATCA because “a single illegal detention . . . violates no norm of
17 customary international law so well defined as to support the creation of a federal remedy.”
18 *Sosa*, 2004 WL 1439873 at *25.

19 The *Sosa* Court held that claims recognized under the ATCA should not be those
20 “for violations of any international law norm with less definite content and acceptance
21 among civilized nations than the historical paradigms familiar when § 1350 was enacted.”
22 The majority then cited with approval cases recognizing such specific claims:

23 See *Filartiga, supra*, at 890 (“[F]or purposes of civil liability, the torturer has
24 become — like the pirate and slave trader before him — *hostis humani*
25 *generis*, an enemy of all mankind”); *Tel-Oren, supra*, at 781 (Edwards, J.,
26 concurring) (suggesting that the “limits of section 1350’s reach” be defined by
27 “a handful of heinous actions — each of which violates definable, universal
28 and obligatory norms”); see also *In re Estate of Marcos Human Rights*
Litigation, 25 F.3d 1467, 1475 (CA9 1994) (“Actionable violations of
international law must be of a norm that is specific, universal, and
obligatory”).

Sosa, 2004 WL 1439873 at *23 (citations in original).

Thus, the *Sosa* Court recognized that specific, universal, and obligatory international

1 norms shall be recognized under federal common law and are made actionable by the
2 ATCA. As described below, both extrajudicial killing and crimes against humanity meet
3 that standard.

4 **b. Extrajudicial Killing.**

5 There can be little doubt that under international law, extrajudicial killing is a norm
6 that is “specific, universal, and obligatory.” It plainly meets the requirements of *Sosa* to be
7 recognized under federal law. The Ninth Circuit has held that “[t]he prohibition against
8 summary execution . . . is . . . universal, definable, and obligatory.” *In re Estate of*
9 *Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994 (citing *Forti v.*
10 *Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), *amended* 694 F. Supp. at 710-
11 11). The *Xuncax* Court, relying in part on “[a]n affidavit signed by twenty-seven widely
12 respected scholars of international law [that] attests that every instrument or agreement that
13 has attempted to define the scope of international human rights has ‘recognized a right to
14 life coupled with a right to due process to protect that right,’” concluded that, “[a]s with
15 official torture, the practices of summary execution, ‘disappearance’ and arbitrary detention
16 have been met with universal condemnation and opprobrium.” *Xuncax*, 886 F. Supp. at 185
17 (citing *Forti*, 694 F. Supp. at 711).

18 Furthermore, as discussed above, Congress’ enactment of the TVPA, singling out
19 torture and extrajudicial killing, further confirms that extrajudicial killing provides a cause
20 of action under federal law. *Sosa*, 2004 WL 1439873 at *21, (“a clear mandate appears in
21 the Torture Victim Protection Act of 1991 . . . providing authority that ‘establish[es] an
22 unambiguous and modern basis for’ federal claims of torture and extrajudicial killing . . .”).

23 Plaintiff has established that defendant Saravia is liable for the extrajudicial killing of
24 Archbishop Romero. Complaint ¶¶ 15, 16.

25 **c. Crimes Against Humanity.**

26 Crimes against humanity also meets the *Sosa* standard for recognition as a cause of
27 action under federal law. In *Estate of Winston Cabello v. Fernandez-Larios*, 157 F. Supp.
28 2d 1345 (S.D. Fla. 2001), the Court found “the ruling of the Nuremberg Tribunal

1 memorialized the recognition of ‘crimes against humanity’ as customary international law.”
2 *Id.* at 1360-61 (citing *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C.
3 Cir.1994)) (“The Court thus finds that U.S.-adoption of [various international sources of
4 law] affirms its legal obligation to condemning crimes against humanity.”). Following a
5 jury trial in this case, the defendant was found liable for crimes against humanity. *Estate of*
6 *Cabello v. Fernandez-Larios*, No. 99-0528-CIV-LENARD (Oct. 31, 2003) (a copy of this
7 order is attached as Exhibit D to the van Aelstyn Declaration); *see also Wiwa v. Royal*
8 *Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, *27 (S.D.N.Y. 2002) (where plaintiffs
9 alleged violations of “the international norm prohibiting crimes against humanity — a norm
10 that is customary, obligatory, and well-defined in international jurisprudence.”); *Mehinovic*
11 *v. Vuckovic*, 198 F. Supp. 2d at 1352; *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986)
12 (“crimes against humanity, such as genocide, violate international law”).

13 Crimes against humanity are defined as “any of certain enumerated acts that are
14 prohibited by international law ‘when committed as part of a widespread or systematic
15 attack directed against any civilian population, with knowledge of the attack.’ These acts
16 include murder” *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1353 (citing the Rome
17 Statute of the International Criminal Court, art. 7). Plaintiff has established that defendant
18 Saravia is liable for committing crimes against humanity. Complaint ¶¶ 13, 15-16.

19 **4. The TVPA Provides Guidance On Standing And Damages Under**
20 **ATCA.**

21 Once a cause of action based on an international norms like extrajudicial killing and
22 crimes against humanity have been recognized under federal law, courts must still
23 determine various subsidiary issues like statute of limitations, whether a particular plaintiff
24 has standing and the damages to which he or she is entitled. Lower courts have sought to
25 resolve these questions in one of two ways: either by looking to the closest state or federal
26 analogue, or by carrying out a choice of law analysis. Plaintiff submits that the former
27 approach is more appropriate and better reflects the intent of Congress, but Plaintiff here
28 provides the framework for a choice of laws analysis as well.

1 In *Papa v. U.S.*, 281 F.3d 1004, 1012 (9th Cir. 2002), the Ninth Circuit “borrowed”
2 the TVPA’s statute of limitations for application to the ATCA:

3 The ATCA specifies no statute of limitations. In such situations, courts apply
4 the limitations period provided by the jurisdiction in which they sit unless ‘a
5 rule from elsewhere in federal law clearly provides a closer analogy than
available state statutes, and when the federal policies at stake...make that rule
a significantly more appropriate vehicle for interstitial lawmaking.’

6 *Id.* at 1011-12 (citations omitted). Other Courts have done the same. *See, e.g., Xuncax*, 886
7 F. Supp. at 191.

8 To the extent that matters such as standing and damages are undefined under the
9 ATCA, it is appropriate for this Court to look to the TVPA and decisional law under that
10 statute. *See Tachiona*, 234 F. Supp. 2d at 422-23 (unnecessary for Court in connection with
11 extrajudicial killing claim under ATCA to conduct and adhere to strict choice of law
12 analysis).

13 5. Salvadoran Law Is Consistent With This Result.

14 Other courts have approached the task of filling in the gaps in the ATCA as, instead,
15 a choice of laws issue. The Ninth Circuit in *Alvarez-Machain*, 331 F.3d at 632, stated: “In
16 addressing the matter of damages related to Sosa’s liability under the ATCA, we must first
17 determine the applicable substantive law.” The Court then undertook a “traditional choice
18 of law analysis.” *Id.* at 633. The Supreme Court did not reach this issue in its analysis, as it
19 held that the plaintiff had not established a violation of the ATCA. Accordingly, the Ninth
20 Circuit’s analysis is *dicta*.⁴ Because the cause of action for international law violations is
21

22 ⁴ In *Alvarez-Machain*, 331 F. 3d at 633, n.16, the Ninth Circuit indicated that a
23 choice of law analysis was compelled by the Supreme Court’s decision in *Zicherman v.*
24 *Korean Air Lines Co.*, 516 U.S. 217 (1996). In the *Zicherman* case, Justice Scalia, writing
25 for the Court, held that the Warsaw Convention does not “empower us to develop some
26 common-law rule — under cover of general admiralty law or otherwise — that will
27 supersede the normal federal disposition.” *Id.* at 229. The Supreme Court in *Sosa v.*
28 *Alvarez-Machain*, however, did in fact find that federal common law could expand to
include those international law norms that had as much “definite content and acceptance
among civilized nations [as] the historical paradigms familiar when § 1350 was enacted.”
Sosa, 2004 WL 1439873 at *23. In light of that finding, the Ninth Circuit’s basis for
conducting a choice of law analysis in an ATCA case is questionable. Plaintiff submits that
the approach adopted in *Papa v. U.S.* is more appropriate. *See* Section III.B.4, *supra*.

1 provided for under the common law, questions of damages and standing should be resolved
2 by looking to the closest analogues to the ATCA existing under state or federal law. In the
3 Ninth Circuit, the closest analogue is the TVPA. *Papa*, 281 F.3d at 1012, and federal
4 damages law has developed under the TVPA. *See*, section III.B.4, *supra*.

5 If a choice of law analysis is necessary, this Court may look to the law of El
6 Salvador, but only to the extent it does not frustrate the very purpose of the ATCA. *See*
7 *Tachiona*, 234 F. Supp. 2d at 419 (choice of law determination should not compel
8 “dispositive application of foreign law where the municipal rule of decision may conflict
9 with federal law or international standards”); *see also Filartiga v. Pena-Irala*, 577 F. Supp.
10 860, 863-64 (E.N.Y. 1984) (“the court should consider the interests of Paraguay to the
11 extent they do not inhibit the appropriate enforcement of the applicable international law or
12 conflict with the public policy of the United States”). In the event the Court decides to
13 look to the law of El Salvador, that law does support awards of “moral damages,” which are
14 tantamount to punitive damages under U.S. law. *See Novais Decl.* at ¶¶ 19-21.

15 **6. Plaintiff Is Entitled To Damages Under The ATCA.**

16 Plaintiff is entitled to significant compensatory and punitive damages for violations
17 of the ATCA, including extrajudicial killing and crimes against humanity. Previous courts
18 have awarded the following:

- 19 • *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (awarding \$5
20 million each in punitive damages to the father and sister of Joelito Filartiga,
21 who was tortured to death by Paraguayan officials; court also awarded
22 \$350,000 in compensatory damages);
- 23 • *Xuncax v. Gramajo*, 886 F. Supp. 162, 198, (D. Mass. 1995) (awarding \$7
24 million in compensatory and punitive damages to each of the three plaintiffs
25 asserting a claim for extrajudicial killing);
- 26 • *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496,
27 (S.D.N.Y., Apr. 9, 1996) (awarding between \$10 million and \$35 million in
28 compensatory and punitive damages to each plaintiff suing for the

- 1 extrajudicial killing of a number of relatives during massacres in Rwanda);
- 2 • *Trajano v. Marcos (In re: Estate of Ferdinand E. Marcos Human Rights*
 - 3 *Litigation)*, 978 F.2d 493 (9th Cir. 1992) (awarding \$4.16 million in
 - 4 compensatory and punitive damages and attorneys fees for torture and
 - 5 extrajudicial killing);
 - 6 • *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (awarding
 - 7 undifferentiated damages under both the TVPA and the ATCA in the amount
 - 8 of \$7.5 million in compensatory and punitive damages for each of three
 - 9 claims of extrajudicial killing); and
 - 10 • *Estate of Winston Cabello v. Fernandez-Larios*, No. 99-0528-CIV-LENARD
 - 11 (S.D. Fla. Oct. 31, 2003) (following a jury trial, an award of \$1 million was
 - 12 entered in favor of plaintiffs for a claim of crimes against humanity).

13 Plaintiff will present evidence at the August 24-27 hearing on this motion for default
14 judgment to support the claim for damages in this range.

15 **IV. CONCLUSION**

16 For all the foregoing reasons, and based on the evidence to be presented at the
17 August 24-27, 2004 evidentiary hearing previously scheduled by the Court, plaintiff
18 respectfully seeks judgment in an amount to be determined.

19 Dated: July 27, 2004

HELLER EHRMAN WHITE & McAULIFFE LLP

21 By _____
22 Nicholas W. van Aelstyn

23 Attorneys for Plaintiff
24 J. DOE

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