No. _____

In The
Supreme Court of the United States

NICOLAS CARRANZA,
Petitioner,

v.

ANA CHAVEZ, CECILIA SANTOS, JOSE CALDERON, ERLINDA FRANCO, and DANIEL ALVARADO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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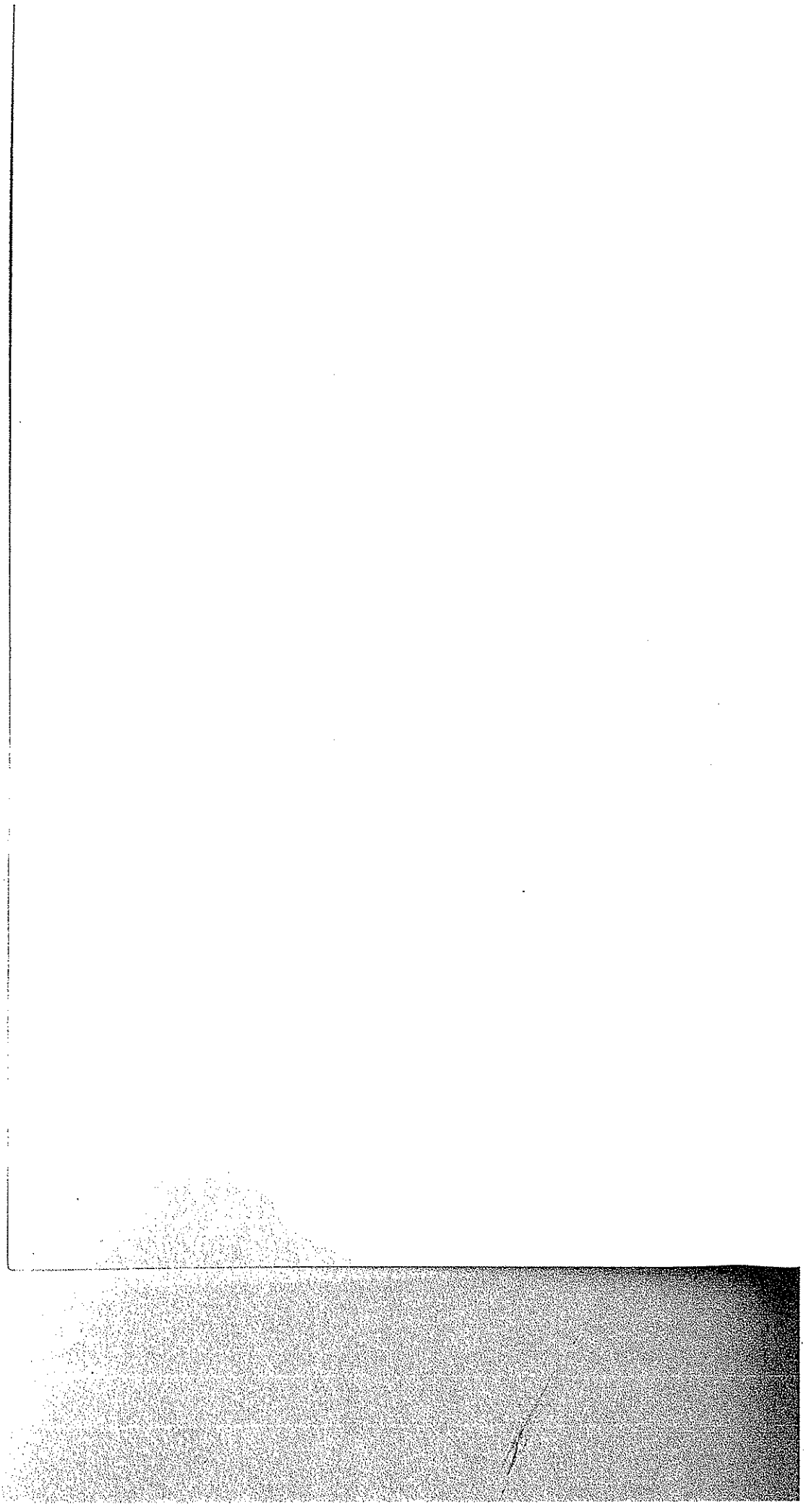
Dated: May 28, 2009

QUESTION PRESENTED

1. Whether a United States Court could or should exercise jurisdiction under the Alien Tort Claims Act, 28 U.S.C. Sec. 1350, and the Torture Victims Protection Act, Note to 28 U.S.C. Sec. 1350, in derogation of El Salvador's Amnesty Law which was enacted for the express purpose of ending El Salvador's civil war, against a defendant covered by the amnesty, for misdeeds alleged to have been committed in El Salvador during the course of that country's civil war.



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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Nicolas Carranza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix ["App."] A) is reported at *Chavez et al. v. Carranza*, 559 F.3d 486

(6th Cir. 2009). The August 15, 2006 opinion of the United States District Court for the Western District of Tennessee (App. B) is unreported. The October 25, 2005 opinion of the United States District Court for the Western District of Tennessee (App. C) is reported at 413 F. Supp. 2d 891 (W.D. Tn. 2005). The October 17, 2005 opinion of the United States District Court for the Western District of Tennessee (App. D) is unreported. The September 30, 2004 opinion of the United States District Court for the Western District of Tennessee (App. E) is reported at 407 F. Supp. 2d 925 (W.D. Tn. 2004).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Alien Tort Claims Act, 28 U.S.C. Sec. 1350 ("ATCA"), The Torture Victims Protection Act, Note to 28 U.S.C. Sec. 1350 ("TVPA"), and the Republic of El Salvador Law of General Amnesty for the Consolidation of Peace, Legislative Decree No. 486, March 20, 1993 ("Amnesty Law"), are set forth in Apps. F, G and H, respectively.

STATEMENT OF THE CASE

El Salvador was beset by civil war from 1980 until 1992. At odds in this country the size of Rhode Island were leftist guerillas united under the Farabundo Marti National Liberation Front ("FMLN") and the government of El Salvador.

The United States Department of State estimates that the war cost El Salvador some 70,000 killed. *Fifteenth Anniversary of the Peace Accords,* Dept. of State Press Statement, January 16, 2007 ("*Anniversary Message*")[1].

The parties were citizens of El Salvador during the period pertinent to this case. Respondents allege various abuses to include torture and murder visited on them or on loved ones by Salvadoran security forces during the course of the war. Petitioner was a Salvadoran Army colonel who served as Sub-Minister to the Minister of Defense from October 1979 until January 1981 and as Director of the Treasury Police from June 1983 until May 1984. Citing the principle of command responsibility, Respondents have claimed against Petitioner under ATCA and TVPA for the alleged actions of subordinates allegedly subject to his command.

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[1] *Available at* http://2001-2009.state.gov/r/pa/prs/ps/2007/78920.htm. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The war ended with the signing in Mexico City of the Agreement of Chapultepec of January 16, 1992. Chapter VI, Section 1, of the agreement, "Political Participation of the FMLN," as translated from the Spanish in which the agreement is written, requires:

> "the adoption of legislative or other measures as are necessary to guarantee to ex-combatants of the FMLN the full exercise of their civil and political rights in order that they be legally reintegrated into the civil, political and institutional life of the country.

This provision led to the passage of the Amnesty Law which, as translated from Spanish, reads in part:

> "In Consideration:
>
> I. That the process of consolidation of peace underway in our country demands the creation of confidence in all of society, toward the end of achieving the reconciliation and reunification of the Salvadoran family by means of legal measures for immediate effect which guarantee to all inhabitants of the republic the full development of their activities in an atmosphere of harmony, respect and confidence for all the social sectors...

> IV. That in order to impel and achieve national reconciliation it is appropriate to convey the grace of full, absolute and unconditional amnesty to all persons who have in any manner participated in crimes occurring prior to January 1, 1992, be they political or common in nature...

App. 110a, 111a.

The amnesty granted by the law was neither unilateral nor a simple concession to the Salvadoran armed forces and their confederates. It was instead the product of a painfully negotiated compromise between all the combatants, which compromise was actively promoted by the United Nations and brokered by the governments of several nations to include the United States. The terms of the compromise, that is to say the Amnesty Law, were sought and agreed to by all the combatants for the purpose of protecting all the combatants as a prerequisite to the national healing necessary for an enduring peace. It bears noting that the Amnesty Law bears the name of Ruben Zamora as a Vice President of the Legislature. Ruben Zamora was a member of the Frente Democratico Revolucionario ("FDR"). *El Salvador: A Country Study*, Washington GPO for the Lib. of Congress, 1988, at "Left-Wing Parties."[2] Until 1987, the FDR was a partner of the FMLN as noted below.

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[2] *Available at* http://memory.loc.gov/frd/cs/svtoc.html. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The criticality of the amnesty to El Salvador's peace is acknowledged in the State Department's statement quoting the United States government representative tasked at the time with ensuring the success of the peace negotiations.

> "That immunity, said [the United States *charge d'affaires* charged with ensuring the success of the peace negotiations, Peter] Romero, 'helped get the country beyond its civil strife and violence and moved it forward'... [I]n light of more recent conflicts where people have argued that it's more important to seek justice than it is to move the country ahead... Romero said his experience from El Salvador 'is that you need to get all the parties to agree' to a peace agreement, and 'one of the key ingredients' for achieving that end is 'if combatants know they will not be prosecuted subsequently for human rights abuses.' Granting such amnesty, said Romero, is not a 'perfect' solution, but does help move a country forward.

El Salvador Called Example to World for Healing Wounds of War, Bureau of International Information Programs, USINFO, January 22, 2007 ("*Example to World*").[3]

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[3] *Available at* http://www.america.gov/st/washfile-english/2007/January/20070122173614lXEneerG0.3538782.html. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The Department of State also acknowledges in its "*Example to World*" statement the "distinctly critical" role of the United States government in the formulation of the peace accords and the Amnesty Law:

> "Former U.S. diplomat Peter Romero, who was *charge d'affaires* at the U.S. Embassy in El Salvador during the Salvadoran peace negotiations, told *USINFO* January 19 that the peace accords and their implementation in El Salvador represented 'multilateralism at its best.'
>
> " 'A four-nation group dubbed 'the Friends of El Salvador' -- Colombia, Venezuela, Spain, and Mexico – plus the United States and the United Nations worked to bring about a comprehensive peace agreement and to ensure its implementation', Romero said.
>
> "Romero said he was dispatched to serve as the U.S. 'unofficial' representative to the peace negotiations, with the United States playing an 'understated' but 'distinctly critical role' for helping to ensure that the Salvadoran government and the FMLN kept to their commitments made in the peace accords. Romero said the United States provided about $270 million per year and other incentives to

> El Salvador to bring about implementation of the accords.

Example to World.

The State Department commends El Salvador's progress as a democracy in the wake of the Amnesty Law, proclaiming 15 years after the peace accords:

> "In this time, El Salvador's transformation has been impressive. With U.S. and U.N. support, the former insurgents are a well established political party. El Salvador is a vibrant and free democracy, and its expanding economy and increasing trade are translating into increased living standards for all Salvadorans. El Salvador's example demonstrates that war torn countries can transition to successful post conflictive societies.

Anniversary Message.

On March 15, the Salvadoran people vindicated the State Department's faith in their democracy by electing as President, Mauricio Funes of the FMLN.

I. Proceedings in this Case.

a. The Trial

The trial before a jury was preceded by Petitioner's motion to dismiss pursuant to the 10 year statute of limitations governing the ATCA and the TVPA on the grounds that the claims filed in December 2003 did not timely address the subject abuses alleged to have occurred in the early 80's. The trial court denied the motion, finding that feared reprisals in El Salvador constituted "extraordinary circumstances" tolling the statute until March 1994 when the first post-war elections were held. App. 99a, 103a.

The trial court allowed Terry Karl, an academic with no military experience, to testify as an expert on the Salvadoran military. Sixth Circuit Joint Appendix ("JA"), Vol. III 598-99, 667-68.

The trial court overruled Petitioner's objection to the admission of a variety of evidence. This included a United States Defense Intelligence Agency report denied by its putative author. Additionally, it included highly graphic photographs of cadavers bereft of any demonstrated connection to Petitioner. App. 41a, 42a.

It was undisputed at trial that the allegations against Petitioner fell within the class of crimes covered by the civil and criminal immunity created by El Salvador's Amnesty Law. App. 87a, 88a. Nonetheless, the trial court refused to recognize immunity for Petitioner Carranza for the reason that

the Amnesty Law, in the trial court's opinion, did not address claims made outside of El Salvador. App. 36a. The trial court reached this decision after refusing to hear the testimony of the only witness, Petitioner's expert Dr. David Escobar Galindo, proffered by any party to explain the provenance and effect of the Amnesty Law. Dr. Galindo is not only a lawyer, but participated in the peace negotiations that produced the Amnesty Law and ended the civil war. JA, Vol. III 770-71. The trial court found that Dr. Galindo's testimony would have comprised a "legal conclusion, and one that an expert may not draw." App. 37a.

b. The Decision of the United States Court of Appeals for the Sixth Circuit

The Sixth Circuit begins by affirming the equitable tolling of the statute of limitations, quoting directly from the legislative history of TVPA to the effect that the statute is tolled while a defendant enjoys "immunity from suit." App. 8a (quoting S. Rep. No. 102-249, at 10-11). Clearly, Congress intended that TVPA would not overbear a foreign amnesty.

Notwithstanding her lack of any military experience, the Sixth Circuit finds Terry Karl's claimed expertise on the Salvadoran military was properly established because "she discusses her credentials as an expert in the politics of Latin America," but specifies none of said credentials or their pertinence to El Salvador as opposed to Latin America, much less to its military. App. 18a, 19a.

The Sixth Circuit demonstrates in other regards an overweening accommodation of Respondents in numerous regards:

> The court recites that "widespread human rights abuses were carried out by the Salvadoran military during the country's civil war..." App. 10a, but at no point says anything about guerilla misdeeds. Significant guerilla abuses, however, are detailed in the Truth Commission Report entered into evidence at the trial (e.g. murders of mayors and other public figures and of unarmed United States military personnel). JA, Vol. IV 1009-36.
>
> Notwithstanding Colonel Brian Bosch's assertion that he did not author a prejudicial report attributed to him, the court somehow finds this does not amount to his disputing "its authenticity." App. 20a.
>
> The court finds highly graphic photographs of cadavers published to the jury "demonstrate that Carranza had notice of the human rights violations committed by his subordinates," notwithstanding the record is silent as to the authors of the subject deaths or of Petitioner's contemporaneous knowledge of the photographs. App. 21a.

The Sixth Circuit speculates that Respondents' claims would be "barred" in El Salvador. App. 14a. However, the Supreme Court of El Salvador has specifically inferred the discretion of Salvadoran courts to waive the immunity of the Amnesty Law in particular cases involving "fundamental human rights." Cases 24-97 and 21-98, Sup. Ct. of El Sal., (Sept. 26, 2000), Sec. VII(2).[4] Rather than exhaust that remedy, Respondents have sought to be accommodated in the more favorable venue of an American court. However, the importance of a Salvadoran remedy should not be dismissed, particularly since the party of the former guerillas, the FMLN, now comprises the largest party in the Salvadoran Legislature and will control the executive branch after the change of government on June 1.[5] The courts of this country, on the other hand, are woefully ill equipped to adjudicate events of nearly 30 years ago in Central America, particularly since most of the people able to elucidate those events from first-hand knowledge are beyond the reach of American courts.

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[4] *Available at* http://www.jurisprudencia.gob.sv/Jindice.htm. Search "constitucional," "inconstitucionalidades," "sentencias definitivas," "2000," and "24-97 ac 21-98." Petitioner requests the Court take judicial notice of the decision pursuant to Fed. R. Evid. 201.

[5] CRS Report RS21655, *El Salvador: Political, Economic, and Social Conditions and U.S. Relations*, "2009 Elections," by Claire Seelke and Peter Meyer, *available at* http://fpc.state.gov/documents/organization/121836.pdf. Petitioner requests the Court take judicial notice of this official publication pursuant to Fed. R. Evid. 201.

The Sixth Circuit affirms the trial court's finding that there is no conflict between El Salvador's Amnesty Law and the ATCA and TVPA, notwithstanding the trial court refused to hear the only evidence proffered on the effect of the foreign statute, the testimony of Petitioner's expert, Dr. Galindo. The Sixth Circuit found simply that "[a]n expert opinion on a question of law is inadmissible." App. 22a. However, the precedent upon which the appellate court relied, *Berry v. City of Detroit*, 25 F.3d 1342, 1346-55 (6th Cir. 1994), concerned an unqualified expert testifying about an ultimate question of liability and had nothing to do with expert testimony on foreign law. In fact, the Sixth Circuit has more than once affirmed the permissibility of expert testimony before a court only to explain a foreign law. *See Johnson v. Ventra Group*, 191 F.3d 732, 742 (6th Cir. 1999); *Tschira v. Willingham*, 135 F.3d 1077, 1084 (6th Cir. 1998).

The Sixth Circuit reviewed the decision of the trial court "not to grant comity to the Salvadoran Amnesty Law for an abuse of discretion." App. 13a. Comity, however, is only one of several analyses under which the Amnesty Law should have been granted full faith and credit by the trial court. The threshold question as to whether the jurisdiction of ATCA and of TVPA encompass the claims at bar is a question of law as would be any subsequent choice of law determination between the Amnesty Law and the statutes subject of the claims. Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The Sixth Circuit, in fact, has specifically held that a threshold finding as to jurisdiction under ATCA is reviewed *de novo*,

Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007), as is a choice of law determination, *Merida Prods. v. Abbott*, 447 F.3d 861, 865 (6th Cir. 2006).

The Sixth Circuit incorrectly gleans from *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993), the notion that comity has no application absent "an actual conflict between the domestic and foreign law," which it describes as a circumstance where a party's compliance with both is impossible. App. 14a. In fact, *Hartford* nowhere so says. *Hilton v. Guyot*, 159 U.S. 113 (1895), from which *Hartford* quotes, imposes no such threshold limitation on considerations of comity, which it describes as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation..." *Id.* at 164. *Hartford* entailed British insurers sued for anticompetitive conduct that "produced substantial effect," 509 U.S. at 796, within the United States, with the consequence that "international comity would not counsel against exercising jurisdiction in the circumstances alleged here." *id.* at 798. As such, *Hartford's* conflict analysis was undertaken in lieu of, not as a prerequisite to, comity considerations. Moreover, *Hartford's* exercise of anti-trust jurisdiction over foreign conduct with substantial domestic repercussions has little relevance to the case at bar wherein the domestic consequences were nil.

The Sixth Circuit dismisses out of hand the pertinence of *F. Hoffmann-LaRoche v. Empagram*, 542 U.S. 155 (2004), because that decision does not specifically entail ATCA or TVPA. App. 15a. *Hoffmann* involves the Foreign Trade Antitrust

Improvements Act ("FTAIA") which excludes from this nation's antitrust jurisdiction "much anticompetitive conduct that causes only foreign injury." *Id.* at 158. While the FTAIA is primarily domestic in its prescriptive focus, the authorities and principles cited in *Hoffmann* restricting extraterritorial prescriptive jurisdiction are by no means limited to the FTAIA. The *Restatement (Third) of Foreign Relations Law of the United States*, on which *Hoffmann* relies, can hardly be said to be so limited.

The Sixth Circuit improvidently looks to *BMW Stores, Inc. v. Peugeot Motors of America*, 860 F. 2d 212 (6th Cir. 1988), for the proposition that a statute has no extraterritorial effect unless it bears a clear indication that it was intended to apply outside the country enacting it. App. 14a. In fact, *BMW* involved no foreign country, but only refused to apply in Ohio a Kentucky law restricting automobile franchises. The *BMW* court simply reasoned that a Kentucky law intended to protect "the citizens of the State of Kentucky" should not be applied to the detriment of a Kentucky franchisee for the sole benefit of an Ohio franchisee. 860 F. 2d at 215. The situation at bar is the converse. Application of the Amnesty Law would benefit El Salvador and its populace as the statute was intended to do, while a failure of such application would have the opposite effect. Moreover, the *BMW* court inquired whether a law revealed an intention to proscribe an extraterritorial act. Proscribing an extraterritorial act is vastly different from proscribing the effect to be given a statute by another sovereign. One sovereign cannot legislate the affairs of another and

any such suggestion in the Amnesty Law – or any law – would be a nullity.

Finally, the Sixth Circuit neglects to consider, or even to mention, this Court's latest ruling on ATCA, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), or most of the prudential concerns delineated therein: the balance of contacts and interests of the states involved, the commitment of the matter to a political branch, and the practical consequences of exercising jurisdiction.

REASONS FOR GRANTING THE PETITION

I. The Prescriptive Jurisdiction of the Alien Tort Claims Act and the Torture Victims Protection Act Does Not Extend to this Case.

The Sixth Circuit's refusal to accord full faith and credit to El Salvador's Amnesty Law constitutes an unwarranted intrusion into the sovereign affairs of another nation. Notwithstanding the Sixth Circuit's offhand dismissal of its relevance, this Court's decision in *F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155 (2004), illustrates clearly the limitations inherent in overseas application of prescriptive jurisdiction.

Hoffmann dealt with FTAIA and Sherman Act claims that included foreign conduct with strictly foreign repercussions. This Court cited the *Restatement (Third) of Foreign Relations Law of the United States* Secs. 403(1) and (2) for the principle that limits the "unreasonable exercise of prescriptive

jurisdiction with respect to a person or activity having connections to another State." Consequently, this Court ruled that the application of our antitrust laws to other nations that have their own regulatory schemes when there is no domestic harm "creates a serious risk of interference with a foreign nation[]..." *Hoffmann*, 542 U.S. at 165.

This Court noted in *Hoffmann* [quoting a petitioner's pleading] that United States courts should not provide a venue "to any foreign suitor... unhappy with its own sovereign's provisions for private anti-trust enforcement..." 542 U.S. at 166. This describes perfectly Respondents, in the context of anti-trust instead of tort, who have failed to exhaust their local remedies as required by Sec. 2(b) of TVPA and presumably by ATCA as well. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, n.21 (2004).

The trial court's decision undermines the very vehicle of El Salvador's transformation from a war torn charnel house to a robust democracy. *Hoffmann* decries an incursion of American anti-trust regulation that diminishes other countries' anti-trust regulation as "legal imperialism." 542 U.S. at 169. How would this Court describe an incursion that jeopardizes another country's peace?

Importantly, this Court in *Hoffmann* premised its concerns for the sovereignty of the subject foreign nations on the effect of claims on prospective, not accomplished, grants of amnesty by those nations. " [A] decision permitting independently injured foreign plaintiffs to pursue [these claims in a U.S. court]... would undermine foreign nations' own

antitrust enforcement policies diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty... " 542 U.S. at 169.

The grant of amnesty to Petitioner and all combatants of the civil war by El Salvador's Amnesty Law is not a possibility, it is already a fact. The disincentive referenced in *Hoffmann* to seeking amnesty through cooperation with authorities is certainly no more corrosive of a sovereign's interests than is impugning a statute that laid to rest a bloody civil war.

It bears emphasis that *Hoffmann's* refusal to contravene a foreign amnesty, even a prospective one, mentions no requirement that the amnesty be formulated with the intent of affecting controversies or cases in other countries.

II. The Trial Court's Exercise of Jurisdiction in this Case Does Not Survive Scrutiny Under *Sosa*.

a. The Supreme Court's Latest Ruling on the Alien Tort Claims Act Calls for a Dismissal of the Instant Claims Pursuant to an Analysis of Prudential Considerations.

Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) calls for "great caution" in applying the Alien Tort Claims Act. In overturning an award under the statute, the Supreme Court opined that ATCA was meant to apply only to a "narrow set of violations of

the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs... " *Id.* at 715. Courts should consider ATCA claims, mindful "that the door is still ajar [for such claims, but is] subject to vigilant doorkeeping." *Id.* at 729.

The trial court can hardly be said to have exercised caution in allowing the instant claims when it overbore the statute of a sovereign power after having refused to hear expert testimony on the effect of the Amnesty Law and having identified no basis for its conclusion that the statute "does not prohibit legal claims brought outside of El Salvador." App. 36a.

The trial court does not justify its derogation of the Amnesty Law by concluding that both ATCA and TVPA evince a clear congressional intent to "provide a means for victims of the law of nations to seek redress." App. 92a. Neither ATCA nor TVPA specifically mentions or contemplates the circumstance of a countervailing foreign law of amnesty. To the contrary, the legislative history of TVPA indicates that the statute shall not be applied so long as a defendant enjoys "immunity," which presumably would flow from a foreign amnesty.

By the trial court's and, presumably, the appellate court's logic, every foreign law at variance with an American law would simply constitute a nullity in any American court. Choice of law, however, is not nearly so simplistic. *Sosa* describes a "flexible balancing analysis to inform choice of law" and quotes from the *Restatement (Second) of Conflict*

of Laws, Sec. 146, a default rule for tort cases that "'in an action for personal injury, the local law of the state where the injury occurs determines the rights and liabilities of the parties, unless ... some other state has a more significant relationship . . . to the occurrence and the parties.'" 542 U.S. at 709.

The United States can hardly be said to have a more significant relationship to the allegations at bar than does El Salvador. As the locus of the alleged conduct, the locus of the effects of that conduct, the place of residence of most of the litigants, and the progenitor of a justified expectation of amnesty, El Salvador's interest is clearly the greater.

Further, the lower court neglects *Sosa's* requirement that courts considering ATCA cases exercise "a policy of case specific deference to the political branches." 542 U.S. at n.21. ATCA cases (and TVPA cases) implicate foreign policy, an area committed to the "executive and the legislative – 'the political' departments of the government.'" *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Courts are specifically discouraged from intruding into foreign policy matters already subject to undertakings by either of the political branches. *See Mujica v. Occidental*, 381 F. Supp. 2d 1164, 1195 (C.D. Cal. 2005); *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019, 1031 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007); *Iwanowa v. Ford*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999), in all of which, courts declined to adjudicate "political questions" implicating foreign policy.

The executive branch of the United States Government played a "distinctly critical role" and invested $270 million per annum in the negotiation of the peace accords and the Amnesty Law that constitutes their bulwark.

Remarkably, *Sosa* proffers circumstances precisely similar to those at bar as illustrative of the very cases auguring judicial restraint in accepting ATCA claims. *Sosa* offers as illustration *In re: South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (JPML 2002), which entails ATCA claims by South Africans against foreign corporations that allegedly abetted the apartheid regime. The government of South Africa had cautioned that adjudication could interfere with South Africa's "'reconciliation, reconstruction, reparation and goodwill'" in the wake of its transition from apartheid. 542 U.S. at n.21 (quoting Penell Mpapa, South African Minister of Justice). The impact of the claims at bar on the interests of El Salvador should be no less worthy of consideration.[6]

Finally, *Sosa* warns courts to consider the "practical consequences" of making a claim under international law available to a federal litigant. 542 U.S. at 732-33.

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[6] *Khulumani v. Barclay Natl. Bank*, 504 F.3d 254 (2d Cir. 2007) reverses the district court's dismissal of the claims subject of the *South African Litigation* case. However, *Khulumani* "expresses no view" on the applicability of the prudential considerations, having remanded the case primarily because the appellate court disagreed with the lower court's rejection of aider and abettor liability under ATCA. *Id.* at 263-64, n.12.

b. The Practical Consequences of Exercising Jurisdiction Are Untenable.

Respondents have sought, and received, equitable tolling of the statutes of limitations that would ordinarily bar their claims. Equitable concerns, however, augur consideration of the plight of all those victimized in El Salvador's civil war. The Report of the United Nations Truth Commission on El Salvador, UN Security Council, Annex, S/25500, April 1, 1993 ("Report"), admitted into evidence at trial, JA Vol. II 986, recounts some of the conduct of the sundry combatant groups united under the FMLN.

The FMLN assassinated nine mayors, JA, Vol. IV 1009-12; as well as Herbert Anaya Sanabria, Commissioner of Human Rights of El Salvador, JA, Vol. IV 1020; Napoleon Romero Garcia, disaffected leader of a component of the FMLN, JA, Vol. IV 1025; Francisco Peccorini Lettona, university professor and newspaper contributor, JA, Vol. IV 1026; Jose Roberto Garcia Alvarado, Attorney General of El Salvador, JA, Vol. IV 1027; Francisco Jose Guerrero, former Chief Justice of the Salvadoran Supreme Court, JA, Vol. IV 1027; and Jose Apolinar Martinez, Justice of the Peace, JA, Vol. IV 1036. What of the Salvadorans who suffered at the hands of the FMLN and see their country's Amnesty Law unilaterally denigrated in an American court?

The Sixth Circuit's decision corrodes the spirit of reconciliation embodied in the Amnesty Law and pivotal to the success of El Salvador's post-war democracy. The Report reflects that El Salvador had previously implemented Law 805 of Unconditional Amnesty in 1987, JA, Vol. IV 871, but the war continued for over four more years thereafter. By what right does an American court require the people of El Salvador to assume the risk of devaluing the successor amnesty which has enjoyed such remarkable success?

Moreover, the detriment to flow from the decision to adjudicate Respondents' claims would extend beyond El Salvador. Relations between the United States and El Salvador would suffer as well as those of the United States with every other country that would perceive the blatant violation of El Salvador's sovereignty that is the lower courts' decision. Other amnesties, in existence or contemplated in areas of violent strife, would be undermined.

Finally, the Report also attributes to the FMLN the assassination of four unarmed and out of uniform United States Marine Embassy Guards (along with nine bystanders), JA, Vol. IV 1015, and the summary execution of United States Army Lieutenant Colonel David Pickett and Corporal Ernest Dawson as these last lay wounded and defenseless after their helicopter was shot down, JA, Vol. IV 1032. (The sentences of the two guerillas convicted of murdering Lt. Col. Pickett and Cpl. Dawson were vacated following passage of the

Amnesty Law. Case No. CPS02495.95, Sup. Ct. of El Sal., (Aug. 16, 1995), pp. 1-2.[7])

It bears noting that one of Respondents, Daniel Alvarado, was convicted in El Salvador of membership in a subversive organization during the civil war. (Department of State Cable, Ex. K. to Plaintiffs' Memorandum in Support of Motion for Summary Judgment, *Chavez v. Carranza* Docket No. 35). Appellee Erlinda Franco Revelo claims for the death of her husband, a member of the FDR, App. 58a, revealed as a partner of the FMLN until 1987. JA, Vol. IV 859, 863, 869.

This Court should consider the implications of adjudicating monetary claims on behalf of members of groups committed to killing American soldiers. Imagine a claim by a member of al Qaeda against former President George W. Bush for waterboarding. Imagine such a claim, or others similar, against American or allied commanders by any of the thousands aggrieved through the prosecution of our wars in Iraq and Afghanistan in a foreign court following an American cohort's lead.

CONCLUSION

El Salvador stands as an example of reconciliation to all the strife torn nations of the world. Factions that less than 20 years ago waged a bloody civil war against each other, today address

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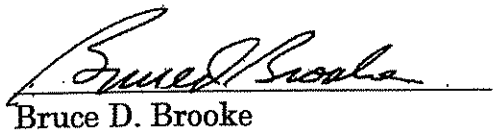
[7] *Available at* http://www.jurisprudencia.gob.sv/exploiis/.%5Cindice.asp?nBD=1&nDoc=22080&nItem=22082&nModo=1. Petitioner requests the Court take judicial notice of the decision pursuant to Fed. R. Evid. 201.

their differences through the institutions of a robust democracy. This remarkable transition was made possible by the Amnesty Law, a statute that signifies the will of all the combating factions and the people of El Salvador as a whole to reconcile and move forward as a nation rather than wallow in destructive recriminations. Respondents' claims undermine this reconciliation and the stability it has created.

El Salvador and the Salvadorans deserve the future that the Amnesty Law has made possible. It is not for the trial court, or any foreign court or entity, to jeopardize that future.

The decision to allow Respondents' claims violates the sovereignty of El Salvador and offends this Court's proscriptions on the action at bar. It should be reversed.

Respectfully submitted,



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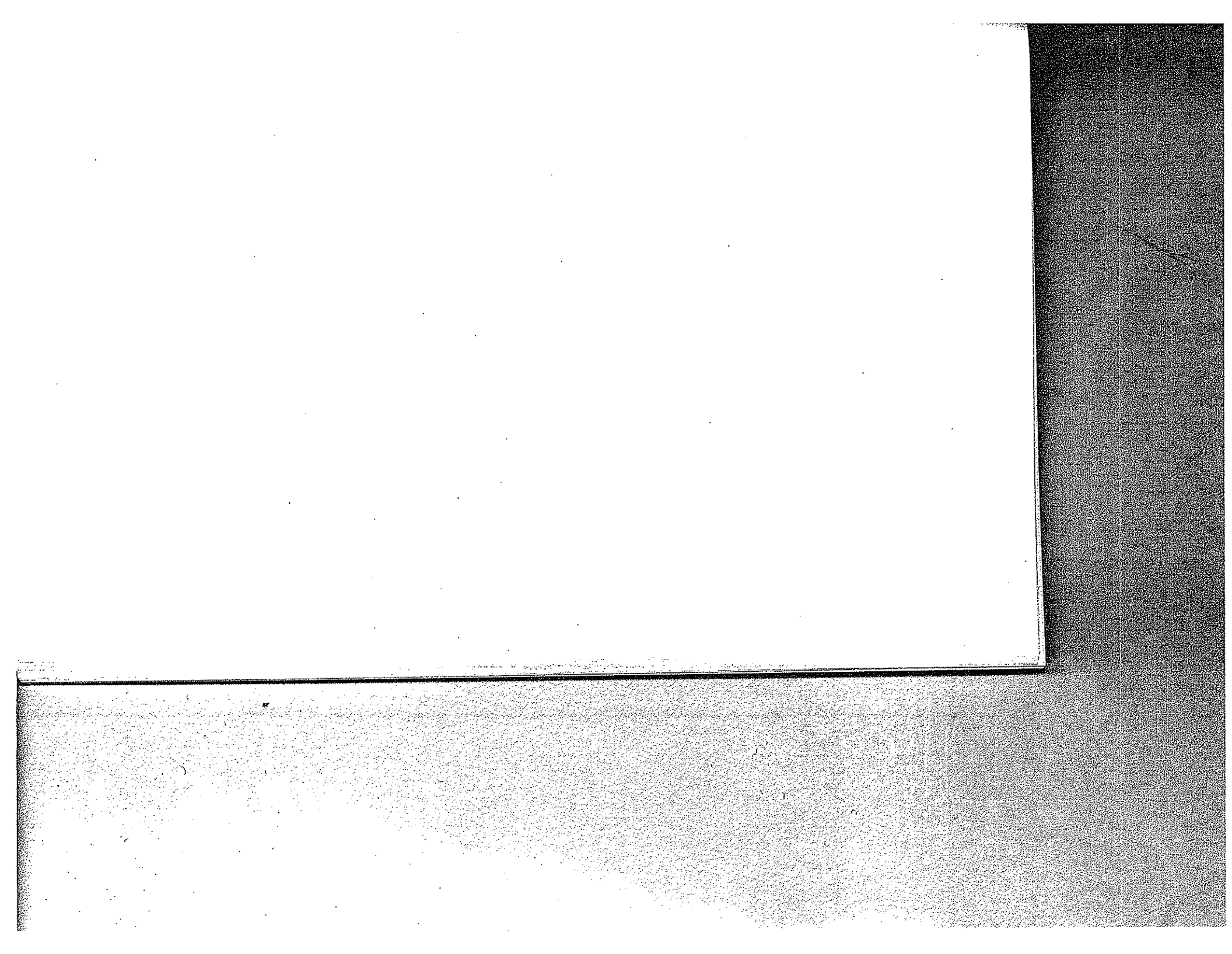

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANA CHAVEZ,
CECILIA SANTOS,
JOSE CALDERON,
ERLINDA FRANCO, and
DANIEL ALVARADO,
Plaintiffs-Appellees,

No. 06-6234

v.

NICOLAS CARRANZA,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 03-02932—Jon Phipps McCalla, Chief District Judge.

Argued: October 28, 2008

Decided and Filed: March 17, 2009

Before: SILER and McKEAGUE, Circuit Judges; LUDINGTON, District Judge.*

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*The Honorable Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNSEL

ARGUED: Robert M. Fargarson, Bruce D. Brooke, FARGARSON & BROOKE, Memphis, Tennessee, for Appellant. Matthew J. Sinback, BASS, BERRY & SIMS, Nashville, Tennessee, for Appellees. John C. Kiyonaga, ATTORNEY AT LAW, Alexandria, Virginia, for Amicus Curiae. **ON BRIEF:** Robert M. Fargarson, Bruce D. Brooke, FARGARSON & BROOKE, Memphis, Tennessee, for Appellant. David R. Esquivel, BASS, BERRY & SIMS, Nashville, Tennessee, for Appellees. John C. Kiyonaga, ATTORNEY AT LAW, Alexandria, Virginia, for Amicus Curiae.

OPINION

SILER, Circuit Judge. Defendant Nicolas Carranza appeals a jury verdict awarding compensatory and punitive damages to victims of torture, extrajudicial killing, and crimes against humanity in violation of the Alien Tort Statute (ATS), also called the Alien Tort Claims Act (ATCA) and the Torture Victims Protection Act (TVPA). Carranza argues that the district court abused its discretion by (1) holding that extraordinary circumstances justified equitable tolling of the statute of limitations, (2) not granting comity to the Salvadoran Amnesty Law, and (3) making various evidentiary rulings. He also contends that the district court erred in its instruction to the jury on command responsibility. We AFFIRM.

BACKGROUND

From the 1930s to the mid-1980s, El Salvador was governed by a military dictatorship. By the 1970s, opposition to the military's dominance increased. In response, militant organizations, such as the Salvadoran Security Forces, carried out systematic repression and human rights abuses against political dissenters. Civil unrest in the country resulted in a war which lasted from 1981 to 1992.

On January 1, 1992, the government of El Salvador and the Salvadoran guerilla forces signed a Peace Accord sponsored by the United Nations. In March 1993, the Salvadoran legislature adopted an amnesty law precluding criminal or civil liability for political or common crimes committed prior to January 1, 1992. In March 1994, the first national elections were held after the end of the civil war.

Carranza spent nearly thirty years as an officer in the armed forces of El Salvador. He served as El Salvador's Vice-Minister of Defense and Public Security from about October 1979 until January 1981. While in this position, he exercised operational control over the Salvadoran Security Forces–comprised of the National Guard, the National Police, and the Treasury Police. He also served as Director of the Treasury Police from June 1983 until May 1984. In 1984, he became a resident of the United States. He moved to Memphis, Tennessee, in 1986 and has been a naturalized citizen since 1991.

Plaintiff Cecilia Santos was tortured and assaulted while in custody at the National Police headquarters in San Salvador. On September 25, 1980, she was arrested and accused of planting a bomb. She was taken to the headquarters of the National Police where she was electrocuted, physically tortured with acid, and had an object forced into her vagina. She spent 32 months in confinement.

On September 11, 1980, members of the National Police entered Plaintiff Jose Calderon's home, forced him to the ground, and murdered Calderon's father.

Plaintiff Erlinda Franco's husband, Manuel, was abducted, tortured, and killed in 1980. He was a professor at the National University and was a prominent leader of the Democratic Revolutionary Front (FDR). On November 27, 1980, he attended a meeting of FDR leadership in San Salvador. While at the meeting, members of the Security Forces abducted Mr. Franco and five other leaders of the FDR. Later that day, the bodies of Mr. Franco and the other five men were found. Each had visible signs of torture.

On August 25, 1983, Plaintiff Daniel Alvarado was abducted by members of the Treasury Police while attending a soccer game. He was accused of killing Lt. Cmdr. Albert Schaufelberger, a United States military advisor in El Salvador. After four days of torture, Alvarado confessed to killing Schaufelberger. Carranza presided over the ensuing press conference. After being held in custody for

several weeks, Alvarado was questioned by members of the United States Navy and Federal Bureau of Investigation about the assassination of Schaufelberger. Alvarado was unable to provide accurate information about the assassination and subsequently explained that his confession was coerced through torture. After imprisonment for over two years, Alvarado fled to Sweden.

Plaintiffs filed suit against Carranza on December 10, 2003. Using a command responsibility theory, they claim that Carranza is liable for the acts of torture, extrajudicial killing, and crimes against humanity.

Carranza filed several motions during the course of the litigation, raising the same issues he argues on appeal: (1) the district court should not equitably toll the statute of limitations, and (2) the Salvadoran Amnesty Law bars plaintiffs' claims.

After trial, the jury found Carranza liable and awarded $500,000 in compensatory damages and $1 million in punitive damages to each plaintiff. However, the jury could not reach a unanimous verdict as to claims made by Plaintiff Ana Chavez. The district court declared a mistrial as to her claims, and those claims were later voluntarily dismissed.

DISCUSSION

I. Equitable Tolling of the Statute of Limitations

A.

Under the TVPA, plaintiffs have ten years from the date the cause of action arose to bring suit. 28 U.S.C. § 1350. However, the ATS does not specify a statute of limitations. When faced with this situation, courts should apply the limitations period provided by the local jurisdiction unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (quoting *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983)).

Like all courts that have decided this issue since the passage of the TVPA, we conclude that the ten-year limitations period applicable to claims under the TVPA likewise applies to claims made under the ATS. *See Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005); *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.D.C. 2003).

The TVPA and the ATS share a common purpose in protecting human rights internationally. The TVPA grants relief to victims of torture, 28

U.S.C. § 1350, and the ATS grants access to federal courts for aliens seeking redress from torts "committed in violation of the law of nations." 28 U.S.C. § 1350. Both statutes use civil suits as the mechanism to advance their shared purpose and both can be found in the same location within the United States Code. *See Arce v. Garcia*, 434 F.3d 1254, 1262, n.17 (11th Cir. 2006); *Papa*, 281 F.3d at 1012.

Likewise, the justifications for the application of the doctrine of equitable tolling under the TVPA apply equally to claims brought under the ATS. Congress provided explicit guidance regarding the application of equitable tolling under the TVPA. The TVPA "calls for consideration of all equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiff's rights." S. REP. NO. 102-249, at 10 (1991).

We have identified five factors a district court should consider when determining whether to equitably toll the statute of limitations: (1) lack of notice of the filing requirement, (2) lack of constructive knowledge of the filing requirement, (3) diligence in pursuing one's rights, (4) absence of prejudice to the defendant, and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement. *See Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000). However, "the propriety of equitable tolling must necessarily be determined on a case-by-case basis." *Id.* (quoting *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998)).

Again, Congress has provided explicit guidance as to when to apply the equitable tolling doctrine in TVPA cases:

> Illustrative, *but not exhaustive*, of the types of tolling principles which may be applicable include the following. The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

S. REP. NO. 102-249, at 10-11 (1991) (emphasis added).

Courts that have addressed equitable tolling in the context of claims brought under the TVPA and ATS have determined that the existence of extraordinary circumstances justifies application of

the equitable tolling doctrine. *See Arce*, 434 F.3d at 1259, 1262-63 (tolling the statute of limitations under the TVPA and ATS until the signing of the Peace Accord in 1992 because the fear of reprisals against plaintiffs' relatives orchestrated by people aligned with the defendants excused the plaintiffs' delay); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (tolling the statute of limitations under the TVPA and ATS "[u]ntil the first post-*junta* civilian president was elected in 1990" for claims brought against a Chilean military officer); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (tolling the statute of limitations for TVPA and ATS claims against former Philippine dictator Ferdinand Marcos until the Marcos regime was overthrown); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987) (holding that the plaintiff raised an issue of fact as to whether the ATS statute of limitations should be tolled for claims against an Argentine military officer until a democratically-elected government was in place).

When the situation in a given country precludes the administration of justice, fairness may require equitable tolling. In such limited circumstances, where plaintiffs legitimately fear reprisals against themselves or family members from the regime in power, justice may require tolling. These circumstances, outside plaintiffs' control, make it impossible for plaintiffs to assert their TVPA and ATS claims in a timely manner. In such extraordinary circumstances, equitable tolling of TVPA and ATS claims is appropriate.

In sum, we conclude that the ten-year limitations period applicable to TVPA claims also governs claims under the ATS, equitable tolling principles apply, and the existence of extraordinary circumstances provides a justification for the application of the equitable tolling doctrine.

B.

We review a decision on the application of equitable tolling de novo where the facts underlying the equitable tolling are undisputed. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007). When the facts are in dispute, we apply an abuse of discretion standard. *Id.* Here, Carranza disputes plaintiffs' contention that facts and circumstances in El Salvador justify equitable tolling. Accordingly, we review the district court's decision for an abuse of discretion.

Each of the acts for which Carranza was held liable occurred more than ten years before plaintiffs filed suit. However, the district court determined that the pervasive violence that consumed El Salvador until March 1994 (when El Salvador held its first national elections following the signing of the Peace Accord) justified equitable tolling of the ten-year statute of limitations. These findings of fact are supported by the record.

The evidence established that widespread human rights abuses were carried out by the Salvadoran military against civilians during the country's civil war and that plaintiffs feared reprisals against themselves or their family

members. Carranza held a position of power within the Salvadoran military regime.

In addition, the violence associated with the civil war continued after the signing of the Peace Accord in 1992 until at least March 1994, when the first national elections were held after the civil war. Plaintiffs submitted affidavits stating that even after they arrived in the United States, they were afraid that their families in El Salvador would be subject to repression or violence by the Salvadoran military. They also stated that they did not feel that it was safe for their families in El Salvador to bring suit until many years after the end of the civil war. Given this evidence, it was within the district court's discretion to toll the statute of limitations until March 1994.

Carranza argues that the district court abused its discretion in tolling the statute of limitations because plaintiffs did not introduce evidence at trial proving they feared reprisals for bringing this lawsuit, and the plaintiffs were not aware of their right to bring a legal action during the period in which they feared reprisals by the Salvadoran military. Carranza's arguments fail.

First, the decision to invoke equitable tolling is a question of law. *Rose v. Dole*, 945 F.2d 1331, 1334 (6th Cir. 1991). The district court addressed and decided the equitable tolling issue in denying Carranza's motions to dismiss and for summary judgment. As such, the issue had been resolved prior to trial and no additional proof was required.

Second, equitable tolling was justified by extraordinary circumstances outside of plaintiffs' control, which made it impossible for plaintiffs to assert their claims in a timely manner. Whether the plaintiffs knew they had an actionable claim under United States law does not change the fact that at least until March 1994, the circumstances in El Salvador were not sufficiently safe for plaintiffs to seek redress in court.

The district court appropriately considered the documentary evidence and witness declarations in addressing the issue of equitable tolling when it considered and denied Carranza's motions to dismiss and for summary judgment. The district court did not abuse its discretion in finding extraordinary circumstances existed justifying the equitable tolling of the ten-year statute of limitations.

II. Salvadoran Amnesty Law

The Salvadoran Amnesty Law was passed by the Salvadoran Legislature in order to provide amnesty to all those who participated in political or common crimes during the civil war in El Salvador before 1992. *See* Decreto Legislativo 486 de 3/22/93 Aprueba la Ley Sobre la Amnistía General para la Consolidación de la Paz [Legislative Decree 486 of 3/22/93 Approving the General Amnesty Law for Consolidation of the Peace], Diario Oficial, 23 de Marzo de 1993 (E.S.). The purpose of the Salvadoran Amnesty Law is "to reconcile and reunite the Salvadoran family by promulgating, and immediately implementing, legal provisions that protect the right of the entire Salvadoran population

to fully conduct its activities in harmony, and a climate of trust and respect for all social sectors."

Carranza claims that he is entitled to amnesty pursuant to the Salvadoran Amnesty Law.[1] He argues that the district court erred when it declined to apply the Salvadoran Amnesty Law to plaintiffs' claims. We review the district court's decision not to grant comity to the Salvadoran Amnesty Law for an abuse of discretion. *See, e.g., Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 121-22 (3d Cir. 2002); *cf. Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007) ("[T]he theory of comity can serve as a discretionary basis for a court to determine whether a foreign country court's judgment should be given preclusive effect.").

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another

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[1]It is not clear from the record whether Carranza is immune from suit under the Salvadoran Amnesty Law. Article 4 of the law sets forth a series of procedures for a person to gain amnesty. According to Article 4, an unindicted person or a person wishing to benefit from the amnesty must file a motion or appear before a trial judge and request a certificate of amnesty. It is unclear whether this process applies exclusively to criminal defendants or whether it is meant to apply to defendants in civil cases as well.

Nevertheless, there is no evidence in the record indicating that Carranza has a certificate of amnesty. In any event, neither party has raised this issue and it does not impact our analysis of the extraterritorial application of the Salvadoran Amnesty Law, nor does it effect the outcome of this case.

nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In order for an issue of comity to arise, there must be an actual conflict between the domestic and foreign law. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798 (1993). There is no conflict for comity purposes "where a person subject to regulation by two states can comply with the laws of both." *Id.* at 799 (quoting RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 403 cmt. e (1987)).

There is no conflict between domestic and foreign law because the Salvadoran Amnesty Law cannot be interpreted to apply extraterritorially. A statute must not be interpreted as having extraterritorial effect without a clear indication that it was intended to apply outside the country enacting it. *BMW Stores, Inc. v. Peugeot Motors of Am., Inc.*, 860 F.2d 212, 215 n.1 (6th Cir. 1988). There is nothing in the Salvadoran Amnesty Law to suggest that it should apply or was intended to apply outside of El Salvador.

Moreover, compliance with both domestic law and the Salvadoran Amnesty Law is possible. Plaintiffs may be barred from filing suit in El Salvador, but they are not barred from filing suit in the United States. Likewise, if Carranza were living in El Salvador, he would likely be immune from suit. However, he is a citizen and resident of the United States and is therefore subject to civil liability for his violations of the ATS and TVPA. In addition, the Republic of El Salvador, as amicus, argues that this