case would be rejected if it were brought in El Salvador– further demonstrating that Salvadoran courts can apply the Salvadoran Amnesty Law domestically without undermining the jurisdiction of United States courts.

Carranza's reliance on *F. Hoffmann-LaRoche v. Empagran*, 542 U.S. 155 (2004), is misplaced. In *Empagran*, the Supreme Court interpreted an antitrust statute, the Foreign Trade Antitrust Improvements Act of 1982 (FTAI), which expressly places extraterritorial limits on the application of the Sherman Act. With some exceptions, the FTAI provides that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." *Id.* at 158 (quoting 15 U.S.C. § 6a). In reaching its conclusion, the Supreme Court did not address the ATS or TVPA, nor did it discuss international comity. Therefore, *Empagran* is of little relevance to the law at issue in this case.

III. Evidence at Trial

A. The Truth Commission Report

Carranza contends that the district court abused its discretion in admitting the Truth Commission Report into evidence. Specifically, Carranza argues that the report is not timely and, therefore, is not trustworthy.

The Truth Commission Report was prepared by the Commission on the Truth for El Salvador, an entity established under the 1992 United Nations-sponsored peace agreements between the

Government of El Salvador and the Frente Farabundo Marti para la Liberación Nacional. The Truth Commission Report sets forth the factual findings that the Truth Commission discovered through its investigation of El Salvador– an investigation mandated by the peace agreements sponsored by the U.N. The district court admitted the Truth Commission Report into evidence under the Public Records and Reports exception to the hearsay rule.

Under the Public Records and Reports exception to the hearsay rule, reports of "public offices or agencies" setting forth "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." FED. R. EVID. 803 (8)(C). To determine whether a report is trustworthy, courts consider the following four factors: (1) the timeliness of the investigation upon which the report is based, (2) the special skill or experience of the investigators, (3) whether the agency held a hearing, and (4) possible motivational problems. *Bank of Lexington & Trust Co. v. Vining-Sparks Sec., Inc.*, 959 F.2d 606, 616-17 (6th Cir. 1992).

Carranza claims that the Report is not timely because the investigation on which it was based did not begin until at least eight years after Carranza's association with the El Salvador military was over, and ended seven years after he moved to the United States. However, the timeliness factor focuses on how much time passed between the events being investigated and the beginning of the investigation.

See id. at 617. Here, the Peace Accord was signed on January 1, 1992, and the Truth Commission began its investigation on July 13, 1992, seven months later. Therefore, the timeliness of the investigation suggests the Report is trustworthy.

Carranza also contends that the Truth Commission Report is untrustworthy because the commission did not hold a hearing. However, a formal hearing is not necessary when other indicia of trustworthiness are present. *Id.* Even though the Truth Commission did not conduct a formal hearing, it interviewed numerous witnesses, victims, and relatives associated with the events described in the Report. In addition, the Truth Commission reviewed thousands of complaints of acts of violence, examined documents, interviewed members of the military, and visited locations of acts of violence.

For the foregoing reasons, the district court did not abuse its discretion in admitting the Truth Commission Report into evidence.

B. Testimony of Ambassador White and Professor Karl

Carranza argues that the district court abused its discretion in allowing two of plaintiffs' expert witnesses, Robert White, former U.S. Ambassador to El Salvador, and Professor Terry Karl, the former Director of the Center of Latin American Studies at Stanford University, to testify. Carranza objects to several statements made by both experts as highly inflammatory and based on inadmissible hearsay.

Experts may base their testimony on inadmissible facts "of a type reasonably relied upon by experts in the particular field." FED. R. EVID. 703. Ambassador White's testimony was based on intelligence gathered by himself, his staff, and other government agents. Furthermore, Ambassador White was listed, without objection by Carranza, in the joint pretrial order as an expert witness. Professor Karl testified as to the levels of violence in El Salvador during the period of military control. Professor Karl relied upon interviews, commission reports (including the Truth Commission Report), documentary research, and field research to form her opinions. *See, e.g., Katt v. City of New York*, 151 F. Supp. 2d 313, 356-57 (S.D.N.Y. 2001) (noting that interviews, commission reports, research articles, scholarly journals, books, and newspaper articles are the types of data reasonably relied upon by social science experts).

Carranza also contends that the district court improperly admitted testimony by Professor Karl: Carranza claims that Professor Karl should not have been permitted to testify about military procedures and command responsibility because she has never served in a military organization and she was never identified as a military expert.

Professor Karl's report contains a lengthy discussion of her opinions about Salvadoran military structure and Carranza's command responsibility. In her report, Professor Karl discusses her credentials as an expert in the politics of Latin America including: the military strategies of both the Salvadoran military and security forces and the

armed opposition, the command structure of the Salvadoran military, the corruption of the Salvadoran military and security forces, and the practice of death squads.

The district court did not abuse its discretion in allowing the jury to determine the weight to be given to the testimony of Professor Karl and Ambassador White.

C. Embassy Cables

Carranza contends that Trial Exhibit 6 was improperly admitted into evidence because its purported author has disavowed authorship.

Trial Exhibit 6 is a United States government document describing a conversation in 1980 between a U.S. official and Salvadoran military officers in which Carranza "supported [a] line of thinking" that assassinations of political opponents should be accomplished whenever possible. Ambassador White testified that the author of this document was Colonel Brian Bosch, a U.S. military representative at the U.S. Embassy in San Salvador. Ambassador White used the contents of this document to support his testimony regarding the Salvadoran military's responsibility for the six FDR murders, the basis for Franco's claim. In a post-trial affidavit, Colonel Bosch claims he is not the author of this cable and that he has no personal knowledge of the statements attributed to Carranza.

Trial Exhibit 6 was admissible under Rule 803(6) of the Federal Rules of Evidence. Through the

testimony of Ambassador White, the plaintiffs established a foundation that certain cables, including Trial Exhibit 6, were transmitted from United States governmental agents describing or recording events made at or near the time the acts took place by someone with personal knowledge of the acts. Ambassador White also testified that the cables were kept in the course of regularly conducted business of the United States governmental agency, and it was the regular practice of the agencies to make those records. Colonel Bosch's affidavit disputes that he is the author of Trial Exhibit 6 but it does not dispute its authenticity.

However, even if Trial Exhibit 6 was improperly admitted, it did not unfairly prejudice Carranza. The gravamen of the cable is the knowledge and approval of the assassination of the FDR leaders by members of the Salvadoran military, including Carranza. This was corroborated by several witnesses and exhibits at trial, including the testimony of Ambassador White and Professor Karl, as well as the Truth Commission Report and several other cables.

Carranza also argues that the copy of Trial Exhibit 6 he was provided with during discovery is illegible and highly redacted. Therefore, Carranza characterizes the cleaner copy of Trial Exhibit 6, provided to the jury by plaintiffs, as "previously undisclosed." This contention is without merit and is belied by the fact that plaintiffs provided Carranza with a copy of Trial Exhibit 6 during his deposition and Carranza was asked a number of questions about it.

D. Photographs

Carranza argues that the district court abused its discretion when it admitted into evidence photographs depicting dead bodies and victims of military atrocities. Carranza contends that the photographs were unfairly prejudicial.

The photographs are relevant (1) to prove crimes against humanity and (2) to establish liability under a theory of command responsibility. They are relevant proof that the Salvadoran military was engaged in a systemic attack against civilians. The photographs also demonstrate that Carranza had notice of the human rights violations committed by his subordinates, as required for liability under a theory of command responsibility.

Although it is likely that the photographs had a substantial impact on the jury, the district court did not abuse its discretion in determining that the photographs' probative value was not substantially outweighed by the danger of unfair prejudice.

E. Exclusion of Carranza's Expert

Carranza contends that the district court abused its discretion in excluding the testimony of his expert witness, Dr. David Escobar Galindo. Dr. Galindo's testimony would have centered on the purposes behind the Salvadoran Amnesty Law as well as its application to plaintiff's claims against Carranza. As the district court properly declined to grant comity to the Salvadoran Amnesty Law, testimony regarding how the Salvadoran Amnesty

Law would apply to Carranza is not relevant and, therefore, not helpful.

An expert opinion on a question of law is inadmissible. *Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994). Dr. Galindo's testimony would have addressed whether the Salvadoran Amnesty Law prohibits U.S. courts from exercising jurisdiction over plaintiffs' claims. This is a legal question and not one which should be presented to a jury. Therefore, the district court did not abuse its discretion in excluding Dr. Galindo's testimony.

Carranza also argues that the district court erred in not allowing Dr. Galindo to offer factual information of circumstances in El Salvador. However, Dr. Galindo was not proposed as a fact witness until four days prior to trial. Nevertheless, plaintiffs agreed to stipulate to those facts that were disclosed in Dr. Galindo's expert report. Carranza did not introduce those facts.

IV. Jury Instructions on the Law of Command Responsibility

Finally, Carranza argues that the district court erred in its instructions to the jury on the law of command responsibility. Specifically, he contends that the jury should have been instructed on proximate cause.

Three elements must be established for command responsibility to apply: (1) a superior-subordinate relationship between the defendant/military commander and the person or

persons who committed human rights abuses; (2) the defendant/military commander knew, or should have known, in light of the circumstances at the time, that subordinates had committed, were committing, or were about to commit human rights abuses; and (3) the defendant/military commander failed to take all necessary and reasonable measures to prevent human rights abuses and punish human rights abusers. *See Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002).

The law of command responsibility does not require proof that a commander's behavior proximately caused the victim's injuries. *See Hilao*, 103 F.3d at 776-79 (proximate cause is not an element of command responsibility). This conclusion is in accord with the legislative history of the TVPA:

> [A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts - anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

S. REP. NO. 102-249, at 9 (1991) (footnote omitted). Any question as to whether an injury was caused by a commander's act or omission can be resolved by a finding of liability under the elements of command responsibility.

Accordingly, plaintiffs were not required to submit proof of proximate cause in order to succeed on their claims under the law of command responsibility, and the district court was not required to instruct the jury on this issue.

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION**

ANA PATRICIA CHAVEZ, CECILIA SANTOS, JOSE FRANCISCO CALDERON, ERLINDA REVELO, and DANIEL ALVARADO,	)	
Plaintiffs,	)	
v.	)	**No. 03-2932 Ml/P**
NICOLAS CARRANZA,	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND/OR REMITTITUR

Before the Court is Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur, filed February 1, 2006. Plaintiffs Santos, Calderon, Revelo, and Alvarado responded in opposition on February 17, 2006, and Defendant filed a reply on March 15, 2006. For the reasons set forth below, Defendant's motion is DENIED.

I. Background and Procedural History

Plaintiffs,[1] who are or were at all pertinent times citizens of El Salvador, filed the instant action against Defendant on December 10, 2003. Plaintiffs' claims arise under the Torture Victims Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992)(codified as Note to 28 U.S.C. § 1350), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. Plaintiffs allege that Defendant, a former military leader in El Salvador in the early 1980s, exercised command responsibility over Salvadoran security forces that carried out widespread human rights abuses against the civilian population during the country's civil war. Plaintiffs claim that, as a member of the high command of the Salvadoran military and, later, as director of the treasury police, Defendant bears command responsibility for the torture, extrajudicial killing, and crimes against humanity that Plaintiffs and their family members suffered at the hands of the Salvadoran military and police forces. Defendant, who has resided in the United States since 1984 and is currently a resident of Memphis, Tennessee, maintains that he did not have effective control over the conduct of his subordinates and that he should not be held liable for their acts.

On September 30, 2004, the Court denied Defendant's motion to dismiss and renewed motion to dismiss, finding that the doctrine of equitable

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[1] Ana Patricia Chavez was also an original plaintiff in this case. As explained below, Chavez voluntarily dismissed her suit after the jury was unable to reach a verdict as to her claims.

tolling applied to Plaintiffs' claims and that the ten-year statute of limitations should be tolled until March of 1994, when the first post-war elections were held. The Court also denied Defendant's motion to dismiss based on Plaintiffs' failure to exhaust their legal remedies in El Salvador and Defendant's motion to dismiss based on subject matter jurisdiction. (Docket No. 28.)

On October 18, 2005, the Court denied Defendant's motion for judgment on the pleadings, or in the alternative, for summary judgment. The Court again denied Defendant's statute of limitations argument. It also rejected Defendant's contention that the broad amnesty law passed by the Salvadoran Legislature in 1993 is entitled to full faith and credit and that, under the doctrine of comity, the Court should decline jurisdiction in this case. (Docket No. 97.)

Prior to trial, Plaintiffs moved this Court to find that no issue of material fact existed as to whether Plaintiffs and/or their family members had been subjected to torture and/or extrajudicial killings—the predicate acts for which Plaintiffs claimed that Defendant was liable under the doctrine of command responsibility. Plaintiffs did not seek summary judgment on the issue of Defendant's liability under the law of command responsibility or on their claims for crimes against humanity. On October 26, 2005, the Court granted summary judgment in favor of Plaintiff Santos as to her claim of torture under the TVPA, Plaintiff Calderon as to his claim of torture and extrajudicial killing under the TVPA, Plaintiff Revelo as to her claim of

extrajudicial killing under the ATCA and the TVPA, and Plaintiff Alvarado as to his claim of torture under the ATCA and the TVPA. The Court denied Plaintiff Chavez's motion for summary judgment on her claims of torture and extrajudicial killing under the ATCA and TVPA, finding that an issue of material fact existed as to whether government actors were involved in the alleged acts. (Docket No. 108.)

II. Trial

The trial of this case commenced on October 31, 2005. Each Plaintiff testified at trial, and Plaintiffs called five other witnesses to testify on their behalf. These witnesses included Robert White, the former United States ambassador to El Salvador, who testified as a fact witness and as an expert on Salvadoran military and political structure. Plaintiffs also called Professor Terry Lynn Karl, an expert in the political history of El Salvador and the role of the military within the Salvadoran government, and Professor Jose Luis Garcia, a retired colonel in the Argentinian military who testified as an expert on the Salvadoran military structure and the obligations of a military commander.

At the close of Plaintiffs' case, Defendant moved for judgment as a matter of law on the ground that the doctrine of equitable tolling is not applicable in Plaintiffs' case, and, therefore, that their action is time-barred. The Court denied Defendant's motion.

Defendant's case-in-chief consisted of the testimony of five witnesses, including Defendant. Plaintiffs then recalled Professor Karl as a rebuttal witness. At the close of all evidence, Defendant renewed his motion for judgment as a matter of law on the basis of his statute of limitations argument and on all other grounds previously raised in his pretrial motions. The Court denied Defendant's renewed motion.

On November 18, 2005, the jury rendered its verdict in favor of Plaintiffs Santos, Calderon, Revelo, and Alvarado. Specifically, the jury found that Defendant was liable under the law of command responsibility for (1) the torture of Plaintiff Santos; (2) the extrajudicial killing of Plaintiff Calderon's father and the torture of Plaintiff Calderon; (3) the extrajudicial killing of Plaintiff's Revelo's husband and crimes against humanity; and (4) the torture of Plaintiff Alvarado and crimes against humanity. The jury also found, as to these Plaintiffs, that Defendant's conduct was intentional, malicious, wanton, or reckless. The jury awarded Plaintiffs Santos, Calderon, Revelo, and Alvarado $500,000 each in compensatory damages. The jury was unable to reach a verdict as to the claims of Plaintiff Chavez. Following brief arguments from both sides on punitive damages, the jury resumed deliberations and subsequently awarded Plaintiffs Santos, Calderon, Revelo, and Alvarado $1,000,000 each in punitive damages.

Following the trial, Plaintiff Chavez voluntarily dismissed her claims, and a final judgment was entered on January 18, 2006.

Defendant subsequently filed the instant motion for judgment notwithstanding the verdict, a new trial, and/or remittitur.

III. Renewed Motion for Judgment as a Matter of Law

A. Standard of Review

Defendant moves for judgment notwithstanding the verdict under Federal Rule of Civil Procedure 50. Rule 50 was amended in 1991, and a motion for judgment nothwithstanding the verdict is now referred to as a renewed motion for judgment as a matter of law. Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 786 n.1 (6th Cir. 2005). Accordingly, the Court will refer to Defendant's Rule 50 motion as a renewed motion for judgment as a matter of law.

Rule 50(b) provides that if the court does not grant a motion for judgment as a matter of law made at the close of all evidence, "[t]he movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment . . . ." Fed. R. Civ. P. 50(b). A court may grant a motion for judgment as a matter of law "only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." Gray v. Toshiba Am. Consumer Prods., Inc., 263 F.3d 595, 598 (6th Cir. 2001). A Rule 50(b) motion should only be granted "if a complete absence of proof exists on a material issue

in the action, or if no disputed issue of fact exists on which reasonable minds could differ." LaPerriere v. Int'l Union UAW, 348 F.3d 127, 132 (6th Cir. 2003).

B. Analysis

1. Equitable Tolling

In the instant motion, Defendant renews his motion to dismiss Plaintiffs' action as untimely. The Court has examined and rejected Defendant's statute of limitations defense twice prior to trial and on Defendant's motion for judgment as a matter of law during trial. (See Order Denying Def.'s Mots. Dismiss Compl., Sept. 30, 2004 (Docket No. 28); Order Denying Def.'s Mot. J. Pleadings and Summ. J., Oct. 5, 2005 (Docket No. 97); Tr. 1211-21, 1622-23.) Specifically, the Court found that the ten-year statute of limitations period applicable to actions under the TVPA and ATCA should be tolled, under the doctrine of equitable tolling, until March of 1994, when the first post-war elections were held in El Salvador.

As previously noted in this Court's earlier rulings, other courts have held that the doctrine of equitable tolling should apply to actions brought under the TVPA or ATCA "where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim." Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987); see also Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996). The Sixth Circuit has not addressed the applicability of the doctrine of

equitable tolling in TVPA or ATCA actions, but has identified several factors to consider when determining whether to apply equitable tolling. Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000)(including lack of notice or constructive knowledge of the filing requirement and "the plaintiff's reasonableness in remaining ignorant of the particular legal requirement"). The specific considerations identified by the Sixth Circuit are not the only relevant considerations, however, as "[t]he 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)).

In applying the doctrine of equitable tolling to the facts of Plaintiffs' case, the Court found that the widespread human rights abuses carried out by the Salvadoran military against civilians during the country's civil war and Plaintiffs' fear of reprisal against themselves or their family members in El Salvador constitute "extraordinary circumstances" sufficient to toll the statute of limitations. (Order Denying Def.'s Mots. Dismiss Compl. 6-8.) Further, the Court found that since the violence associated with the civil war continued after the signing of the negotiated peace agreements in 1992, the statute of limitations should be tolled until March of 1994, when the first national elections were held after the war. (Id. at 8-10.)

Contrary to Defendant's assertions in the instant motion, the evidence at trial did not undermine the Court's determination that the

statute of limitations should be tolled in this case. According to Defendant, Plaintiffs' fear of reprisal should not serve as a basis to toll the statute of limitations because Plaintiffs testified at trial that "they did not know they could file a lawsuit until contacted by lawyers from the Center for Justice and Accountability, who solicited each of them to pursue claims against Nicolas Carranza specifically." (Mem. Support Def.'s Mot. 4.) This is not a fair characterization of Plaintiffs' testimony. Erlinda Franco was the only Plaintiff who testified about being contacted by an attorney regarding the possibility of bringing a lawsuit in the United States. (Tr. 495.) Moreover, the fact that one or even all of the Plaintiffs might have been unaware that they could pursue a legal claim against Defendant in the United States until 2002 or 2003, as some Plaintiffs testified, is not relevant to the equitable tolling determination. Plaintiffs' awareness of their legal rights has no bearing on whether, until at least March of 1994, the circumstances in El Salvador were too volatile and dangerous to file suit against Defendant.

Instead, the testimony at trial served only to bolster Plaintiffs' earlier assertions to this Court that they believed that it was too dangerous to pursue legal action at any time prior to March of 1994. As the Court explained when it denied Defendant's motion at trial, Plaintiffs' testimony made very apparent the apprehension and fear that each had experienced as a result of their ordeals. (Tr. 1217-20.) Plaintiffs' testimony served to strengthen,

not undermine, the "extraordinary circumstances" justifying the tolling of the statute of limitations in this case.

Defendant also contends that it was improper for the Court to rely upon affidavits submitted by Plaintiffs in pretrial filings to deny his motion for judgment as a matter of law at trial.[2] According to Defendant, the Court's reliance was in error because Defendant did not have the opportunity to cross-examine Plaintiffs about their statements. Defendant also argues that Plaintiffs failed to present evidence at trial to support the equitable tolling of the statute of limitations. (Def.'s Mot. ¶ 4.)

These arguments fail for several reasons. First, Defendant did have an opportunity to cross-examine Plaintiffs about their prior statements, as every Plaintiff testified at trial, and Defendant cross-examined all of them. Second, Plaintiffs were not required to present evidence at trial to support their argument for equitable tolling. Equitable tolling is a question of law for the court to decide. Hilao v. Estate of Marcos, 103 F.3d 767, 779 (9th Cir. 1996);

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[2] The affidavits were submitted in opposition to Defendant's motion for judgment on the pleadings or for summary judgment. Plaintiffs Chavez, Santos, and Calderon submitted separate affidavits in which they stated that even after they came to the United States, they were afraid that their family in El Salvador would be subject to repression or violence by the Salvadran 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. (Pls.' Mem. Opp. Def.'s Mot. J. On Pleadings or Summ. J., Exs. 2, 3, 4.)

see also Gumbus v. United Food & Commercial Workers Int'l Union, 1995 WL 5935, at *3 (6th Cir. Jan. 6, 1995). Moreover, this issue had been ruled upon by the Court prior to trial; it was not an unresolved issue on which Plaintiffs needed to present proof. Nevertheless, Plaintiffs did present evidence—through the testimony of Plaintiffs and Professor Terry Lynn Karl—that supported the Court's finding of extraordinary circumstances.

Finally, the Court based its ruling on Defendant's renewed motion on the record as a whole—not merely on Plaintiffs' pretrial affidavits. (See Tr. 1211-21.) The Court noted that "the information that was submitted at the time of the court's ruling was more than sufficient to satisfy the court that equitable tolling was appropriate in this case" and went on to explain that Plaintiffs' testimony bolstered this conclusion and "strongly supports the determination of tolling in this case . . . ." (Id. at 1215, 1220.) In sum, both of Defendant's arguments in support of his statute of limitations defense are without merit, and Defendant's renewed motion for judgment as a matter of law is DENIED.

2. Comity

Defendant also argues that judgment as a matter of law is warranted on the basis that Plaintiffs' claims are barred under El Salvador's amnesty law. This law was passed by the Salvadoran legislature at the conclusion of the country's civil war in order to provide broad amnesty to all those who participated in political or common crimes in the country before 1992. According to Defendant, by

denying his motion for judgment as a matter of law on this basis at trial, the Court improperly "refused to grant full faith and credit to the sovereignty of El Salvador and grant immunity to Defendant." (Def.'s Mot. ¶ 2.)

The Court examined and rejected Defendant's argument prior to trial. (Order Denying Def.'s Mot. J. Pleadings and Summ. J., Oct. 5, 2005 (Docket No. 97)). In the instant motion, Defendant acknowledges the Court's prior ruling but fails to explain why it was erroneous. Defendant simply maintains that the Court "has rejected essentially the sovereign law of El Salvador and refused to grant full faith and credit to a hemispheric neighbor and an Amnesty Agreement and Treaty enacted into law in El Salvador." (Def.'s Reply 5.)

As this Court has previously noted, in order for the issue of comity to arise, there must be an actual conflict between domestic and foreign law. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 798 (1993). Where "a person subject to regulation by two states can comply with the laws of both[,]" there is no conflict for comity purposes. Id. at 799. In this case, as the Court has previously explained, there is no conflict between domestic and foreign law because El Salvador's amnesty law does not prohibit legal claims brought outside of El Salvador. Therefore, contrary to Defendant's argument, allowing Plaintiffs' claims to proceed does not "ignore[ ] and nullif[y] a legitimate law of a sovereign hemispheric neighbor." (Def.'s Reply 5.) Defendant's renewed

motion for judgment as a matter of law on this ground is DENIED.[3]

IV. Motion for a New Trial

A. Standard of Review

Federal Rule of Civil Procedure 59(a) provides that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States ...." Fed. R. Civ. P. 59(a). The authority to grant a new trial under Rule 59 rests within the discretion of the trial court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). "[A] new trial is warranted when a jury has reached a seriously erroneous result . . . ." Strickland v. Owens Corning, 142 F.3d 353, 357 (6th Cir. 1998). A "seriously erroneous result" is evidenced by: "(1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias."

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[3] In a related argument, Defendant contends that it was error for the Court to grant Plaintiffs' motion in limine to exclude the testimony of Defendant's proposed expert witness, Dr. David Escobar Galindo. According to Defendant, Dr. Galindo was prepared to testify that the instant action violates the sovereign law of El Salvador and circumvents the purpose of the Peace Accord and Amnesty Agreement. This testimony was properly excluded because it would not have assisted the trier of fact "to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Whether the Salvadoran amnesty law should be afforded full faith and credit or otherwise operates to bar Plaintiffs' suit is a legal conclusion, and one that an expert may not draw. See Berry v. City of Detroit, 25 F.3d 1342, 1353-54 (6th Cir. 1994).

Holmes v. City of Massillon, 78 F.3d 1041, 1045-46 (6th Cir. 1996). Further, a motion for a new trial will not be granted unless the moving party has suffered prejudice. Tompkin v. Philip Morris USA, Inc., 362 F.3d 882, 891 (6th Cir. 2004)("Even if a mistake has been made regarding the admission or exclusion of evidence, a new trial will not be granted unless the evidence would have caused a different outcome at trial.")(quotation omitted). The burden of demonstrating harmful prejudice is on the party moving for a new trial. Id. (quotation omitted).

B. Analysis

1. Hearsay

Defendant first argues that several trial exhibits contain hearsay statements and should not have been admitted into evidence. Specifically, Defendant objects to the admission of the United Nations Truth Commission Report (Exhibit 28), telegraph cables from the United States Embassy in El Salvador (Exhibits 6, 37, 40, and 41), and an intelligence report, dated December 1980, that was authenticated by former Ambassador Robert White (Exhibit 6). Defendant fails to advance any argument or explanation for why the Court's rulings on the admissibility of the United Nations Truth Commission Report or embassy cables were erroneous. Therefore, the Court will not revisit these rulings.

Defendant does elaborate on his objection to the admissibility of Exhibit 6, an intelligence report that White testified was prepared by Colonel Brian

Bosch for the military intelligence bureau at the Pentagon. The report summarizes the reaction of Salvadoran military officers to the assassinations in 1980 of six leaders of a pro-democracy political party—the Frente Democrático Revolucionario ("FDR")—including the husband of Plaintiff Revelo. The report states, in pertinent part:

> Most [Salvadoran] military officers were highly pleased with the assassination of the six FDR leaders. These officers believe that other leaders and members of the FDR should be eliminated in a similar fashion wherever possible. These feelings were expressed by several middle-level army officers on 28 November 1980 in the presence of Col. Jose Garcia Merino, Minister of Defense, and Nicolas Carranza, Sub-Minister of Defense, and both Garcia and Carranza indicated that they supported this line of thinking. From the comments of all those present during this conversation, it was clear that Garcia, Carranza and the other officers present accepted as a fact that the military services were responsible for the assassination of the six FDR leaders.

(Ex. 6 ¶ 7.) Defendant contends that Exhibit 6 was not authored by Colonel Bosch, as Ambassador White testified, and that the statements in the report are inconsistent with Colonel Bosch's current recollection of events. Defendant submits the

affidavit of Colonel Bosch, dated November 25, 2005, in support of this argument. In his affidavit, Colonel Bosch, who is now retired, states that he served as the Defense and Army Attaché at the United States Embassy in San Salvador, El Salvador, from 1980 through 1981. (Bosch Aff. ¶ 2.) He states that he has reviewed Exhibit 6, and he is "absolutely positive that [he] did not prepare this document" because it is not consistent with his writing style or the form of document that he would have prepared while serving as military attaché. (Id. at ¶ 5.) Bosch goes on to state that the substance of the report "is completely contrary to my recollection of the facts and circumstances surrounding the events of the kidnapping and killing of the six (6) FDR members in El Salvador" because "[a]t no time did I observe or hear any expression by any of El Salvador's military officials that exhibited or expressed condoning or approval of the kidnapping and killing of the FDR leaders." (Id. at ¶ 6.)

As Plaintiffs correctly note, the fact that Colonel Bosch came forward after the trial to contradict Ambassador White's testimony as to the authorship of the report does not mean that it was improperly admitted into evidence under one of the Court's three alternative grounds—namely, Federal Rule of Evidence 803(6), as a record of regularly conducted activity, Rule 803(8), a public record, or Rule 803(16), as an ancient document. (Tr. 301-06, 357.) Moreover, even if the document was improperly admitted, its admission did not result in any prejudice to Defendant. The substance of the report—that members of the Salvadoran officer

corps, including Defendant, knew about and supported the assassination of the six FDR leaders—was corroborated by Ambassador White's testimony as well as several trial exhibits. (See Exhs. 5, 7, 28, and 50.) As set forth above, "[e]ven if a mistake has been made regarding the admission or exclusion of evidence, a new trial will not be granted unless the evidence would have caused a different outcome at trial." Tompkin, 362 F.3d at 891. The admission of Exhibit 6, even if in error, does not necessitate a new trial.[4]

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[4] Defendant's suggestion that Plaintiffs' witnesses falsely testified or that Plaintiffs' counsel elicited false testimony must be rejected. As set forth in the declaration of one of Plaintiffs' attorneys, David R. Esquivel, Colonel Bosch represented to Mr. Esquivel prior to trial that he was not the author of Trial Exhibit 6 and stated that the content of the report was not consistent with his personal opinion of Defendant. (Esquivel Decl. ¶ 11.) However, Colonel Bosch did not question the document's authenticity, and he made other statements that caused Mr. Esquivel to question his credibility. (Id. at ¶¶ 10-11.) Further, Plaintiffs' counsel was also aware that Ambassador White had previously identified Colonel Bosch as the author of the report in his testimony during the trial in Romagoza v. Garcia, No. 99-8364 (S.D. Fla.).

Defendant has put forward no evidence to show that Plaintiffs' counsel improperly credited Ambassador White's conclusion regarding the report's authorship or that Plaintiffs' counsel improperly discredited statements of Colonel Bosch. Moreover, Defendant had ample opportunity to present the testimony of Colonel Bosch at trial—the appropriate forum for that presentation—and Defendant's belated attempt to undermine the report's authenticity or veracity in his post-trial motion provides an insufficient basis to require a new trial.

2. Photographs

Defendant contends that the Court erred by admitting "highly inflammatory photographs depicting numerous dead bodies and victims of alleged military atrocities, for which there was no direct causal relationship to any conduct of the Defendant." (Def.'s Mot. ¶ 7.) Defendant argues that these photographs (Exhibits 20, 22, 25, and 26) "grossly prejudiced and inflamed" the jury. This argument is without merit.

As Plaintiffs point out, the photographs are relevant to show that the Salvadoran military was engaged in a widespread and systematic attack against a civilian population—an element that Plaintiffs Chavez, Revelo, and Alvarado were required to prove as part of their claims for crimes against humanity. The photographs are also relevant to show that Defendant had notice of his subordinates' human rights abuses, which Plaintiffs had to prove under the doctrine of command responsibility. Taking these considerations into account, the Court correctly determined, under Federal Rules of Evidence 401, 402, and 403, that the photographs were relevant and that their probative value outweighed any danger of unfair prejudice.

3. Expert Witness Testimony

Next, Defendant argues that it was error for the Court to allow Plaintiffs' expert witnesses "to testify in reliance upon inadmissible hearsay and inflammatory irrelevant information," including

"hearsay evidence regarding unknown and unidentified third parties and outrageous conduct committed after the Defendant was no longer associated with the military and after [he] had left El Salvador." (Def.'s Mot. ¶ 8.)

Contrary to Defendant's assertion, expert witnesses may base their opinions on information and facts of a type reasonably relied upon by experts in their particular field that are otherwise inadmissible. Fed. R. Evid. 703. Defendant does not specify what information was improperly relied upon by Professor Karl or Ambassador White. The Court has reviewed the testimony of these witnesses and finds that the intelligence reports relied upon by Ambassador White and the interviews and research relied upon by Professor Karl are of the sort reasonably relied upon by experts in their fields. In addition, the Court properly allowed Plaintiffs' experts to testify about events that affected individuals other than Plaintiffs or their families, as evidence of other human rights abuses committed by military officers or personnel is relevant to the widespread or systematic attack element of Plaintiffs' crimes against humanity claim and to the doctrine of command responsibility. See Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1353-54 (N.D. Ga. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 172-73 (D. Mass. 1995).

Defendant also objects to Professor Karl's testimony on military procedures and command responsibility "because she never served in any military organization and did not have military training or education . . . ." (Def.'s Mot. ¶ 9.) The

Court overruled this objection at trial and permitted Professor Karl to testify about the Salvadoran military and command structure because the Court found that these matters were within her expertise. The Court noted that Defendant could cross-examine Professor Karl on her credentials and that it was for the jury to decide how much weight to give her testimony. (Tr. 903-04.) Defendant offers no explanation or authority for his argument that Professor Karl was unqualified to testify on military matters in El Salvador during the relevant period, and, indeed, Professor Karl's credentials and testimony strongly belie this contention. Moreover, Defendant has failed to specify which testimony he believes Professor Karl was unqualified to give or how he was unfairly prejudiced by this testimony.

Defendant's thirteenth assignment of error states, in its entirety, that "[t]he Court erred as a matter of law by allowing Plaintiffs to elicit testimony from their expert witnesses, as well as [ ] argue to the jury about 'other cases', which was prejudicial to Defendant." (Def.'s Mot. ¶ 13.) The Court is unaware of the "other cases" to which Defendant refers and is uncertain as to the basis for this objection. Because Defendant has failed to state with particularity the grounds of his argument, the Court cannot examine this basis for a new trial on its merits.

4. Inflammatory References

Defendant next argues that the Court should have granted a mistrial when Plaintiffs' counsel "referred to the post-World War II Nuremberg trials

against Nazi war criminals . . . ." (Def.'s Mot. ¶ 14.) Defendant points out that, in contrast, he was not permitted to ask Plaintiffs' witness, Colonel Jose Luis Garcia, whether "Argentina was, in fact, a haven and refuge for German Nazi war criminals." (Id.)

Plaintiffs' counsel made the statement to which Defendant objects in her closing argument on punitive damages:

> As your verdict has indicated, you have recognized that crimes against humanity occurred in El Salvador under Colonel Carranza's watch. The term crimes against humanity was coined to express the outrage of the whole world at the crimes of World War II. It is a recognition that there are acts which are so offensive that they are crimes against all humankind. They're crimes against every one of us.

(Tr. 1891.) Plaintiffs point out that this was their only reference to World War II and that they did not attempt to connect Defendant to the crimes committed during World War II.

In determining whether a new trial is appropriate, the Court "must consider the frequency of the allegedly objectionable comments and the manner in which the parties and the court treated the comments." Clemens v. Wheeling & Lake Erie R.R., 99 Fed. Appx. 621, 626 (6th Cir. 2004). In Clemens, as here, counsel made only one

objectionable remark during closing argument and, moreover, the comment referred to an issue of damages. The Sixth Circuit found that "counsel's isolated comment was therefore unlikely to have influenced the jury's verdict." Id. Similarly, the Court finds that in this case, Plaintiffs' counsel's reference to the crimes of World War II was neither inflammatory nor prejudicial, and a new trial is not warranted on this basis.

Further, Plaintiffs' objection to Defendant's attempt to question Colonel Jose Luis Garcia on whether Argentina was a haven and refuge for German Nazi war criminals was properly sustained at trial. Defendant has not put forward an explanation—either at trial or in the instant motion—of how this line of questioning is relevant or a proper basis upon which to impeach Colonel Garcia's credibility. Accordingly, this argument is without merit.

5. Law of Command Responsibility

Defendant contends that Plaintiffs failed to prove a causal connection between Plaintiffs' injuries and Defendant's actions. As Defendant puts it, "it is basic tort law that there must be a causal relationship in connection between the act and injury." (Def.'s Mem. Supp. Mot. 8.) The law of command responsibility under which Defendant was found liable, however, does not require proof that a commander's behavior proximately caused the victims' injuries. Hilao v. Estate of Marcos, 103 F.3d 767, 774 (9th Cir. 1996). As the Eleventh Circuit has

explained, "the concept of proximate cause is not relevant to the assignment of liability under the command responsibility doctrine [because] the doctrine does not require a direct causal link between a plaintiff victim's injuries and the acts or omissions of a commander." Ford v. Garcia, 289 F.3d 1283, 1298 (11th Cir. 2002)(emphasis in original). Accordingly, Plaintiffs were not required to submit proof of proximate cause in order to succeed on their claims under the law of command responsibility, and the Court was not required to instruct the jury on this issue.[5] In addition, Defendant fails to put forward any explanation as to why the Court's jury instructions on the law of command responsibility were "erroneous." (Def.'s Mot. ¶ 15(b)). Accordingly, the Court will not address this objection.

6. Number of Jurors

Defendant argues that the Court erred by denying Defendant's pretrial Motion for Trial by Jury with Twelve Jurors. Defendant states that he "does not contend that he has an exclusive right to demand twelve (12) jurors to try his case but, on the other hand, contends that the trial court has discretion and authority to permit twelve (12) jurors to sit as jurors . . . ." (Def.'s Mem. Support Mot. 7.) To the extent that Defendant is arguing that the Court did not recognize its discretion under Federal

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[5] Defendant's related argument—that the Court should not have allowed Plaintiffs to bring their claims under the theory of command responsibility because "there has not been any specific body of civil law on the subject, except in other cases advanced by Plaintiffs' counsel and their Center for Justice and Accountability"—is simply incorrect and does not merit further discussion.

Rule of Civil Procedure 48 to "seat a jury of not fewer than six and not more than twelve members[,]" Defendant is incorrect. The Court exercised its informed discretion to seat a ten-member jury, nine of whom ultimately reached a unanimous verdict as to the claims of Plaintiffs Santos, Calderon, Franco, and Alvarado.[6] As the Supreme Court has held, "a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases." Colgrove v. Battin, 413 U.S. 149, 160 (1973). The Defendant had no right to a twelve-person jury, and his argument does not compel a new trial in this case.

As set forth above, none of Defendant's arguments in support of his motion for a new trial are meritorious, and Defendant's motion is DENIED.

V. Motion for Remittitur

The jury in this case awarded Plaintiffs Santos, Calderon, Revelo, and Alvarado $500,000 each in compensatory damages and $1,000,000 each in punitive damages. Defendant claims that the award of punitive damages is "patently excessive" for a "senior citizen on Social Security," and it is not supported by the evidence, as Plaintiffs failed to present any evidence as to his financial wealth. (Def.'s Mot. ¶¶ 16-17.)

A court may order a remittitur if an award of punitive damages is grossly excessive. Argentine v. United Steelworkers of Am., AFL-CIO, 287 F.3d 476, 487 (6th Cir. 2002)(citing BMW of N. Am., Inc. v.

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[6] One juror was excused for cause on the first day of trial.

Gore, 517 U.S. 559 (1996)). In determining whether an award of punitive damages is grossly excessive, "a court should consider (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damage award; and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases." Id.

Consideration of these factors supports the jury's award of punitive damages in this case. By finding Defendant responsible for acts of torture and summary executions of Plaintiffs and/or their family members, as well as finding that these acts were carried out as part of a widespread or systematic attack directed at a civilian population, the jury clearly found Defendant's conduct to be reprehensible. Second, the award of punitive damages bears a "reasonable relationship" to the award of compensatory damages. Id. at 583. The ratio between compensatory and punitive damages in this case is 2:1, which the Court does not find to be unreasonable. See Argentine, 287 F.3d at 488 (finding ratio of 42.5 to 1 to be reasonable where monetary damage to plaintiffs' reputations and free speech rights difficult to assess).

Finally, the award of punitive damages in this case is at the low end of the range of awards in other cases involving violations of the TVPA and ATCA. See Doe v. Saravia, 348 F. Supp. 2d 1112, 1158-59 (E.D. Cal. 2004)(listing punitive damages awards in TVPA and ATCA cases ranging from $1 million to $35 million). Plaintiffs note that in a case factually

similar to this one, a jury awarded three Salvadoran torture survivors punitive damages in the amounts of $5 million, $10 million, and $5 million, respectively, against former General Vides Casanova, who served as Director General of El Salvador's National Guard from 1979 to 1983. The jury also awarded two of the survivors $10 million each against former General Guillermo Garcia, who served as Minister of Defense of El Salvador during the same period. (Pls.' Mem. Support Opp. Def.'s Mot. 19, Ex. D (Arce v. Garcia, Case No. 99-8364, Final J. (S.D. Fla. July 31, 2002)). In Arce, as here, the defendants were held liable under a theory of command responsibility for the torture inflicted by Salvadoran military personnel under the defendants' command. See Arce v. Garcia 434 F.3d 1254, 1257-59 (11th Cir. 2006). In light of the awards in Arce and other comparable cases, as well as the other two factors discussed above, the Court does not find the punitive damages award to be grossly excessive. Remittitur is not warranted in this case.

Defendant's other argument in support of remittitur—that Plaintiffs failed to present evidence of Defendant's financial wealth as "a required ingredient of an award for punitive damages"—is not persuasive. Defendant has not presented any authority, and the Court has found none, to support the contention that a plaintiff must submit proof of a defendant's finances in order to sustain an award of punitive damages. The jury was instructed that, among several other factors, it could consider Defendant's net worth and financial condition when determining whether to award punitive damages. (Tr. 1909.) Defendant's counsel, in fact, argued that

Defendant is "not a rich person" and that the compensatory damages award alone would result in "severe financial consequences" for Defendant. (Id. at 1904-05.) As the jury was properly instructed on this factor, Defendant's argument does not support a remittitur of the punitive damages awards in this case.

VI. Conclusion

For all the reasons set forth above, Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur is DENIED.

So ORDERED this 15th day of August, 2006.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION**

ANA PATRICIA CHAVEZ,	)	
CECILIA SANTOS,	)	
JOSE FRANCISCO CALDERON,	)	
ERLINDA REVELO, and	)	
DANIEL ALVARADO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 03-2932 MI/P**
	)	
NICOLAS CARRANZA,	)	
	)	
Defendant.	)	

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before this Court is Plaintiffs' Motion for Summary Judgment, filed June 24, 2005. Defendant responded in opposition on July 27, 2005, and Plaintiffs filed a reply on October 13, 2005. For the reasons set forth below, Plaintiffs' motion is GRANTED in part and DENIED in part.

I. Background and Relevant History

Plaintiffs, who are or were at all pertinent times citizens of El Salvador, filed their original complaint in this action pursuant to the Torture Victims Protections ACT ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (enacted March 12, 1992) (codified as Note to 28 U.S.C. § 1350), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, on December 10, 2003. Plaintiffs filed an Amended Complaint on July 29, 2004, and a Second Amended Complaint on June 20, 2005. On September 30, 2004, the Court denied Defendant's motion to dismiss and renewed motion to dismiss, and on October 18, 2005, it denied Defendant's motion for judgment on the pleadings, or in the alternative, for summary judgment.

According to Plaintiffs, Defendant, Nicolas Carranza, served as El Salvador's Subsecretary of Defense and Public Security, from about October, 1979, until January, 1981, during which time he "exercised command and control over the three units of the Salvadoran Security Forces—the Guardia Nacional ('National Guard'), Policia Nacional ('National Police'), and Policia de Hacienda ('Treasury Police')." (Second Am. Compl. ¶¶ 2-3.) He served as Director of the Treasury Police from about June, 1983, until May, 1984, during which time he "possessed and exercised command and control over the Treasury Police." (Id. ¶ 3.) Plaintiffs' Second Amended Complaint alleges that Mr. Carranza "exercised command responsibility over, conspired with, or aided and abetted subordinates in the Security Forces of El Salvador, or persons or groups acting in coordination with the Security Forces or

under their control, to commit acts of extrajudicial killing, torture, and crimes against humanity, and to cover up these abuses." (Second Am. Compl. ¶ 2.) Defendant has resided in the United States since 1984 and is currently a resident of Memphis, Tennessee.

Plaintiffs claim that Defendant bears command responsibility for certain predicate acts—namely, the torture, extrajudicial killing, and crimes against humanity that Plaintiffs and their family members have allegedly suffered. (Pls.' Mot. Summ. J., at 1.) The doctrine of command responsibility requires that Plaintiffs prove (1) the occurrence of each predicate act and (2) that Defendant is liable as the commander of those who perpetrated the acts. (Id. at 1-2.) Plaintiffs seek summary judgment on the predicate acts of torture and extrajudicial killing under the TVPA and the ATCA. They argue that there is "overwhelming evidence in the record" to support these claims. In addition, by granting summary judgment, "the Court will narrow the complex body of facts and law that the jury will be required to consider at trial and thereby promote trial efficiency." (Id. at 1.)

II. Undisputed Facts

The facts underlying Plaintiffs' claims are largely undisputed. Plaintiff Ana Maria Chavez ("Chavez") is a citizen of El Salvador, a legal permanent resident of the United States and a current resident of California. (Second Am. Compl. ¶ 8.) On July 26, 1980, Chavez, her partner, Carlos Omar Reyes, and her infant daughter were at

Chavez's parents' home in El Salvador for a visit. Her parents, Guillermina and Humberto Chavez, were school teachers and members of the teachers' union in Ahuachapan, El Salvador. That morning, Chavez saw "in the corridor of the house a man dressed in civilian clothes, wearing a mask, and carrying a rifle." This individual grabbed Chavez's mother and threw her on the bed. More armed men, dressed similarly, entered the house. One threw Chavez on the bed next to her mother. The men beat Chavez's mother, and opened "all the drawers in the bedroom wardrobe, and demanded to see propaganda and money." Chavez and her infant daughter were taken to another room, where Chavez could hear her mother's continued beating, and then gunshots. Once it was quiet, Chavez left the room and found that her mother had been killed. She subsequently found her partner at the neighbor's house and her father in the corridor of her parents' home. Both had been shot. (Def.'s Resp. Pls.' Statement Mat. Facts ("Def.'s Resp. Pls.' SOMF") ¶¶ 2-11.)

Cecilia Santos ("Santos") is a native of El Salvador, a naturalized citizen of the United States, and a resident of New York. (Second Am. Compl. ¶ 9.) According to the undisputed facts, Santos was a student at the National University of El Salvador and worked full-time for the Salvadoran Ministry of Education in 1980. On September 25, 1980, Santos was in the restroom at a shopping mall in San Salvador when she heard a loud noise that sounded like an explosion. Two private security guards entered the restroom and began questioning Santos about the sound. They subsequently took Santos to

an office in the mall and "accused her of having planted a bomb, offering what appeared to be a box of cigarettes as proof." An individual in the office made a telephone call, and thirty minutes later, "two men dressed in civilian clothes came to the office and took Ms. Santos away in a taxi." (Def.'s Resp. Pls.' SOMF ¶¶ 16-22.)

After driving for approximately twenty minutes, they reached the headquarters of the National Police, whereupon Santos was "turned over to the Corporation of National Investigation," a subsection of the National Police agency. Santos was blindfolded, led through a tunnel, and "crossed a larger room where she heard the sounds of many people moaning and groaning on the floor." Santos was seated in a room with several men in it and was told, "[i]t will be easy if you cooperate with us." One of the men interrogated Santos, asking her about her family members, co-workers and classmates. Another "groped her by pressing on her breasts and legs, and trying to put his hand inside her blouse and skirt[;] later . . . one of her interrogators pulled her partially out of the chair and forced an object into her vagina." Santos screamed in pain, to which one of the men replied, "[t]hat's nothing. That's just to test." Another said, "[d]o you remember where you are? This is the National Police Headquarters, and here we decide what is going on, what can . . . happen to you." An interrogator inquired whether Santos knew how to make a bomb and told her that she had to know, since she was in the University. "The man dipped a Q-Tip into a bottle of sulphuric acid and inserted it into Ms. Santos' nose. He also dropped acid onto Ms. Santos' right hand, which

caused it to blister almost immediately." Later, "while one man monitored her heart rate with a stethoscope, another man attached wires around the fingers of Ms. Santos' right hand and administered electric shocks." (Def.'s Resp. Pls.' SOMF ¶¶ 23-37.)

During the interrogation, the men placed pictures of different individuals before Santos and asked her to identify them. She later signed a blank piece of paper, "with the assistance of one of her interrogators." After her interrogation ended, one of the men who had been questioning her took her "to a man in a green uniform, who was to place her in a cell." Her interrogator instructed the man that Santos "is in the deposit of the Ministry of Defense." (Def.'s Resp. Pls.' SOMF ¶¶ 38-41.)

Plaintiff Jose Francisco Calderon ("Calderon") is a native of El Salvador, a naturalized citizen of the United States, and a resident of California. (Second Am. Compl. ¶ 10.) According to Plaintiffs' undisputed statement of facts, Calderon's father ("Paco") was a school principal and, like Chavez's parents, a member of the teachers' union in Ahuachapan, El Salvador. In June 1980, Calderon's father was arrested for possession of flyers that "instructed the population about what to do in the event of a general strike or a natural disaster." Calderon testified that "when you have one of those flyers, the army sees you as a subversive." (Calderon Dep., Pls.' Mem. Supp. Mot. Summ. J. Ex. E at 18.) Upon his release, Plaintiff Calderon's father moved in with Calderon in San Salvador. On September 11, 1980, uniformed members of the National Police wearing bulletproof vests came to Calderon's house

and demanded entry. Calderon opened the door, and "several men in civilian clothes entered the house." One of the men, "was wearing a mask and carried a G3 military-issued rifle," forced Calderon on the floor, stepped on him and pointed the rifle at his back. The men also detained Calderon's father, at which point they "broke the light bulbs in the living room, then fired five gunshots from the G3 rifles into Paco Calderon's body." Calderon "thought that he would be shot next," but the men left. (Def.'s Resp. Pls.' SOMF ¶¶ 42-55.)

Plaintiff Erlinda Revelo, ("Revelo")[1] is a citizen and current resident of El Salvador. (Second Am. Compl. ¶ 11.) According to Plaintiffs,[2] Revelo's husband, Manuel Franco, was a professor at the National University in El Salvador and a prominent leader of the Democratic Revolutionary Front (FDR) in 1980. On November 27, 1980, Revelo's husband and five other FDR leaders were abducted "in a military operation in which the perimeter of the school was secured by the Treasury Police." Franco's body was later dumped on the side of the road on the

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[1] Revelo originally brought her claims under a pseudonym, Jane Doe. Her husband's pseudonym was James Doe. The Court granted Plaintiffs' Unopposed Motion Regarding Use of Pseudonyms and to Unseal Documents Filed Under Seal on September 19, 2005.

[2] Plaintiffs rely largely on the findings of fact set forth in the Report of the United Nations Truth Commission on El Salvador ("Truth Commission Report" or "Report"), dated April 1, 1993. The Truth Commission on El Salvador was charged with investigating acts of violence that took place during the country's civil war from 1980 to 1991. (See Truth Comm'n Report, Pls.' Mem. Supp. Mot. Summ. J. Ex. B ("Truth Comm'n Report") at PL0009.)

outskirts of Apulo, El Salvador. When Revelo identified her husband's body, she observed gunshot wounds to her husband's mouth and thorax, as well as "a well-defined burn surrounding his entire neck." (Def.'s Resp. Pls.' SOMF ¶¶ 56-63.)

Plaintiff Daniel Alvarado ("Alvarado")[3] is a native of El Salvador, is not a United States citizen, and has resided in Sweden since 1986. (Second Am. Compl. ¶ 12; Pls.' Resp. Def.'s SOMF ¶ 4.) Alvarado was abducted in August 1983 by men dressed in civilian clothes and carrying military-issued rifles. He was taken to the Treasury Police headquarters, and placed in a cell. The men connected wires to Alvarado's toes and ran an electric current through his body. They also placed a hood over his head and beat him. The men accused Alvarado "of being a guerrilla fighter" and that he was responsible for the death of Lt. Cmdr. Albert Schaufelberger, a United States military advisor in El Salvador. Alvarado alleges that the individual in charge was Major Ricardo Pozo, the chief of the intelligence section of the Treasury Police and the head of the official Salvadoran investigation into Lt. Cmdr. Schaufelberger's death. Pozo told Alvarado "that his cooperation was necessary because there was a reward for finding the perpetrator of the Schaufelberger assassination, and that Maj. Pozo wanted to give the reward to 'his boys,' Mr. Alvarado's torturers." Alvarado was tortured over the course of four days, after which point he "could not withstand further torture, and he signed a statement, which he did not read, and which he later

[3] Alvarado originally brought his claims under a pseudonym, John Doe. See supra n.1.

discovered attributed to him responsibility for the Schaufelberger murder." Alvarado was subsequently taken to a media event at the Treasury Police headquarters—at which Defendant presided—and was forced to say that he killed Lt. Cmdr. Schaufelberger. Upon return to his cell, Alvarado was once again tortured with electric shocks, causing him to suffer a nervous breakdown. Alvarado was transferred to another cell within "the more public part" of the Treasury Police headquarters eighteen days later. Several weeks later, he was questioned by two representatives from the United States and was given a polygraph exam, which confirmed Alvarado "had been tortured and that he did not participate in the Schaufelberger assassination." (Def.'s Resp. Pls,' SOMF ¶¶ 64-88.)

III. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary

judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

When confronted with a properly-supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 250 (6th Cir. 1998). A genuine issue of material fact exists for trial "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

IV. Analysis

Plaintiffs allege that Defendant is liable under a theory of command responsibility for acts of torture, extrajudicial killing, and crimes against humanity that were perpetrated against Plaintiffs and/or their family members. They seek summary judgment on several of these predicate acts: (1) Chavez's claims of torture and extrajudicial killing under the ATCA and the TVPA; (2) Santos's claim of torture under the TVPA; (3) Calderon's claims of

torture and extrajudicial killing under the TVPA; (4) Revelo's claim of extrajudicial killing under the ATCA and the TVPA; and (5) Alvarado's claim of torture under the ATCA and the TVPA. (Pls.' Mot. Summ. J. 2.)

Defendant argues broadly that "Plaintiffs' case and claims are tendered by reliance upon hearsay, double-hearsay, triple-hearsay, irrelevance, denial of due process and all of the other objections" Defendant has set forth in earlier submissions to the Court. (Def.'s Mem. Opp. 1.) In particular, Defendant challenges Plaintiffs' reliance on the Truth Commission Report. He also claims that he "cannot even investigate the truthfulness of the allegations or find witnesses as to the alleged incidents to which he was not present or aware." (Id. at 2.) With the exception of the facts taken from the Truth Commission Report, Defendant does not dispute the facts that underlie Plaintiffs' claims of torture and extrajudicial killing. (See Def.'s Resp. Pls.' SOMF.)[4]

A. Applicable Law

The Alien Tort Claims Act states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the

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[4] Defendant also argues repeatedly that Plaintiffs cannot prove a "causal connection" between the acts complained of and Defendant's knowledge or involvement. As Plaintiffs' motion does not seek summary judgment on any aspect of Defendant's liability under the theory of command responsibility, however, the Court will not address this argument.

United States." 28 U.S.C. § 1350.[5] The Supreme Court recently interpreted the ATCA in Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739 (2004). Sosa held that the ATCA is a "jurisdictional statute creating no new causes of action" but that the grant of jurisdiction was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time [of its enactment]." 124 S.Ct. at 2761. The Court did not specify which violations of international law norms are actionable under the ATCA, but courts have since construed Sosa to permit claims of torture and extrajudicial killing to go forward under the ATCA. See, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005)(holding plaintiffs "can raise separate claims for state-sponsored torture under the [ATCA] and also under the [TVPA]); Mujica v. Occidental Petroleum Corp., 381 F.Supp.2d 1164, 1179 (CD. Cal. 2005)(recognizing claims of torture and extrajudicial killing under ATCA); Doe v. Saravia, 348 F.Supp.2d 1112, 1144-45 (E.D. Cal. 2004)(recognizing claim of extrajudicial killing under ATCA and TVPA); but see Enahoro v. Abubakar, 408 F.3d 877, 885 (7th Cir. 2005)(construing Sosa to limit relief against torture and extrajudicial killing to the TVPA and dismissing plaintiffs' torture claim brought solely under ATCA).

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[5] Courts sometimes refer to this statute as the "Alien Tort Statute" or the "Alien Tort Act." See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739 (2004); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

The Torture Victim Protection Act provides that:

> [a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note. The TVPA provides an "unambiguous and modern basis for a cause of action" for torture and extrajudicial killing. H.R. Rep. No. 102-367(II), reprinted in 1992 U.S.C.C.A.N. at 86. Unlike the ATCA, both citizens and non-citizens of the United States may file claims under the TVPA. See Saravia, 348 F.Supp.2d at 1145.

B. Torture

To prove a claim of torture under either the ATCA or the TVPA, each Plaintiff must first establish that governmental actors carried out the alleged torture to which they were subjected. See 28 U.S.C. § 1350 note § 2(a)("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall . . . be liable . . . ."); H.R. Rep. No. 102-367(III),

reprinted in 1992 U.S.C.C.A.N. at 87 (noting that suits against "purely private groups" are not actionable under the TVPA and that "the plaintiff must establish some governmental involvement in the torture to prove a claim"); Aldana, 416 F.3d at 1247 (recognizing state action as necessary element of torture under the ATCA); Kadic, 70 F.3d at 243-44 (holding torture actionable under the ATCA "only when committed by state officials or under color of law"). When persons who are not government officials "act[ ] together with state officials" or act with "significant state aid[,]" they are deemed governmental actors for the purposes of the state action requirement under the TVPA and the ATCA. Saravia, 348 F.Supp.2d at 1145 (noting courts look to the jurisprudence of 42. U.S.C. § 1983 "as a guide to determine when persons who are not themselves government officials, nonetheless act under apparent authority or color of law").

The TVPA defines torture as any act (1) "directed against an individual in the offender's custody or physical control[;]" (2) that inflicts "severe pain or suffering[,] . . . whether physical or mental[;]" (3) for the purpose of obtaining information, intimidation, punishment or discrimination. 28 U.S.C. § 1350 note § 3(b)(1). The ATCA does not define torture. Courts analyzing ATCA torture claims generally rely on the definition set forth in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which is substantially the

same as the TVPA definition.[6] See Aldana, 416 F.3d at 1251 (relying on CAT definition of torture to evaluate ATCA claim); see also Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289, 326 (S.D.N.Y. 2003); Kadic, 70 F.3d at 243-44.

1. Chavez

As set forth above, each Plaintiff must first establish that governmental actors were involved to make out a claim of torture under the ATCA and the TVPA. See 28 U.S.C. § 1350 note § 2; H.R. Rep. No. 102-367(111), reprinted in 1992 U.S.C.C.A.N. at 87; Aldana, 416 F.3d at 1247; Kadic, 70 F.3d at 243-44.

Under this standard, a triable issue of material fact exists as to whether government actors were involved in Chavez's alleged torture. The undisputed fact show that masked men—dressed in

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[6] The Convention defines torture as:

> any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Part I, Article I, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984).

civilian clothes, carrying rifles, and demanding propaganda and money—carried out the attack on Chavez's family. (Def.'s Resp. Pls.' SOMF ¶¶ 2-6.) Chavez characterizes this group of men as members of a "death squad" working in cooperation with the government to carry out attacks on civilians, citing the Truth Commission Report, which states that Salvadoran armed forces "operated on the death squad model" and that operations were carried out by "members of the armed forces, usually wearing civilian clothing, without insignias, and driving unmarked vehicles." (Truth Comm'n Report at PL0161, PL0166)("The members of such groups usually wore civilian clothing, were heavily armed, operated clandestinely and hid their affiliation and identity. They abducted members of the civilian population . . . .") Defendant, however, argues that Plaintiffs simply presume—without proof—that the men who killed Chavez's parents were members of government-affiliated death squads. (Def.'s Mem. Opp. Pls.' Mot. Partial Summ. J. at 2.)

The Court agrees that, in order to find the requisite state involvement in Chavez's claims, the Court would have to infer from the fact that government-sponsored death squads operated in El Salvador during this period that the men who killed Chavez's parents must have been members of death squads. On a motion for summary judgment, however, the Court must draw all inferences in the nonmovant's favor. Kochins v. Linden-Alimak, Inc., 7 99 F.2d 1128, 1133 (6th Cir. 1986)("A summary judgment movant bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as

well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion.") Accordingly, the Court finds that Chavez has failed to demonstrate the absence of a genuine issue of material fact on the issue of state involvement. Cf. Aldana, 416 F.3d at 1248-49 (granting defendants' motion to dismiss torture claim under ACTA and TVPA where plaintiffs' allegation that police knew of and deliberately ignored private security force attack on civilians was based solely on the fact that the police station was nearby). The Court DENIES Chavez's motion for summary judgment as to the predicate act of torture under the ATCA and the TVPA.

2. Santos

Plaintiff Cecilia Santos alleges that she was subject to torture under the TVPA. The undisputed facts demonstrate that Santos suffered severe pain and suffering—she was sexually assaulted, given electric shocks, and burned with acid while in the custody of the Salvadoran National Police. (Def.'s Resp. Pls.' SOMF ¶¶ 28-29, 34-35, 37); see Doe v. Oi, 349 F.Supp.2d 1258, 1317 (N.D. Cal. 2004)(finding "use of particularly heinous acts such as electrical shock or other weapons or methods designed to inflict agony does constitute torture"). Santos was tortured for the purpose of "obtaining information, intimidation, punishment or discrimination," 28 U.S.C. § 1350 note § 3(b), as evidenced by the fact that she was accused of having planted a bomb and asked to identify people in several pictures (Def.'s Resp. Pls.' SOMF ¶¶ 20, 32-33, 38). Finally, Santos has established government involvement in her

torture. She claims that she was in the custody of officials from the Corporation of National Investigation ("CAIN"), a subsection of the Salvadoran National Police,[7] and was repeatedly told that she was in the National Police headquarters. After her torture and interrogation had concluded, one of her interrogators told a "man in a green uniform" that Santos was "in the deposit of the Ministry of Defense." (Id. ¶¶ 23-25, 31, 36, 41.) The undisputed facts plainly indicate that Santos was subjected to severe pain and suffering by individuals acting under color of law for the purpose of obtaining information, intimidation, or punishment. Accordingly, the Court GRANTS Santos' motion for summary judgment as to her predicate act claim that she was tortured under the TVPA.

3. Calderon

Plaintiff Calderon alleges that he was subjected to severe pain and suffering by being forced to witness the death of his father and by being threatened with imminent death. The TVPA defines "mental pain or suffering" as:

> prolonged mental harm caused by or resulting from . . . (C) the threat of imminent death; or (D) the threat that another individual will imminently be subjected to death, severe physical pain

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[7] Defendant admits this statement, as per Santos' testimony, but notes that he was "not familiar with the National Police and did not know the name 'CAIN' and whether it was a proper name." (Id. ¶ 25.)

> or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 note § 3(b)(2). The undisputed facts show that Calderon's attackers forced him to the ground, stepped on him, and pointed a rifle at his back. After the men shot his father, Calderon thought he would be shot next. (Def.'s Resp. Pls.' SOMF ¶¶ 49-55); see Oi, 349 F.Supp.2d at 1318 (finding plaintiff subjected to mental torture under TVPA where forced to "witness the guards' severe mistreatment of a close friend"); Aldana, 416 F.3d at 1251-52 (finding threats of imminent death to constitute severe mental suffering under both ATCA and TVPA).

Calderon has also established the requirement of state action. He observed "uniformed members of the National Police wearing bulletproof vests" outside his house who demanded that he open the door. One of the men carried a "G3 military-issued rifle." (Def.'s Resp. Pls.' SOMF¶¶ 46-55; see also Truth Comm'n Report at PL0263 ("G3 rifles were the regulation weapon of the security forces at the time and were used by the armed forces of El Salvador in the war against Honduras in 1969."))

Finally, Calderon has demonstrated that the men who carried out the attack and killed his father acted with the purpose of obtaining information, intimidation, punishment, or discrimination. Plaintiffs claim that Calderon was tortured in order