

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 07-21783-CIV-JORDAN

TEÓFILA OCHOA LIZARBE, in her individual capacity, and in her capacity as the personal representative of the estates of Silvestra Lizarbe Solis, Gerardo Ochoa Lizarbe, Victor Ochoa Lizarbe, Ernestina Ochoa Lizarbe, Celestino Ochoa Lizarbe, and Edwin Ochoa Lizarbe, and

CIRILA PULIDO BALDEÓN, in her individual capacity, and in her capacity as the personal representative of the estates of Fortunata Baldeón Gutiérrez and Edgar Pulido Baldeón,

Plaintiffs,

v.

TELMO RICARDO HURTADO HURTADO,

Defendant.

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**PLAINTIFFS' MEMORANDUM OF LAW ON  
DAMAGES AND CLOSING STATEMENT**

Plaintiffs, Teófila Ochoa Lizarbe and Cirilia Pulido Baldeón, (collectively, "Plaintiffs"), submit their Memorandum of Law on Damages and their Closing Statement for the trial held on February 11, 2008. The Plaintiffs brought two claims against Defendant Telmo Ricardo Hurtado Hurtado ("Hurtado" or "Defendant") – one under the Alien Tort Statute ("ATS") (Counts I –VII) and the other under the Torture Victim Protection Act ("TVPA") (Counts I-III). The claims were brought on behalf of the Plaintiffs individually, and on behalf of the Plaintiffs' deceased mothers and six deceased siblings. As this Court has entered default

judgment, Hurtado is liable for all claims. The remaining issue is the amount of the damage award that would appropriately compensate Plaintiffs and punish Defendant Hurtado.

## **I. Introduction**

It is a proven and admitted fact that Defendant Hurtado tortured and murdered Plaintiffs' mothers and siblings – along with 61 other people – on August 14, 1985, in what is known as the Accomarca Massacre. Plaintiffs' murdered siblings were children – 10, 8, 6, 3, 1 and nine months old – at the time of their deaths. The torture and murder included the brutal beating of men, women and children, and the raping of women. The victims of the Accomarca Massacre, including Plaintiffs' relatives, were beaten with the butts of weapons and kicked with the heels of soldiers' boots. They were lined-up single file and herded into houses of death, where Hurtado and his soldiers repeatedly shot the Plaintiffs' family members, and then burned them alive amidst desperate screams for mercy. All of these acts were personally seen and heard by two 12-year old girls, Teófila Ochoa Lizarbe and Cirila Pulido Baldeón, and in this way, the two Plaintiffs were themselves tortured by Defendant Hurtado. As a result of their massacre of the entire village of Accomarca, Hurtado and his soldiers are responsible for extrajudicial killing, torture, war crimes, and crimes against humanity – all in violation of the international law of nations.

Plaintiffs Teófila Ochoa Lizarbe and Cirila Pulido Baldeón witnessed and lived through the mass torture and execution of their nuclear and extended family, friends, and community. These facts are not in dispute. The only issue that remains is what damages the Plaintiffs, Teófila Ochoa Lizarbe, her mother Silvestra Lizarbe Solis, her siblings Gerardo Ochoa Lizarbe, Victor Ochoa Lizarbe, Ernestina Ochoa Lizarbe, Celestino Ochoa Lizarbe, and Edwin Ochoa Lizarbe; and Cirila Pulido Baldeón, her mother Fortunata Baldeón, and her brother Edgar Baldeón, should be awarded.

The admission of the facts in the Complaint; the testimonies of Teófila Ochoa Lizarbe and Cirila Pulido Baldeón; the testimony of Peruvian Truth Commission Editor Eduardo Gonzalez, supported by Chapter 2.15 of the Final Report of the Peruvian Truth and Reconciliation Commission (Plaintiffs' Exh. 2); and the testimony of Senator Javier Diez Canseco, supported by the Peruvian Senate Report (Plaintiffs' Exh. 3), comprise more than an ample showing of substantial damages under the two federal statutes in question – the ATS and the TVPA.

The ATS and the TVPA are federal laws enacted by Congress that respectively provide remedies to plaintiffs who can 1) demonstrate conduct in violation of international norms; and 2) show that they have been tortured or subjected to extrajudicial killing. The ATS allows the award of compensatory and punitive damages for the commission of a tort that violates international law. The TVPA provides the award of compensatory and punitive damages for torture and extrajudicial killing.

It is federal common law that should be applied when addressing damages under ATS and TVPA claims. Under federal common law, the surviving Plaintiffs are entitled to compensatory damages for their pain and suffering due to Hurtado's crimes; and the decedent Plaintiffs are entitled to compensatory damages for their pain and suffering prior to their murder, and for their murder by Hurtado. All ten Plaintiffs, under federal common law, are also entitled to punitive damages to punish Hurtado, and to deter others from committing genocide, torture, and murder.

Federal common law mandates that courts draw on all "relevant sources" of law in order to effectuate the federal interest in providing an appropriate remedy for violations of a federal statute. This court should look to existing federal common law, as applied in previously-

decided ATS and TVPA cases, to craft a remedy that will appropriately compensate Plaintiffs and punish Hurtado.

Because Hurtado's human rights abuses occurred in Peru, against Peruvian citizens, the Court may look to the laws of Peru to determine if there are additional remedies or damages that should be considered in order to effectuate the purpose of international law and its norms, and to compensate victims of murder and torture. Although it does not refer specifically to "compensatory" or "punitive" damages, the law of Peru permits courts to award damages to compensate victims for pain and suffering; to punish perpetrators of tortious conduct; and to deter others from such tortious conduct. Because the law of Peru is consistent with the federal common law of damages in tort, this Court need not apply Peruvian law to determine an award of damages.

The federal common law of the ATS and the TVPA and Peruvian law on damages (described herein) reflect virtually identical principles, such that no real conflict exists between those laws – further supporting reference to both or either set of laws in fashioning a compensatory and punitive damages award. The law of Florida has no application to this case, and Florida laws and statutes (wrongful death laws and otherwise) should not be considered.

In conclusion, as a Closing Statement, Plaintiffs provide a factual summary of how this law should apply to the evidence presented during the trial on damages.

## **II. Federal Common Law Applies to the Assessment of Damages Under Both the ATS and the TVPA**

In determining damages, this Court should apply federal common law to Plaintiffs' claims under the ATS and the TVPA. Claims under the ATS and the TVPA are predicated on federal question jurisdiction. In cases arising under federal jurisdiction, federal

common law applies to the choice-of-law determination. *See Chan v. Soc’y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997).

## **A. Federal Common Law**

### **1. Federal Choice of Law Analysis**

Federal courts have yet to articulate a consistent choice-of-law analysis for the determination of damages in ATS and TVPA cases. Few courts have explicitly addressed the question of what law applies to damages under the ATS or the TVPA. A review of the decisions addressing the choice of law applicable to damages under the ATS or the TVPA, however, demonstrates that federal common law is the appropriate choice.<sup>1</sup>

The first court to conduct a detailed choice-of-law analysis for damages under the ATS was *Filartiga v. Peña-Irala* (“*Filartiga II*”), 577 F. Supp. 860 (E.D.N.Y. 1984). The *Filartiga II* court found that almost all the contacts relevant to the choice of law analysis took place in Paraguay, and so Paraguayan law applied to the award of compensatory damages. But because Paraguay did not recognize punitive damages, the *Filartiga II* court held that federal common law, which included principles of international law, applied to its award of punitive damages. *Id.* at 865. The court held that this was warranted in order to “give effect to the

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<sup>1</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) is the only Supreme Court case to address the ATS. *Sosa* held that the ATS is only a jurisdictional grant but it does not address the applicable law for damages under the ATS. *Id.* 713. There are, however, several findings in the opinion that impliedly support the applicability of federal law to ATS and TVPA claims.

First, the Court held that “the jurisdictional grant (in the ATS) is best read as having been 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.” *Id.* at 724. This implies that international law is a part of the common law. Second, the Court states that “in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.” This acknowledges that federal courts may play an active role in fashioning the common law in areas under the oversight of federal courts – such as claims brought under the ATS. Third, the Court found that “a clear mandate appears in the Torture Victim Prevention Act of 1991, 106 Stat 73, providing authority that ‘establish[es] an unambiguous and modern basis for’ federal claims of torture and extrajudicial killing, H.R. Rep. No. 102-367, pt. 1, p3 (1991). This plainly states that claims arising under the TVPA arise under federal law, and implies that federal common law could apply to TVPA claims.

manifest objectives of the international prohibition against torture.” *Id.* The *Filartiga II* court applied Paraguayan law to the determination of damages, insofar as it did not conflict with federal common law. For practical purposes, this amounts to an application of federal common law.<sup>2</sup>

In *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), the Eleventh Circuit held that federal common law applied to the question of remedies under the ATS. *Id.* at 848. (“[W]e conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.”). *See also Paul v. Avril*, 901 F.Supp. 330, 335 (S.D. Fla. 1994) (*citing Filartiga II*).

In *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) the court conducted an in-depth choice of law analysis for damages under the ATS. *Id.* at 406-418. After reviewing the entire body of case law regarding the applicable damages, the court found that traditional choice of law analyses do not apply in ATS and TVPA cases, because “the evolution of international human rights law in the light of contemporary realities ... points to the necessity of staking out a more flexible course in the determination of the substantive law to be applied in adjudicating ATCA cases.” *Id.* at 420. With specific reference to claims for torture and extrajudicial killing, the court found that the Congressional intent was to “favor[] the adjudication of TVPA claims in federal courts as a matter of United States policy” and also to recognize that “in considering the substantive law governing a cause of action invoking the TVPA the courts may apply federal law rights embodied in the TVPA’s definitions of torture and extrajudicial killing to adjudicate the dispute.” *Id.* at 422. The court, further, found that for claims of torture and extrajudicial killing asserted under the TVPA and the ATS there was no

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<sup>2</sup> The TVPA was enacted by Congress later, in 1991.

need “to conduct and adhere to a strict choice of law analysis.” *Id.* at 422-23. In sum, the *Tachiona* court held that both federal law and international law apply to ATS and TVPA claims.

The Ninth Circuit also conducted an examination of the applicable choice-of-law for damages in ATS cases, in *Alvarez-Machain v. United States* 331 F.3d 604, (9th Cir. 2003) *rev’d on other grounds, Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). After finding that federal common law applies to the choice-of-law determination, the court held that it should first look to the Restatement (Second) of Conflict of Laws, which states that choice of law principles in tort law are governed by the “most significant relationship” test. *Id.* at 633-34. (*citing Section 145 Restatement §6*). In order to determine what law has the most significant relationship to the tort, the Restatement looks to the following factors:

(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. *Id.* at 634.

The court then articulated competing policy factors that should be considered in ATS cases. These factors included:

“(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.” *Id.* at 634 (*citing Section 145 Restatement §6(2)*).

The *Alvarez-Machain* court held that the totality of the factors, including the “policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations,” weighed in favor of applying United States law. *Id.*

The federal common law analysis articulated in these precedents favors the underlying federal interest in enforcing the ATS, so that the choice of law analysis is effectively trumped by federal law where the applicable law is inconsistent with federal common law. As a practical matter, this means that federal courts typically apply federal common law to damages under the ATS. Here, under Eleventh Circuit precedent, federal common law would apply to the determination of damages under the ATS. Under the analysis articulated by the *Tachiona* court, the law of nations and federal common law would apply to the damages inquiry under the ATS. *Tachiona* at 419-20. Under the *Alvarez-Machain* standard, the “most significant relationship” test favors the application of Peruvian law, but the relevant policy considerations articulated in the decision favor the application of federal common law. The totality of the case law, thus, weighs in favor of applying federal common law to the determination of damages under the ATS. This Court should award Plaintiffs damages under federal common law for their ATS and TVPA claims.

Federal courts also analyze the choice of law applicable to a claim by looking to the source of the right for the claim. *See In re: Air Disaster At Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1278 (2d Cir. 1991) (citing *Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977)). In analyzing cases under the Warsaw Convention, federal courts have held that because the source of the right to sue is the Convention itself, and only the federal government has the power to make a treaty, federal common law applies to claims under the Convention itself. *Id.* at 1278. *See also Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *Corporacion Venezolana de Formento v. Vintero Sales Corp.*, 629 F.2d 728, 795 (2d Cir. 1980); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201 n.12 (3d Cir. 1978). In ATS and TVPA cases, the source of the right to sue is the statute itself – one that only the federal

government has the power to create.<sup>3</sup> By analogy to this line of cases, federal common law would also apply to claims under the ATS and the TVPA.<sup>4</sup>

## 2. Federal Common Law on Damages

Once it has been determined that federal common law applies to the question of damages, it becomes necessary to determine how to ascertain what the federal common law of damages is, as it relates to damages under the ATS and the TVPA. In order to determine or to fashion federal common law remedies, “courts may be guided by appropriate statutes without adopting any in their entirety.” *See Park v. Korean Air Lines Co.*, 1992 U.S. Dist. LEXIS 16841, 20 (S.D.N.Y. 1992) (citing *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 406-408 (1970);

<sup>3</sup> This is true under both the ATS, which is simply a jurisdictional grant that enables plaintiffs to bring claims for violations of established international law, and under the TVPA, which creates a specific cause of action for claims of torture and extrajudicial killing. In each case, absent the federal statute, plaintiffs would have no ability to sue in federal court.

<sup>4</sup> The application of federal common law to damages under ATS and TVPA cases is also supported by legal commentators. *International Human Rights Litig. in U.S. Courts* states that in ATS litigation “[t]he remedy however, is a ‘purely domestic tort remedy’ governed by ‘traditional, well-established concepts of federal common law.’” Beth Stephens, *International Human Rights Litigation in U.S. Courts* (Brill Publishers 2008), citing William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 641 (2006). Wright & Miller states that courts should look to a wide variety of sources, including “considerations of what rule is best designed to implement the underlying federal policy or statute involved [and] general considerations of equity jurisprudence.” Wright & Miller, *Federal Practice & Procedure* § 4518.

Although some courts conceptualize this broad inquiry as a choice of law analysis, they only follow choice of law principles to the extent those principles are consistent with the federal common law policy objective – enforcing the intent of the ATS. Most federal court decisions that perform any choice of law analysis do so in the context of an inquiry over other aspects of ATS law, rather than damages. *See e.g. In re Estate of Ferdinand Marcos Human Rights Litigation (Hilao v. Marcos)* 25 F.3d 1467, 1475 (9th Cir. 1994), cert. denied 513 U.S. 1126 (1995) (abatement); *Estate of Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345 (S.D. Fl. 2001 (standing)). Many of these courts, although notably not the Eleventh Circuit, cite to the Restatement 2nd of Conflicts or refer to more traditional choice of law principles drawn from United States Supreme Court holdings such as *Lauritzen v. Larsen* 345 U.S. 571 (1953). *See e.g. Tachiona* at 420 (reviewing pre-2002 case law on choice of law issues). One outlier court based the choice of law analysis on the law of the U.S. state in which the federal court sits. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F.Supp.2d 633 (S.D.N.Y. 2006) (appeal pending).

But federal courts have consistently refused to be shackled by any conventional choice of law principles in ATS cases and if they conduct a choice of law analysis at all, they do so only within the larger context of the federal common law inquiry, which itself allows reference to a broad range of legal principles. *See e.g. Filartiga II*. Many courts simply collapse the choice of law analysis into the federal common law analysis of the appropriate source of law, as the District Court did in *Filartiga II*. Most courts facing the issue in this case – assessment of ATS damages after a default – skip a choice of law analysis altogether and instead rely on previously decided ATS cases that awarded compensatory and punitive damages. *See e.g. Paul v. Avril*, 901 F.Supp. 330 (S.D. Fla. 1994).

*Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325-326)). Federal courts have continued to employ this flexible analysis in ATS cases. *See e.g. Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1158 n.4 (E.D. Calif. 2004) (Awarding compensatory and punitive damage awards with reference to prior ATS decisions on damages and holding that “[i]f a choice of law analysis is necessary to determine the applicability of punitive damages, this Court may look to the law of El Salvador but only to the extent it does not frustrate the very purpose of the ATCA.”).

This same analysis applies to damages under the TVPA. The TVPA was enacted by Congress in 1991 in order to provide damages to victims of torture and execution. 28 U.S.C. §1350, Provisions §2(a). (Party “shall, in a civil action, be liable for damages.”) Although the TVPA does not specifically define damages, courts have uniformly held that federal common law applies and allows for both compensatory and punitive awards: “Courts in this and other circuits have awarded substantial compensatory and punitive damages to plaintiffs claiming torture and extra-judicial killing under the TVPA...” *See Tachiona v. Mugabe* 216 F.2d 262, 267 (S.D.N.Y. 2002). The TVPA’s legislative history cites extensively to *Filartiga* (which awarded both compensatory and punitive damages) and states that the purpose of the TVPA is to “enhance” the remedy provided by the ATS. H.R. Rep. No. 102-367, at 4 (1991). *See also Xuncax v. Gramajo*, 886 F.Supp. 162, 199 (D. Mass 1995) (“...in enacting the TVPA, Congress contemplated the award of punitive damages thereunder.”)

Federal courts have further held that the lack of Congressional instruction regarding how to determine damages under the TVPA permits federal courts to create federal common law in order to achieve justice under the ATS and the TVPA. *See Tachiona v. Mugabe*, 216 F.2d 262, 267 (S.D.N.Y. 2002) (“[B]ecause Congress in the TVPA offered no methodology as to how damages should be determined, federal courts are free to and should create federal

common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treaties dealing with the protection of human rights.”); *In re Estate of Marcos*, 910 F. Supp. 1460, 1469 (D. Haw. 1995) (citing *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957) (“Some [problems] will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.”)).

**B. Peruvian Law On Damages Does Not Differ From Federal Common Law**

Even if the Court were to decide that Peruvian law on damages applies to these claims, the result would be the same as that dictated by federal common law. Although Peruvian law does not explicitly refer to compensatory and punitive damages by name, the same concepts that govern compensatory and punitive damages in United States courts are found in the Peruvian statutes and legal precedents that govern the award of civil damages in Peru.

The Peruvian Penal Code provides for damages, or civil reparation, both to punish a criminal defendant and to provide redress to his or her victim. *See* Declaration of Peruvian Attorney Ronald Gamarra (attached here as Exhibit A, “Gamarra Decl.”), ¶ 3.<sup>5</sup> The Peruvian Civil Code regulates the concept of damages, but judges have wide discretion in determining the amount of damages. *Id.* at ¶ 5. The law in Peru differentiates between *material* damages and *moral* damages. *Id.* at ¶¶ 5-7. Material damages include non-economic harms such as pain and suffering, as well as economic losses to the victims or their families. *Id.* at ¶ 6. Thus, material damages are analogous to the concept of compensatory damages under United States law. Moral damages take into account the egregiousness of the crime as well as the deterrence value in

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<sup>5</sup> Relevant provisions of Peruvian penal and civil codes, as well as Peruvian jurisprudence, on the issue of civil damages are provided in detail in the Gamarra Declaration, that is attached here as Exhibit A. Mr. Gamarra has attached to his declaration English translations of the Peruvian statutes to which he cites.

awarding damages. *Id.* at ¶ 7. Both these factors – punishment for outrageous behavior and deterrence - are taken into account when determining punitive damages under United States law. *Smith v. Wade*, 461 U.S. 30, 54 (1983). Thus, moral damages in Peru are analogous to punitive damages under United States law. *Saravia*, 348 F.Supp.2d at 1159, n.4 (“Salvadoran law does support awards of ‘moral damages,’ which are tantamount to punitive damages ... under-U.S. law.”). Additionally, Peru has accepted the jurisdiction of the Inter-American Court of Human Rights, which has upheld the right of victims of human rights abuses to collect both material and moral damages. *Id.* at ¶ 8.

The law that governs damages in Peru incorporates concepts that overlap with United States concepts of compensatory and punitive damages. A determination of damages based on Peruvian law would include the same factors used to determine damages under federal common law developed in the ATS and TVPA case law. Thus, even if this Court decides to look to the law of Peru in assessing damages in this case, the evidence, as discussed below, supports a substantial award of damages to the Plaintiffs in this case.

### **C. Florida Law Does Not Apply**

While either federal common law or Peruvian law may apply to the instant case, Florida law does not apply. First, Florida’s sole connection to this lawsuit is an arbitrary one – the Defendant happened to be located here, thus enabling this Court to obtain personal jurisdiction over him. This is a claim by Peruvian citizens against a Peruvian citizen, acting under the color of Peruvian governmental authority, for the violation of an international law, created by a United States federal statute. These facts weigh in favor of applying federal common law, not the law of Florida.

Second, as discussed, federal precedent applies federal common law, not state law, to claims under the ATS and the TVPA. The *Alvarez-Machain* court looked at the question

of whether to apply federal or state law to ATS claims and held that “because the ATCA invokes international law principles of universal concern, it holds a unique place among federal statutory tort causes of action, and application of federal common law is therefore appropriate” *Alvarez–Machain* at 635-36 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (observing that, in ‘international disputes implicating ... relations with foreign nations ... our federal system does not permit the controversy to be resolved under state law’ because the ‘international nature of the controversy makes it inappropriate for state law to control’); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964) (noting that the ATCA is an example of a statute reflecting a ‘concern for uniformity in this country’s dealings with foreign nations’ .)).

Third, logic compels this result. Congress enacted the ATS and the TVPA to create a right of redress for violations of international law – something that is beyond the scope of existing state law and beyond the scope of a State’s legislative powers. State law does not contemplate torts of the type articulated by the ATS and the TVPA. Thus, it would not make sense to apply state law to claims under the ATS and the TVPA.

Finally, the application of state law to damages claims under the ATS and the TVPA would result in the inconsistent application of law to damages awarded under these statutes. For example, state law varies regarding what damages may be compensated in tort actions and the availability of punitive damages for tort claims. Applying state law to damages claims under the ATS and the TVPA would create potentially different recoveries for different plaintiffs based solely on the state where the defendants happened to be located.

**III. Under the Federal Common Law on Compensatory and Punitive Damages, ATS and TVPA Claims Warrant a Substantial Award to the Plaintiffs**

The federal common law, which has developed to give effect to the remedial purpose of the ATS and the TVPA, compels an award of substantial compensatory damages, including damages based on non-economic harm such as pain and suffering – and substantial punitive damages.

The controlling federal common law of the ATS and the TVPA allows a court to craft a flexible remedy that includes both compensatory and punitive damages, if a plaintiff can demonstrate that (1) he or she has suffered compensable harm, including non-economic harm such as pain and suffering, and (2) any given defendant's conduct warrants a punitive award. Plaintiffs have met their burden and provided overwhelming evidence of compensable harm – including the acute pain and suffering of the Plaintiffs and their deceased relatives – and similarly overwhelming evidence that Defendant Hurtado's conduct is a prototypical example of grounds justifying a large punitive damages award.

The fact that Plaintiffs should receive an award, however, does not automatically suggest what amount is appropriate. This Court is faced with the task of assigning a quantitative value to torture and murder on a scale not often seen in a federal district court in the United States. The task is not an easy one, but it is a task that is imposed upon this Court by the ATS and the TVPA, precisely in order to allow recovery. It should be noted that, although it is difficult to calculate damages for harms that are so outside the frame of reference for United States courts, the difficulty of quantification does not result in no damages being awarded. Such a line of reasoning would defeat the purpose of both statutes. Accordingly, Plaintiffs suggest two methods that this Court should use to arrive at an appropriate compensatory and punitive damage award.

First, the Court should be guided by the decisions of other Federal District Courts that have granted compensatory and punitive awards for similarly heinous acts. Second, Plaintiffs suggest that this Court conduct a detailed examination of the evidence submitted by Plaintiffs, including the admitted facts of the Complaint, the testimony, and documentary evidence and assess that evidence according to six factors recently proposed by the Eastern District of California for use in this precise situation. The decision in *Doe v. Saravia*, 348 F.Supp.2d 1112, 1158 (E.D. Calif. 2004) reviewed the existing federal law on damages and concluded that courts awarding compensatory and punitive damages under the ATS and the TVPA typically look to six factors in shaping the damage award:

- i. Brutality of the act;
- ii. Egregiousness of defendant's conduct;
- iii. Unavailability of criminal remedy;
- iv. International condemnation of act;
- v. Deterrence of others from committing similar acts;
- vi. Provision of redress to plaintiff, country and world.

*Doe v. Saravia* at 1158.

**A. The Federal Common Law of Compensatory Damages in ATS and TVPA Claims Authorizes a Substantial Award**

In this case there are two sets of Plaintiffs: the survivor plaintiffs, Teófila Ochoa Lizarbe and Cirilia Pulido Baldeón; and the decedent plaintiffs. Prior to analyzing federal common law regarding compensatory damages in ATS and TVPA cases, it is important to note that different types of harm were suffered by each set of plaintiffs.

The decedent plaintiffs seek compensation for their pain and suffering prior to their deaths, as well as compensation for the brutal murders that resulted in their deaths. ATS

and TVPA cases routinely permit compensation for these acts. *See e.g. Tachiona* at 420-22. Additionally, federal common law, as articulated, for example, by maritime law, permits claims for decedents' pain and suffering prior to their deaths. *See Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 773 (W.D. Mich. 1988) *aff'd in part, rev'd in part*, 894 F.2d 804 (6th Cir. 1994) (citing *Azzopardi v. Ocean Drilling & Exploration Co. of Phil.*, 742 F.2d 890, 893 (5th Cir. 1984)). Compensation for pain and suffering prior to death includes the "fright, shock and terror felt by decedents who are in apprehension of imminent death, or who are faced with a situation involving life-threatening peril." *Anderson* at 774. (citing *Stissi v. Interstate & Ocean Transport Co.*, 590 F. Supp. 1043, 1048-49 (E.D.N.Y. 1984), *aff'd in part, vacated in part on other grounds*, 765 F.2d 370 (2d Cir. 1985).

The survivor plaintiffs seek compensation for their pain and suffering caused by being placed in fear for their lives during the invasion of their village; witnessing the massacre of their relatives and the looting of their village; hiding from soldiers over the next months; and escaping reprisals. They also seek compensation for their ongoing pain and suffering caused by living through this severe trauma. Finally, they seek compensation for their pain and suffering caused by watching their family members tortured and killed. Federal courts adjudicating ATS and TVPA claims have consistently upheld the right of surviving victims to be compensated for these types of suffering. *See Tachiona* at 438. *See also Jama v. United States INS*, 22 F.Supp. 2d 353, 363 (D.N.J. 1998); *Mehinovic* 198 F.Supp.2d at 1347-48 (citing *Abebe-Jira*, 72 F.3d at 847; *Cabello v. Fernandez-Larios*, 157 F.Supp. 2d 1345, 1362 (S.D. Fla. 2001). In permitting recovery for similar claims under the TVPA, the *Tachiona* court held, "the relatives necessarily made to bear witness to the torture and degradation of their kin, or the ransacking of their common property, are technically not themselves victims of torture. Few would quarrel,

however, that the offenders' lawlessness would cause these individuals themselves to suffer the severe emotional pain and indignities associated with forms of cruelty and inhuman treatment."

*Tachiona* at 438.

It is within the power of federal courts to award substantial compensatory damage awards. A review of federal case law in ATS and TVPA cases shows that compensatory damages for pain and suffering are substantial and correspond to the level of extreme harm suffered by plaintiffs in these cases. In *Arce v. Garcia*, compensatory damages of \$5,000,000 were awarded to Plaintiff Romagoza Arce for his kidnapping and torture (22 days) by Salvadoran soldiers; compensatory damages of \$6,500,000 were awarded to Plaintiff Gonzalez for his kidnapping and torture (12 days) by Salvadoran soldiers; and compensatory damages of \$3,100,000 were awarded to Plaintiff Mauricio for his kidnapping and torture (10 days). *Arce*, Case No. 99-8364 CIV-HURLEY (July 31, 2002) (final judgment), *Arce v. Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006) (affirming jury award of \$54,600,000 in total damages). In *Estate of Cabello v. Fernandez-Larios*, the jury awarded \$3 million in compensatory damages to plaintiffs for the torture, extrajudicial killing, and crimes against humanity of a Chilean economist killed by a member of Pinochet's caravan of death. *Cabello* at 1148. In *Abebe-Jira v. Negewo*, a jury awarded each plaintiff \$200,000 in compensatory damages for their arrest and imprisonment without charges (for variable periods), their torture while in prison, and other cruel acts by the Ethiopian military. *Abebe-Jira*, 72 F.3d 844, 845-46 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996). In *Paul v. Avril*, plaintiffs were awarded between \$2,500,000 and \$3,500,000 each in compensatory damages for their detention without charge, torture, and other cruel acts by the Haitian military. *Paul*, 901 F.Supp. at 336.<sup>6</sup> See also *Hilao v. Estate of Marcos*, 103 F.3d 767,

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<sup>6</sup> In another Eleventh Circuit case, after the lower court's grant of the defendant's motion to dismiss was (cont.)

787 (9th Cir. 1996); *Tachonia* at 267-269; *Mehinovic v. Vukovic*, 198 F. Supp. 2d. 1322, 1358-60 (N.D. Ga. 2002); *Jane Doe v. Karadzic*, Civ. No. 93-0878, 2001 WL 986545 (S.D.N.Y. Aug. 28, 2001), *Filartiga II* at 867; *Saravia* at 1112.

These awards sought to compensate the plaintiffs for non-economic damages such as pain and suffering and mental anguish. *See Paul v. Avril*, at 335. (“The Court awards compensatory damages for ... pain and suffering...”); *Mehinovic v. Vukovic* at 1358-60. (“Courts have awarded substantial compensatory damage awards to plaintiffs in ATCA and related cases in light of the gravity of the abuses and the serious physical and psychological injuries caused by acts such as those suffered by plaintiffs.”); *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409, \*7 (S.D.N.Y. Apr. 9, 1996) (“the award for pain and suffering damages will be calculated at \$500,000 per relative”). In one recent decision, Judge Lenard of the Southern District of Florida considered a case factually similar to this case, in which she granted a default judgment against a defendant from Honduras accused of serious human rights violations under the ATS and the TVPA. She awarded five of the plaintiffs \$2,000,000 each in compensatory damages, and the sixth plaintiff \$3,000,000. Final judgment, *Reyes v. Grijalba*, 02-CIV-22046-JAL (S.D. Fla. March 31, 2006). In the Findings of Fact and Conclusions of Law, she stated,

Each of the plaintiffs in this action has endured mental pain and suffering, mental anguish, and shock, and is therefore entitled to compensatory damages. Findings of Fact and Conclusions of Law at 16, *Reyes v. Grijalba*, 02-CIV-22046-JAL (S.D. Fla. March 31, 2006).

In *Mushikiwabo v. Barayagwiza*, the District Court was asked to award damages to five Rwandan Tutsi plaintiffs after a grant of default judgment against a Rwandan Hutu

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overturned, the case went to trial resulting in a jury verdict of \$3,500,000 in compensatory damages. 03-20161-CIV-KING (Aug. 16, 2007 (final judgment), *Jean v. Dorelien*, 431 F. 3d 776 (11th Cir. 2005).

military leader. The Court heard similar facts regarding the systematic extermination of a whole community of unarmed men, women, and children and commented:

One cannot place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs.

*Id.* at \*6 (awarding plaintiffs \$500,000 in compensatory damages, \$1,000,000 in punitive damages to each plaintiff for each relative killed, plus an additional \$5,000,000 in punitive damages for each plaintiff).

As shown above, federal courts award extremely substantial compensatory and punitive damage awards in situations similar to this case – awards that often total tens of millions of dollars. These decisions suggest an appropriate order of magnitude for the award.

Courts in the Eleventh Circuit usually consider some combination of the *Saravia* factors when making compensatory damages awards. *See e.g. Paul v. Avril*, 901 F.Supp. 330, 336 (S.D. Fla. 1994) (egregiousness); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1358 (N.D. Ga. 2002) (brutality; egregiousness); *Abebe-Jira v. Negewo*, 1193 WL 814304, \*4, *aff'd* 72 F.3d 844, 847 (11th Cir. 1996), *cert denied* 519 U.S. 830 (1996) (finding that plaintiffs were entitled to “compensatory damages sufficient to compensate for all physical and nonphysical injuries caused by the illegal act and punitive damages sufficient to punish the defendant and deter future violations.”).<sup>7</sup> The testimony and documentary evidence submitted by Plaintiffs shows that under federal common law in ATS and TVPA cases and under the six *Saravia* factors, Plaintiffs should be granted a substantial compensatory damage award.

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<sup>7</sup> As detailed in the Gamarra Declaration, Exhibit A, the law of Peru is in accord. If this Court finds the law of Peru to be inconsistent with the federal common law, it should disregard Peruvian law in favor of a source of law which allows the court to fashion a remedy that effectuates the intent of the ATS and the TVPA.

**B. Federal Common Law on Punitive Damages**

There is a large body of federal precedent – including three separate decisions of the Eleventh Circuit – in which punitive damages were awarded in ATS cases. In *Arce v. Garcia* punitive damages were awarded in the amount of \$15,000,000 to Plaintiff Romagoza Arce, \$15,000,000 to Plaintiff Gonzalez, and \$10,000,000 to Plaintiff Mauricio. *Arce*, 434 F.3d 1254, 1256 (11th Cir. 2006) (affirming jury award of \$54,600,000 in total damages). In *Cabello v. Fernandez-Larios* punitive damages were awarded in the amount of \$1,000,000. *Cabello* at 1151-52. In *Abebe-Jira v. Negewo*, the district court awarded \$300,000 in punitive damages to each plaintiff. *Abele* at 846 (affirming district court’s award of \$300,000 in punitive damages to each plaintiff). *See also Hilao* at 787; *Tachonia* at 267-69; *Mehinovic* at 1358-60; *Karadzic*, Civ. No. 93-0878, 2001 WL 986545 (S.D.N.Y. Aug. 28, 2001); *Filartiga II* at 867; *Paul* at 336 (awarding \$4,000,000 in punitive damages to each plaintiff); *Saravia* at 1158. In *Reyes v. Grijalba*, the court also granted a substantial total punitive damages award in the amount of \$16,000,000. In the Findings of Fact and Conclusions of Law, “the Court [found] that the award of substantial punitive damages in this action will send a message that the offenses of torture, disappearance, and extrajudicial killing shall not be tolerated under any circumstances and shall always be punished.” Findings of Fact and Conclusions of Law at 21, *Reyes v. Grijalba*, 02-CIV-22046-JAL (S.D. Fla. March 31, 2006).

The Eleventh Circuit ATS cases cited above, in which substantial punitive damages were awarded, also included TVPA claims. *See Arce*, 434 F.3d 1254; *Cabello*, 402 F.3d 1148, and *Jean*, 431 F.3d 776. Under the federal common law that gives content to the broad remedial purpose of both the ATS and the TVPA, this Court should award significant punitive damages to Plaintiffs.

General principles of federal common law also favor an award of punitive damages and articulate standards for determining an award of punitive damages in accordance with the due process principles of the federal Constitution. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In *BMW v. Gore*, the Court highlighted three factors to consider when reviewing the appropriateness of an award of punitive damages. These factors were: the reprehensibility of the conduct; the disparity between the actual or potential harm to the plaintiffs, and the punitive damages assessed – described as a ratio; and the difference between the punitive damages and the civil and criminal penalties authorized by the law for that conduct. *BMW v. Gore* at 575, 580, 583.

In *BMW v. Gore*, the defendant had repainted damages cars and passed them off as never-damaged cars. *Id.* at 563-64. The jury awarded \$4,000 in compensatory damages to the plaintiff (who purchased one of the cars) and \$4,000,000 in punitive damages; the Alabama Supreme Court reduced the punitive damage award to \$2,000,000. *Id.* at 565. The Court held that the punitive damages were excessive because the only harm was economic, not physical, and a ratio of 500 to 1 was too high in those circumstances. *Id.* at 576, 583. The Court, however, refused to draw any bright line rule regarding acceptable ratios for punitive damages. *Id.* at 585-86. In its holding, the Court found that reprehensibility is “the most important indicium of the reasonableness of a punitive damage award.” *Id.* at 575. It also analogized to criminal cases, pointing out that non-violent crimes are less reprehensible than violent crimes. *Id.*

In 2003, the Supreme Court issued a more comprehensive opinion regarding the determination of punitive damages awards, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The *State Farm* Court reiterated that reprehensibility was the “most important indicium” of the reasonableness of a punitive damages award. *Id.* at 419. The *State Farm* Court

also articulated a more comprehensive analysis of what factors to examine when considering reprehensibility. Specifically the Court held that there are five factors to reprehensibility: (1) whether the harm caused is physical rather than economic; (2) whether the conduct causing harm shows “indifference to or a reckless disregard of the health or safety of others;” (3) whether the “target of the conduct” is financially vulnerable; (4) whether the defendant’s conduct involves repeated actions; and (5) whether the harm is the result of “intentional malice, trickery, or deceit, or mere accident.” *Id.* at 419. The Court further held that the ratio of punitive damages to compensatory damages should **generally** not exceed 9 to 1. *Id.* at 425.

Significantly, the Court discussed combinations of factors that would justify higher ratios. In particular, the Court held that if a “particularly egregious act has resulted in only a small amount of economic damages,” or if “the injury is hard to detect or the monetary value of the non-economic harm might have been difficult to determine” then ratios in the high single-digits or even higher could be warranted. *Id.* at 425. (*quoting BMW v. Gore* at 582). When determining punitive damages, federal courts must also consider mitigating factors: e.g., if “defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.” *See In re: Exxon Valdez*, 490 F.3d 1066, 1084 (9th Cir. 2007).

In accord with the federal law in this area, the un-refuted facts of this case show that a multiplier greater than 9 to 1, is appropriate. The conduct at issue here involves the brutal torture and massacre of innocent civilians. It is a crime so reprehensible that it has been condemned internationally. The harm itself is physical, although it also had economic repercussions for the surviving plaintiffs. It involved the deliberate and systematic massacre of an entire village, showing extreme “indifference” and “reckless disregard for the health and

safety of others.” The brutal acts were targeted at a population of indigenous, subsistence farmers, who were extremely vulnerable, and included the looting and destruction of their homes and few possessions. The acts sued for involved the repeated and systematic slaughter of an entire village, not one single, stand-alone act. And finally, Hurtado’s own testimony, relayed by Senator Xavier Diez Canseco, demonstrated that the horrors he perpetrated on Accomarca were intentional. Reprehensibility is the most significant factor in any analysis of punitive damages, and in this case, the reprehensibility of these acts beggars description. *BMW* at 575; *State Farm* at 419; *Exxon Valdez* at 1084.

The criminal and civil penalties for these actions are also severe. Under federal law, murder is punishable by the most severe penalties of life imprisonment or death, demonstrating that high punitive damages awards are appropriate in these cases. The federal case law regarding ATS and TVPA claims, likewise, shows that punitive damages awards are an established part of the jurisprudence, and are traditionally high.

Under both the federal common law of damages in ATS and TVPA cases, and general principles of federal common law, Plaintiffs have demonstrated that substantial punitive damages should be awarded in this case.

#### **IV. Closing Statement**

On August 13, 1985, Plaintiffs Teófila Ochoa Lizarbe and Cirilia Pulido Baldeón were both 12-year-old girls living a peaceful, quiet rural life with their families in a community outside of the Andean mountain town of Accomarca in the Department of Ayacucho, in Peru. Both girls were exceptionally close to their mothers and to their siblings and lived in a tight knit indigenous Quechua-speaking community. Both girls worked tending animals and assisted with their families’ agricultural activities and Cirila also went to school. Both Plaintiffs gave detailed testimony about their memories of their mothers and siblings before they were killed and

described the unique personalities of each decedent. Neither girl nor their families were involved in politics in any way or had even heard of the Maoist insurgent group the Shining Path.

The facts admitted and evidence at trial conclusively shows that, by the conclusion of the following day – August 14, 1985 – the lives of both girls were utterly shattered. When both girls woke up, in their separate homes high in the hills, they saw the unspeakable events unfold: a heavily-armed Peruvian army patrol, commanded by Defendant Hurtado, had encircled the community and was moving house to house, rounding up the villagers and forcing them down to a large flat field known as Llocclapampa. Teófila testified that soldiers came to her house and her mother, Silvestra, attempted to pacify them by offering them food and talking with them about her older son, who himself served in the Peruvian army. Although they accepted Silvestra's food, the soldiers then forced her out of the house. She took her terrified youngest children with her – Victor, Ernestina, Celestino, and the baby Edwin. Silvestra told Teófila and her younger brother Gerardo to stay behind, to take care of the house and the animals. Knowing what was likely to happen, Silvestra buried the family's papers and valuables before she left, carrying her crying children.

Cirila testified that from her house, which was higher up the hill and less accessible, she watched a similar scene unfold with two of her younger brothers and sisters. Having heard gunfire the night before in Pitsecc, Cirila's parents and her 9 month-old baby brother Edgar had left in fear of the soldiers. As Cirila watched the army patrol rounding up the villagers, Cirila realized that her mother, Fortunata, and her brother Edgar were among them – that they had been captured.

Both girls, from their separate vantage points, then watched the same grotesque scene unfold. While Teófila and Cirila, trembling with fear, watched helplessly, Hurtado and the

Peruvian soldiers, under the authority of the government, tortured and executed Plaintiffs' mothers and siblings and all of the other villagers who had been herded to Lloccllapampa. The defenseless, weaponless civilians, all of whom were known to Plaintiffs, were raped, beaten, lined up, marched in single file down to a building where the soldiers repeatedly shot at them, threw grenades into their midst, and burned them alive. These villagers included the elderly, women (some visibly pregnant), children and babies.

Both Plaintiffs testified about their additional, separate ordeals of personally fleeing from soldiers, dodging bullets and hiding to avoid capture and death. Teófila was forced to flee immediately when the soldiers began their "mop up" operation, returning to all the houses in the village after the first round of killings in order to make sure that no survivors remained. Teófila and her brother Gerardo both left the house in order to hide and almost immediately encountered the soldiers. Teófila ran up the path, while Gerardo ran down the path towards the soldiers. In his last words, Gerardo – who was ten years old – screamed that he wanted to die next to his mother, whose death he had just witnessed. Teófila ran, dodging the soldiers and their bullets, and hid behind a rock, until the soldiers left her for dead.

Cirila was able to remain in her remote home, high in the hills, with her two younger siblings. They huddled there alone for days, afraid of starting a cooking fire that would attract the attention of the soldiers. Ultimately her father returned, expecting to see his wife and youngest child. Cirila had to tell her father that her mother and brother, Edgar, had been killed. Both Plaintiffs buried their loved ones and the others executed by Hurtado and his soldiers, and both testified about the condition of the bodies at the time of burial – a sticky mixture of severed limbs and heads, grain and gravel that could only be moved by shovel. Several weeks later, Cirila and her remaining family were in hiding when the soldiers returned and attempted to

eliminate by execution any remaining witnesses. Cirila ran from the soldiers, through the dense forest and down a river. She hid under a waterfall, in the river, for most of a day and night while the soldiers searched for her. She, too, was left for dead by the Peruvian soldiers.

Plaintiffs also testified about their lives after the massacre, how their communities were shattered and the population of their town forcibly displaced – destroying the unique indigenous culture that was their birthright. Both Plaintiffs were forced to abandon their lives and move to Lima in order to find jobs to support themselves and their remaining family members. Due to their youth and lack of preparation, both plaintiffs testified they were forced to accept jobs as domestic workers in private houses where neither received a salary for their work, and they were forced to eat the leftovers for their food. Plaintiffs had to abandon their native language, Quechua, and learn a second language, Spanish, in order to survive. Both Plaintiffs testified about their desire for an education and their belief that if their families had survived intact, their lives would have been profoundly different and significantly better – a fact that is quite self-evident.

Most importantly, both Plaintiffs testified about their own extreme and continuing mental anguish. Both Plaintiffs suffer lasting psychological and emotional harm because of Hurtado's acts and both Plaintiffs have physical manifestations relating to that emotional harm. Plaintiffs testified about nightmares and depression and overwhelming fear of soldiers and of fire. Both Plaintiffs provided compelling testimony about the abject terror of their mothers and siblings as they were led to their deaths. Silvestra's partial torso was one of the few identifiable bodies pulled from the wreckage of the fire. Silvestra's youngest child, nine-month old Edwin, was still strapped to her back, headless. Teófila's testimony also proves the sheer terror and desperation of her young siblings and especially her 10-year old brother Gerardo, who ran

*towards* the soldiers, screaming that he wanted to die next to his mother. For her part, Cirila testified about her mother's fear of the soldiers, which drove her to flee the area.

Finally, there is ample evidence of the physical pain suffered by all eight decedents. Plaintiffs themselves testified about the screams of the villagers, including their relatives, as they were beaten and raped in Llocclapampa and later as they were strafed with bullets and grenades. This testimony is entirely consistent with the separate reports of both the Peruvian Senate (Plaintiffs' Exh. 3) and the later Peruvian Truth and Reconciliation Commission (Plaintiffs' Exh. 2).

With respect to the Defendant Hurtado's conduct, Plaintiffs presented two witnesses with specific expertise in the social and political situation of Peru in 1985: Peruvian Truth Commission Senior Editor and transitional justice expert Eduardo Gonzalez, and former Senator Javier Diez Canseco, a member of the Peruvian Senate Commission set up in September 1985 to investigate the Accamarca Massacre. Mr. Gonzalez testified that Defendant Hurtado and his patrol were part of a planned military operation called "Operation Huancayoc," in which the soldiers made no distinction between members of the insurgent Shining Path guerilla movement and innocent civilians. As detailed by the Peruvian Truth Commission Report (Plaintiff's Exh. 2), Operation Huancayoc had, as its object, the outright extermination and cleansing of the civilian population in the Accamarca area. Senator Diez Canseco testified about detailed statements Defendant Hurtado made to the Senator **personally** in which Hurtado admitted his direct and central role in the massacre. **In the course of this interview, Defendant Hurtado stated that he believed the children needed to be killed, and failed to demonstrate any remorse whatsoever.** These statements are memorialized verbatim in the Senate Report. (Plaintiffs' Exh. 3).

Both Mr. Gonzalez and Senator Diez Canseco testified about the complete impunity of Defendant Hurtado from prosecution. Senator Diez Canseco testified about his proposal to constitute a Senate Investigative Commission to investigate the events of August 14, 1985. Despite the senators' findings and the petitions made to the Peruvian civilian prosecutor by the Senate to prosecute Defendant Hurtado and the others responsible for the massacre, the Peruvian military co-opted the nascent civilian investigation into the massacre, starting its own sham investigation.

After a controversial jurisdictional decision by the Peruvian Supreme Court, the responsibility for prosecuting the admitted crimes of Defendant Hurtado fell to the military. As described in depth in the Peruvian Truth Commission Report on the Accomarca Massacre (Plaintiffs Exh. 2) and by Mr. Gonzalez, the military investigation and prosecution resulted in Hurtado's conviction on only one charge – "Abuse of Authority" with only a *de minimus* sentence. But this trivial sentence was not enforced. In 1995, the Peruvian Congress passed a general amnesty law, exempting all participants in the counter-insurgency campaign against the Shining Path from prosecution. Although this amnesty was ultimately nullified, Defendant Hurtado fled from Peru and thus, could not be criminally prosecuted. In fact, Defendant Hurtado, between 1985 and the time he left Peru, was actually commended and promoted by the Peruvian military. These circumstances insured that Hurtado never served any sentence or bore any real responsibility for his heinous crimes.

The Accomarca Massacre was deeply emblematic in Peru and internationally. Mr. Gonzalez testified about the notoriety of the massacre and its profound importance in Peru, Latin America and the world. Mr. Gonzalez testified that the massacre demonstrated that the presidency of Alan Garcia would continue the repressive policies of his predecessor and the

executive branch of Peru would continue to abdicate all responsibility for checking the military's human rights abuses. Mr. Gonzalez further testified that the massacre was reported in media throughout the world, appeared in a number of prominent human rights reports, and was universally condemned.

Mr. Gonzalez opined that a substantial monetary award from this Court would have a profound deterrent effect. Defendant Hurtado's conduct during the course of the Accomarca Massacre, and the subsequent cover-up, is a prototypical example of impunity. The evidence submitted by Plaintiffs demonstrates that a damage award here would deter others who might be tempted to commit similar acts; it would show that such impunity is not absolute and there is no safe haven in the United States for human rights violators such as Defendant Hurtado. Plaintiffs also provided compelling testimony on what a large compensatory and punitive damages award would mean to them and to the association of survivors of the Accomarca Massacre, whom they represent. Both Plaintiffs testified that they seek justice and to bring attention to Defendant Hurtado's heinous acts. Mr. Gonzalez testified that a large damage award would also recognize and work to address the racism inherent in the Peruvian army's repressive policies in the 1980s and 90s.

This case is the story of a peaceful community that was caught in the social and political struggle of a country to repress a violent terrorist group, the Shining Path. The innocent Plaintiffs here were victimized because they were wrongly identified as supporters and sympathizers of the Shining Path and then victimized again when the military, with the implicit permission of the government, covered up its crimes and refused to punish the wrongdoers. Accordingly, Plaintiffs ask for the following compensatory and punitive damage award:

**Compensatory Damages:**

Teófila Lizarbe and Cirila Baldeón: no less than \$2,000,000 each  
Eight Decedents: no less than \$500,000 each

**Punitive Damages:**

Teófila Lizarbe and Cirila Baldeón: no less than \$4,000,000 each  
Eight Decedents: no less than \$4,000,000 each

Such an award would compensate Plaintiffs and effectively punish Defendant Hurtado in accordance with the controlling federal common law of the ATS and the TVPA.

**V. Conclusion**

The admitted facts, testimony and documentary evidence demonstrates that Plaintiffs and the estates that they represent should be awarded substantial damages. Should the Court so request, Plaintiffs would gladly proffer Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted,

Dated: February 29, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 29, 2008, I electronically filed *Plaintiffs'* *Memorandum of Law on Damages and Closing Statement* with the Clerk of the Court by using the CM/ECF system. I also certify that a copy of the foregoing has been served by U.S. Mail on TELMO RICARDO HURTADO HURTADO, Federal Penitentiary #79395-0004, KROME SERVICE PROCESSING CENTER, 18201 S.W. 12th Street, Miami, FL 33194.

s/ Robert M. Brochin

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Robert M. Brochin