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

[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.

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 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

[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.)

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); 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

[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).

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.” 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

(continued ...)

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

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(... continued)
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.

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.

[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.

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 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.

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

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. 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