Command Responsibility: The Anatomy of Proof in *Romagoza v. Garcia*

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Broken bones danced today with the news
Spirits of the disappeared rose up
The hearts of the grieving leapt for once
With a measure of joy.

Oh may the winds scream this news
Into torture chambers in every corner of this world
May blood stained hands of oppressors tremble
May the arms ready to deliver a blow
Freeze
Melt.

We've needed a sign of hope in these times
The people of El Salvador did it again.

Let us dry Neris's tears, kiss Juan's scars, salve Carlos's wounds.[1]

INTRODUCTION

On July 23, 2002, in the courtroom of Judge Daniel T.K. Hurley, a South Florida jury returned a $54.6 million verdict, encompassing punitive and compensatory damages, in favor of three Salvadoran survivors of torture.[2] The case, *Romagoza v. Garcia*,[3] was brought under

[1] Poem by Jean Stokan, Policy Director, SHARE Foundation (www.share-elsalvador.org).

[2] Robert Collier, *Florida Jury Convicts 2 Salvadoran Generals of Atrocities, $54.6 Million*

the Alien Tort Claims Act (ATCA)[4] and the Torture Victim Protection Act (TVPA)[5] by three Salvadoran refugees, Dr. Juan Romagoza, Professor Carlos Mauricio, and Ms. Neris Gonzalez, against two former Ministers of Defense of El Salvador. One defendant, General Jose Guillermo Garcia, was Minister of Defense and Public Security of El Salvador from 1979–1983. At that time, the other defendant, General Carlos Eugenio Vides Casanova, was the Director-General of the National Guard, one of three internal security forces under the jurisdiction of the Ministry of Defense. When General Garcia retired in 1983, General Vides Casanova was appointed Minister of Defense. With the exception of Dr. Romagoza, the case was not based on allegations that the generals personally participated in, or even planned or ordered, the plaintiffs' detention or torture.[6] Rather, the case proceeded under the longstanding doctrine of command responsibility, which provides that military commanders may be liable for abuses committed by their subordinates when certain conditions are met.

The *Romagoza* case followed closely on the heels of *Ford v. Garcia*,[7] a similar case brought in the same courtroom and against the same two generals. The plaintiffs in *Ford* were family members of four United States churchwomen who were raped and murdered by members of the Salvadoran National Guard in 1980.[8] In November 2000, the *Ford* jury rendered a verdict that the generals were not liable for the crimes under the theory of command responsibility. Apparently the jury was not satisfied that the two generals had exercised "effective control" over

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Awarded To Three Torture Victims, S.F. CHRON., July 24, 2002, at A12. The defendants have appealed the verdict on the ground that the trial court abused its discretion when it tolled the ten-year statute of limitations applicable to the Torture Victim Protection Act and the Alien Tort Claims Act. Romagoza v. Garcia, Brief of Appellants, (Jan. 10, 2003), at 2, *available at* http://www.cja.org/cases/Romagoza_Docs/RomagozaAppellantsbrief.pdf (last visited April 29, 2003).

[3] No. 99-8364 CIV-HURLEY (S.D. Fla. Feb 17, 2000).

[4] 28 U.S.C. § 1350 (2001). The ATCA provides that federal courts may entertain "any civil suit by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* To proceed under the ATCA, the plaintiff must be an alien, and the defendant may be a U.S. or a foreign citizen or a corporation.

[5] Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 (2001). The TVPA allows suits for torture and extrajudicial killing only and extends jurisdiction to United States citizens.

[6] Dr. Romagoza identified General Vides Casanova as being in one of the torture chambers in which he was interrogated and as being present when he was released from detention.

[7] Case No. 99-8359-CV-HURLEY (S.D. Fla. Nov. 22, 2000).

[8] The two cases were filed concurrently in May 1999 and proceeded in parallel until 2000 when the churchwomen's case went to trial.

their subordinates, which is one of the elements of command responsibility.[9] Plaintiffs in *Ford* appealed the jury instructions setting forth the elements of command responsibility. The Eleventh Circuit Court of Appeals, in an opinion that extensively considered contemporaneous international precedent emerging from the International Criminal Tribunal for the Former Yugoslavia ("the ICTY"), found no error in the instructions given by the trial court.[10] The Supreme Court recently denied *certiorari*.[11]

Collectively, the *Romagoza* and *Ford* cases are significant as the first modern command responsibility cases in which a defendant testified in his own defense and was judged by a lay jury, as opposed to by a professional judge or military officers staffing a military tribunal. These are also the first cases in which a domestic tribunal closely considered the modern doctrine of command responsibility as articulated and clarified by the ICTY. Furthermore, the *Romagoza* case is the first case in which civil plaintiffs proved liability under the doctrine of command responsibility in an adversarial setting under the federal rules of evidence and procedure. As such, the *Romagoza* proceedings themselves deserve close attention for what they can teach about the application of the doctrine and the strategic and evidentiary challenges it presents. This Essay will deconstruct the formulation of the doctrine of command responsibility in the jury instructions employed in the two Salvadoran cases. It will then discuss the challenges the doctrine poses with reference to the legal and evidentiary strategies employed by the *Romagoza* plaintiffs to prove command responsibility under the applicable rules of procedure and evidence.[12]

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[9] This supposition is gleaned from questions posed by the jury during deliberations and subsequent juror interviews by members of the press. *See, e.g.*, Susan Benesch, *Salvadoran Generals on Trial: Command Responsibility in a Florida Courtroom* (Aug. 19, 2002), *available at* http://www.crimesofwar.org/onnews/news-elsalvador.html (last visited May 14, 2003) (reporting on juror statements); *Justice and The Generals* (Gail Pellett Productions Inc.). *See generally* http://www.pbs.org/wnet/justice/about.html (last visited Mar. 26, 2003) (PBS film about case with juror interviews).

[10] *See* Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002). The opinion was unique in its consideration of international legal precedent. *See id.* at 1290 (noting "[t]he recently constituted international tribunals of Rwanda and the former Yugoslavia have applied the doctrine of command responsibility since *In re* Yamashita, and therefore their cases provide insight into how the doctrine should be applied in TVPA cases."); *id.* at 1293 (finding statute of International Criminal Court to be authoritative in ATCA/TVPA context as well).

[11] Ford v. Garcia, 123 S.Ct. 868 (Mem), 71 U.S.L.W. 3191, 71 U.S.L.W. 3466, 2003 WL 102519 (U.S.).

[12] The legal strategies outlined in this Essay were developed collectively by the legal team in the *Romagoza* case, which in addition to the author included: Peter Stern (Morrison & Foerster LLP, Walnut Creek, CA), James K. Green (Law Offices of James K. Green, West

I. THE LEGAL THEORY: THE DOCTRINE OF COMMAND RESPONSIBILITY

The essence of the doctrine of command responsibility is that a defendant can be held legally responsible, either criminally or civilly, for unlawful acts committed by his subordinates. Command responsibility attaches if the defendant knew, or should have known, that his subordinates were committing abuses and he did not take necessary and reasonable measures to prevent these abuses or to punish the perpetrators.[13] The command responsibility theory of liability is premised on the commander's failure to exercise his powers of command and control over his subordinates in the face of a duty to act. In contrast, where a defendant has planned, ordered, aided and abetted, conspired in, or otherwise participated directly in abuses, he is liable under a theory of direct responsibility.[14] Although originally developed in the military context, the doctrine of command responsibility applies to both military and civilian superiors.[15]

Palm Beach, FL), Carolyn Patty Blum (U.C. Berkeley School of Law (Boalt Hall), International Human Rights Clinic), Joshua Sondheimer (The Center for Justice & Accountability, San Francisco, CA), in conjunction with plaintiffs' expert witnesses Prof. Terry Karl (Stanford University) and her research assistant Thad Dunning, Col. Jose Luis Garcia (Ret.), and Ms. Margaret Popkin (Due Process of Law Foundation, Washington, DC).

[13] Some renditions of the doctrine of command responsibility have existed as long as there have been military institutions, but the doctrine was employed most prominently during the many legal proceedings following World War II and concerning high-level Axis defendants. *See, e.g., In re* Yamashita, 327 U.S. 1 (1946); Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence, *reprinted in* 41 AM. J. INT'L L. 172 (1947); 20 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard & Sonia Magbanua Zaide eds., 1981) [hereinafter TOKYO MAJOR WAR CRIMES TRIAL]; "The High Command Case," 10 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 3 (1951); "The Hostages Case," 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10 757 (1950); *In re* Yamashita, 4 Law Reports of the Trials of War Criminals 1 (1948).

[14] *See* Article 7(1), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/25704 (1993) ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in . . . the present Statute, shall be individually responsible for the crime."); *see also* Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Aug. 2, 2001) ¶¶ 605, 652 (finding accused directly responsible for abuses and accordingly disregarding command responsibility counts).

[15] In order to sustain a conviction against a civilian superior for command responsibility, the two *ad hoc* tribunals have required a showing that the civilian superior possessed powers of authority analogous to those of a military commander. *See, e.g.,*

According to most modern formulations, the doctrine comprises three primary elements:[16]

1. A relationship of subordination — The direct perpetrators of the unlawful acts were subordinates of the defendant;

2. *Mens rea* — The defendant knew or should have known that his subordinates were committing, had committed, or were about to commit abuses; and

3. *Actus reus* — The defendant commander failed to take steps to prevent or punish such abuses.[17]

Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement of the Int'l Crim. Trib. Rwanda, Tr. Chamber (Jan. 27, 2000) ¶ 880 (finding defendant exercised sufficient *de jure* and *de facto* control over employees of his tea factory to support finding of command responsibility, but dismissing command responsibility counts involving crimes by non-employees within general populace); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (June 25, 1999) ¶ 75 (noting that doctrine applies to civilian authorities who are "in a similar position of command and exercise a similar degree of control with respect to their subordinates."). Because the *Ford* and *Romagoza* cases involved military commanders, military terminology will be employed throughout this Essay.

[16] The doctrine has been codified, albeit with elemental variations, in a number of multilateral instruments. *See, e.g.*, Article 86(2), Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (Protocol I), *reprinted at* 16 I.L.M. 1391, 1429 (1977) ("The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew, or had information which would have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."); Article 7(3), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/25704 (1993) ("The fact that [the crime] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."); Article 6(3), International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994); Article 28, Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

[17] This prong is formulated in the disjunctive, but the prevention and punishment of abuses are not alternative courses of action available to a commander. Rather, where a

The finder of fact considers these elements in logical sequence. Thus, the finder of fact's first step is to determine whether the direct perpetrators of the acts that underlie the indictment or complaint were subordinates of the defendant.[18] This prong of the doctrine ensures that any measures undertaken by the defendant to prevent or punish abuses would have reached the individuals accused of directly perpetrating the acts in question. If this prong is satisfied, then it must be determined whether the defendant was on notice that his subordinates were committing abuses. It is this knowledge, which may be actual or constructive, that triggers the defendant's duty to act.[19] Finally, if the defendant possessed the requisite knowledge, then the finder of fact must determine whether the defendant fulfilled his duty to act in the face of this knowledge. In this regard, the finder of fact must determine whether the defendant did all that was necessary and reasonable under the circumstances to prevent and punish criminal conduct by his subordinates.[20] A defendant is legally responsible for the acts

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commander fails to prevent known crimes, he cannot absolve his responsibility by punishing the perpetrators after the fact. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Mar. 3, 2000) ¶ 336.

[18] It is understood that the perpetrators need not be direct or immediate subordinates of the defendant commander. Rather, they must be within the defendants' chain of command. *See, e.g., In re* Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) (finding defendant responsible to plaintiff class for acts perpetrated by subordinates at all levels within Filipino military); Paul v. Avril, 901 F. Supp. 330, 335 (S.D.Fla. 1994) (finding defendant responsible for acts of officers and foot soldiers in Haitian military); Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Feb. 26, 2001) ¶ 408 (noting that subordination may be direct or indirect). Likewise, that subordinates may have been under multiple chains of command or subject to the authority of multiple superiors does not detract from a superior's own authority and ability to control them. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Mar. 3, 2000) ¶¶ 296, 303; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (June 25, 1999) ¶ 106.

[19] In this regard, the defendant need not have knowledge that the particular victims themselves would be targeted for abuse. Rather, a defendant is considered to be on notice when he knows, or should know, that subordinates generally are committing abuses. This understanding of the operation of prong two finds support in the *Marcos* class action, in which the defendant's estate was found liable to a class of almost 10,000 plaintiffs for acts of torture, disappearance, and summary execution committed by troops under his command, even though it would have been impossible to show the defendant was aware of each and every act of violence in the complaint. Hilao v. Marcos, 103 F.3d 767, 776 (9th Cir. 1996) (finding Marcos liable if he knew "of such conduct" and failed to use his power to prevent it).

[20] "Necessary" measures are understood to mean those measures that are required to discharge the defendant's obligation to prevent and punish criminal behavior under the prevailing circumstances. "Reasonable" measures are those measures that the defendant was in a position to take under those circumstances. Prosecutor v. Blaskic, Case No. IT-95-

complained of where there is sufficient evidence that he failed to implement appropriate preventative and punitive measures in light of his knowledge that subordinates were committing abuses.

The doctrine of command responsibility does not set forth a strict liability standard. If the party bearing the burden of proof fails to establish any of the three elements, a defendant should be exonerated. This should occur where there is insufficient evidence that the direct perpetrators were the defendant's subordinates or that the defendant had knowledge, either actual or constructive, of subordinates' abuses. Likewise, this should occur where the evidence indicates that the defendant undertook sufficient measures to prevent and punish criminal conduct given the circumstances. In these situations, a defendant should be exonerated notwithstanding that the victim was injured.

The basic import and function of the three doctrinal elements of command responsibility have remained stable over time. However, their precise formulation, and thus evidentiary implications, has evolved significantly as a result of the ICTY's recent jurisprudence. In developing this body of law, the ICTY began with the post-WWII precedent, from which it has significantly developed the law along several dimensions. In particular, the ICTY jurisprudence has established more precise legal tests for determining when a direct perpetrator constitutes the legal subordinate of the defendant, when knowledge may be imputed to a defendant where evidence of actual knowledge is either lacking or insufficient, when a defendant has a duty to investigate the conduct of his subordinates, and what preventative and punitive measures must be undertaken for a defendant to discharge his duty under the doctrine.

Because the two Salvadoran cases were slated to be jury trials, the question of the precise legal standard of the doctrine of command responsibility arose in the context of drafting the jury instructions.[21] In

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14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Mar. 3, 2000) ¶ 333.

[21] Prior to the two Salvadoran cases, several other ATCA and TVPA cases had proceeded according to the doctrine of command responsibility. The majority of these civil cases resulted in default bench judgments, as the defendant had fled the jurisdiction. Therefore, the elements of command responsibility did not receive a comprehensive adversarial treatment and were not codified into jury instructions. As a result, the language used in these opinions is imprecise and in some instances melds principles of direct responsibility with those of command responsibility. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 172-73 (D. Mass. 1995) (finding former Minister of Defense "was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths [and] refused to act to prevent such atrocities."); *Paul*, 901 F. Supp. at 335 (holding defendant liable for acts committed by his "employees, representatives, or agents . . . acting under his instructions, authority, and control and

drafting the jury instructions in both cases, the district court was heavily influenced by the ICTY's ruling in the case of *The Prosecutor v. Delalic*,[22] and in particular by the ICTY's treatment of the subordination prong of the doctrine. This Essay will discuss the formulation and evidentiary implications of all three elements of the doctrine of command responsibility with a particular emphasis on the concept of subordination, as it proved to be the most significant in the *Ford* and *Romagoza* cases.

A. Prosecutor v. Delalic

Delalic involved the prosecution of four Bosnian Muslim camp guards and commanders for the mistreatment of Bosnian Serb prisoners of war in the Celebici prison camp. In setting forth the applicable law, the Trial Chamber ruled that the required relationship of subordination between the defendant and the direct perpetrator(s) is established if the defendant exercised "effective control" over the individual perpetrator(s).[23] This requires showing that the defendant had the "material ability to prevent and punish the commission of the offenses" at issue.[24] Under this formulation, a showing of *de jure* command over the direct perpetrators within a military hierarchy or formal chain of command is a relevant but not sufficient showing to satisfy the first prong of the doctrine. Thus,

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acting within the scope of the authority granted by him"); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1537-38 (N.D. Cal. 1987) (finding defendant liable where plaintiffs had alleged that their torturers were all "agents, employees, or representatives of Defendant acting pursuant to a 'policy, pattern and practice' of the First Army Corps under defendant's command"); Doe v. Lumintang, Case No. 00-674 (GK) (AK), Findings of Fact and Conclusions of Law (Sept. 10, 2001), at 30-33, *available at* http://www.cja.org/cases /Lumintang_Docs/Lumintang_Judgment.html (finding defendant directly liable for planning and ordering abuses and indirectly liable under doctrine of command responsibility). Two cases did require the drafting of jury instructions, but they did not have the benefit of the ICTY's recent jurisprudence. *See Hilao*, 103 F.3d at 776-78 (affirming that Marcos's estate could be found liable if it were determined that Marcos had "directed, ordered, conspired with, or aided" members of Philippine military or paramilitary forces to commit acts of torture, summary execution, and disappearance against members of class, or "knew of such conduct by the military and failed to use his power to prevent it"); Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995) (noting that international law imposes "an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of atrocities").

[22] Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Nov. 16, 1998) [hereinafter Delalic Judgement], *aff'd in part and rev'd in part*, Prosecutor v. Delalic, Judgement (Appeals Chamber ICTY, Feb. 20, 2001) [hereinafter Delalic Appeal].

[23] Delalic Judgement, *supra* note 22, ¶ 354.

[24] *Id.* ¶ 378.

even where a commander had the legal authority to control the actions of his subordinates by virtue of his rank or position within a military hierarchy, a finding of liability under the doctrine of command responsibility requires proof that the commander could actually exercise that power as a factual matter. Thus, the Trial Chamber required a showing of *de facto* control in addition to *de jure* command.[25] The theory behind the adoption of this standard is that the "doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates."[26]

The effective control standard for determining subordination was affirmed on appeal.[27] In addition, the Appeals Chamber articulated, in dicta, the burden of proof for effective control. The Appeals Chamber stated that a showing of *de jure* command gives rise to a legal presumption that the defendant exercised effective control.[28] If the defendant does not come forth with evidence rebutting this presumption, the existence of effective control can be presumed. The operation of this presumption has been confirmed in several subsequent cases in which the ICTY presumed the existence of effective command on the basis of a defendant's *de jure* authority because the defendant had put forth no evidence rebutting the presumption.[29]

The ICTY developed the effective control standard in the context of allegations that the defendants' *de jure* positions did not accurately reflect their *de facto* powers to prevent or punish criminal conduct by subordinates. For example, in *Delalic*, the prosecution argued that defendant Delalic exercised considerable control and authority within the Celebici camp, even though there was no official instrument or letter of appointment conferring any formal responsibility over the camp to him.[30] The *Delalic* tribunal noted that such situations are often found in the context of civil wars, in which "previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be

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[25] *Id.* ¶ 370 ("The existence of such a position [of command] cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates."); *id.* ¶ 795.

[26] *Id.* ¶ 377.

[27] Delalic Appeal, *supra* note 22, ¶¶ 196-197.

[28] *Id.* ¶ 197.

[29] *See, e.g.*, Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Aug. 2, 2001) ¶ 648; Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Feb. 26, 2001) ¶ 405.

[30] Delalic Judgement, *supra* note 22, ¶ 610.

ambiguous and ill-defined."[31] In subsequent cases, however, the ICTY has ruled that the effective control standard governs the determination of the subordination prong in all command responsibility situations, including those involving *de jure* commanders whose formal rank or position is uncontested.[32]

Although the *Delalic* tribunal purported to adopt a uniform standard, the doctrine of effective control requires different inquiries and produces different legal strategies depending on the particular context of *de facto* and *de jure* command and control. With respect to *de facto* commanders, the effective control standard ensures that individuals lacking formal rank or title, or operating outside of any official or sanctioned chain of command, can still be held liable for abuses committed by individuals under their actual command or control. Conversely, with respect to *de jure* commanders, the effective control standard ensures that *de jure* commanders can be held liable for abuses by individuals not formally under their command, but who are nonetheless under their control, such as death squad members or civilians within occupied territory. And, the effective control standard ensures that commanders possessing formal command or authority are not held responsible for the criminal conduct of individuals who may be formal subordinates, but who are not under a commander's actual control by virtue of the prevailing circumstances. This argument was precisely the legal defense offered by the defendants in the Salvadoran cases.

B. Ford v. Garcia *Jury Instructions*

Based upon the *Delalic* precedent, the district court issued the following jury instructions in *Ford v. Garcia*:

> To hold a specific defendant/commander liable under the doctrine of command responsibility, each plaintiff must prove all of the following elements by a preponderance of the evidence:
>
> (1) That persons under defendant's effective command had committed, were committing, or were about to commit torture and

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[31] *Id.*; *see also* Delalic Appeal, *supra* note 22, ¶ 193 ("In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitaries groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive.").

[32] *See, e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Mar. 3, 2000) ¶ 302; Delalic Appeal, *supra* note 22, ¶ 196 ("The showing of effective control is required in cases involving both *de jure* and *de facto* superiors.").

> extrajudicial killing;[33] and
>
> (2) The defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command had committed, were committing, or were about to commit torture and extrajudicial killing; and
>
> (3) The defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing or failed to investigate the events in an effort to punish the perpetrators.[34]

The court defined "effective command" to require a showing that "the commander has the legal authority and the practical ability to exert control over his troops."[35] The instruction also noted that "[a] commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control."[36] The court included a separate instruction entitled "Proximate Cause," which instructed the jury:

> If you find that one or more of the plaintiffs have established all of the elements of the doctrine of command responsibility, as defined in these instructions, then you must determine whether the plaintiffs have also established by a preponderance of the evidence that the church women's injuries were a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfill

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[33] The precise formulation of this prong of the doctrine departs from previous formulations. As has been discussed, see text accompanying note 18 *supra*, most formulations of this prong of the doctrine focus on whether the direct perpetrators of the acts in questions were subordinates of the defendant. Instead, the *Ford* instructions are drafted with respect to defendants' subordinates in general. This inquiry is probably better considered as a corollary to the knowledge prong of the doctrine, which queries whether the defendant knew, or should have known, that subordinates generally were committing abuses. This ambiguity in the formulation of the first prong of the doctrine was not the subject of appeal.

[34] Ford v. Garcia, Jury Instructions, at 7, *available at* http://www.lchr.org/archives/arc_ijp/lac/nuns/courtdocs/instructions.pdf [hereinafter *Ford* Jury Instructions].

[35] *Id.* This definition of effective control departs from the definition employed by the ICTY. *See supra* note 23. Significantly, and as noted by Judge Barkett in her concurrence in *Ford*, this definition would seem to exclude consideration of *de facto* commanders who may lack official "legal authority" to command subordinates but who may nonetheless be found liable for the actions of subordinates under their actual control. Ford v. Garcia, 289 F.3d 1283, 1297 (11th Cir. 2002) (Barkett, J., concurring).

[36] *Ford*, 289 F.3d at 1287 n.3.

their obligations under the doctrine of command responsibility.[37]

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[37] *Id.* at 1287 n.4. The *Ford* plaintiffs' theory of liability was in part premised on the defendants' failure to adequately punish the individuals accused of murdering the four churchwomen by improperly delegating the responsibility for investigation to subordinates and by impeding that and subsequent investigations up the chain of command. *See* Ford v. Garcia, Amended Complaint for Extrajudicial Killing, Summary Execution and Torture (filed February 25, 2000), ¶¶ 71-77, *available at* http://www.lchr.org/archives/arc_ijp/lac/nuns/courtdocs/amendedcomplaint22500.pdf (last visited May 20, 2003). Based on these allegations, the defendants succeeded in obtaining a delegation instruction, which stated in effect that a defendant could be absolved from responsibility where he delegated to a subordinate or other authority the task of investigating or punishing abuses. Specifically, the instruction stated:

> A commander may be relieved of the duty to investigate or to punish wrongdoers if a higher military or civilian authority establishes a mechanism to identify and punish the wrongdoers. In such a situation, the commander must do nothing to impede or frustrate the investigation.
>
> A commander may fulfill his duty to investigate and punish wrongdoers if he delegates this duty to a responsible subordinate. A commander has a right to assume that assignments entrusted to a responsible subordinate will be properly executed. On the other hand, the duty to investigate and punish will not be fulfilled if the commander knows or reasonably should know that that subordinate will not carry out his assignment in good faith, or if the commander impedes or frustrates the investigation.

Ford Jury Instructions, *supra* note 34, at 7. In the *Romagoza* case, the defendants urged a similar instruction. In opposition, the plaintiffs argued that a delegation instruction was inappropriate in light of the facts of their case, which involved no allegations that any legal process had been initiated with respect to the plaintiffs' cases. The plaintiffs also argued that the instruction as given in *Ford* was incorrectly formulated as a matter of law. *See* Romagoza v. Garcia, Memorandum of Law in Support of Draft Jury Instructions on Command Responsibility Submitted in Light of the Eleventh Circuit's Ruling in Ford v. Garcia (filed May 10, 2002), at 15-17, *available at* http://www.cja.org/cases/Romagoza_Docs/RomagozaProposedJuryInstructions.pdf (last visited Jan. 15, 2003). In particular, the plaintiffs argued that the law of command responsibility constrains the ability of a commander to delegate responsibility for punishing abuses, because the commander retains a continuing duty to ensure that any investigation is a credible one that is undertaken in a manner consistent with an intent to bring the perpetrators to justice. *See, e.g.*, TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 13, at 49,791 (finding that defendant Hirota "was derelict in his duty" because he was "content to rely on assurances, which he knew were not being implemented while hundreds of murders, violations of women and other atrocities were being committed daily. His inaction amounted to criminal negligence."). No delegation instruction appeared in the *Romagoza* case. However, the instructions did indicate that the "failure to punish may be established by proof that the defendant/military commander failed to investigate reliable allegations of torture and/or extrajudicial killing by subordinates, or failed to submit these matters to competent authorities for investigation and prosecution." Romagoza v. Garcia, Jury Instructions, at 9, *available at* http://www.cja.org/cases/Romagoza_Docs/RomagozaJuryInstructions.pdf (last visited May 14, 2003) [hereinafter *Romagoza* Jury Instructions].

After the jury returned a defense verdict, the *Ford* plaintiffs unsuccessfully sought a new trial and then appealed to the Eleventh Circuit Court of Appeals. The plaintiffs argued that the instructions contained three material errors of law and that the jury's verdict was against the weight of the evidence.[38] First, the plaintiffs argued that the instructions improperly placed the burden on plaintiffs to prove that the generals exercised *de facto* control, in addition to *de jure* command, over their subordinates in the National Guard.[39] Rather, they argued, their burden was to demonstrate the existence of a *de jure* relationship of subordination between the defendants and the actual perpetrators.[40] Once that was established, the burden would then shift to the defendants to prove as an affirmative defense that they were unable to exercise effective control over their subordinates for some legitimate reason.[41] Second, the plaintiffs argued that they should not have borne the burden of proving that the defendants failed to take *all* reasonable measures to prevent the murders of the churchwomen or punish the perpetrators.[42] Rather, they argued, the burden rested with defendants to prove what their options were, what they actually did, and why their initiatives failed.[43] Under this approach, this is properly the defendants' burden because they were in the best position to produce persuasive evidence in this regard.[44] Third, the plaintiffs appealed the inclusion of the separate proximate cause instruction on the ground that the doctrine of command responsibility is a doctrine of imputed liability and thus does not contain a causation element.[45]

Because the *Ford* plaintiffs had not objected to the jury instructions at trial, the Eleventh Circuit analyzed the instructions for plain error[46] and upheld the district court's jury instructions.[47] With regard to the first

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[38] *See* Ford v. Garcia, Plaintiffs' Memorandum of Law in Support of New Trial (filed Nov. 22, 2000), *available at* http://www.lchr.org/archives/arc_ijp/lac/nuns/courtdocs/1122memorandumoflawinsupport.pdf (last visited May 20, 2003) [hereinafter New Trial Memorandum]; Ford v. Garcia, Brief of Appellants (on file with the author) (filed May 30, 2001) [hereinafter Appellate Brief].

[39] New Trial Memorandum, *supra* note 38, at 4; Appellate Brief, *supra* note 38, at 32.

[40] Appellate Brief, *supra* note 38, at 32-33.

[41] *Id.* at 33-34.

[42] *Id.* at 34.

[43] *Id.* at 35.

[44] *Id.*

[45] *Id.* at 42.

[46] According to Federal Rule of Civil Procedure 51: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict." FED. R. CIV. P. 51.

[47] Ford v. Garcia, 289 F.3d 1283, 1292-93 (11th Cir. 2002).

alleged error, the court canvassed the ICTY's command responsibility jurisprudence and ruled that "a showing of the defendant's actual authority to control the guilty troops is required as part of the plaintiff's burden under the superior-subordinate prong of command responsibility."[48] Although the Eleventh Circuit acknowledged the legal presumption identified by the ICTY, the court opined that the presumption only shifted the burden of production, not that of persuasion.[49] The court did not elaborate upon how this legal presumption should operate within the context of a jury trial, except to note that instructing the jury as to shifting burdens of production is disfavored.[50] As to the plaintiffs' second alleged error, the court noted that most modern recitations of the "necessary and reasonable measures" prong employ the same language that they were challenging.[51]

With respect to the inclusion of the proximate cause instruction, a majority of the Eleventh Circuit panel ruled that this was unreviewable "invited error." The court based this ruling on the fact that the plaintiffs themselves had participated in the drafting of that language and had not preserved any objection to it.[52] Judge Barkett, in concurrence, however, suggested that the Eleventh Circuit should consider the rule adopted by the Sixth and Ninth circuits that allows for the reversal of judgments where invited errors have resulted in "substantial injustice."[53] Citing the *Marcos*[54] and *Delalic*[55] cases, Judge Barkett noted that proximate cause has never been considered a fourth element of command responsibility.[56] She stated that the notion of causation is inherent to the doctrine and that requiring a showing of causation would "practically eviscerate" the doctrine.[57] Based on her review of the *Ford* trial transcript, Judge Barkett

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[48] *Id.* at 1291; *see also id.* at 1292.

[49] *Id.* at 1291.

[50] *Id.* at 1292 (citing Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1321-22 (11th Cir. 1999)).

[51] *Id.* at 1292-93.

[52] *Id.* at 1293-94.

[53] *Id.* at 1298 (Barkett, J., concurring).

[54] Hilao v. Marcos, 103 F.3d 767, 776-79 (9th Cir. 1996).

[55] Delalic Judgement, *supra* note 22, ¶ 197; Delalic Appeal, *supra* note 22, ¶¶ 398-400; *see also* Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Feb. 26, 2001) ¶ 447; Prosecutor v. Blaskic, No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Mar. 3, 2000) ¶ 339 ("such a causal link may be considered inherent in the requirement that the superior failed to prevent the crimes which were committed by the subordinate").

[56] *Ford*, 289 F.3d at 1299 (Barkett, J., concurring).

[57] *Id.*

noted that questions from the jury revealed that the proximate cause language created significant confusion among the jury. In her eyes, this warranted reversal.[58] The *Ford* plaintiffs' petitions for rehearing *en banc*[59] and *certiorari*[60] were denied.

C. Romagoza v. Garcia *Jury Instructions*

The Eleventh Circuit's ruling in *Ford* considerably restricted the formulation of the elements of the command responsibility doctrine in the *Romagoza* case. Accordingly, the district court employed the following jury instructions:

> 1. The plaintiff was tortured by a member of the military, the security forces, or by someone acting in concert with the military or security forces;
>
> 2. A superior-subordinate relationship existed between the defendant/military commander and the person(s) who tortured the plaintiff;[61]
>
> 3. The defendant/military commander knew, or should have known, owing to the circumstances of the time, that his subordinates had committed, were committing, or were about to commit torture and/or extrajudicial killing;[62] and
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> 4. The defendant/military commander failed to take all necessary and reasonable measures to prevent torture and/or extrajudicial killing, or failed to punish subordinates after they had committed

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[58] *Id.*

[59] Ford v. Garcia, Appellants' Petition for Rehearing En Banc (on file with the author).

[60] Ford v. Garcia, 123 S.Ct. 868 (Mem), 71 U.S.L.W. 3191, 71 U.S.L.W. 3466, 2003 WL 102519 (U.S.). In their *certiorari* petition, the *Ford* plaintiffs primarily argued that the Eleventh Circuit's approach to invited error conflicted with the approach adopted by other circuits. *Ford v. Garcia*, Petition for Writ of Certiorari, at 14 (filed September 2002) (on file with the author). The *Ford* plaintiffs argued that the five circuits that have addressed the issue allow exceptions to the invited error rule where the error resulted in substantial injustice or affected substantial rights. *Id.* at 18.

[61] In the *Romagoza* instructions, the court bifurcated the inquiry that is ordinarily demanded by the first prong of the doctrine. Nonetheless, this Essay will consider these two inquiries together.

[62] The *Romagoza* court limited the recitation of crimes to torture and extrajudicial killing because these are the claims for relief allowed by the TVPA, although it could be argued that knowledge on the part of the defendant that subordinates were committing other abuses (such as arbitrary detention, deportation, war crimes, and crimes against humanity) should trigger a defendants duty to act to prevent further abuses.

> torture and/or extrajudicial killing.[63]

The instructions then explained that to find the element of subordination, it must be shown that the defendant both held a higher rank than, or had authority over, the direct perpetrators and had effective control over them. "Effective control" was defined to mean that

> the defendant/military commander had the actual ability to prevent the torture or to punish the persons accused of committing the torture. In other words, to establish effective control, a plaintiff must prove, by a preponderance of the evidence, that the defendant/military commander had the actual ability to control the person(s) accused of torturing the plaintiff.[64]

The instructions also clarified that it was not necessary to prove that the defendants knew that the plaintiffs themselves would be targeted for abuse. The instructions stated that it was sufficient that the defendants knew that subordinates were committing human rights abuses like those suffered by the plaintiffs.[65] No proximate cause instruction was issued based upon the reasoning set forth in Judge Barkett's concurrence in the *Ford* case.[66]

While the instructions were being drafted, the plaintiffs argued that the judge should instruct the jury about the existence and operation of the legal presumption identified by the *Delalic* Trial Chamber. They argued specifically that the jury should have the benefit of considering the special policies and logical deductions that underlie this presumption. Further, they argued that the presumption would be

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[63] *See Romagoza* Jury Instructions, *supra* note 37, at 7.

[64] *Id.* Although it was not immediately apparent, this definition of effective control contains a latent ambiguity when read in conjunction with the rest of the instructions, as was made clear by a question from one of the jurors during deliberations. Specifically, a juror passed a note to the court asking, "one juror wants to know, isn't it absolutely necessary to show the identity of the individuals who tortured the plaintiffs? Or at least that the individual was a subordinate? It seems something is missing." Romagoza v. Garcia, Trial Transcript, at 2532, *available at* http://www.cja.org/cases/Romagoza_Docs/Romagoza_Trial_Transcripts.shtml [hereinafter Transc.]. This question revealed that the inclusion of the word "the" before the word "torture" in the definition of "effective control" suggested that it may be necessary for the plaintiffs to prove that the defendant knew that the torture of the plaintiffs was occurring and had the actual ability to intervene *at that time*. The court gave an additional oral explanation that it was not necessary for the plaintiffs to prove that defendants knew the precise identity of the individual who tortured the plaintiffs; rather, plaintiffs must prove only that the direct perpetrators were subordinates of the defendants within the meaning of that term in the instructions. *Id.* at 2531.

[65] *Romagoza* Jury Instructions, *supra* note 37, at 7.

[66] Transc. at 2373.

meaningless unless the jury received an instruction on the operation of the presumption. The court denied this motion, citing language from the Eleventh Circuit's opinion in *Ford* counseling against instructing the jury on shifting burdens.[67] Instead of instructing the jury, the *Romagoza* court made a legal determination at the close of trial that the defendants had presented sufficient evidence to rebut the presumption of effective control.[68]

II. PROVING COMMAND RESPONSIBILITY

Given the formulation of the command responsibility doctrine employed in the *Romagoza* jury instructions, this Section will discuss the legal, factual, and evidentiary strategies the *Romagoza* plaintiffs utilized to prove the defendants' command responsibility. This Section begins with a discussion of the defendants' factual defenses as they were framed within the formulation of the command responsibility doctrine as employed. It then describes the way in which the plaintiffs sought to counter these defenses and satisfy their burden of proof by outlining the plaintiffs' evidentiary strategy and describing their evidence, including expert and percipient testimony.

A. The Defendants' Case

A number of defensive arguments frequently appear in command responsibility cases premised on the notion of effective control.[69] In addition, the *Romagoza* plaintiffs were able to anticipate the defendants' defensive strategy to a certain degree from the latter's testimony during the *Ford* trial, their pre-trial depositions, and their documents. Specifically, the defendants argued broadly that their direct subordinates were not responsible for the bulk of the violence and that contrary accusations were the product of an international leftist conspiracy against the Salvadoran government.[70] The defendants at times categorically denied having had any knowledge that subordinates were

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[67] *Id.* at 2527; *see* Ford v. Garcia, 289 F.3d 1283, 1292 (11th Cir. 2002).

[68] Transc. at 2557; *see Ford*, 289 F.3d at 1292.

[69] *See, e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Mar. 3, 2000) ¶¶ 444-49 (summarizing defendant's arguments regarding disorganization of his troops, his dependence on faulty communications infrastructure, and factionalization of his military unit).

[70] Transc. at 2090 (re-direct examination of Gen. Garcia), 2234 (direct examination of Gen. Vides Casanova).

committing torture, arbitrary detention, and other abuses.[71] When pushed, however, they did admit that they had heard rumors and allegations of violence being perpetrated by members of the military and security forces but denied having had any "proof" that it was their subordinates who were committing the abuses.[72]

The defendants argued to the jury that the violence in El Salvador during the period in question came from elsewhere. Their testimony suggested that the new government, of which they were members, was trying to "hold the center" in a Cold War maelstrom of violence. The defendants testified that this violence was attributable to either right-wing death squads outside of their formal control and sphere of influence or left-wing insurgents being funded, trained and supported by Cuba and the Soviet Union.[73] By their account, the defendants' efforts were undermined by antagonistic elements in their midst attempting to destabilize the government by, among other things, staging multiple coup attempts.[74] Further, the defendants repeatedly averred that they were operating within the context of a virulent civil war in which the very survival of the nation as a bulwark against the spread of communism in Central America was at stake.[75] In this regard, the defendants' expert witness, Ambassador Edwin Corr who served in El Salvador from 1985 to 1988 while General Vides Casanova was Minister of Defense, expressed on cross-examination some reluctance to condemn any abuses that may have occurred because he considered it difficult to judge the situation faced by El Salvador at the time. He later backed off this position on re-direct examination.[76]

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[71] *Id.* at 1772 (direct examination of Gen. Garcia), 2161-62 (direct examination of Gen. Vides Casanova).

[72] *See, e.g., id.* at 310-12 (Gen. Garcia deposition designations), 494-95 (Gen. Vides Casanova deposition designations), 1769-70 (direct examination of Gen. Garcia), 2234 (direct examination of Gen. Vides Casanova). In their case in chief, the plaintiffs played portions of the defendants' video depositions for the jury.

[73] *See, e.g., id.* at 282-83 (cross-examination of Amb. White), 1441-42, 1445-59 (cross-examination of Prof. Karl), 1707 (defendants' opening statement), 1745-46 (direct examination of Gen. Garcia), 1906-07 (direct examination of Amb. Corr).

[74] *Id.* at 1713-14 (defendants' opening statement), 1743, 1780-83 (direct examination of Gen. Garcia), 1902 (direct examination of Amb. Corr), 1970-72, 1992-94, 2002 (cross-examination of Amb. Corr), 2262 (cross-examination of Gen. Vides Casanova).

[75] *Id.* at 1904-06 (re-direct examination of Amb. Corr).

[76] *Id.* at 1938-40 (cross-examination of Amb. Corr), 1996 (re-direct examination of Amb. Corr). Both parties presented testimony from former Ambassadors, who were certified by the court as expert witnesses pursuant to FRE 702 and as such were granted broad leeway in offering their expert opinions about relevant aspects of the history of El Salvador pursuant to FRE 703. The latter Rule allows expert witnesses to give expert testimony about conversations and documents that might otherwise be inadmissible at trial, so long

To defend against a finding of "effective control," the defendants tried to prove that the Salvadoran military's chain of command was attenuated and decentralized, such that regional commanders retained a significant degree of autonomy in terms of recruitment, training, and discipline.[77] Further, the defendants tried to establish that the military itself was factionalized.[78] According to the defendants, any abuses by members of the military were attributable to a group of rightist hard-liners being directed, financed, and influenced in part by members of the oligarchy (the rich landowners) and various Miami exiles.[79] The defendants also offered testimony that rampant corruption weakened their command.[80] Further, the defendants testified that a system of military education that created strong loyalties among individuals from the same graduating class, or *tanda*, overrode formal command relationships.[81] In this regard, the defendants frequently invoked an incident in which a powerful regional commander had revolted against General Garcia's command.[82] Finally, the defendants' expert witness argued that if the defendants had attempted to investigate or punish members of the military and security forces for abuses, it would have further jeopardized the military's unity and cohesiveness.[83]

The defendants also argued against their exercise of "effective control" by presenting evidence suggesting that the civil war had created a state of "chaos" in the country. Therefore, the defendants argued, it was impossible for them to fully know what their subordinates were doing or to be able to intervene effectively to prevent or punish criminal conduct, to the extent there was any.[84] In particular, they argued that although the

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as such sources are of a kind reasonably relied upon by experts in the particular field in forming their opinions or inferences on the subject. *See* Katt v. City of New York, 151 F. Supp. 2d 313, 352-54, 356-58 (S.D.N.Y. 2001) (admitting expert testimony regarding institutional practices and culture, including alleged "code of silence" in police department).

[77] Transc. at 1892, 1907-08 (direct examination of Amb. Corr).

[78] *Id.* at 1783-85 (direct examination of Gen. Garcia), 1889-90, 1892, 1906 (direct examination of Amb. Corr).

[79] *See, e.g., id.* at 1048 (cross-examination of M. Popkin), 1887 (direct examination of Amb. Corr).

[80] *Id.* at 1896-97 (direct examination of Amb. Corr).

[81] *Id.* at 1893-94 (direct examination of Amb. Corr).

[82] *Id.* at 1779-80 (direct examination of Gen. Garcia), 1893-96 (direct examination of Amb. Corr).

[83] *Id.* at 1940 (cross-examination of Amb. Corr).

[84] *See, e.g., id.* at 1456, 1474-77 (cross-examination of Prof. Karl), 1731, 1735, 1746 (direct examination of Gen. Garcia), 1885-86, 1904-06, 1910, 1916 (direct examination of Amb. Corr). Allegations of a prevailing climate of "chaos" are a frequent theme in the defense of actions premised on command responsibility, especially given the effective control

Salvadoran military was formally organized according to a command structure, the chain of command was not fully functional during the period in question.[85] This, according to the defendants, was in part because the rebel forces had disrupted the country's telecommunications and transportation infrastructure with acts of sabotage.[86] The defendants tried to paint a picture of El Salvador as a poor and underdeveloped nation that did not have the resources or wherewithal to establish an effective reporting, judicial or disciplinary system within the military.[87]

In the face of all this, the defendants portrayed themselves as "reformers" who had done all that they could to improve El Salvador.[88] The defendants testified that, despite this chaotic climate and internal opposition, reforms were implemented, abuses diminished, and democracy established during their tenures.[89] As proof, the defendants noted that the United States government had consistently determined that the human rights situation in El Salvador was improving under their watch, as demonstrated by the fact that aid, conditioned by Congress on such improvements, continued to flow during this period.[90] The defendants also introduced several Legion of Merit awards and other diplomatic correspondence that they had received from U.S. government officials, implying that the United States had seen fit to commend them on their efforts at reform and nation building.[91]

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standard. *See, e.g.*, Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement of the Int'l Crim. Trib. Rwanda, Tr. Chamber (May 21, 1999) ¶ 491 (noting that Trial Chamber must view *de jure* powers of defendant with appreciation for state of chaos in Rwanda and that "any consideration as to the *de jure* powers exercised by Kayishema must be subject to an elucidation of the *de facto* power, or lack thereof, that he held over the assailants."); *id.* ¶¶ 218-19, 486-98 (finding that even in chaotic environment, the accused retained his *de jure* authority over assailants).

[85] Transc. at 1712 (defendants' opening statement).

[86] *Id.* at 294-95 (cross-examination of Amb. White), 1887-88, 1905 (direct examination of Amb. Corr).

[87] *Id.* at 2294 (direct examination of Gen. Garcia).

[88] *Id.* at 2082-83, 2098, 2135-36 (re-direct examination of Gen. Garcia).

[89] *Id.* at 1886, 1911-14, 1917-20 (direct examination of Amb. Corr).

[90] *Id.* at 1747 (direct examination of Gen. Garcia), 1909-10 (direct examination of Amb. Corr).

[91] *Id.* at 1786-89 (direct examination of Gen. Garcia), 2242-50 (direct examination Gen. Vides Casanova). Plaintiffs attempted to exclude these awards on the grounds that they constituted hearsay, were irrelevant to any issues to be decided, and constituted improper character evidence within the understanding of FRE 404(a). However, the court ultimately admitted these exhibits, ruling that the defendants were entitled to present such public records to the jury because, rather than constituting character evidence, the awards contained relevant statements by U.S. government officials about the defendants' efforts to discharge their responsibilities regarding the conduct of the civil war. *See id.* at 1686-89, 1694-1700, 1849-52. Accordingly, the plaintiffs then attempted to demonstrate, through

B. The Plaintiffs' Case

1. Establishing Prong #1: Defendants Exercised "Effective Control" Over Their Subordinates

Given the prior verdict in the *Ford* case, the plaintiffs were most concerned about their burden of proof with respect to the first prong of the doctrine. The evidence was relatively uncontested that the plaintiffs were detained and tortured by members of the military and security forces, at least formally under the defendants' command. It remained to be proven, however, that the National Guardsmen and National Police members who actually injured the plaintiffs were under the defendants' "effective control." Further, the plaintiffs anticipated that the defendants would suggest that death squads who were outside the formal military hierarchy and the defendants' chain of command were primarily responsible both for the violence in El Salvador and for the harm that the plaintiffs' suffered.

The doctrine of command responsibility is premised upon a defendant's omissions of command. Therefore, the effective control standard requires the party with the burden of proof to demonstrate that the defendant possessed powers he did not properly use. Thus, the *Romagoza* plaintiffs had to demonstrate that the defendants could exercise their command when they wanted to and thus could have prevented or punished criminal conduct by their subordinates. Accordingly, as a threshold matter, the plaintiffs attempted to prove the extent of the defendants' *de jure* command and authority. They also attempted to prove that there were no impediments, logistical, legal, or situational, to the defendants exercising the full scope of their *de jure* command. In this regard, the plaintiffs presented evidence of the defendants' *de facto* command, showing that the defendants had, on specific occasions, effectively exercised their command. Indeed, the plaintiffs presented evidence that suggested that the defendants' *de facto* authority actually exceeded their *de jure* authority.[92] Thus, the plaintiffs'

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expert testimony, that such awards were mere diplomatic pageantry and that other individuals subsequently implicated in human rights abuses had received them in the past, but this line of testimony was limited because the plaintiffs could not establish that their expert witness had expertise in this area. *Id.* at 2300-03 (rebuttal examination of Col. Garcia).

[92] Thus, the effective control standard suggests a mechanism for holding defendants liable for actions that would be beyond their actual authority in a formal or technical sense. *See, e.g.*, Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Feb. 26, 2001) ¶ 422 (noting that in civil war situations, civilian

evidence lead to the conclusion that had the defendants properly exercised their command over their troops, any training, reporting, or disciplinary measures implemented would have reached the direct perpetrators of the acts in question.

a. Proof that Members of the Military or Security Forces Abducted and Tortured the Plaintiffs

All three plaintiffs testified that they were detained and/or tortured by members of the Salvadoran military or security forces, and the defendants offered little contrary evidence. Specifically, Professor Mauricio was detained and tortured for approximately one and a half weeks in the National Police headquarters in San Salvador; Dr. Romagoza was detained during a joint operation of Salvadoran infantrymen and National Guardsmen, taken to a National Guard post, and then transferred to the National Guard headquarters in San Salvador where he was detained and tortured for approximately three weeks; and Ms. Gonzales was detained and tortured in the National Guard post in San Vicente for approximately two weeks.[93] Because they were blindfolded much of the time, the plaintiffs could not identify by name or rank all of the individuals who detained and tortured them. However, they were able to give some testimony about the uniforms and boots worn, the type of vehicles and arms employed, the way in which orders were given and received by individuals at various levels of an apparent hierarchy within the detention centers, and the formalized way in which detainees were processed and interrogated within these detention centers. For example, at one point, Professor Mauricio was photographed without his blindfold, so he was able to see his captors briefly.[94] In addition, all of the plaintiffs saw their captors upon their capture and release from detention.[95]

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leaders may assume powers more important and potent than those with which they are officially vested); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement of the Int'l Crim. Trib. Rwanda, Tr. Chamber (May 21, 1999) ¶ 219 (noting that consideration of defendant's *de jure* authority alone would overlook prosecution's allegations that accused exercised effective control over members of *interahamwe*, who were not within his formal chain of command).

[93] *See* Romagoza v. Garcia, Case No. 99-8364 CIV-HURLEY, Second Amended Complaint For Torture; Crimes Against Humanity; Cruel, Inhuman Or Degrading Treatment Or Punishment; And Arbitrary Detention (filed Feb. 17, 2000), *available at* http://www.cja.org/cases/Romagoza_Docs/RomagozaComplaint.htm (last visited Jan. 15, 2003).

[94] Transc. at 592-93 (direct examination of Prof. Mauricio).

[95] *Id.* at 99-104, 132 (direct examination of Dr. Romagoza), 579-91, 619 (direct

Professor Mauricio amassed a surprising amount of evidence documenting his abduction and detention by the National Police. For example, he introduced into evidence a letter from the Defense Ministry that had been received by a colleague who had initiated a campaign for his release and that confirmed that Professor Mauricio had been detained and was being "investigated" by the National Police.[96] Similarly, he had obtained a certificate from the International Committee of the Red Cross (ICRC) indicating that an ICRC representative had visited him in the National Police headquarters prior to his release.[97]

Although the *Romagoza* case did not involve allegations of the involvement of death squads in their detention or abuse, there was a concern that the jury would find credible the defendants' assertions that death squads, rather than members of the "regular" military and security forces, were responsible for the plaintiffs' injuries. To counter this, the plaintiffs presented testimony that the death squads did not act outside the formal military system. Rather, the plaintiffs presented testimony that the death squads actually operated out of the regular military and security headquarters and posts and were composed in large measure of off duty or retired military and security force officers and enlisted men.[98] To the extent that individuals not in uniform were responsible for the alleged abuses, or that the plaintiffs could not establish that individuals in uniform had committed the abuses, the plaintiffs testified that such individuals were always working in concert with, or at the direction of, members of the military or security forces. For example, although heavily armed individuals in plainclothes initially detained Professor Mauricio, he was later transferred to the National Police headquarters in San Salvador, where he was interrogated by individuals in uniform.[99] Likewise, Ms. Gonzales was identified in the marketplace by an individual not in uniform, but she was ultimately abducted by uniformed National Guard members.[100]

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examination of Prof. Mauricio), 1565, 1588 (direct examination of Ms. Gonzales). Prof. Mauricio and Dr. Romagoza were released from detention after family members in the military intervened on their behalf. Ms. Gonzales survived because her captors thought she was dead and had left her body in a garbage dump.

[96] *Id.* at 626-28 (direct examination of Prof. Mauricio).

[97] *Id.* at 613-15 (direct examination of Prof. Mauricio). Prof. Mauricio obtained this letter by writing to the ICRC after the case was filed.

[98] *See, e.g., id.* at 1039-42, 1054-55 (re-direct examination of M. Popkin), 1427-28, 1440 (cross-examination of Prof. Karl), 1485-87 (re-direct examination of Prof. Karl).

[99] *Id.* at 579-81 (direct examination of Prof. Mauricio).

[100] *Id.* at. 1561-65 (direct examination of Ms. Gonzales), 1596-99 (cross-examination of Ms. Gonzales).

b. Proof that the Regular Military and Security Forces Were Responsible for the Majority of Abuses

The plaintiffs also demonstrated that even if there were independent death squads operating within El Salvador during the period in question, the vast majority of the abuses in El Salvador were attributable to members of the formal military and security forces. The plaintiffs had compiled a number of non-governmental and governmental reports that reached this conclusion. However, the most authoritative document in this regard was the report generated by the United Nations-sponsored Truth Commission,[101] which concluded that 85% of the violence was attributable to the military and security forces, 10% to unaffiliated death squads, and 5% to leftist guerilla forces.[102] Likewise, contemporaneous U.S. government documents, including some authored by the defendants' own expert witness, detailed the extent to which torture, arbitrary detention, and disappearances were utilized by the military and security forces to quell suspected reformers and terrorize their families.[103] In the context of this line of testimony, the defendants' own expert conceded that the military and security forces were responsible for the bulk of the abuses.[104] He also testified that although the end of General Vides Casanova's tenure as Minister of Defense saw improvements in this regard, there was a resurgence in violence in 1987-88 as evidenced by his own post-reporting cable.[105]

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[101] The Commission on the Truth for El Salvador, U.N. Doc. No. S/25500 (April 1, 1993) [hereinafter Truth Commission Report]; *see* Transc. at 527-28 (direct examination L. Gilbert), 1142-53 (direct examination of Prof. Karl). Defendants stipulated to the admissibility of that report, although the plaintiffs were confident it would be considered admissible through the public records and reports exception to the hearsay bar (FRE 803(8)). *See In re* Korean Airlines Disaster, 932 F.2d 1475, 1482 (D.C. Cir. 1991) (finding that International Civil Aviation Organization, intergovernmental body created by treaty under auspices of United Nations, constituted public agency); Zenith Radio Corp. v. Matsushita Elec. Corp., 505 F. Supp. 1125, 1187 (E.D. Pa. 1980) ("we see nothing in the language of 803(8) and no hint in the Advisory Committee Note to indicate that the phrase 'public offices or agencies' . . . cannot include an international governmental body such as the United Nations"); *see also* United States v. M'Biye, 655 F.2d 1240, 1242 (D.C. Cir. 1981) (concluding that United Nations is "public office or agency" within meaning of FRE 803(10)).

[102] Transc. at 528 (direct examination of Prof. Gilbert); *see* Truth Commission Report, *supra* note 101, at 43.

[103] Transc. at 1228-37 (direct examination of Prof. Karl), 1926 (cross-examination of Amb. Corr).

[104] *Id.* at 1949-53 (cross-examination of Amb. Corr).

[105] *Id.* at 1961 (cross-examination of Amb. Corr). Plaintiffs presented the jury with a number of U.S. government cables transmitted between U.S. government agencies and the Salvadoran embassy in San Salvador. The admissibility of these cables was stipulated to by

This statistical evidence of the military and security forces' overwhelming responsibility for abuses was supplemented by anecdotal evidence from Father Paul Schindler, a priest who served in El Salvador from 1972 to 1982. Father Schindler recounted various occasions in which parishioners told him about abuses they suffered at the hands of members of the military and security forces.[106] He also described how he attempted to secure the release of parishioners who had disappeared and were detained in one of the various military detention centers in his region.[107]

c. Proof that the Defendants Exercised *De Jure* Command as a Threshold Matter

The "effective control" jury instruction made clear that a showing of *de jure* command alone would not satisfy the first prong of the command responsibility doctrine in keeping with ICTY jurisprudence. Nonetheless, the plaintiffs laid out the case for the defendants' *de jure* command by virtue of law, rank, and position within the military hierarchy.[108] Much of this evidence came from the defendants' own

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counsel, although the court did indicate that they would be admissible under either the government documents (FRE 803(8)) or the business records (FRE 803(6)) exceptions to the hearsay rule. *Id.* at 1850. Plaintiffs obtained the majority of these U.S. government cables from the National Security Archive, a non-governmental organization that collects and publishes declassified documents acquired through the Freedom of Information Act and elsewhere. *See* The National Security Archive, *available at* http://www.gwu.edu/~nsarchiv (last visited Apr. 2, 2003).

[106] Transc. at 492 (direct examination of Father Schindler). This line of testimony, although hearsay, was admissible as excited utterances (FRE 803(2)) or "dying declarations" (FRE 804(b)(2)). *See, e.g.*, Gross v. Greer, 773 F.2d 116, 120 (7th Cir. 1985) (affirming admissibility of testimony about statements made by witness to crime); Carver v. United States, 164 U.S. 694, 696 (1897) (admitting testimony about statements where declarant asked for last rites).

[107] Transc. at 430-31 (direct examination of Father Schindler).

[108] Prior to trial, the *Romagoza* plaintiffs had moved for partial summary judgment, arguing that there were no facts in dispute with respect to the first prong of the doctrine of command responsibility. *See* Romagoza v. Garcia, Plaintiffs' Motion for Partial Summary Judgment of Defendants' *De Jure* Command Authority, or, Alternatively For Determination of Facts Without Substantial Controversy (filed Feb. 6, 2001) (on file with the author). Although plaintiffs were not seeking a final determination on the question of defendants' command responsibility for the acts alleged, their motion made clear that summary judgment may be "proper as to some causes of action but not as to others, or as to some issues but not as to others, or as to some parties but not as to others." Barker v. Norman, 651 F.2d 1107, 1123 (5th Cir. 1981). Alternatively, plaintiffs argued that the court could determine pursuant to Rule 56(d) that such facts were without substantial controversy and accordingly should be deemed established at trial. *See, e.g.*, Scott Paper Co. v. Taslog, Inc., 638 F.2d 790, 796 n.4 (5th Cir. 1981). Plaintiffs' statement of undisputed facts set forth excerpts from defendants' depositions, proposed exhibits, and interrogatory responses that

testimony and documents. This placed the defendants in the difficult position of either affirming their former *de jure* power or conceding impotence and that their subordinates disrespected orders.

For example, the defendants produced numerous documents, including several diagrams of the Salvadoran military and security forces and copies of relevant Salvadoran legislation, demonstrating that they occupied positions at the apex of the National Guard and Ministry of Defense.[109] These documents and the defendants' testimony confirmed that the Ministry of Defense encompassed both the military and security forces (such as the National Guard and National Police which were implicated in this case) and that the various forces often conducted joint operations.[110] In their deposition and trial testimony, the defendants confirmed that the military and security forces operated according to a formal chain of command: orders were regularly issued either by phone, in writing, or by messenger; subordinates were under a duty to report significant events up the chain of command; and subordinates wore uniforms and were inspected and supervised by superiors, including the defendants.[111] Both of the defendants were affiliated with the military academy in San Salvador, first as cadets and later as faculty, and they testified that the curriculum included study of the proper functioning of this chain of command.[112] The plaintiffs' testimony also noted that the defendants' ability to exercise their command was bolstered by the fact that the Salvadoran officer corps was

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demonstrated that it was uncontested that defendants exercised *de jure* command over their subordinates. Plaintiffs argued that on these undisputed facts, the court could rule as a matter of law that the first prong of the doctrine of command responsibility had been satisfied and that the jury should be instructed accordingly. This motion was denied without opinion. After the issuance of the Eleventh Circuit's opinion in *Ford*, plaintiffs renewed their Rule 56(d) motion, arguing that given the presumption identified by the Eleventh Circuit and in light of the evidence in the record, the fact of defendants' *de jure* command authority over members of the Salvadoran military and security forces was without substantial controversy and should be deemed established for purposes of trial. *See* Plaintiffs' Motion for Reconsideration of Previously Denied Motion for Partial Summary Judgment of Defendants' De Jure Command Authority, Or, Alternatively, For Determination of Facts Without Substantial Controversy, Romagoza v. Garcia (filed May 10, 2002) (on file with the author). This motion was also denied.

[109] *See, e.g.*, Transc. at 326-28 (Gen. Vides Casanova deposition designations), 1760-64 (direct examination of Gen. Garcia), 1797-99 (cross-examination of Gen. Garcia).

[110] *Id.* at 1802, 1805 (cross-examination of Gen. Garcia), 2257-58 (cross-examination of Gen. Vides Casanova).

[111] *Id.* at 307-10, 313 (Gen. Garcia deposition designations), 1807, 1813 (cross-examination of Gen. Garcia).

[112] *See, e.g., id.* at 1721-22, 1727 (direct examination of Gen. Garcia), 1794-97 (cross-examination of Gen. Garcia), 2150-52 (direct examination of Gen. Vides Casanova), 2264-65 (cross-examination of Gen. Vides Casanova).

a small one, so the defendants themselves could exercise oversight and discipline directly.[113] Indeed, both generals admitted in testimony that General Vides Casanova, as Director-General of the National Guard, had direct control over the National Guard headquarters, where Dr. Romagoza was detained and tortured, and of all of its interrogators.[114]

The defendants' testimony also revealed that during the period in question, the defendants bore all the trappings of power and authority: they wore uniforms, they were saluted at military events, they were called "sir" when addressed, they inspected troops, they were among the first individuals ever elevated to the rank of general in the Salvadoran military, and they regularly gave orders to subordinates.[115] Indeed, General Vides Casanova testified in deposition that, to his knowledge, no subordinate ever disobeyed his command.[116] To emphasize the defendants' formidable personas during the years in question, particularly in light of their current grandfatherly appearances, the plaintiffs presented to the jury a series of photographs taken during the era showing the defendants in full uniform and exercising their command over subordinates.[117]

In addition to the defendants' own testimony, the plaintiffs called as an expert witness a retired Argentine colonel, Colonel Jose Luis Garcia, whose extensive knowledge of El Salvador stemmed from expert testimony he had provided in an earlier trial of individuals accused of murdering six Jesuits in 1989.[118] By way of background, Colonel Garcia testified about the operative rules of warfare, as set out in the 1949 Geneva Conventions and other governing treaties, and the structure and operation of a military chain of command in general and in the

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[113] *Id.* at 1471-72 (cross-examination of Prof. Karl).

[114] *Id.* at 1778 (direct examination of Gen. Garcia), 2270 (cross-examination of Gen. Vides Casanova).

[115] *Id.* at 314 (videotape deposition of Gen. Garcia).

[116] *Id.* at 334 (Gen. Vides Casanova deposition designations), 1348 (direct examination of Prof. Karl), 2263-64 (cross-examination of Gen. Vides Casanova).

[117] These photographs had been collected from various photo archives, such as Magnum Photo, *available at* http://www.magnumphotos.com/c/ (last visited April 29, 2003). Photographs are generally deemed admissible so long as they are authenticated by testimony from a witness that the photograph depicts what it is claimed to depict. United States v. Oaxaca, 569 F.2d 519, 525 (9th Cir. 1978), *cert. denied*, 439 U.S. 926 (1978). The authenticating witness need not be the person who took the photograph. United States. v. Holmquist, 36 F.3d 154, 169 (1st Cir. 1994).

[118] Transc. at 793-80 (direct examination of Col. Garcia). Colonel Garcia had served as a military expert in several previous human rights trials as well, but testimony about other such proceedings was significantly limited by the court. *Id.* at 801 (direct examination of Col. Garcia).

Salvadoran military in particular.[119] Drawing upon provisions of the Salvadoran military codes, he discussed the way in which Salvadoran law assigned all powers of command to the defendants in their respective positions.[120]

Similarly, a former U.S. ambassador to El Salvador, Ambassador Robert White who served in El Salvador from March 1980 to March 1981, testified that according to U.S. government assessments, the Salvadoran military's chain of command was "unified."[121] He testified that the Defense Ministry exercised complete control over members of the military and security forces as well as over significant aspects of governmental policy.[122] He further testified that neither of the defendants ever complained to him that he was unable to control his troops.[123] In this regard, several witnesses testified that the U.S. government understood the defendants to be the persons capable of ensuring respect for human rights, and that this understanding served as the basis for the U.S. government's efforts to try to curb abuses in El Salvador.[124] For example, Ambassador White testified that U.S. government sources informed members of the embassy staff that it was the Minister of Defense who was capable of controlling abuses.[125] Much of this testimony was corroborated by declassified U.S. government cables transmitted between Washington, D.C. and the U.S. embassy in San Salvador confirming the functioning of the Salvadoran chain of command and the defendants' top positions therein.[126] These cables also recorded the embassy staff's impressions of the role of members of the military command structure in committing, encouraging, or tolerating abuses by lower level members of the military and security forces.

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[119] *Id.* at 825-28 (direct examination of Col. Garcia).

[120] *See also id.* at 835 (direct examination of Col. Garcia), 1118-24 (direct examination of Prof. Karl). Expert testimony on the structure and organization of military forces is often employed in command responsibility cases to demonstrate the operation of the formal chain of command and the competencies of and relationships between different individuals within that chain of command. *See, e.g.*, Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Aug. 2, 2001) ¶¶ 626-27; Hilao v. Marcos, 103 F.3d 767, 776 (9th Cir. 1996) (affirming admissibility of expert testimony to prove agency relationship between perpetrators and defendants).

[121] Transc. at 255 (direct examination of Amb. White).

[122] *Id.* at 254-55 (direct examination of Amb. White).

[123] *Id.* at 260 (direct examination of Amb. White).

[124] *See, e.g., id.* at 259 (direct examination of Amb. White), 1172-85 (direct examination of Prof. Karl), 1487-88 (re-direct of Prof. Karl), 1942-43, 1957-58 (cross-examination of Amb. Corr).

[125] *Id.* at 256-59 (direct examination of Amb. White).

[126] *Id.* at 1348-49 (direct examination of Prof. Karl).

d. Proof that There Were No Impediments to the Exercise of the Defendants' Command

To counter the defendants' arguments that the chaos wrought by the civil war prevented them from fully exercising their command, the plaintiffs presented expert and percipient testimony that the Salvadoran military's communications and transportation infrastructure were sufficiently developed and intact to enable the defendants to exercise control over their troops.[127] The plaintiffs also presented various forms of anecdotal evidence from individuals who had been in El Salvador during the period in question. Several witnesses testified that although the level of violence was high, people generally went about their daily lives, especially in San Salvador.[128] Further, the plaintiffs demonstrated that much of the repression of the civilian population pre-dated the commencement of the civil war, overcoming any claim by the defendants that the exigencies of prosecuting the war precluded them from preventing or punishing abuses.[129] In particular, cross-examination of the defendants and their witness emphasized that two of the plaintiffs had been detained and tortured within San Salvador, and the third was detained a mere forty miles away, so problems with regional commands and telecommunications would not have impacted the defendants' abilities to supervise or exercise their command within the implicated detention centers.[130]

In addition, Ambassador White testified about the extent and type of military and logistical equipment provided by the United States to the Salvadoran government as military aid.[131] In particular, he and other witnesses testified that because the U.S. government was legally prevented from providing lethal aid, the majority of the in kind aid provided to the Salvadoran military during the period in question involved telecommunications equipment (such as night scopes, walkie-talkies, and mobile radios), means of transportation (jeeps, trucks, helicopters, and helicopter pads), other logistical materiel, and training in the use of such equipment.[132] Another expert witness demonstrated that the provision of this non-lethal military aid increased dramatically

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[127] *See, e.g., id.* at 2293-95, 2297-2300 (rebuttal examination of Col. Garcia).

[128] *See, e.g., id.*, at 574 (direct examination of Prof. Mauricio), 1352 (direct examination of Prof. Karl).

[129] *Id.* at 2318-19 (rebuttal examination of Prof. Karl).

[130] *Id.* at 1949-55 (cross-examination of Amb. Corr), 2253-54 (cross-examination of Gen. Vides Casanova).

[131] *Id.* at 260, 290 (direct examination of Amb. White).

[132] *Id.* at 290 (direct examination of Amb. White).

during the period in question.[133] In addition, the plaintiffs conceded that there were factions in the military, reflecting dissension over the best strategy for winning the civil war. However, they presented expert testimony that these factions did not impact the defendants' ability to exercise their command, especially with respect to abuses of civilians.[134] Likewise, the defendants' own expert witness conceded in deposition that the defendants had the capacity to give instructions to subordinates about respecting human rights and to investigate human rights abuses.[135]

e. Proof of the Defendants' *De Facto* Command

Several witnesses, including the plaintiffs, testified about how prevalent the military was throughout the country and how tightly it controlled all aspects of Salvadoran society. Professor Terry Karl of Stanford University, as an expert witness,[136] provided historical context for this phenomenon by describing the way in which the military had ruled El Salvador for most of the century by continually consolidating its power within the society and repressing any opposition.[137] Father Schindler testified that his region contained a number of well-outfitted command posts representing the various military and security forces.[138] Further, he testified that it was impossible to travel anywhere in the country without passing through a military checkpoint, as every major highway was riddled with such roadblocks staffed by members of the military and security forces wielding extensive weaponry and telecommunications equipment.[139]

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[133] *Id.* at 1354-56 (direct examination of Prof. Karl), 1424-25 (cross-examination of Prof. Karl).

[134] *Id.* at 1349-50 (direct examination of Prof. Karl).

[135] *Id.* at 1353-54 (cross-examination of Amb. Corr).

[136] Courts regularly allow historians and social scientists to provide expert testimony where relevant. *See, e.g.*, S. Christian Leadership Council v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (affirming admissibility of social science testimony relating to racially polarized voting patterns), *cert. denied*, 516 U.S. 1045 (1996); McLaughlin v. Boston School Comm, 976 F. Supp. 53 (D. Mass. 1997) (admitting testimony of historian in race discrimination case); United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Oh. 1981) (admitting testimony of Holocaust expert historian); United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981) (admitting historical testimony regarding Nazi abuses in Estonia), *aff'd*, 685 F.2d 427 (2d Cir. 1982); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998) (admitting testimony by historian of abuses and terrorist activity in Iran).

[137] Transc. at 1093-1112, 1115-32 (direct examination of Prof. Karl).

[138] *Id.* at 476-78 (direct examination of Father Schindler).

[139] *Id.* at 417-86 (direct examination of Father Schindler).

The plaintiffs also attempted to present the jury with concrete instances in which the defendants exercised their command effectively, suggesting that had the defendants wanted to prevent and punish criminal conduct they could have. Much of this line of evidence came from the defendants' own testimony, as they attempted to portray themselves as reformers who were utilizing the military for positive ends. For example, General Garcia testified about deploying the military throughout the country to implement a national banking reform in a mere twenty-four hour period and agrarian reform in a matter of days.[140] Also, to the extent that such evidence was available, the plaintiffs demonstrated that different military and security forces undertook coordinated military attacks and campaigns, which implied that direction was possible and that a functioning chain of command could be invoked when top leaders had the will to do so.[141]

As a final line of argument, the plaintiffs introduced evidence suggesting that the defendants' *de facto* control over their subordinates was not merely coextensive with their *de jure* command, but was in fact in excess of it. Professor Karl explained that, although the government of which the defendants were members was technically a civilian/military junta, it was in essence a military dictatorship. As a result, the civilian members served "at the pleasure of" the military and, accordingly, exercised no real control over the military.[142] Rather, in her estimation, General Garcia, when he was Minister of Defense, was the real "power behind the throne."[143] Even the defendants' own expert witness conceded that although General Garcia may have received orders from members of the junta who were technically his superiors, he would have "negotiated" with them about implementation.[144]

f. Proof that Abuses Were Coordinated and Systematic, Implying Control and Direction

Given that constructive knowledge of abuses could be established with a showing that abuses were so rampant that the defendants should — and must — have known about them, the temptation was to introduce

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[140] *Id* at 1743-45 (direct examination of Gen. Garcia), 1821-25 (cross-examination of Gen. Garcia), 2320 (rebuttal examination of Prof. Karl). The ICTY has noted that arguments by a defendant that matters improved under his command operate as a concession of effective control. Delalic Judgment, *supra* note 22, ¶ 743.

[141] Transc. at 1353-54 (cross-examination of Amb. Corr).

[142] *See, e.g., id.* at 1444 (cross-examination of Prof. Karl).

[143] *Id.* at 2323-24 (rebuttal examination of Prof. Karl).

[144] *Id.* at 1920 (direct examination of Amb. Corr).

overwhelming evidence of how extensive human rights abuses were in El Salvador during the period in question. At the same time, however, the plaintiffs recognized that too much evidence in this regard threatened to reinforce the defendants' chaos theory — especially for a lay jury who may be stunned by the sheer magnitude of the violence — and create an impression within the jury that El Salvador in the 1980s was a country under no one's direction or control. Accordingly, the *Romagoza* plaintiffs presented an array of evidence, including human rights reports and expert testimony, identifying widespread and systematic patterns of torture by members of the Salvadoran military and security forces during the period in question. It was hoped that this evidence, in addition to establishing the defendants' knowledge, would also reinforce the plaintiffs' argument that abuses were under the control of the Ministry of Defense.

For example, a former Amnesty International (AI) researcher for Latin America, Michael McClintock,[145] testified about AI's efforts in El Salvador to track patterns of violence. He and others testified that the torture techniques employed throughout the country were common, even within detention centers under the authority of different military and security forces.[146] The plaintiffs also demonstrated that the particular demographic segments represented by the plaintiffs (doctors, academics, and churchworkers) were specifically targeted for repression because they were working with the poor and seeking reform.[147] The point was to demonstrate that El Salvador was not a failed state, as the defendants would have it portrayed, but a police state in which the military controlled all aspects of society and chose their victims strategically.

Much of this evidence came in through the expert testimony of Professor Karl, who drew upon her extensive research of the patterns and practices of violence in El Salvador during the period in question.[148] She described the way in which consistent strategies of repression were employed to terrorize the population, such as "draining the sea" by eliminating popular support for rebel forces.[149] Further, she demonstrated that the violence was too coordinated, and those responsible were too well equipped, to have been attributable to rogue

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[145] *Id.* at 725-93 (direct examination of M. McClintock).

[146] *Id.* at 1233-37 (direct examination of Prof. Karl).

[147] *Id.* at 1223-27 (direct examination of Prof. Karl).

[148] *See, e.g., id.* at 1076-79, 1084-90 (direct examination of Prof. Karl).

[149] *Id.* at 1133-34 (direct examination of Prof. Karl).

military factions or random acts by individual abusers.[150] Relying on Freedom House's scale of terror, she discussed the way in which the nature of the repression in El Salvador changed from widespread state terror to more targeted terror at different times over the period of the defendants' tenure depending upon the prevailing political climate.[151] To describe the phenomenon of violence in El Salvador to the jury, Professor Karl utilized the metaphor of the "spigot," implying that the violence could be turned on and off as was politically expedient or as pressure from the United States for reform increased.[152]

For example, Professor Karl testified about a series of visits by various U.S. government officials, culminating in a visit by then-Vice President George H.W. Bush in 1983. She described the way in which these officials reprimanded members of the Salvadoran military, including General Vides Casanova who had recently assumed the position of Minister of Defense, for the high levels of official violence in the country and threatened to curtail economic and military aid if the violence did not diminish. She demonstrated graphically that after this series of visits, the level of violence decreased considerably, implying that it was controllable.[153] Important testimony in this regard also came from Professor Lauren Gilbert, who in the 1990s was an investigator with the United Nations-sponsored Truth Commission, which investigated and reported upon the patterns of violence during the civil conflict.[154] Professor Gilbert described the Truth Commission's methodology and results, which confirmed that the repression was anything but random.[155]

2. Establishing Prong #2: Knowledge

Establishing the knowledge prong posed less of a challenge to a certain degree, because the violence in El Salvador was so extensive and well documented that any claims of lack of knowledge were sure to ring hollow to the jury. At the same time, the plaintiffs recognized the need

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[150] *Id.* at 2307-14, 2317-18 (rebuttal examination of Prof. Karl). *See, e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Mar. 3, 2000) ¶¶ 467, 529, 659 (noting that scale and systematic nature of crimes being committed by subordinates could not be reconciled with defendant's argument that they were committed by rogue elements).

[151] Transc. at 1165-71 (direct examination of Prof. Karl).

[152] *Id.* at 1222 (direct examination of Prof. Karl), 2317 (rebuttal examination of Prof. Karl).

[153] *Id.* at 1171-1205, 1220-23 (direct examination of Prof. Karl).

[154] *Id.* at 498-547, 654-715 (direct examination of Prof. Gilbert).

[155] *Id.* at 500-04 (direct examination of Prof. Gilbert).

to strike a balance between presenting overwhelming evidence of the pervasiveness of violence by the military and security forces, in order to prove both actual and constructive knowledge, while at the same time demonstrating that such violence was coordinated, systematic, and ultimately under the control of the defendants.

Thus, the plaintiffs introduced extensive evidence tending to show both actual and constructive knowledge of abuses on the part of the defendants.[156] In particular, the plaintiffs' evidence covered a number of occasions in which credible sources, such as U.S. and Salvadoran government officials, confronted the defendants with concrete incidents linking their subordinates to human rights abuses. The plaintiffs also presented evidence about the wide range of sources of information that was readily available to the defendants and that would have put the defendants on notice of abuses and of the need to conduct further inquiry. On several occasions, this evidence was objected to on the grounds that it constituted hearsay. However, the court regularly instructed the jury that the evidence was relevant not for the truth of the matter asserted, but to demonstrate notice to the defendants.[157]

a. Proof of Actual Knowledge: What the Defendants Knew

The plaintiffs presented extensive evidence that the defendants personally had been put on notice of abuses. In particular, Ambassador White testified that he confronted the defendants about known abuses by military and security forces and about strategies for curbing those abuses.[158] The defendants' own expert, Ambassador Corr, affirmed that the United States was aware of incidents of torture and that he and other embassy officials spoke with both of the defendants about such abuses.[159]

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[156] As their guide to proving the knowledge prong, plaintiffs structured much of their proof around the factors identified by the United Nations Commission of Experts on the Former Yugoslavia: the number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the geographic location of the acts; the widespread occurrence of such acts; the modus operandi of similar acts; and the location and position of the commander. *See* United Nations, Security Council, Letter Dated 24 May 1994 from the Secretary General to the President of the Security Council, U.N. Doc. A/1994/674, at 17 (1994).

[157] *See, e.g.*, Transc. at 740-41, 752-54; *see also* WEINSTEIN'S FEDERAL EVIDENCE § 801.11(5)(a) ("Statements are not hearsay where they are offered . . . to prove the extent of a recipient's notice of certain conditions."); Katz v. Utah Power & Light Co., 913 F.2d 599, 605 (9th Cir. 1990) (affirming admissibility of newspaper and radio press releases to show plaintiffs had notice of conditions); United States v. Chavis, 772 F.2d 100, 105 (5th Cir. 1985) (finding admissible records of complaints to prove notice).

[158] *Id.* at 197-98 (direct examination of Amb. White).

[159] *Id.* at 1942-43, 1946-48 (cross-examination of Amb. Corr); *see also id.* at 1241-43 (direct

Many of these interactions with the defendants were memorialized in the "cable traffic" between the U.S. embassy in San Salvador and the U.S. Department of State and other U.S. governmental agencies. This body of evidence effectively rebutted the defendants' claims in their depositions and testimony that they had never had such conversations with Ambassador White or any other U.S. official.[160]

In addition, a former Organization of American States (OAS) investigator, Roberto Alvarez, described a fact-finding mission in El Salvador that occurred just prior to the time when the defendants assumed their positions of power. His mission had discovered clandestine torture chambers within the National Guard headquarters.[161] In 1979, the OAS delegation presented its findings and recommendations to the new government, which included both of the defendants. Even though the abuses had been committed during a prior regime, this evidence was deemed admissible, because the investigative report was presented to the government of which the defendants were members and served to place the government on notice that torture, arbitrary detention, and presumably disappearances had been employed by the National Guard in official buildings.[162] Mr. Alvarez testified that despite this clear evidence of abuses by National Guardsmen, and the presentation of a number of concrete recommendations for ensuring that such abuses were not repeated, the new government did nothing to investigate those acts or bring responsible parties to justice.[163] Indeed, General Garcia admitted to knowing about the report[164] and General Vides Casanova admitted to failing to conduct an investigation even though he had assumed command over the National Guard in whose headquarters the abuses were alleged to have occurred.[165] And yet, plaintiffs' expert Colonel Garcia testified that a commander has a duty to know what is happening in his own and other regional headquarters, which was particularly relevant to both Dr. Romagoza's testimony that he was detained and tortured in the complex in which General Vides Casanova had his office[166] and Ms. Gonzales's testimony that she was

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examination of Prof. Karl, reviewing deposition examination of Amb. Edwin Corr).

[160] *See, e.g., id.* at 1772 (direct examination of Gen. Garcia).

[161] *Id.* at. 349-417 (direct examination of R. Alvarez).

[162] *Id.* at 362-65 (direct examination of R. Alvarez).

[163] *Id.* at 391-92 (direct examination of R. Alvarez).

[164] *Id.* at 2028 (re-direct examination of Gen. Garcia).

[165] *Id.* at 2272-75 (cross-examination of Gen. Vides Casanova), 2275-78, 2281 (re-direct examination of Gen. Vides Casanova).

[166] *Id.* at 903 (direct examination of Col. Garcia).

detained at a National Guard post in San Vicente.[167]

b. Proof of Constructive Knowledge: What the Defendants Should Have Known

The plaintiffs' evidence indicated that there was a considerable amount of information generally available to the defendants that would have put them on notice that their subordinates were committing abuses. For example, Mr. McClintock testified that AI would regularly issue so-called Urgent Actions in order to mobilize AI's membership to write to responsible government officials seeking the release or proper treatment of political prisoners in El Salvador.[168] Mr. McClintock testified that top members of the Salvadoran military would have received hundreds of letters from AI members in response to these appeals. The plaintiffs had located several letters that military officials had written in reply to these Urgent Action letters acknowledging receipt of a complaint and usually denying knowledge of the whereabouts of the individual who was the subject of the inquiry.[169] Most importantly, the plaintiffs located one particular letter in AI's archives written by General Vides Casanova in response to an Urgent Action appeal confirming that the records of the National Guard had been "meticulously reviewed" and that there was no evidence of the individual in question being detained.[170] Although AI and other non-governmental human rights organizations drafted comprehensive reports about the scope of the violence in El Salvador,[171] the plaintiffs were not entitled to admit many such reports into evidence on the grounds that their prejudicial effect outweighed their probative value and it could not be satisfactorily established that the defendants or others in the Salvadoran government ever received the reports.[172]

Similarly, Father Schindler described the way in which the Catholic Church and the archbishopric's legal aid office (*Socorro Juridico,* or "Judicial Assistance") documented and publicized violence by military and security forces. To assist families in locating loved ones who had been "disappeared," Socorro Juridico maintained a series of books containing photographs and other information about individuals found dead or in detention. Father Schindler testified about how he had

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[167] *Id.* at 1561-62 (direct examination of Ms. Gonzales).

[168] *Id.* at 729, 737-39 (direct examination of M. McClintock).

[169] *Id.* at 751-69 (direct examination of M. McClintock).

[170] *Id.* at 768 (direct examination of M. McClintock).

[171] *See, e.g., id.* at 1247 (direct examination of Prof. Karl).

[172] *Id.* at 774-77 (direct examination of M. McClintock).

collected and conveyed such information in his region.[173] In addition, Father Schindler described the way in which the homilies of the late Archbishop Oscar Romero, which were issued at least weekly prior to his assassination and broadcast or published throughout the country, described specific acts of violence and beseeched the military to stop the repression.[174] Both of the defendants admitted to being aware of these homilies.[175]

The plaintiffs also presented testimony that many human rights abuses were designed to be highly visible in order to terrorize the population.[176] Presenting a number of his personal photographs, Father Schindler described the way in which he would regularly visit local body dumps in order to document and cremate the dead who were found there. Many of these bodies showed signs of torture and mutilation and had their thumbs tied behind their backs, which he testified was a common way for the security forces to restrain prisoners.[177] He also noted that he had to pass through several military checkpoints to reach these areas, implying that whoever dumped the bodies would have also had to pass through these checkpoints.[178]

The plaintiffs also introduced a number of *campos pagados*, or "paid ads," that had been published in the Salvadoran newspapers by individuals seeking the whereabouts of friends, family members, and colleagues who had been "disappeared".[179] For example, Professor Mauricio introduced into evidence several *campos pagados* that had been drafted by colleagues seeking his and others' release.[180] Ironically, in an attempt to demonstrate that he was issuing orders to his subordinates to respect the civilian population, General Garcia admitted into evidence the text of a published speech that appeared on the same page as several of these *campos pagados*.[181] General Vides Casanova also admitted to having seen such appeals.[182]

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[173] *Id.* at 437 (direct examination of Father Schindler).

[174] *Id.* at 492 (direct examination of Father Schindler).

[175] *Id.* at 2182-83, 1773-74 (direct examination of Gen. Garcia).

[176] *Id.* at 1248-49 (direct examination of Prof. Karl).

[177] *Id.* at 437-38 (direct examination of Father Schindler).

[178] *Id.* at 445 (direct examination of Father Schindler), 476-78 (cross-examination of Father Schindler).

[179] *See, e.g., id.* at 1243-44 (direct examination of Prof. Karl).

[180] *Id.* at 622-26 (direct examination of Prof. Mauricio).

[181] *Id.* at 2014-16 (cross-examination of Gen. Garcia).

[182] *Id.* at 2183 (direct examination Gen. Vides Casanova).

One of the plaintiffs' expert witnesses was originally allowed to testify as to her opinion about whether the defendants knew or should have known about the abuses being perpetrated against civilians.[183] However, the court subsequently changed its ruling on that point and instructed the jury to disregard her testimony as to what the defendants *knew* about the prevalence of human rights abuses because that was not the proper subject of expert testimony.[184] Nonetheless, the jury was entitled to consider her testimony that, given all of these forms of notice, the defendants should have known that subordinates were committing or had committed abuses. Most powerfully, even the defendants' own expert witness testified that one would have had to be a "dunce, blind or deaf" not to know of abuses.[185]

3. Establishing Prong #3: The Defendants' Omissions

The third prong of the command responsibility doctrine is formulated in the disjunctive, providing that a commander is liable when he either fails to prevent abuses or fails to punish them after the fact. The failure to punish component of this prong could be narrowly interpreted to cover only those cases in which a defendant failed to punish the perpetrators of the precise acts complained of once he was made aware of them. In many respects, the churchwomen's case was premised on this narrow notion of failure to punish. Specifically, the *Ford* plaintiffs argued that the defendants failed in their duty to punish the perpetrators of the churchwomens' murders when they delegated the responsibility of investigation to subordinates without follow up; impeded the resulting investigation; were derelict in entrusting the task of prosecution to the Salvadoran courts; or otherwise sought to cover up evidence of the crimes. In contrast, the *Romagoza* plaintiffs took a more expansive approach to the third prong of the doctrine by proceeding under the theory that the failure to prevent and the failure to punish criminal conduct are not necessarily mutually exclusive inquiries. Rather, they advanced the position that a failure to punish abuses generally also operates as a failure to prevent abuses by essentially giving the "green light" to future abuses and contributing to a climate of impunity.[186]

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[183] *Id.* at 1085-89 (direct examination of Prof. Karl).

[184] *Id.* at 1159-64, 1205-12, 1217-19, 1239.

[185] *Id.* at 1249-52 (direct examination of Prof. Karl, reviewing deposition examination of Amb. Edwin Corr), 1953-54 (cross-examination of Amb. Corr).

[186] *Id.* at 502-03 (direct examination of Prof. Gilbert), 1382 (direct examination of Prof.

The plaintiffs' evidence with respect to this prong proceeded along three tracks. First, the plaintiffs presented testimony indicating that the defendants undertook no preventative or punitive measures when confronted with abuses being committed by their subordinates. Second, although this showing alone would have been sufficient to base liability, the command responsibility doctrine also invites the party with the burden of proof to present a standard of conduct of what would have been an appropriate response to the circumstances to set the benchmark for the finder of fact to evaluate the defendants' conduct. Accordingly, the *Romagoza* plaintiffs presented testimony about concrete measures the defendants should and could have taken to discharge their duty given their legal authority and the resources and institutions available to them. Third, the plaintiffs presented testimony and evidence about what the defendants actually did. This evidence demonstrated that rather than preventing or punishing criminal conduct by subordinates, the defendants actually encouraged, promoted or at the very least condoned it.

a. Proof that the Defendants Did Nothing to Prevent or Punish Criminal Behavior

The defendants were confronted in their depositions and at trial with several instances in which they were made aware of abuses by members of the military but failed to act. On such occasions, the defendants generally admitted that they conducted no investigation or follow up.[187] Other witnesses testified about a number of opportunities for the defendants to investigate and punish known abuses, which they failed to undertake.[188] For example, Professor Karl testified that then-Vice President Bush presented General Vides Casanova with the names of members of the military and security forces who should be removed from their posts, but no action was taken with respect to any of these individuals.[189] Another of the plaintiffs' expert witnesses — Ms. Margaret Popkin, the author of a book on the Salvadoran justice system — testified that no officer was ever convicted of a human rights crime during the period in question.[190] Ambassador Corr echoed this

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Karl).

[187] *Id.* at 317-18 (direct examination of Gen. Garcia), 1818-20, 1829-32 (cross-examination of Gen. Garcia).

[188] *See, e.g., id.* at 244-47, 253 (direct of Amb. White).

[189] *Id.* at 1343 (direct examination of Prof. Karl).

[190] *Id.* at 1043 (direct examination of M. Popkin).

assessment.[191] By the defendants' own testimony, to the extent that members of the military were prosecuted, it was for common crimes, such as murder or robbery, and not for human rights abuses.[192]

Indeed, the defendants were unable to identify any specific actions they took to prevent abuses or punish perpetrators. Although they claimed to have issued standing orders against the commission of torture and other abuses,[193] they produced only vague guidelines addressing the need for discipline generally but not specifically condemning or prohibiting the use of torture or other human rights abuses.[194] They also produced several speeches that had been reproduced in Salvadoran newspapers that they claimed were directed at subordinates.[195] However, on cross-examination, it was revealed that many of these so-called "orders" were little more than broad pronouncements encouraging the public to trust and respect the military, denying abuses by the military, and promising to implement reforms and free elections.[196] Although the defendants produced an International Committee of the Red Cross pamphlet entitled "Soldier's Manual," both of the defendants conceded that although the pamphlet was published in 1972 it was not distributed to troops until approximately 1983.[197] They also admitted that there was no centralized reporting mechanism for human rights complaints and that they did not personally visit detention centers.[198]

Professor Karl testified that this pervasive inaction by the military can be explained by the fact that the military was governed by an entrenched "code of silence" — a term employed by Ambassador Corr in his post

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[191] *Id.* at 1976 (cross-examination of Amb. Corr).

[192] *Id.* at 2188 (direct examination Gen. Vides Casanova), 2255-56 (cross-examination of Gen. Vides Casanova).

[193] *Id.* at 1767-69 (direct examination of Gen. Garcia).

[194] *Id.* at 2121-35 (re-direct examination of Gen. Garcia), 2138 (re-cross examination of Gen. Garcia).

[195] *Id.* at 1748-54 (direct examination of Gen. Garcia), 2066-2103 (re-direct examination of Gen. Garcia), 2232-34 (direct examination Gen. Vides Casanova).

[196] *Id.* at 1814 (cross-examination of Gen. Garcia), 2066-2103 (re-direct examination of Gen. Garcia).

[197] *Id.* at 2116 (re-direct examination of Gen. Garcia), 2140-42 (re-cross examination of Gen. Garcia), 2200-01 (direct examination Gen. Vides Casanova). General Vides Casanova attempted to introduce another manual directing soldiers to respect human rights, but this exhibit was withdrawn as irrelevant when it was revealed that it had been published in 1994, well after the events in question. *Id.* at 2235-40 (direct examination Gen. Vides Casanova).

[198] *Id.* at 2009-10 (cross-examination of Gen. Garcia), 2191 (direct examination Gen. Vides Casanova), 2256 (cross-examination of Gen. Vides Casanova).

reporting cable — that protected military members from scrutiny or discipline and that gave rise to collective denials when allegations were launched against the military.[199] The cable issued by Ambassador Corr corroborated these observations,[200] and he conceded at trial that it was the responsibility of high ranking officers to break the code of silence to the extent that it interfered with the proper functioning of command.[201] There was also testimony that this code of silence was facilitated by the so called "*tanda* system," which was a feature of Salvadoran military training that bound graduates of the same graduating class together through strong bonds of loyalty.[202]

b. Proof of What the Defendants Could Have Done

The plaintiffs' military expert, Colonel Garcia, testified about the formal and informal corrective actions that were available to the defendants. He indicated that in the face of allegations that subordinates were committing abuses, the defendants could and should have taken specific actions. These actions included issuing direct orders to all subordinates to respect human rights, implementing a strict reporting mechanism to track instances in which weapons were discharged or civilians detained, conducting or ordering investigations, convening a military tribunal or court martial, transferring or otherwise cashiering individuals associated with abuses, inspecting detention centers and other sites at which human rights abuses were alleged to have occurred, and coordinating responses with superiors within other levels within the chain of command.[203] In this regard, he referred to specific provisions within the Salvadoran Military Code of Justice authorizing —and indeed obligating — the defendants to undertake internal disciplinary measures in response to abuses.[204] In response, the defendants admitted that by law they could have established military tribunals to prosecute members of the military for rights abuses but that they never did so.[205] Based upon his research, Colonel Garcia testified that, in his expert opinion, the defendants had failed in their duty to respond to credible allegations of

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[199] *Id.* at 1306-13, 1321-29 (direct examination of Prof. Karl, reviewing deposition examination of Amb. Edwin Corr).

[200] *Id.* at 1963-64, 1967-69, 1974-78 (cross-examination of Amb. Corr).

[201] *Id.* at 1976 (cross-examination of Amb. Corr).

[202] *Id.* at 1215 (direct examination of Prof. Karl), 1801-3 (cross-examination of Gen. Garcia).

[203] *See, e.g., id.* at 849-56, 899-900, 911-19 (direct examination of Col. Garcia).

[204] *Id.* at 863-64, 905-09 (direct examination of Col. Garcia).

[205] *Id.* at 334-45 (deposition designations for Gen. Vides Casanova).

abuses;[206] and if they were unable to control their troops, they should have relinquished their command.[207]

Likewise, Professor Karl outlined an additional series of concrete steps the defendants could have taken to fulfill their duty to prevent and punish criminal conduct. These included issuing repeated and public denunciations of abuses, demanding immediate reports of all civilian deaths and detentions, punishing officers for failing to make such reports or to follow up on abuses, issuing clear instructions about the treatment of civilians and how to handle allegations of abuses, personally inspecting sites where human rights abuses were alleged to have occurred, forwarding cases of abuses to the civilian court system, cooperating with judicial and non-governmental investigations, protecting witnesses to human rights abuses, requesting help from the United States and elsewhere in preventing abuses and conducting investigations, and removing rather than promoting individuals accused of rights violations.[208] Professor Karl testified that the defendants could have as a legal and practical matter implemented each of these specific measures, but that they did not do so.[209] Further, she presented several U.S. government cables indicating that the United States had offered investigative help, especially in cases in which United States citizens were involved, but that the Salvadoran military had declined this assistance and in fact impeded investigations.[210] Ambassador Corr likewise admitted that the U.S. government presented the defendants with concrete recommendations for curbing abuses.[211] He further testified that had the recommendations been implemented they would have been effective at preventing further abuses.[212]

Ms. Popkin gave additional testimony about various legal actions the military could have undertaken to address allegations of human rights abuses by their members. These included identifying responsible individuals and their commanders, reviewing log books and other reporting mechanisms to determine which troops may have been involved in abuses, turning responsible individuals over to the civilian justice system in the event military justice would not be forthcoming for whatever reason, prohibiting the establishment of detention centers

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[206] *Id.* at 853 (direct examination of Col. Garcia).

[207] *Id.* at 900 (direct examination of Col. Garcia).

[208] *Id.* at 1127 (direct examination of Prof. Karl).

[209] *Id.* at 1370-81 (direct examination of Prof. Karl).

[210] *Id.* at 1319-20 (direct examination of Prof. Karl).

[211] *Id.* at 1942-43, 1946-48 (cross-examination of Amb. Corr).

[212] *Id.* at 1983-88 (cross-examination of Amb. Corr).

within military headquarters and posts, and utilizing only public detention centers to detain civilians.[213] She noted that the military failed to implement any of these measures, even though outside observers and human rights monitors had made recommendations to this effect.[214]

c. Proof of What the Defendants Did Instead

In contrast to this range of options available to the defendants, the plaintiffs presented testimony about what the defendants did in fact do. For example, there was expert testimony about the way in which the defendants consolidated their power by transferring reformist-minded officers to negligible posts or removing reformers from command completely.[215] In addition, the plaintiffs demonstrated that instead of punishing, investigating, demoting, discharging, or otherwise disciplining members of the military alleged to be responsible for abuses, these individuals were actually protected and promoted by the defendants, as was described in various U.S. government cables.[216] A particular incident was discussed at length, in which a reformist in the military interrupted a secret meeting between a number of individuals associated with rights violations. Rather than ensuring the investigation and prosecution of the individuals involved, General Garcia arranged for them to be released, and the reformist was eventually relieved of his command and forced to resign.[217]

As testified to by Professor Gilbert, both of the defendants had been identified as responsible for abuses by the Truth Commission's final report. In particular, the Truth Commission report made various findings with respect to high profile acts of violence that the defendants either denied had happened or whose investigation the defendants sought to impede or cover up.[218] Professor Karl also introduced several U.S. government cables that recounted conversations with General Garcia with respect to the El Mozote massacre and other incidents and recorded how General Garcia denied that abuses had occurred as alleged and ultimately initiated no investigation.[219] Indeed, one of Ambassador

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[213] *Id.* at 1005-08 (direct examination of M. Popkin).

[214] *Id.* at 1009 (direct examination of M. Popkin).

[215] *Id.* at 1093-1112, 1115-32 (direct examination of Prof. Karl), 1430-33, 1443, 1484-85 (cross-examination of Prof. Karl), 2296-98 (rebuttal examination of Col. Garcia).

[216] *See, e.g., id.* at 1189-90, 1329-46 (direct examination of Prof. Karl).

[217] *See, e.g., id.* at 1436-48, 1483 (cross-examination of Prof. Karl).

[218] *Id.* at 529, 537-38, 694-95 (direct examination of Prof. Gilbert); *see also id.* at 1358-68 (direct examination of Prof. Karl).

[219] *Id.* at 1168 (direct examination of Prof. Karl), 2021-23 (cross-examination of Gen.

Corr's own cables recounted an incident in which General Vides Casanova had blatantly impeded an investigation into abuses by the National Guard.[220] Professor Karl described this cycle of denial, minimization, obstruction, and inaction with respect to known abuses as a classic "pattern of deniability" on the part of the defendants.[221]

Ms. Popkin further testified that the military prevented the civilian justice system from handling cases involving military perpetrators. Indeed, she noted that although the National Guard and National Police were supposed to be "auxiliary organs" of the judicial system and assist in the carrying out of criminal investigations, these forces did not function in this capacity when the crimes in question had been committed by their own or by members of the military.[222] Rather, according to her testimony, the military and security forces impeded investigations. By way of example, she discussed the way in which the military had interfered in the investigation into a particularly notorious incident — the murder of two United States advisors from the American Institute for Free Labor Development and the Salvadoran head of the Salvadoran Agrarian Reform Institute at the Sheraton Hotel in downtown San Salvador by members of the National Guard.[223] It was also established that General Vides Casanova later promoted two individuals associated with that incident.[224]

CONCLUSION

The Salvadoran proceedings demonstrate the challenges of holding commanders legally responsible under the doctrine of command responsibility for human rights violations committed by their subordinates. These challenges are particularly acute given the ICTY's adoption of the effective control standard of subordination. This standard places a substantial burden on individuals injured by low level members of a military or paramilitary force to demonstrate that a defendants *de jure* command translated into an actual ability to control his subordinates given the prevailing circumstances at the time. Plaintiffs are thus required to introduce evidence regarding, among

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Garcia).

[220] *Id.* at 1978-83 (cross-examination of Amb. Corr).

[221] *Id.* at 1356-58 (direct examination of Prof. Karl).

[222] *Id.* at 997-1003 (direct examination of M. Popkin).

[223] *Id.* at 1009, 1018-39 (direct examination of M. Popkin), 1055-56 (re-direct examination of M. Popkin).

[224] *Id.* at 2266-70 (cross-examination of Gen. Vides Casanova).

other things, the structure and operation of the military command hierarchy; country conditions in terms of telecommunications, transportation, and other logistical factors; concrete situations in which the defendant demonstrated his ability to exercise his command when it was expedient to do so; and, actions by subordinates or a pattern of violations that could only be the result of direction or coordination from the command hierarchy. This is a more searching inquiry then has been required in prior command responsibility cases brought under the ATCA and the TVPA.

Nonetheless, the *Romagoza* proceedings demonstrate that the challenges posed by the effective control standard are not insurmountable. In the face of the plaintiffs' evidentiary approach as outlined in this Essay, the *Romagoza* jury did not find credible the defendants' denials that their subordinates were committing abuses or their protestations that, in the chaos of the civil war, there was nothing more they could have done. Indeed, the jury foreperson told journalists after the trial, "[t]he generals were in charge of the National Guard and the country, it was a military dictatorship and they had the ability to do whatever they chose to do or not do, and they had the right and the obligation."[225]

This juror's explanation for the verdict reveals that military commanders occupy a position of great public trust and responsibility. Accordingly, international law, in the form of the doctrine of command responsibility, imposes on them a legal duty to prevent and punish atrocities committed by individuals under their command or control. The doctrine recognizes that commanders are in the best position to prevent the violations of international humanitarian law and human rights norms that characterized the *Ford* and *Romagoza* cases.[226] The *Romagoza* case should serve as a warning to future despots that the conduct of their subordinates and their own derelictions of command could someday by subject to the scrutiny of a United States jury. As the international community becomes increasingly committed to ensuring accountability for human rights abuses in domestic and international fora, perhaps the doctrine of command responsibility and the threat of later prosecution will begin to exercise a deterrent effect and promote

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[225] David Gonzales, *Torture Victims in El Salvador are Awarded $54 Million*, N.Y. TIMES, July 24, 2002, at A8.

[226] Maj. Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 166 (2000) (noting that commanders are society's last "line of defense").

vigilance on the part of commanders to properly supervise individuals under their command and control.

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