

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
MIAMI, FLORIDA**

**In the Matter of:**

**GARCIA-MERINO, Jose Guillermo**

**(b) (6)**

**RESPONDENT**

**IN REMOVAL PROCEEDINGS**

**ON BEHALF OF RESPONDENT**

Alina Cruz, Esq.  
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**ON BEHALF OF DEPARTMENT**

Loren G. Coy  
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**NOTICE REGARDING RELIEF FROM REMOVAL**

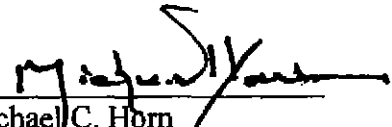
The Court provides the following notice to the parties:

This Court has issued a decision in this matter, dated February 26, 2014, finding Respondent inadmissible as charged. As such, Respondent is subject to removal from the United States to El Salvador.

Should Respondent wish to seek relief from removal, he shall file any and all applications, with a written statement as to his eligibility for any relief sought, within 45 days of this notice, no later than **Monday, April 14, 2014**.

If an application for relief is filed, the Court will schedule a hearing on its Individual calendar. If an application for relief is not filed with the Court in a timely manner, the Court will proceed with an order of removal.

DATED this 28th day of February 2014.

  
Michael C. Horn  
Immigration Judge

Cc: Alina Cruz, Esq. and Alejandrina G. Cruz, Esq.  
Loren G. Coy and Gina Garrett-Jackson, Assistants Chief Counsel

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**RESPONDENT**

**IN REMOVAL PROCEEDINGS**

**CHARGES:**

Section 212(a)(3)(E)(iii)(I) of the Immigration and Nationality Act (INA): any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of any act of torture, as defined in section 2340 of title 18, United States Code, is inadmissible.

Section 212(a)(3)(E)(iii)(II) of the INA: any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of, under color of law of any foreign nations, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note), is inadmissible.

**ON BEHALF OF RESPONDENT**

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**WRITTEN DECISION AND ORDERS OF THE IMMIGRATION JUDGE**

**I. Procedural History**

Respondent Jose Guillermo Garcia-Merino is an 80-year-old native and citizen of El Salvador. On October 14, 1989, he entered the United States as a nonimmigrant visitor. On August 6, 1990, Respondent was granted asylum by the legacy Immigration and Naturalization

Service. On October 1, 1991, Respondent adjusted his status to that of a lawful permanent resident (LPR).

On December 17, 2004, President George W. Bush signed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) to reform the intelligence community and the intelligence-related activities of the United States Government, and for other purposes. Pub. L. No. 108-458, 118 Stat. 3638 (2004). Subtitle E of the IRTPA includes provisions relating to the treatment of aliens who commit acts of torture, extrajudicial killings, or other atrocities abroad. Id. Specifically, section 5501(a)(2) of the IRTPA amended the Immigration and Nationality Act by adding section 212(a)(3)(E)(iii), titled "Commission of Acts of Torture or Extrajudicial Killings." Id. The IRTPA amendment to the INA applies to offenses committed before, on, or after the date of enactment, December 17, 2004. Id.\*

Respondent departed the United States to El Salvador<sup>†</sup> on December 22, 2005 and on July 7, 2006 made an application to enter the United States via Miami International Airport in Miami, Florida as a lawful permanent resident. On October 2, 2009, the Department of Homeland Security (DHS) commenced removal proceedings with the filing of a Notice to Appear (NTA), alleging, *inter alia*, that Respondent assisted or otherwise participated in the commission of acts of torture during his term as Defense Minister of El Salvador from 1979 to 1983. The NTA charged Respondent as an arriving alien inadmissible pursuant to INA § 212(a)(3)(E)(iii)(I) as an alien who, outside the United States, committed, ordered, incited, assisted, or otherwise participated in the commission of acts of torture.

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\* Further, the IRTPA amendments to the INA incorporated provisions of the proposed Anti-Atrocity Alien Deportation Act of 2003. Matter of D-R-, 25 I&N Dec. 445, 452 (BIA 2011). See also Exh. 5, Tab XX.

<sup>†</sup> A copy of Respondent's passport contains an El Salvadoran date stamp: "22 DIC. 2005." Exh. 2, Tab E. Respondent testified that he and his wife returned to El Salvador so that (b) (6). The couple could not return to the United States (b) (6) as planned due to (b) (6).

(b) (6) Respondent stayed with his wife in El Salvador during this period.

On March 18, 2010, Respondent appeared with counsel for a master calendar hearing. As to the allegations contained in the NTA, Respondent through counsel admitted one through three, and nine through eleven<sup>\*</sup>; and denied four and five regarding his participation in acts of torture. Respondent contested the charge of removability pursuant to INA § 212(a)(3)(E)(iii)(I). The Court continued the case in order to provide the parties additional time to address the issue of removability. At a subsequent master calendar hearing held on April 22, 2010, Respondent admitted allegations six through eight of the NTA.

On June 23, 2010, DHS filed a Form I-261, Additional Charges of Inadmissibility/Deportability, lodging two additional allegations and an additional charge of removability against Respondent pursuant to INA § 212(a)(3)(E)(iii)(II) as an alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of, under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victims Protection Act of 1991 (28 U.S.C. 1350 note).

An individual hearing on the merits of the charges of removability was conducted in this case over the span of eight days: December 10 – 14, 2012 and February 25 – 27, 2013. On December 10, 2012, Respondent, through counsel, denied the two allegations and contested the charge of removability contained within the I-261. Respondent was present for the entirety of the individual hearing, at which he was provided with simultaneous interpretation in the Spanish language.

## **II. Findings of Fact**

The record of proceedings consists of Exhibits 1 through 16; Exhibits A through F; and the testimony of: United States Ambassador Robert E. White; Dr. Juan Jose Romagoza Arce;

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<sup>\*</sup> In Respondent's Closing Statement submitted to the Court on June 3, 2013, he contends that he "denied all allegations . . . in his notice to appear[.]" Respondent's Closing Statement at 1. This is an inaccurate description of the record.

Professor Terry L. Karl; Respondent; and Respondent's daughter, (b) (6) All admitted evidence has been considered in its entirety regardless of whether specifically mentioned in this decision. The Court finds that the record contains relevant, credible, and probative evidence to support the following findings of fact.

**A. Respondent's Biographical Information and Professional History**

The Court makes the following findings of fact regarding Respondent's background prior to becoming Minister of Defense of El Salvador:

Respondent was born on June 25, 1933 in San Vicente, El Salvador.<sup>1</sup> He attended primary and secondary school in San Vicente before entering Military School in San Salvador in 1953.<sup>2</sup> Respondent was a member of the *tanda*, or graduating class, of 1956.<sup>\*</sup> Upon his graduation, Respondent was honored with the Best Cadet in the Graduating Class of 1956 Award which was presented to him by the President of the Republic and Commander General of the Army, Lieutenant Colonel Jose Maria Lemus.<sup>3</sup> Recipients of this prestigious military award were thought of by other members of their *tanda* as *presidenciable*, or presidential material. Between 1956 and 1974, Respondent rose through the ranks of the Salvadoran military. Neither party focused on the period between 1956 and 1974 during which Respondent held mostly administrative posts<sup>4</sup> and rose through the ranks of the military, thus the Court will focus on the period of time relevant to the charges in the NTA.

Prior to becoming the Minister of Defense, Respondent served as the executive director of the military-run Central American Telecommunications Association (ANTEL) in San

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<sup>\*</sup> Officers in Salvadoran military shared strong professional and personal bonds to their *tanda*, to which they pledged allegiance. Exh. 4, Tab Z at 42. The *tanda* alliance, the common institutionalization process in Military School, and the smallness of the officer corps fostered a sense of cohesion among armed forces officers in El Salvador. *Id.* In its *Briefing Paper on Right-Wing Terrorism in El Salvador* dated October 27, 1983, the United States Central Intelligence Agency (CIA) indicates that the "Salvadoran military has an especially well-developed sense of officer corps solidarity which incorporates an ethos of silence with regards to wrongs committed by fellow officers, particularly by military school classmates." Exh. 8, Tab XXXX at 79.

Salvador from 1974 to 1977.<sup>5</sup> In 1977, military officers selected General Carlos Humberto Romero, instead of Respondent, to be the next president.<sup>6</sup> In 1978, President Romero appointed Respondent Commander of the Fifth Infantry Brigade in San Vicente, a form of internal exile due to Respondent's involvement in a plot to overthrow President Romero.<sup>7</sup> In May 1979, Respondent began plotting with Colonel Carlos Eugenio Vides Casanova\*, Colonel Jaime Abdul Gutierrez, and Major Roberto D'Aubuisson† to pool military resources for a coup d'état to overthrow President Romero.<sup>8</sup> In October 1979, President Romero accused Respondent of plotting a coup.<sup>9</sup>

The Court finds that on October 15, 1979, a coup d'état occurred which resulted in the overthrow of President Romero. The Court makes the following findings of fact regarding that coup d'état:

The coup was the result of a group of young reformist military officers (Young Officers Movement) who joined with civilian opposition to overthrow the repressive military government of President Romero.<sup>10</sup> The young officers and representatives from the civilian opposition came together to form a civil-military junta dedicated to a transition to democracy and a political solution to El Salvador's brewing conflict.<sup>11</sup> The young officers took steps to end repression by releasing political prisoners, dismantling the military intelligence center, purging or retiring some of the well-known repressive officers from the military, and promising to disband the civil guard (ORDEN)<sup>‡</sup> and the military intelligence apparatus ANSESAL.<sup>12</sup> One of these officers was

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\* The Court takes administrative notice that in a decision dated February 22, 2012, an Immigration Judge found Mr. Carlos Eugenio Vides Casanova to be removable from the United States pursuant to INA § 237(a)(4)(D) as an alien described in INA § 212(a)(3)(E)(iii)(I) and (II). Mr. Vides Casanova has appealed that determination to the Board of Immigration Appeals where his case is currently pending.

† D'Aubuisson was an intelligence officer in the National Guard.

‡ According to the Department of State, Bureau of Democracy, Human Rights and Labor, under President Romero, ORDEN, "a government-sponsored para-military organization[,] . . . committed human rights violations, including beatings and torture, on a widespread basis." Exh. 6, Tab BBB.

Roberto D'Aubuisson. After decades of military rule, social inequality, and repression, the possibility of social and structural change in El Salvador was within reach<sup>\*</sup>.<sup>13</sup>

Though not part of the reformist Young Officers Movement, Respondent gained the backing of the young officers by professing support for reform, portraying himself as a leader who could unite the senior and junior officers, and highlighting his connections to United States officials<sup>†</sup>.<sup>14</sup>

The Court finds that Respondent occupied the position of Minister of Defense of El Salvador from mid-October 1979<sup>‡</sup> until April 1983.

#### **B. State Repression and Civil War in El Salvador<sup>§</sup>**

The Court makes the following findings of fact as to the history of the conflict in El Salvador leading up to the civil war:

From 1932 until the mid-1980s, a series of military governments or military-dominated governments ruled El Salvador.<sup>15</sup> The military governments were allied with the country's wealthiest landowners, who owned over three-quarters of El Salvador's arable land.<sup>16</sup> The rural workers earned extremely low wages, lived in desperate poverty, and were subject to repression by the security forces and paramilitary forces, which prevented the organization of labor unions and maintained a highly unequal economy.<sup>17</sup> By the 1970s, opposition to the military's dominance increased. In response, militant organizations such as the Salvadoran security forces,

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<sup>\*</sup> United States Ambassador to El Salvador, Robert E. White, testified that when he first arrived in El Salvador in March 1980, "there was a real chance to . . . achieve a civilized society. The military's insistence on . . . dealing with dissent through torturing and killing people," however, plunged the country into civil war.

<sup>†</sup> Respondent's protestations in support of the reformist ideas of the Young Officers were largely disingenuous. See Exh. 11 at 32-33 n.81.

<sup>‡</sup> Respondent stated he became Minister of Defense a few days after the coup. Other evidence in the record indicates he took that position on the same day of the coup.

<sup>§</sup> The Court makes the following note on terminology: The Salvadoran Armed Forces includes the army, navy, and air force, as well as the security forces, meaning the National Guard, National Police, and Treasury Police. The terms "armed forces," "military," and "Salvadoran Armed Forces" refer to all combined forces, while the term "security forces" is limited to the National Guard, National Police, and Treasury Police.

carried out systematic repression against political dissenters.<sup>18</sup> State repression fueled and united the opposition under the *Frente Farabundo Martí para la Liberación Nacional* (FMLN), the Farabundo Martí National Liberation Front.<sup>19</sup>

In March 1980, the United States Ambassador to El Salvador, Robert E. White\*, provided an assessment to the United States Secretary of State Cyrus Roberts Vance of the political situation in El Salvador, describing the "intense hatred that has been created in [El Salvador] among the masses by the insensitivity, blindness and burtality [sic] of the ruling elite, usually designated 'the oligarchy.'"<sup>20</sup> Ambassador White continued his assessment, explaining that:

the traditionally stark contrast between rich and poor has been intensified dratically [sic] in recent years by the immense riches that have accrued to the landowning class as a result of high prices for export crops – coffee, sugar, and cotton – produced on their vast plantations staffed by impoverished and largely illiterate day laborers, meanwhile the cities have been flooded with the poorest and most depressed campesinos [peasants] who are fleeing overpopulation and rural poverty in search of work.<sup>21</sup>

In Ambassador White's estimation, El Salvador was "a social bomb that has been ticking away for a number of years and is only now at the point of explosion."<sup>22</sup> The "oligarchy," explained Ambassador White, had

stifled all forms of political expression for decades and relied on military force and ultimately torture and summary executions to maintain an oppressive system against all challengers, the conduct of the welathy [sic] upper classes and the actions of the armed forces have created a deep reservoir of hatred and frustration among large sectors of the rural and urban poor[.]<sup>23</sup>

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\* Robert E. White served as ambassador to El Salvador for approximately one year beginning in March 1980 under the Carter Administration. Ambassador White was dismissed from his post by Secretary of State Alexander Haig, who was appointed by the Reagan Administration. The ambassador testified that Secretary of State Haig ordered him to send a telegram to the Department of State asserting that the Salvadoran military was making a good-faith effort to find and punish the people who killed the four American churchwomen. Ambassador White responded to that order by informing Secretary Haig that, as he must know from the reports issued by the United States Embassy in El Salvador, members of the Salvadoran military killed the women and the military had no intention of investigating and prosecuting the killers. Ambassador White refused to participate in that cover-up. He testified that he was dismissed from his post for this reason.



In his assessment, Ambassador White indicated that "[a]ll three of the security services have a very bad human rights record, most of it well deserved."<sup>24</sup>

### **C. Respondent's Power and Authority as Minister of Defense**

The Court finds that as Minister of Defense, Respondent's position became that of the greatest power and authority in El Salvador.<sup>25</sup> The Salvadoran Armed Forces had a formal chain of command headed by the High Command, the highest decision-making body of which the Minister of Defense was the most important member.<sup>26</sup> Not only was the Minister of Defense the top position in the Salvadoran Armed Forces, but following the October 1979 coup, it was also the most powerful post in El Salvador.<sup>27</sup> Prior to the coup, the Minister of Defense would have reported to the military president, who would have held the greatest power as the Commander in Chief of the Armed Forces.<sup>28</sup> While the provisional juntas and the subsequent civilian president theoretically occupied a position higher than Respondent's, in actuality the powers of the Commander in Chief of the Armed Forces devolved into the Minister of the Defense\*.<sup>29</sup> A United States government cable described Respondent's rise to the Minister of Defense, and his relative authority as follows:

In October 1979, Garcia helped plan the coup that toppled the Romero regime and instead of seeking a seat on the junta, formed to rule the country, he chose to become Minister of Defense, where

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\* Colonel Gutierrez and Colonel Majano, the military representatives in the military-civilian junta that formed following the October 1979 coup, stood above the Minister of Defense in a formal legal sense but in practice they did not possess the command authority of previous military presidents. Exh. 11 at 39. Col. Gutierrez fell ill in January 1980 and effectively ceded his position to Respondent. *Id.* at 40 n.99. While Col. Majano, a reformist, presented a challenge to Respondent, Respondent and Col. Gutierrez removed him from command in May 1980. *Id.* at 40. In his November 1981 "Report of the El Salvador Military Strategy Assistance Team," United States General Fred Woerner stated that Col. Majano's reformist followers were reassigned

to non-command positions and non-influential roles, scatter[ing] their numbers and their ability to exercise further significant influence within the Armed Force institution. As a consequence, no countervailing force presently exists within the Armed Force to oppose the propensity of the more conservative officers to tolerate the use of excessive force and violence.

he gained operational control of the armed forces and became, in effect, the power behind the throne and was free to pursue his foremost goal – preserving the cohesion of the armed forces.<sup>30</sup>

The United States Central Intelligence Agency (CIA) characterized Respondent as “the strongman in the government” of El Salvador who “represent[ed] a consensus view [among the conservative officers] that the lasting solution to the extreme leftist problem should be military rather than political.”<sup>31</sup> Although civilians sat on the provisional junta, and a civilian president was appointed between 1982 and 1984, in practice, civilian control of the military did not exist during Respondent’s tenure as the Minister of Defense.<sup>32</sup>

Notwithstanding the promise made at the time of the October 1979 coup to disband the widely-feared paramilitary civil guard, ORDEN was renamed “Civil Defense Groups” and placed under the control of the Ministry of Defense.<sup>33</sup> Further, although the Young Officers Movement had vowed to dismantle the repressive military intelligence apparatus, ANSESAL, it was renamed the National Intelligence Agency (ANI), shifted from the presidential palace to the Ministry of Defense, and reorganized under the Army Chief of Staff, out of reach of the provisional civil-military junta.<sup>34</sup>

By December 1980, the CIA reported that the Salvadoran military was “more unified and its chain of command more consolidated than at any time since the coup of October 1979.”<sup>35</sup> The Ministry of Defense “retain[ed] complete control of all military affairs and [had] significant veto power over other government policy[.]”<sup>36</sup>

When asked on direct examination whether Respondent lacked control over the military, Ambassador White stated that in his many interviews and meetings with Respondent during the period that Ambassador White served in El Salvador, “never once did [Respondent] plead lack of capacity to govern. . . . He never once said . . . he did not exercise control over his military.” The

ambassador never heard Respondent complain at any time of rebellious officers, nor did any members of the military file any report that Respondent did not have effective control over his troops. Ambassador White testified that he did not know "of any concrete instance where there was any kind of breakdown in that command of control." The Ambassador continued, "unfortunately, [Respondent] did not choose to use that power for good, but to use it to permit the continued onslaught of killings of defenseless people."<sup>\*</sup>

#### **D. Legal Authority and Obligations of the Minister of Defense**

The Court finds that as Minister of Defense, Respondent had command authority over the entire military of El Salvador, including the air force, navy, the regular army and its major units.<sup>37</sup> Military authority was highly centralized in the Ministry of Defense and flowed from the top down.<sup>38</sup> The Court also finds that Respondent had command authority over the security forces: the National Guard, National Police, and Treasury Police, all of whom answered to the Minister and Vice Minister of Defense.<sup>39</sup>

The Court finds that the Constitution of El Salvador authorizes the creation of military tribunals when a suspension of constitutional guarantees has been declared.<sup>40</sup> The Court also finds that Article 140 of the Army Ordinance (1934) provides that the Ministry of Defense is responsible "for the administration of the army."<sup>41</sup> Further, the Court finds that El Salvador's Military Code of Justice (1964) (ESMCJ) provided 15 to 20 years imprisonment for "any military person who, in the time of international or civil war, when not required by war operations . . . pillages against the inhabitants of towns or of the countryside or commits acts of violence against persons[.]"<sup>42</sup> Additionally, the ESMCJ provided for five to ten years' imprisonment of an officer "who does not use every means at his disposal to prevent his subordinates from committing acts of devastation, looting or pillage."<sup>43</sup>

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<sup>\*</sup> The Court finds Ambassador White's testimony to be credible and persuasive.

The Court finds that pursuant to Article 73 of the ESMCJ, the Ministry of Defense had the power and obligation to initiate military proceedings for crimes committed by officers of the armed forces.<sup>44</sup> The Court also finds that the Minister of Defense could demote, transfer, or remove officers from the armed forces.<sup>45</sup> Finally, the Court finds that during a state of emergency, as was the case during Respondent's tenure as Minister of Defense, he had the discretionary authority to expel military officers for "not being suitable for military service" and to retire officers for "bad conduct."<sup>46</sup> Thus, the Court finds that based on these facts, Respondent, as Minister of Defense of El Salvador, had actual and legal authority to command all aspects of the Salvadoran Armed Forces.

#### **E. Respondent's Appointments as Minister of Defense**

The Court finds that as Minister of Defense, Respondent selected for positions of high authority close associates who favored a military, rather than a political, solution to the conflict in El Salvador, reinforcing the power of hard-liners while marginalizing the reformist Young Officers and civilians in the junta\*.<sup>47</sup> As his Vice Minister of Defense, Respondent appointed, over the Young Officers opposition, Colonel Nicolas Carranza<sup>†</sup>, a recognized member of the extreme right with whom he had worked closely at ANTEL.<sup>48</sup> Colonel Carlos Reynaldo Lopez Nuila<sup>‡</sup> was named director of the National Police. Respondent appointed Francisco Antonio Moran, a friend from San Vicente, as director of the Treasury Police.<sup>49</sup> Respondent appointed

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\* In January 1980, two of the three civilian members of the provisional junta resigned in protest, citing "the growing dominance of ultra-rightist military officers as well as the Salvadoran armed forces' failure to replace [Respondent] as Defense Minister." Exh. 11 at 53. Ten of the 11 cabinet ministers, all 13 deputy ministers and 12 officials, including Supreme Court magistrates and senior officials resigned in January 1980 as well. *Id.* In March 1980, the members of the Christian Democratic Party who had joined the government following the January resignations, also resigned. *Id.*

<sup>†</sup> In *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009), the Sixth Circuit affirmed the district court in holding Nicolas Carranza liable under the Torture Victim Protection Act (TVPA) based in part on his conduct as Vice Minister of Defense. Exh. 7, Tab SSS.

<sup>‡</sup> Col. Lopez Nuila was the (b) (6) Exh. 11 at 45.

Colonel Carlos Eugenio Vides Casanova to lead the troubled National Guard, which had a reputation for human rights abuses prior to Respondent's tenure as Minister of Defense.<sup>50</sup>

**F. Death Squads within the Security Forces**

The Court finds that death squads existed within the National Police, the Treasury Police, and the National Guard during Respondent's tenure as Minister of Defense. The CIA reported that a death squad existed within the National Police starting in late 1979.<sup>51</sup> According to the CIA, the head of the squad was the Chief of Detectives and Head of the Intelligence Department, Lieutenant Colonel Aristides Marquez, and "most of the members of the National Police paramilitary group [were] drawn from the Criminal Investigation section, the Special Political Investigation Section, and the Narcotics Control Section."<sup>52</sup> The National Police death squad provided support to the death squad organized and financed by ex-Major Roberto D'Aubuisson\*, including providing weapons, occasional joint operations, and cooperation in the operation of a clandestine prison in the Escalon section of San Salvador.<sup>53</sup> Additionally, the CIA relayed that it received reports which "strongly indicate[d] the existence of a death squad operating within the ranks of the Treasury Police."<sup>54</sup> The Treasury Police, under the command of Francisco Moran, later became associated with the massacre at Soyapango.<sup>55</sup> The National Guard, too, was known by the CIA to have operated death squads "since at least 1981" out of the intelligence unit headed by Major Mario Denis Moran.<sup>56</sup>

The Court finds that Ambassador White, in his March 1980 assessment of the political situation in El Salvador, noted that "the major, immediate threat to the existence of [the provisional junta was] the right-wing violence . . . . In the countryside, elements of the security forces torture and kill [peasants]."<sup>57</sup> The ambassador concluded that the command structure of

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\* Although D'Aubuisson had been dismissed or retired from the military by the young officers, he secretly remained on the military payroll during Respondent's tenure as Minister of Defense. Exh. 11 at 48.

the army and the security forces "either tolerates or encourages this activity, these senior officers believe or pretend to believe that they are eliminating the guerrillas."<sup>58</sup> Ambassador White viewed the principal impediment "to a moderate solution [to be] the ultra-right and its allies within the High Command who are permitting the current campaign of torture and murder to continue."<sup>59</sup> Ambassador White advised the United States Secretary of State "to do nothing to strengthen the traditionalist military in its tolerance for, or even encouragement of, right-wing terrorism and brutal abuse of human rights."<sup>60</sup>

The Court also finds that on October 27, 1980, Ambassador White met with Respondent and Vice Minister Carranza to discuss the need to end abuses by the military.<sup>61</sup> The ambassador summarized the meeting as follows:

*There is something of an Alice in Wonderland air to conversations with top military officers here. Garcia and Carranza know perfectly well that some middle and low-level members of the military are involved in death squads and other rightwing violence, and yet as long as I follow civilized rules of discourse aimed at ensuring a continuing dialogue with the High Command, there is almost no way to break through the pose Garcia and company have adopted.*<sup>62</sup>

In that meeting, Respondent agreed to make a televised statement to read a new decree by the civilian-military junta ordering the military to "observe civilized standards and protect human rights."<sup>63</sup> He also agreed to include in his televised statement information regarding a new code of military conduct in order to make it clear that the High Command was "just as interested in suppressing violence from the right as from the left."<sup>64</sup> This televised appearance never occurred.

#### **G. The Assassination of Archbishop Oscar Arnulfo Romero y Galdamez**

The Court finds the following facts regarding Oscar Arnulfo Romero y Galdamez:

Msgr. Oscar Romero was the Archbishop of San Salvador.\* Ambassador White, in his report to the Secretary of State, described Msgr. Romero as "the most important political figure in El Salvador and a symbol of a better life to the poor."<sup>65</sup> Msgr. Romero was also considered a key figure for peace in El Salvador. On March 24, 1980 Archbishop Romero was shot dead by a sniper while he celebrated mass in San Salvador.<sup>66</sup> Investigative Judge Amaya was charged with investigating Msgr. Romero's assassination, but fled the country after members of a National Police death squad, including Chief of Police Aristide Marquez, entered his home and attempted to assassinate him. The United Nations Report of the Commission on the Truth for El Salvador (Truth Commission)<sup>†</sup> indicates that former head of the National Guard, Roberto D'Aubuisson, was involved in the organization and financing of the death squad tasked with the Msgr. Romero's murder.<sup>67</sup> Ambassador White testified that D'Aubuisson was "in constant communication with the top echelons of the Salvadoran military" and that after the assassination of Archbishop Romero, D'Aubuisson circulated a video tape through all of the military barracks, "with consent of top-ranking officers, in which he implicitly takes credit for the assassination." Ambassador White viewed this tape and received reports from the United States military attaché in El Salvador that he had seen the tape circulating in various branches and military headquarters.

The Court finds that on March 24, 2010, the President of El Salvador, Mauricio Funes, offered a state apology for the assassination of Msgr. Romero, recognizing formal responsibility

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\* Through his network of nuns, clergy and lay people throughout the country, Msgr. Romero collected information and evidence regarding specific killings and incidents of torture in El Salvador, including the party responsible. As part of this process, church people began taking pictures of the dead and compiling books of the photographs so family members could find their dead. Clothing and items from the bodies were also collected. These books and items were housed in the Archdiocese in San Salvador. As part of each Sunday's sermon, Msgr. Romero denounced these acts, listing each individually including the name of the person, the location and the responsible party.

<sup>†</sup> The Court notes that on several occasions, the Board of Immigration Appeals has relied on documents and reports issued by the United Nations as background evidence. See, e.g., Matter of R-A-, 22 I&N Dec. 906 (BIA 2001); Matter of Canas, 19 I&N Dec. 697 (BIA 1988).

for his death and subsequent failure to investigate.<sup>68</sup> President Funes acknowledged that the death squad that killed Msgr. Romero "unfortunately acted with the protection, collaboration or participation of state agents."<sup>69</sup>

#### **H. The San Luis Finca Affair**

The Court makes the following findings of fact regarding the San Luis Finca affair:

On May 7, 1980, First Infantry Brigade troops loyal to Colonel Majano, the reformist military representative of the military-civilian junta, raided the San Luis farmhouse to halt a conspiracy by hardline military officers.<sup>70</sup> The officers, along with some civilians, were found at the farmhouse with documents showing:

the organizational structure, personnel, infrastructure, and weaponry or other equipment used by a large number of military officers and some civilians in an elaborate death squad operation aimed at bringing about 'total war;' a framework document spelled out the names and locations of other sympathetic officers willing to help. Other [] documents seized included a notebook containing the payments and plans to assassinate Archbishop Oscar Romero . . . and a detailed record of a substantial arsenal, much of which did not form part of the normal military inventory.<sup>71</sup>

Among the individuals arrested at San Luis Finca were: ex-Major Roberto D'Aubuisson, Major Denis Moran, Captain Eduardo Avila Avila, Lieutenant Rodolfo Isidro Lopez Sibrian, Captain Jose Alfredo Jimenez Moreno, Lieutenant Francisco Raul Amaya Rosa, Lieutenant Colonel Edgardo Casanova Vejar, Colonel Jaime Flores Grijalva, Captain Rene Arnoldo Majano Araujo, Major Domingo Monterrosa, and Lieutenant Colonel Elmer Gonzalez Araujo.<sup>72</sup>

Colonel Majano insisted that Respondent conduct an investigation and that the conspiring officers be detained. Colonel Majano wanted D'Aubuisson to be tried publicly for sedition. Respondent appointed Major Miguel Mendez, an officer listed on the seized documents as a supporter of the conspiracy, to lead an investigation limited to charges of attempted coup.<sup>73</sup>



Although some of the detained military officers confessed to illegal activities, all were released immediately and Colonel Majano was relieved of his command.<sup>74</sup> Respondent prevented D'Aubuisson from being tried.<sup>75</sup> Respondent announced that Major Mendez found no evidence to warrant charges.<sup>76</sup>

Expert witness Professor Terry Karl<sup>\*</sup> described the May 1980 arrest and subsequent release of the conspirators at San Luis Finca as "the key turning point in the descent to mass state terror."<sup>77</sup> After a meeting with Respondent following the San Luis Finca affair, Ambassador White reported to the Department of State: "Col. Garcia made no promise, implicit or explicit, to put an end to the violence. . . . The reality is that the principle threat to stability of this government comes from the offices of the high command who are secretly in the right's corner."<sup>78</sup>

After their release, the conspiring officers assumed or re-assumed important positions in the Salvadoran Armed Forces.<sup>79</sup>

## **I. Selected Killings of Civilians by the Salvadoran Armed Forces: 1980 – 1983**

The Court notes that the evidence submitted by DHS refers to numerous incidents described as "massacres" as well as disappearances and targeted killings.<sup>80</sup> In finding the following facts relating to selected massacres and killings, the Court does not intend to diminish incidents not specifically mentioned.

### *1. Rio Sumpul Massacre*

The Court makes the following findings of fact regarding the Rio Sumpul massacre:

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<sup>\*</sup> During the individual hearing held on December 13, 2013, DHS proffered Professor Terry L. Karl as an expert witness on El Salvador in the areas of politics, political history, human rights, military institutions, and transitions from military rule during the time period of 1979 to 1983. Respondent, through counsel, stated that he had no objections to the qualification of Professor Karl as an expert witness. The Court finds her testimony, both written and oral, to be credible and persuasive.

On May 14, 1980<sup>\*</sup>, combined units of Military Detachment No. 1, the National Guard, and the paramilitary ORDEN<sup>†</sup>, backed by the Salvadoran air force, killed between 300 and 600 civilians as they tried to flee to Honduras<sup>‡</sup> across the Sumpul River in Chalatenango, El Salvador.<sup>81</sup> This operation included collaboration with the Honduran military which, as the peasants reached the Honduran side of the river, forced them back while the Salvadoran units opened fire.<sup>82</sup>

At the time, Respondent denied that this massacre occurred.<sup>83</sup> One year later, he admitted that people had died in a clash at Rio Sumpul, "but not in such 'industrial' quantities."<sup>84</sup> No investigation of this massacre was made during Respondent's tenure as Minister of Defense.<sup>85</sup>

## *2. San Francisco Guajoyo Massacre*

The Court makes the following findings of fact regarding the San Francisco Guajoyo massacre:

On May 29, 1980, 58 members of the security forces and the Second Infantry Brigade arrived at the San Francisco Guajoyo cooperative in the department of Santa Ana, where they dragged members of the cooperative from their homes and took them to the central area of the farm.<sup>86</sup> Ten members of the cooperative and two employees of the Salvadoran Institute for Agrarian Reform, all civilians, were shot at close-range.<sup>87</sup> This incident was not part of an armed confrontation.<sup>88</sup> The Truth Commission made the following finding regarding the massacre at San Francisco Guajoyo:

The Salvadorian State bears full responsibility for the execution of the cooperative members, which was a violation of international

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<sup>\*</sup> This massacre occurred within one week of the release of the San Luis Finca conspirators. Exh. 11 at 61.

<sup>†</sup> Although ORDEN had been officially disbanded, it reemerged under the Ministry of Defense as the "Civil Defense Groups." Peasants continued to call this paramilitary body by its former name. See Exh. 11 at 43 n.115.

<sup>‡</sup> El Salvador and Honduras were traditional enemies, having fought the "Soccer War" in 1970. The border territory of Rio Sumpul was a demilitarized zone where these noncombatant civilians sought safety from El Salvador's armed conflict. Exh. 11 at 71.

humanitarian law and international human rights law, and for having taken no action to identify and punish those responsible.<sup>89</sup>

### *3. The Assassinations of the Frente Democratico Revolucionario (FDR) Leaders*

The Court makes the following findings of fact regarding the assassinations of the FDR leaders:

The *Frente Democratico Revolucionario* (Revolutionary Democratic Front) was an umbrella group for the unarmed civilian opposition. On the morning of November 27, 1980, heavily armed men took six top leaders of the FDR from Colegio San Jose in San Salvador.<sup>90</sup> The names of the FDR leaders were: Enrique Alvarez Cordoba, Juan Chacon, Enrique Escobar Barrera, Manuel de Jesus Franco Ramirez, Humberto Mendoza and Doroteo Hernandez.<sup>91</sup> Their mutilated bodies were subsequently found outside of the city of Apulo.<sup>92</sup> The time and place of the abductions, the number of armed personnel, the type of radio equipment and vehicles used, and the presence of military troops blocking the exits to the Colegio pointed to the security forces having abducted the FDR leaders.<sup>93</sup>

The Colegio San Jose housed Socorro Juridico, a human rights legal aid organization.<sup>94</sup> The United States Secretary of State, in a cable to the United States Embassy in Mexico, noted that the Commander of the National Guard, Colonel Vides Casanova, had stated that the offices of Socorro Juridico were under constant surveillance by the security forces.<sup>95</sup> As such, the Secretary of State concluded that:

it is inconceivable that a large group of heavily armed men could surround the Socorro Juridico's offices, accomplish a room by room search of the premises and take away six men without the permission, not to say participation, of the security forces.<sup>96</sup>

The Court finds that in her briefing to the Secretary of State, the Assistant Secretary for Human Rights, Patricia Darian, confirmed that the assassinations of the six FDR leaders were carried out

by the security forces and that "after the event[,] the High Command senior officers have been either unwilling or unable to apprehend or bring all those responsible to an accounting."<sup>97</sup> The briefing continues and states that:

The killings last week of the FDR leadership were not an aberration nor were they simply the work of a handful of middle-level officers. Since March the security forces have embarked upon a campaign of quickening repression of which the assassination of the FDR leadership is but the latest and most spectacular incident.<sup>98</sup>

The Court finds that Respondent publicly denied that the security forces participated in this incident. Additionally, the Court finds that a declassified United States government cable dated December 1, 1980\* describes a meeting of mid-level Salvadoran army officers on November 28, 1980, at which Respondent was present. The cables states that:

Most military officers were highly pleased with the assassination of the six FDR leaders. These officers believe that other leaders and members of the FDR should be eliminated in a similar fashion wherever possible. . . . These feelings were expressed by several middle-level army officers on 28 November 1980 in the presence of Col. Jose Garcia Merino, Minister of Defense, and Nicolas Carranza, Sub-Minister of Defense, and both Garcia and Carranza indicated that they supported this line of thinking. . . . [I]t was clear that Garcia, Carranza and the other officers present accepted as a fact that the military services were responsible for the assassination of the six FDR leaders.<sup>99</sup>

The Court finds that in a cable to the Secretary of State dated December 1980, the United States Embassy in El Salvador reported information from a source within the military that:

Major D'Aubuisson maintains direct contact with Minister of Defense Garcia. D'Aubuisson heads the Maximiliano Hernandez Martinez Anti-Communist Brigade and personally planned the recent killing of the FDR leaders. He is also responsible for creating some of the country's death squads.<sup>100</sup>

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\* In his testimony, Ambassador White identified this cable as having been written by the U.S. military attaché in El Salvador, Brian Bosch.

The Truth Commission indicated that it has "substantial evidence" that "State bodies were jointly responsible for this incident" and "that the Treasury Police carried out the external security operation which aided and abetted those who committed the murders."<sup>101</sup> The Truth Commission also found an "obvious lack of interest in ordering an exhaustive investigation by an independent State organ to clarify the facts, find out who was responsible and bring those responsible to justice."<sup>102</sup> The Court finds that no individuals were ever arrested for these assassinations.<sup>103</sup>

#### *4. The Assassinations of the Four American Churchwomen*

The Court makes the following findings of fact regarding the assassinations of the four American churchwomen:

On December 2, 1980, members of the National Guard arrested four American churchwomen, Ita Ford, Maura Clarke, Dorothy Kazel, and Jean Donovan, as they left the airport outside of San Salvador.<sup>104</sup> The women worked in El Salvador assisting in the resettlement of refugees.<sup>105</sup> The next morning, the women's bodies were found.<sup>106</sup> They had been shot to death at close range.<sup>107</sup> The Court finds that National Guard Deputy Sergeant Luis Antonio Colindres subsequently admitted that he had received orders from a superior to execute the churchwomen\*.<sup>108</sup>

The Court also finds that Ambassador White traveled to the location where the women's bodies were found and that the United States Embassy immediately informed Respondent of the murders and requested a prompt investigation.<sup>109</sup> On December 10, 1980, embassy officials met with Respondent and Director of the National Guard, Colonel Vides Casanova, and again requested an investigation.<sup>110</sup> Respondent denied complicity of the security forces and promised

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\* The guardsmen who killed the churchwomen were under the command of Lieutenant Colonel Oscar Edgardo Casanova Vejar, cousin of Colonel Carlos Eugenio Vides Casanova, Director of the National Guard. Exh. 11 at 81.

an investigation.<sup>111</sup> The Court finds that Colonel Roberto Monterrosa was charged with an official investigation; however, he deliberately kept back evidence implicating Colindres.<sup>112</sup> The Court finds that a second investigation, headed by Major Lizandro Zepeda, amounted to a cover-up for the murderers.<sup>113</sup> United States Judge Harold R. Tyler, appointed by the U.S. Secretary of State to carry out a third investigation, concluded that Colonel Vides Casanova acquiesced to the cover-up because the murders were committed at the direct order of his cousin, Lieutenant Colonel Oscar Edgardo Casanova Vejar.<sup>114</sup>

The Truth Commission found that:

Then Colonel Carlos Eugenio Vides Casanova, Director-General of the National Guard, Lieutenant Colonel Oscar Edgardo Casanova Vejar, Commander of the Zacatecoluca military detachment, Colonel Roberto Monterrosa, Major Lizandro Zepeda Velasco and Sergeant Dagoberto Martinez, among others, knew that members of the National Guard committed the murders and, through their actions, facilitated the cover-up of the facts which obstructed the corresponding judicial investigation.<sup>115</sup>

The Truth Commission also found that "the Minister of Defence at that time, General Jose Guillermo Garcia [Respondent] made no serious effort to conduct a thorough investigation of responsibility for the murders of the churchwomen."<sup>116</sup>

In May 1984, Sergeant Colindres and four guardsmen under his direct command were found guilty of the executions of the churchwomen and sentenced to 30 years in prison.<sup>117</sup> The Court notes that the investigation leading up to these convictions was conducted only after justice-seeking missions from the United States and a Federal Bureau of Investigation (FBI) inquiry revealed that prior investigations by the Salvadoran military had been cover-ups. It was only as a result of the intense pressure from the United States government, which made economic and military aid contingent on the resolution of this case, that these guardsmen were investigated, tried, and convicted.<sup>118</sup> Even though the guardsmen argued, in their defense, that

they carried out the murders on orders of superior officers, none of their superior officers were ever investigated or prosecuted.<sup>119</sup>

### *5. The Assassinations in the Sheraton Hotel*

The Court makes the following findings of fact regarding the assassinations in the Sheraton Hotel:

On January 3, 1981, the president of the Salvadoran Institute for Agrarian Reform, Jose Rodolfo Viera Lizama, and two American advisors from the American Institute for Free Labor Development, Michael P. Hammer and Mark David Pearlman, were shot in the Sheraton Hotel in San Salvador.<sup>120</sup> The United States military attaché, Brian Bosch, was living at the Sheraton Hotel at that time and was one of the first on the scene.<sup>121</sup> He immediately informed Respondent of the killings and requested full cooperation of the police.<sup>122</sup> The Court finds that despite mounting pressure from the United States to properly investigate these killings, Respondent delayed making an investigation and eventually appointed National Police Director Lopez Nuila\* to head an investigation.<sup>123</sup> The Court finds that this investigation came up empty despite evidence that the assassinations were carried out by members of the Intelligence Section of the National Guard.<sup>124</sup>

Under further U.S. government pressure, Respondent established another investigation. The Court finds that Respondent's purported second investigation did not result in action by Respondent to properly address the killings at the Sheraton Hotel for the following reasons:

Even though the triggermen confessed to having carried out the Sheraton killings on the orders of National Guard commanders Lt. Lopez Sibrian and Capt. Avila Avila†, dozens of witnesses corroborated the events at the Sheraton Hotel that day, and FBI polygraph

\* Lopez Nuila was the (b) (6) Lopez Nuila was also one of the conspirators arrested and released at San Luis Finca.

† The Court notes that these two officers were among those caught and released at San Luis Finca.

examinations pointed to the involvement of Lopez Sibrian and Avila Avila in the killings, “a Salvadoran judge found ‘insufficient evidence’ to warrant further inquiry or to hold [Sibrian or Avila Avila] for trial.”<sup>125</sup> One of the two National Guard gunmen also indicated that National Guard Chief of Intelligence Major Denis Moran was involved in the murders.<sup>126</sup> Moran received payment as a gift by a co-conspiring landowner following the assassinations.<sup>127</sup> The Truth Commission indicated that Denis Moran covered up information about the murders and that his role in the murders was never properly investigated.<sup>128</sup>

The Court further finds that neither Lopez Sibrian, Avila Avila, nor Denis Moran were sanctioned or punished in relation to the Sheraton killings.<sup>129</sup>

#### *6. Soyapango Massacre*

The Court makes the following findings of fact regarding the Soyapango massacre:

On April 7, 1981, at least 24 civilians were killed by Treasury Police in Soyapango, a suburb of San Salvador.<sup>130</sup> Under mounting pressure from the United States government and the press, the Salvadoran government publicly acknowledged the role of the security forces in this massacre.<sup>131</sup> A cable from the United States Embassy to the Secretary of State following the massacre discussed Treasury Police Director Francisco Moran, who had been scheduled to depart from the Treasury Police\* the preceding January: “‘one word’ from the Defense Minister and Moran would go. Why that word isn’t said was a mystery. . . . There might be a tie between Garcia and Moran that prevented the former from ousting the latter.”<sup>132</sup>

The Court finds that when the Christian Democratic Party and the United States government demanded the removal of Francisco Moran from his post as the Treasury Police Director, Respondent protected him.<sup>133</sup>

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\* The cable describes the Treasury Police as “beyond repair.” Exh. 3, Tab S. Ambassador White testified that this cable was authored by the Embassy Charge d’Affaires, Fred Chapin, who succeeded Ambassador White temporarily at the United States Embassy in El Salvador.



### *7. El Mozote Massacre*

The Court makes the following findings of fact regarding the El Mozote massacre:

On December 10, 1981, military units of Atlacatl Battalion detained, without resistance, all men, women and children in the village of El Mozote in the Department of Morazan.<sup>134</sup> The next day, 1,000 individuals within this village were deliberately and systematically executed in groups.<sup>135</sup> Some were shot in the head and some were beheaded.<sup>136</sup> First the men were executed, then the women, and finally the children.<sup>137</sup> This massacre was carried out with the aid of the air force, Artillery Brigade "Teniente Coronel Oscar Osorio," and the Third Infantry Brigade of San Miguel as part of Operation "Rescate" (Rescue) that took place throughout the region between December 7 and 17, 1981.<sup>138</sup> The massacre at El Mozote and the surrounding areas of La Joya, Rancheria, Toriles, Cerro Pando, Jocote Amarillo and Arambala as part of this operation have been described as "the worst massacre of civilians in contemporary Latin American history."<sup>139</sup>

El Mozote had no guerrilla activity.<sup>140</sup> Of the 1,000 victims, at least 250 were under the age of 12.<sup>141</sup> The average age of the children killed in El Mozote was six years old.<sup>142</sup> The victims were left unburied.<sup>143</sup> In his testimony before this Court on February 27, 2013, Respondent stated that he was out of the country during the El Mozote massacre and that when he returned to El Salvador, he was not informed of the massacre. The El Mozote massacre became public knowledge on January 27, 1982 when The New York Times and The Washington Post published articles by journalists who had traveled to El Mozote and seen the unburied bodies.<sup>144</sup>

The Court finds that when the massacre was made public, Respondent denied any knowledge of military action in El Mozote and claimed that accounts of a massacre were part of a guerrilla campaign to block U.S. military assistance to El Salvador.<sup>145</sup> In a discussion with the

United States Ambassador Deane R. Hinton following news reports in the American newspapers, Respondent told the ambassador that the report of massacres in the El Mozote area “was a ‘novela’ [fairytale], pure Marxist propaganda devoid of foundation.”<sup>146</sup> Further, although Respondent acknowledged to Ambassador Hinton that the Atlacatl Battalion had been at El Mozote during the December sweep, “he reiterated that the story [about the massacre] was a pack of lies.”<sup>147</sup> In a subsequent conversation preceding Respondent’s scheduled trip to the United States\*, Ambassador Hinton warned him to be prepared to field questions about the reports of a massacre in El Mozote.<sup>148</sup> The ambassador described Respondent’s reaction: “[h]e was his usual cocky self [and said,] ‘I’ll deny it and prove it fabricated.’”<sup>149</sup> During his testimony before this Court on February 27, 2013, Respondent stated that he did not recall having used the term “novela” to describe the reports of the El Mozote massacre.<sup>†</sup>

The United Nations Truth Commission reported that “[d]espite the public complaints of a massacre and the ease with which they could have been verified, the Salvadorian authorities did not order an investigation and consistently denied that the massacre had taken place.”<sup>150</sup> The Truth Commission report continues by stating:

Although it received news of the massacre, which would have been easy to corroborate because of the profusion of unburied bodies, the Armed Forces High Command did not conduct or did not give any word of an investigation and repeatedly denied that the massacre had occurred. There is full evidence that General Jose Guillermo Garcia, then Minister of Defence, initiated no investigations that might have enabled the facts to be established . . . . *The High Command also took no steps whatsoever to prevent the repetition of such acts, with the result that the same units were used in other operations and followed the same procedures.*<sup>151</sup>

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\* This trip was cancelled; Secretary of State Alexander Haig declared that Respondent was not welcome in the United States due to the reports of the massacres in the El Mozote area and a subsequent confirmed massacre in San Antonio Abad in the outskirts of San Salvador. Exh. 11 at 92.

† When asked by DHS whether he did not recall or whether he denied calling the reports a “novela,” Respondent replied, “I believe saying that I do not recall is also part of denying it.”

The Court finds that Jose Domingo Monterrosa was the commander of the Atlacatl Battalion at the time of Operation Rescue.<sup>152</sup> In addition, the Court finds that units of the Third Infantry Brigade, commanded by Colonel Jaime Flores Grijalva, participated in the operation.<sup>153</sup> The Court finds that these individuals were listed in the documents seized at San Luis Finca as supporters of the conspiracy of hardline military officers to bring about "total war."<sup>154</sup>

The Court finds that the authors of the Truth Commission declined to accept that senior commanders knew nothing of what happened at El Mozote. The Truth Commission reported:

Were it not for the children's skeletons at El Mozote, some people would still be disputing that such massacres took place. Those small skeletons are proof not only of the existence of the cold-blooded massacre at El Mozote but also of the collusion of senior commanders of the armed forces, for they show that the evidence of the unburied bodies was there for a long time for anyone who wanted to investigate the facts. No action was taken to avoid incidents such as this. On the contrary, the deliberate, systematic and indiscriminate violence against the peasant population in areas of military operations went on for years.<sup>155</sup>

The Court finds that on April 24, 2012, the Salvadoran government officially accepted responsibility for the massacre at El Mozote, admitting that the state "engaged in a conscious and systematic process of denial over the last 27 years."<sup>156</sup> Salvadoran President Mauricio Funes traveled to the site and asked for forgiveness "for the abhorrent violations of human rights and the abuses perpetrated in the name of the Salvadoran state."<sup>157</sup>

#### *8. El Calabozo Massacre*

The Court makes the following findings of fact regarding the El Calabozo massacre:

On August 22, 1982, troops from the Atlacatl Battalion killed over 200 men, women and children who had converged in El Calabozo while fleeing a vast anti-guerrilla operation that had begun a few days earlier.<sup>158</sup> The victims had been taken prisoner without offering any resistance.<sup>159</sup>

The Court finds that Respondent did not investigate this massacre and denied that it occurred. The Truth Commission found that "[a]lthough the massacre was reported publicly, the Salvadorian authorities denied it. Despite their claim to have made an investigation, there is absolutely no evidence that such an investigation took place."<sup>160</sup> The Truth Commission also reported that:

[t]he Minister of Defence, General Jose Guillermo Garcia, said that an investigation had been made and that no massacre had occurred. He repeated this assertion in an interview with the Commission . . . . When the Commission requested information on the military operation, the units which had taken part in it and the outcome of the alleged investigation, the Minister of Defence replied that there were no records for that period.<sup>161</sup>

#### *9. Las Hojas and Agua Santa Massacre*

The Court makes the following findings of fact regarding the Las Hojas and Agua Santa massacre:

On February 23, 1983, members of the Jaguar Battalion under the command of Captain Carlos Alfonso Figueroa Morales took 16 civilians from the cooperative at Las Hojas and the nearby town of Agua Santa and shot them to death at close range, with their arms tied behind their backs.<sup>162</sup> Under pressure from the United States, El Salvador's civilian President Magaña and Respondent both promised an investigation. Respondent appointed Colonel Napoleon Alvarado to conduct the military's inquiry.<sup>163</sup> Colonel Alvarado determined that no members of the armed forces were responsible.<sup>164</sup>

The Court finds that Colonel Alvarado engaged in a cover-up of the Las Hojas massacre. The Truth Commission has found that:

[t]here is full evidence that Captain Figueroa Morales, as captain of the Jaguar Battalion, was in command of the operation. Also, that during the operation, 16 peasants were arrested, bound and summarily executed, and that there was no clash with guerrillas

. . . . There is sufficient evidence that Colonel Napoleon Alvarado, who conducted the Ministry of Defence investigation, also covered up the massacre and later obstructed the judicial investigation.<sup>165</sup>

**J. Killings of Civilians by the Salvadoran Armed Forces, Generally: 1980-1983**

The Court makes the following findings of fact regarding the killings of civilians by the Salvadoran Armed Forces between 1980 and 1983:

The Truth Commission describes 1980 through 1983 as a period of “institutionalization of violence” in which “violence became systematic” and “organized terrorism, in the form of the so-called death squads” became the “most aberrant manifestation of the escalation of violence.”<sup>166</sup> Further, the Truth Commission indicates that “[c]ivilian and military groups engaged in a systematic murder campaign with total impunity, while State institutions turned a blind eye.”<sup>167</sup>

The number of massacres and killings attributed to the State of El Salvador between 1980 and 1982 falls within Level VIII of the Freedom House’s Scale of State Terror.<sup>168</sup> Level VIII is defined as “Mass State Terror: Torture, murder, and disappearance threaten the entire population; numerous large-scale massacres of civilians carried out by military and security forces.”<sup>169</sup>

On April 21, 1982, United States Embassy officials visited the clandestine “El Playon Body Dump,” a “lava field located approximately 20 miles northwest of San Salvador where assassins would kill or dump the corpses or victims of political murders.”<sup>170</sup> In a cable to the Secretary of State, embassy officials reported that they found “at least 12 skeletons and 15 spent cartridges” at El Playon and that it was still being used as a clandestine body dump.<sup>171</sup> El Playon was located approximately three miles from the headquarters of three major military units. The road between these headquarters and El Playon was patrolled by the military and accessible only with the approval of military officers.<sup>172</sup>

The Court finds that during Respondent's tenure as Minister of Defense, the Salvadoran Armed Forces was responsible for at least 1,801 killings of individuals who apparently were non-combatant, innocent civilians; 920 disappearances; and the torture of 580 people.<sup>173</sup> The Court finds that at least 59 massacres\* were perpetrated by Salvadoran Armed Forces during Respondent's tenure as Minister of Defense.<sup>174</sup>

The Court finds that these were not isolated incidents. The Court also finds that these incidents formed a pattern of conduct within the Salvadoran Armed Forces. The Truth Commission's report states that because the number of individual and group executions by the armed forces of men, women, and children who offered no resistance "is so high and the reports are so thoroughly substantiated, the Commission rules out any possibility that these might have been isolated incidents where soldiers or their immediate superiors went to extremes."<sup>175</sup> The report continues:

Everything points to the fact that these deaths formed part of a pattern of conduct, a deliberate strategy of eliminating or terrifying the peasant population. . . . It is impossible to blame this pattern of conduct on local commanders and to claim that senior commanders did not know anything about it. . . . There is no evidence that any effort was made to investigate [reported massacres]. The authorities dismissed these reports as enemy propaganda.<sup>176</sup>

When Ambassador White was asked on cross-examination whether he believed that Respondent was *directly* responsible for inciting, assisting, or participating in any extrajudicial killings or torture, he responded that in El Salvador, Ministers of Defense do not take direct action, but rather fashion military policies. Ambassador White explained that he believed that Respondent,

as Minister of Defense, fashioned a policy that encouraged, protected, and guaranteed the impunity of the rampant killings that

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\* "Massacre" is defined in Appendix 3 of Exhibit 11 as the "killing of ten or more non-combatants." Exh. 11 at 433. The Court employs that definition here.

were performed daily by Salvadoran military. . . . That he was responsible for the cover-up for these killings, and for the protection of those who killed, there is no doubt in my mind.

Ambassador White further explained that Respondent's policies

were guaranteed to encourage and protect those who perpetrated violence. And not only that, he refused entreaties from all corners to mend his ways. . . . The job of the El Salvadoran military was to protect the citizens of El Salvador. Instead they killed them, instead they disappeared them, instead they tortured them. And for the entire time I was there, and for the entire time Minister Garcia was there, no military officer was ever punished for any one of these crimes – and that in itself in my belief is the highest crime . . . . As the most powerful man in El Salvador, as the head of the most powerful institution in El Salvador[,] . . . the one organization that had, in effect, unchecked power, it was his responsibility to control that. . . . He had the obligation that [the armed forces] conduct itself according to the law of El Salvador. He failed in that duty. . . . His primary sworn duty was to protect the citizens of El Salvador, instead he made thousands of victims because he refused to take charge of that responsibility.

#### **K. Torture by the Salvadoran Armed Forces: 1979 - 1983**

The Court finds that members of the Salvadoran Armed Forces conducted torture in 1979, 1980, 1981, 1982, and 1983.

##### *1. Specific Incidents of Torture*

The Court finds that Dr. Romagoza Arce was tortured by members of the Salvadoran Armed Forces and specifically by members of the National Guard. On December 12, 1980, Dr. Romagoza Arce was taken from Santa Anita in the Department of Chalatenango by armed individuals in an army truck to a military barracks where he was held for two days before being transferred to the National Guard headquarters in San Salvador. There, he was interrogated and tortured for 22 days. Dr. Romagoza testified regarding the treatment to which he was subjected, including beatings, electric shocks, death threats, asphyxiation with a bag and powdered lime,

and sexual assault with a wooden instrument.\* He was also shot in the arm and hung up by his hands which were bound in wire. His hands were permanently damaged. Dr. Romagoza identified one of his interrogators in the torture chamber as Colonel Carlos Eugenio Vides Casanova, Director of the National Guard. In Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006), the Eleventh Circuit upheld the decision of the United States District Court for the Southern District of Florida holding Respondent liable under the Torture Victims Protection Act, on the theory of command authority, for the torture of Juan Romagoza Arce and two other individuals.<sup>177</sup>

The Court finds that an unnamed individual was held and tortured by the Salvadoran army and Treasury Police in October and November 1981. The United States Embassy in El Salvador interviewed this victim and sent a cable in November 1981 to the United States Secretary of State regarding the victim.<sup>178</sup> According to the cable, the victim was arrested on October 20, 1981, taken to the detention center of the First Army Brigade at the San Carlos Barracks in San Salvador, held incommunicado, and tortured for 14 days.<sup>179</sup> He was then transferred to the Treasury Police<sup>†</sup> detention center and finally released on November 4, 1981.<sup>180</sup> The torture suffered by this victim included beatings, cigarette burns, and electric shocks.<sup>181</sup>

The Court finds that an unnamed Salvadoran Green Cross worker was also tortured in 1982 at the National Police headquarters. In June 1982, the United States Embassy in San Salvador sent a cable to the United States Secretary of State describing the torture of this victim. According to the cable, he was abducted as he left work and taken to the National Police headquarters where he was detained for ten days.<sup>182</sup> During three of those days, he was kept in a closed third floor cell where "a police *comandante* tortured and interrogated him on each of

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\* The Court finds Juan Romagoza Arce's testimony, both oral and written, to be credible and persuasive.

† The Court takes administrative notice that the references in the cable to the "Policia de Hacienda" are references to the Treasury Police.



those three days in an adjacent six-room soundproofed [sic] suite of torture chambers.”<sup>183</sup> He was subjected to a torture involving a wheel traction device that caused severe joint and muscle strain and loss of circulation\*.<sup>184</sup> Additional torture involved the crushing of his testicles using a pulley system†.<sup>185</sup> This victim’s torturer also placed a bag with lime over the victim’s head and punched him in the stomach causing him to inhale the lime, searing his air passages and lungs.<sup>186</sup>

## *2. Torture by the Salvadoran Armed Forces, Generally: 1980-1983*

In December 1980, the United States Embassy in El Salvador reported to the Department of State regarding incidents of torture by the military:

[Redacted] this morning recounted details of large scale commission of atrocities allegedly under way at El Zapote barracks next to the Casa Presidencial in San Salvador. . . . Dozens of young people are being held at el Zapote barracks. . . . There they are subjected to beatings, torture with electric implements, and in bathtub-like tanks of water with electric current. . . . Six soldiers gang-raped a young women who had been arrested that day.<sup>187</sup>

The Department of State’s *El Salvador Country Report on Human Rights Practices – 1980* reports that “[b]odies bearing burns or numerous wounds frequently appear along the highways. Despite governmental policy against using torture, the history of the security forces suggests the involvement of some of its members in unsolved crimes of murder with torture.”<sup>188</sup> The Committee on Foreign Affairs and Foreign Relations’ *Country Reports on Human Rights Practices for 1981 El Salvador* states that “[t]here have been credible accounts of torture and abuse at interrogation centers operated by the security forces, especially the treasury police, during investigations of people suspected of subversion.”<sup>189</sup>

The Committee on Foreign Affairs and Foreign Relations’ *Country Reports on Human Rights Practices for 1982 El Salvador* indicates that the United States Embassy had “specific

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\* This torture was called “The Racker” by this victim’s torturer. Exh. 3, Tab J.

† This torture was called “The Carter” by this victim’s torturer. Exh. 3, Tab J.

reports of eight cases of torture in 1982 by elements of the security forces. These range from psychological abuse such as threats of death to deprivation of food and sleep, and the infliction of electric shock and severe beatings.”<sup>190</sup> The report also states that evidence of torture on the bodies of the dead was widespread in 1982.<sup>191</sup> On June 25, 1982, when United States Ambassador Deane Hinton confronted the newly-elected President Magaña regarding “solid evidence of torture of Salvadoran citizens while the individuals were in the custody of Security Forces[.]” Magaña committed to working with Respondent on the problem.<sup>192</sup> Ambassador Hinton, however, noted that he must tread carefully so as not to “set[] off a possible chain of events which could lead to greater pressure on security forces to eliminate rather than release torture victims.”<sup>193</sup>

The Committee on Foreign Affairs and Foreign Relations’ *Country Reports on Human Rights Practices for 1983 El Salvador* notes that “elements within the Government security forces are still believed to use torture as arbitrary punishment or to extract information from suspected leftists. . . . There is evidence that the use of torture often has been prolonged and extreme.”<sup>194</sup>

The Court finds that no officers were prosecuted or dismissed from the armed forces for these acts while Respondent was the Minister of Defense of El Salvador.

### **III. Legal Analysis**

#### **A. Jurisdiction**

Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by DHS. 8 C.F.R. § 1003.14(a). These removal proceedings commenced, and jurisdiction vested, with the filing of the NTA by DHS on

October 2, 2009. 8 C.F.R. § 1003.14(a). The jurisdiction of this Court extends to the proper application of the law to the facts before it.’

### **B. Res Judicata**

In Respondent’s Closing Statement, he argues that “the finding that Respondent was found by a jury to not be in control of his troops should be found *res judicata* by this Court.”<sup>†</sup> Respondent’s Closing Statement at 2. Specifically, he cites the Eleventh Circuit decision Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002) (finding proper the district court’s jury instructions allocating to the plaintiffs the burden of persuasion regarding whether Respondent, a *de jure* commander, had “effective control” over his troops).<sup>‡</sup>

In Ford v. Garcia, the Eleventh Circuit noted that liability under the Torture Victims Protection Act of 1991 based on the theory of command responsibility for a *de jure* commander must also be premised on his *actual ability* to control his troops, i.e., the superior’s “effective command” over his troops. 289 F.3d at 1291. The court analyzed the application of the command responsibility doctrine in cases arising in the International Criminal Tribunals of Rwanda and the former Yugoslavia, and arrived at the conclusion that, in cases arising under the Torture Victims Protection Act of 1991, the plaintiffs bear the burden of persuasion regarding

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<sup>†</sup> Respondent’s Closing Statement states: “Additionally, recent case law, namely *Mata v. Dichter*, implies that these types of cases can no longer be tried in American Civil Court.” Respondent’s Closing Statement at 3. Respondent provides no citation to the case mentioned, nor any further argument in support of this statement. The Court will give it no weight.

<sup>‡</sup> The Respondent’s argument in his Closing Statement mentioned the potential applicability of *res judicata* almost in passing with little relevant legal argument or support. The Court has analyzed this issue and finds that Respondent has not articulated persuasive reasons for the applicability of *res judicata* to this case.

<sup>\*</sup> The Court also notes that Respondent inexplicably references, in support of his position, the Eleventh Circuit decision in Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006) (holding that in the interest of justice, equitable tolling of the statute of limitations under the Torture Victims Protection Act was well within the district court’s discretion given the extraordinary circumstances of the perpetrating regime remaining in power), which was adverse to him. Arguably, it could be held that the Eleventh Circuit’s decision in Arce would be sufficient to make a determination that Respondent is removable pursuant to INA § 212(a)(3)(E)(iii)(I). The Court will refrain from addressing that point within this opinion, however, because the evidence of atrocities presented in the instant matter encompasses a much wider scope than that presented in Arce. Further, neither the statutory language under INA § 212(a)(3)(E)(iii) nor Respondent’s removability was at issue in Arce.

“effective command.” Thus, the Eleventh Circuit held in Ford that the district court did not commit plain error in instructing the jury that the survivors of the churchwomen murdered in El Salvador on December 2, 1980 were required to prove that the National Guardsmen involved in their assassinations were under the “effective command” of Respondent and his co-defendant, Mr. Carlos Vides Casanova. Id. at 1292.

Res judicata is a judicially crafted doctrine, created to provide finality and conserve resources. Maldonado v. Atty. Gen., 664 F.3d 1369, 1375 (11th Cir. 2011) (citing Eastman Kodak Co. v. Atlanta Retail, Inc., 456 F.3d 1277, 1284 (11th Cir. 2006)). Res judicata “bars the filing of claims which were raised or could have been raised in an earlier proceeding.” Id. (quoting Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir.1999)). For res judicata to bar a subsequent case, four elements must be present: “(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases.” Id.

The Court finds that these removal proceedings are not barred by the doctrine of res judicata. The filing of the NTA initiated these removal proceedings against Respondent. He has never been subject to removal or deportation proceedings in the past. These proceedings arise under the Immigration and Nationality Act and do not involve the same cause of action as the proceedings in Ford, which arose under the Torture Victims Protection Act and the Alien Tort Claims Act.\* Further, DHS was neither a party, nor in privity with a party, in Ford. Finally,

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\* The issue at stake here is not identical to the proceedings in Arce v. Garcia or Ford v. Garcia either because within the context of INA § 212(a)(3)(E)(iii), “command responsibility” can apply so long as “the forces were under his control *either* as a matter of law *or* a matter of fact.” Matter of D-R-, 25 I&N Dec. 445, 453 (BIA 2011) (emphasis added) (citing S. Rep. No. 108-209, at 10, 2003 WL 22846178 at \*10). In contrast, the Eleventh Circuit stated that the doctrine of command responsibility, within the context of Ford, must be premised on not just legal ability, but also the actual ability, to control one’s troops. See Ford, 289 F.3d at 1291.

Ford involved a cause of action brought by the relatives of the murdered American churchwomen. The instant matter before the Court not only encompasses the killings of those four women, but goes far beyond that incident to encompass thousands of killings in El Salvador during Respondent's tenure as Minister of Defense.

### **C. Burden of Proof**

Pursuant to INA section 101(a)(13)(C)(ii), "an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has been absent from the United States for a continuous period in excess of 180 days." DHS bears the burden of establishing by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking admission. Matter of Valenzuela-Felix, 26 I&N Dec. 53, 54 (BIA 2012); Matter of Rivens, 25 I&N Dec. 623, 625 (BIA 2011). An applicant for admission to the United States must establish clearly and beyond a doubt that he is entitled to be admitted and not inadmissible under section 212 of the INA. INA § 240(c)(2)(A); 8 C.F.R. § 1240.8(b). The Board of Immigration Appeals (BIA) has held, however, that where an applicant for admission to the United States has a colorable claim to returning resident status, the burden is on DHS to establish by clear and convincing evidence that the applicant should be deprived of his lawful permanent resident status. Matter of Huang, 19 I&N Dec. 749 (BIA 1988).

Absent egregious circumstances, a distinct and formal admission to an allegation made before, during, or even after a proceeding by an attorney acting in her professional capacity binds her client as a judicial admission. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986). Such an admission in a removal proceeding is binding on the alien and may be relied upon as evidence of removability. Id.

At a master calendar hearing on March 24, 2010, Respondent, through counsel, admitted allegations 9, 10, and 11 contained in the NTA. Specifically, he admitted that he departed the United States on or about December 22, 2005; that he attempted to reenter the United States at Miami International Airport on July 7, 2006; and that his absence from the United States had been for a continuous period in excess of 180 days.<sup>195</sup> Although Respondent argues that he is not an arriving alien seeking admission, he has raised no arguments before this Court that his admissions to the allegations 9, 10, and 11 were inaccurate; that his attorney was ineffective; or that there are any circumstances which should preclude him from being bound by his admissions. The Court finds that DHS has established by clear and convincing evidence that Respondent falls under INA § 101(a)(13)(C)(ii) and is to be regarded as an applicant for admission.

Nevertheless, Respondent has previously been admitted for lawful permanent residence in the United States and is in possession of a valid, unexpired permanent resident card. Thus, the Court finds that Respondent has a colorable claim to returning resident status. Under Matter of Huang, DHS bears the burden of establishing by clear and convincing evidence that Respondent, as an applicant for admission, is inadmissible to the United States. Matter of Huang, 19 I&N Dec. at 754.

#### **D. The Charges of Inadmissibility**

In analyzing Respondent's removability pursuant to INA §§ 212(a)(3)(E)(iii)(II) and (I), the Court will first address the charges separately. Specifically, the Court will analyze whether the killing perpetrated by the Salvadoran Armed Forces constitutes "extrajudicial killing" within the meaning of INA § 212(a)(3)(E)(iii)(II). In addition, the Court will examine the definition of "torture" in the context of INA § 212(a)(3)(E)(iii)(I) and will determine whether the conduct of the Salvadoran Armed Forces meets that definition.

Next, in reference to requirements common to both INA §§ 212(a)(3)(E)(iii)(II) and (I), the Court will analyze the charges of inadmissibility together. Specifically, the Court will analyze the requirement for both charges that Respondent's actions be "under the color of law." The Court will then evaluate whether Respondent "assisted or otherwise participated" in extrajudicial killing or torture.

*1. Section 212(a)(3)(E)(iii)(II) of the INA (Extrajudicial Killing)*

Respondent is charged with inadmissibility pursuant to INA § 212(a)(3)(E)(iii)(II) which states: "[a]ny alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of[,] . . . under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note), is inadmissible." In reading this section, the Court finds that a single extrajudicial killing is sufficient to render an alien inadmissible under INA § 212(a)(3)(E)(iii)(II).

Section 3(a) of the Torture Victim Protection Act (TVPA) of 1991 defines "extrajudicial killing" as:

a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note.

The Court finds that the following killings by members of the Salvadoran Armed Forces constitute extrajudicial killings within the meaning of INA § 212(a)(3)(E)(iii)(II): the assassination of Archbishop Oscar Arnulfo Romero y Galdamez on March 24, 1980; the massacre of between 300 and 600 individuals in Rio Sumpul on May 14, 1980; the killing of 12

individuals in San Francisco Guajoyo on May 29, 1958; the November 27, 1980 assassinations of the six FDR leaders: Enrique Alvarez Cordoba, Juan Chacon, Enrique Escobar Barrera, Manuel de Jesus Franco Ramirez, Humberto Mendoza, and Doroteo Hernandez; the December 2, 1980 slaughter of the four American churchwomen: Ita Ford, Maura Clarke, Dorothy Kazel, and Jean Donovan; the January 3, 1981 assassinations of Jose Rodolfo Viera Lizama, Michael P. Hammer, and Mark David Pearlman in the Sheraton Hotel in San Salvador; the killing of 24 individuals in Soyapango on April 7, 1981; the killing of at least 1,000 people in El Mozote on December 11, 1981; the killing of 200 individuals at El Calabozo on August 22, 1982; and the killing of 16 people at Las Hojas and Agua Santa on February 23, 1983.

Further, the Court finds that members of the Salvadoran Armed Forces carried out hundreds, if not thousands, of additional killings of noncombatant men, women, and children between 1980 and 1983, and that those killings constitute extrajudicial killings within the meaning of INA § 212(a)(3)(E)(iii)(II).

The Court notes that these extrajudicial killings were without bounds. Members of the Salvadoran Armed Forces slaughtered not only hundreds of men and women, but also hundreds of children, including infants. Priests, nuns, doctors, teachers, academics, judges, lawyers, journalists, displaced persons, and farmers were among those who were executed by members of the armed forces. The evidentiary record is replete with examples of the horrific manner in which members of the Salvadoran Armed Forces killed innocent civilians.

## *2. Section 212(a)(3)(E)(iii)(I) of the INA (Torture)*

Respondent is also charged with inadmissibility pursuant to INA § 212(a)(3)(E)(iii)(I), which states: “[a]ny alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of any act of torture, as defined in section



2340 of title 18 United States Code, . . . is inadmissible.” In reading this section, the Court finds that a single act of torture is sufficient to render an alien inadmissible under INA § 212(a)(3)(E)(iii)(I).

Section 2340(1) of Title 18 of the United States Code defines “torture” as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” The section further defines “severe mental pain or suffering” as:

the prolonged mental harm caused by or resulting from--

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2).

The Court finds that the Salvadoran Armed Forces’ treatment of Dr. Juan Jose Romagoza Arce; the unnamed individual detailed in the United States Embassy’s November 1981 cable;<sup>196</sup> and the unnamed Salvadoran Green Cross worker unambiguously constitutes torture as defined at 18 U.S.C. § 2340(2). Further, the Court finds that the conduct of the Salvadoran Armed Forces at the El Zapote barracks detailed in the United States Embassy’s December 1980 cable<sup>197</sup> clearly constitutes torture as defined at 18 U.S.C. § 2340(2). The Court also finds that the conduct of the Salvadoran Armed Forces detailed in the Department of State’s

*El Salvador Country Report on Human Rights Practices – 1980*; and in the Committee on Foreign Affairs and Foreign Relations, *Country Reports on Human Rights Practices for 1982 El Salvador*; and in the *Country Reports on Human Rights Practices for 1983 El Salvador* constitute torture as defined at 18 U.S.C. § 2340(2).

### 3. *Under Color of Law*

Having analyzed the differing portions of sections 212(a)(3)(E)(iii)(I) and (II) separately, the Court will now analyze the requirements common to both statutory provisions.

Sections 212(a)(3)(E)(iii)(I) and (II) of the INA both require that the alien's action with respect to extrajudicial killing or torture be "under the color of law." INA § 212(a)(3)(E)(iii)(II); 18 U.S.C. § 2340(1). The Supreme Court has stated that actions taken under color of law are those where the perpetrator has exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." West v. Atkins, 487 U.S. 42, 49 (1989) (referring to 42 U.S.C. § 1983) (internal citations omitted). In United States v. Belfast, the Eleventh Circuit accepted this definition of "color of law" when interpreting the phrase in the context of the definition of torture at 18 U.S.C. § 2340(1). See 611 F.3d 783, 808-09 (11th Cir. 2010) (citing the above language of West v. Atkins, 487 U.S. 42, 49 (1988)).

All of Respondent's actions at issue in this case are those undertaken in his official capacity as Minister of Defense of El Salvador between mid-October 1979 and April 1983. Any power Respondent wielded in that position was under the express authority of that vested in him by the laws of El Salvador. Thus, the Court finds that Respondent's actions as Minister of Defense at issue in this case were taken "under color of law."

#### 4. "Assisted or Otherwise Participated In"

Sections 212(a)(3)(E)(iii)(I) and (II) of the INA both require the alien to have "committed, ordered, incited, assisted, or otherwise participated in" the commission of acts of torture or extrajudicial killing, respectively. In this case, the Court must determine whether Respondent "assisted or otherwise participated in" acts of torture and extrajudicial killings.

##### a. Legal Standard

In Matter of A-H-, the Attorney General interprets "assisted or otherwise participated in" within the context of the persecutor bar to asylum,<sup>\*</sup> stating that "[t]he plain meaning of the relevant words in the statute is broad enough to encompass aid and support provided by a political leader to those who carry out the goals of his group, including statements of incitement or encouragement and actions that result in advancing the violent activities of the group." 23 I&N Dec. 774, 784 (A.G. 2005). In Matter of D-R-, the BIA employs that interpretation within the context of INA § 212(a)(3)(E), adopting an expansive definition of the "assisted, or otherwise participated in" language. 25 I&N Dec. 445 (BIA 2011).<sup>†</sup> The BIA notes that the "terms are to be given broad application" and "'do not require direct personal involvement in the acts of persecution.'" *Id.* at 452 (quoting Matter of A-H-, 23 I&N Dec. at 784).

The BIA further interprets the phrase "ordered, incited, assisted, or otherwise participated" in light of the legislative history of the Anti-Atrocity Alien Deportation Act of 2003, which was not passed as separate legislation, but whose statutory language was

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<sup>\*</sup> Asylum shall not be granted to any alien determined by the Attorney General to have "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A)(i). The Court takes administrative notice that on August 6, 1990, the legacy Immigration and Naturalization Service (INS) granted Respondent asylum in the United States. The Court is also aware that INA § 208(b)(2)(A)(i) was in effect at that time. The Court will not speak further to that determination by the legacy INS for the reason that it is not the issue before the Court in these proceedings.

<sup>†</sup> Although Matter of D-R-, 25 I&N Dec. 445 (BIA 2011), involved an alien charged with deportability pursuant to INA § 237(a)(4)(D), that section cross-references section 212(a)(3)(E).

incorporated into the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”). Matter of D-R-, 25 I&N Dec. at 452. The BIA notes that the proposed act was “intended to close loopholes in U.S. immigration laws that have allowed aliens who have committed serious forms of human rights abuses abroad to enter and remain in the country.” Id. at 452-53 (quoting S. Rep. No. 108-209, at 1-2, 2003 WL 22846178, at \*1-2). The United States Senate Report for the proposed *Anti-Atrocity Alien Deportation Act of 2003* indicates that “[t]he statutory language—‘committed, ordered, incited, assisted, or otherwise participated in’—is intended to reach the behavior of persons directly or personally associated with the covered acts, including those with command responsibility.” Id. (quoting S. Rep. No. 108-209, at 10, 2003 WL 22846178, at \*10). The Senate Report further states that:

Command responsibility holds a commander responsible for unlawful acts when (1) the forces who committed the abuses were subordinates of the commander (i.e., the forces were under his control either as a matter of law or as a matter of fact); (2) the commander knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts; and (3) the commander failed to prove that he had taken the necessary and reasonable measures to (a) prevent or stop subordinates from committing such acts, or (b) investigate the acts committed by subordinates in a genuine effort to punish the perpetrators. Attempts and conspiracies to commit these crimes are encompassed in the “otherwise participated in” language. This language addresses an appropriate range of levels of complicity for which aliens should be held accountable, and has been the subject of extensive judicial interpretation and construction.

Id. (quoting S. Rep. No. 108-209, at 10, 2003 WL 22846178, at \*10 (citing Fedorenko v. United States, 449 U.S. 490, 514 (1981); Kalejs v. INS, 10 F.3d 441, 444 (7th Cir. 1993); United States v. Schmidt, 923 F.2d 1253, 1257–59 (7th Cir. 1991); Kulle v. INS, 825 F.2d 1188, 1192 (7th Cir. 1987))).

Thus, in Matter of D-R-, the BIA concludes that in light of the legislative history, “inadmissibility under section 212(a)(3)(E) of the Act is established where it is shown that an alien with command responsibility knew or should have known that his subordinates committed unlawful acts covered by the statute and failed to prove that he took reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.” Id. at 453.

The Eleventh Circuit has also examined the “assisted or otherwise participated in” language in the context of the persecutor bar to asylum. See Chen v. Holder, 513 F3d 1255, 1259 (11th Cir. 2008). The Eleventh Circuit held in Chen that “[t]he standard for determining whether an asylum applicant is ineligible for asylum and withholding of removal due to assistance or participation in persecution is a particularized, fact-specific inquiry into whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution.” Id. Thus, in applying the Eleventh Circuit’s standard to the “assisted or otherwise participated in” language in INA § 212(a)(3)(E)(iii), an alien can be found to have “assisted or otherwise participated in” extrajudicial killing or torture only if his conduct was “active, direct and integral” rather than “merely indirect, peripheral and inconsequential.” See id.

In summary, the Court will first apply the BIA’s conceptualization of the phrase “assisted and otherwise participated in,” which does not require Respondent to have personally conducted torture or an extrajudicial killing. See Matter of D-R-, 25 I&N Dec. at 452. The Court will assess whether Respondent “knew or should have known that his subordinates committed” extrajudicial killing and acts of torture and did not take “reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.” See id. at 453. The Court will further assess whether the evidence presented demonstrates that Respondent, as a political

leader, made or engaged in “actions that result[ed] in advancing the violent activities of the group,” namely extrajudicial killing and acts of torture carried out by the Salvadoran Armed Forces while under his command. See id. at 452. Finally, the Court will consider whether Respondent’s “personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral” to the commission of extrajudicial killings and acts of torture. See Chen, 513 F.3d at 1259.\*

b. Analysis

Having already discussed at length in this decision the extent of Respondent’s power and authority in El Salvador during his tenure as Minister of Defense, the Court reiterates its finding that the Salvadoran Armed Forces were under Respondent’s control both as a matter of law *and* as a matter of fact. See Matter of D-R-, 25 I&N Dec. at 453.

Additionally, the Court finds that the legislative history of the Intelligence Reform and Terrorism Prevention Act of 2004 provisions amending the INA to add section 212(a)(3)(E)(iii) indirectly refers to Respondent’s involvement in human rights abuses in El Salvador by quoting an Amnesty International USA report in which he is specifically named.<sup>198</sup> The United States Senate Report for the proposed Anti-Atrocity Alien Deportation Act of 2003 states:

In 1980, four American churchwomen were raped and murdered by the Salvadoran National Guard. Two former officials in the government of El Salvador allegedly covered up the murders. According to the United Nations’ Truth Commission in El Salvador, one of the officials “concealed the fact that murders had been carried out pursuant to superior orders,” and the other “made no serious effort to investigate those responsible for the murders.”†

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\* Respondent argues that “the Department has failed to show a direct link or proximate cause from Respondent to the harm alleged.” Respondent’s Closing Statement at 3. The Court notes that “direct link” and “proximate cause” are not the standards by which the Court must evaluate inadmissibility pursuant to INA §§ 212(a)(3)(E)(iii)(I) and (II). The Court, in its assessment, will adhere to the analysis required by statute, regulation, and case law described in this paragraph.

† These quotations refer to Carlos Eugenio Vides Casanova and Respondent, respectively. See Exh. 5, Tab AAA (United States of America: A Safe Haven for Torturers, Amnesty International USA, April 2002) at 965 (“In 1993, the United Nations-sponsored Truth Commission in El Salvador concluded that Vides Casanova concealed the fact

Both of these Salvadoran former officials currently reside in Florida. The problems are clear, and the Justice Department has recognized the deficiencies in our laws. . . . The Anti-Atrocity Alien Deportation Act would provide a stronger bar to keep human rights abusers out of the U.S.

S. Rep. No. 108-209 at 4-5, 2003 WL 22846178 (citing United States of America: A Safe Haven for Torturers, Amnesty International USA, April 2002 at 48). .<sup>199</sup>

During his testimony on February 27, 2013, Respondent stated that when he became Minister of Defense, he inherited a military institution infiltrated by members on the right and left of the political spectrum. He told the Court that he was partial to neither extreme and that as Minister of Defense he had made several such statements publicly. The conflict in El Salvador, according to Respondent, was between subversive leftist Marxist elements and the armed forces. Respondent testified that Russia, Cuba, Nicaragua, and Panama played a role in the conflict in El Salvador by assisting the leftist subversives.

Respondent told the Court that he knew there were “abuses”<sup>\*</sup> by the Salvadoran Armed Forces, but he attributed these “abuses” to the prior government. He stated that he tried to alleviate the “abuses” through orders, requests, and public directives to the military. Respondent further testified that his attitude regarding “abuses” of civilians by the armed forces “was to address and avoid” such “abuses.” He told the Court that upon hearing reports of “abuses,” such as massacres, investigations were conducted but the dearth of information available about the massacres limited the investigations. Respondent denied that he advocated a violent solution to the conflict in El Salvador. When asked by the Court how members of the military over which Respondent had authority were able to commit atrocities against the civilian population,

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that the murders [of the churchwomen] had been carried out pursuant to superior orders and that [Jose Guillermo] Garcia made no serious effort to investigate those responsible for the murders.”).

<sup>\*</sup> The Court places Respondent’s reference to “abuses” in quotations because the Court considers the term to be a gross understatement of the atrocities committed by the Salvadoran Armed Forces during the period of time at issue in this case.

Respondent replied that he did everything possible to rid the armed forces of "those attitudes," but that due to an ideological conflict within the Salvadoran Armed Forces, he lacked control over some events within the armed forces. Further questioned by the Court regarding how Respondent permitted or allowed members of the armed forces to commit atrocities, Respondent said it was not a matter of "permitting" or "allowing," but rather that "circumstances would occur that made a certain situation."

Respondent is a highly intelligent and accomplished individual. Not only was he ranked number one in his graduating class at the Military School and recognized for that achievement with a prestigious award presented by the military president of El Salvador, as his career progressed, he gained recognition at the highest levels of the government in El Salvador. Respondent was well-respected within the military, even by the young officers who sought to change the governing structure of El Salvador by transitioning the country from military rule to democracy.

Respondent was appointed to the formidable position of Minister of Defense as a person who could lead the Armed Forces of El Salvador through the transition, difficult as the ensuing changes would be for that institution. He was named Minister of Defense during a period of increasing popular dissatisfaction with military rule. For years prior to the coup d'état led by the Young Officers Movement, dissent and popular mobilization against military rule were violently repressed; Salvadorans yearning for political change in El Salvador were coerced by fear of the armed forces to quiet their demands. There is no doubt that when Respondent became the Minister of Defense in mid-October 1979, the task before him was daunting, the challenges enormous. That he was perceived by the civilian-military junta as a leader equal to the task of reform within this volatile political context speaks to his exceptional professional ability.



The record indicates that in the earliest days after the October 1979 coup d'état, the Young Officers Movement took significant steps toward dismantling the military's repressive capacity by promising to disband the paramilitary civil guard and the notorious intelligence apparatus, ANSESAL.

Respondent, however, was not a reformer. Instead of championing change within the military at a moment in which reform was within reach, he sidelined military reformists. Additionally, although the choices Respondent would make for his Vice Minister of Defense and the directors of the National Police, Treasury Police, and National Guard were of utmost importance in imposing new restraints on the military and putting an end to state-sponsored repression, he selected for these positions friends and colleagues who, like him, were not dedicated to a transition to democratic rule and to ending human rights abuses against civilians by the armed forces.

As the head of the armed forces and the most powerful person in El Salvador, Respondent fostered, and allowed to thrive, an institutional atmosphere in which the Salvadoran Armed Forces preyed upon defenseless civilians under the guise of fighting a war against communist subversives. Instead of instituting changes that would decrease the incidents of killings and torture by the military, Respondent failed to stamp out death squads within the security forces. Likewise, despite contemporaneous evidence that members of the military had been involved in the assassination of Archbishop Oscar Romero, a man who could have been an ally in bringing about change and peace in El Salvador, Respondent failed to adequately investigate.

Even when members of the military and Roberto D'Aubuisson were caught at San Luis Finca with documents pointing to an elaborate death squad operation, including the death squad

involved in Archbishop Romero's death, Respondent did not insist upon a thorough investigation and prosecution. Instead, he released them from custody and allowed them to resume their positions. The Court wishes to reiterate that these individuals were arrested with documents relating to the organizational, personnel, infrastructure and weaponry of a large scale *death squad* operating out of the Salvadoran Armed Forces. That these arrests did not result in Respondent requiring a most thorough, impartial investigation and, at the very least, ordering the discharge from the military of those involved, cannot be understood by this Court as merely a failure to act. This event represents such a gross dereliction of his legal responsibilities as Minister of Defense that the Court finds, in reference to the San Luis Finca affair, Respondent knew or should have known that his subordinates committed extrajudicial killing via death squad, as well as the assassination of Archbishop Oscar Romero, and that he did not take "reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators." See Matter of D-R-, 25 I&N Dec. at 453.

Respondent had the power, indeed the obligation, to investigate and impose penalties on the officers arrested at San Luis Finca. He released them, despite opposition from the civilian-military junta, and after a purported investigation by one of the listed sympathizers of death squad activities, announced that they had not been involved in wrongdoing. Respondent's actions regarding the San Luis Finca affair and the assassination of Archbishop Oscar Romero resulted in advancing the violent activities of this group of officers and Major D'Aubuisson by sending the message that they would be protected from investigation and prosecution, and by allowing an atmosphere of impunity to continue within the Salvadoran Armed Forces. See id. at 452. The officers arrested at San Luis Finca and the listed sympathetic officers went on to commit vile acts, including: organization and participation in death squads; torture; the Sheraton

Hotel murders; the assassinations of the four American churchwomen; the FDR murders; the El Mozote massacre; and the Las Hojas and Agua Santa massacre and cover-up. The Court finds that Respondent's personal conduct, as Minister of Defense of El Salvador, in reference to the San Luis Finca affair and the assassination of Archbishop Oscar Romero was not merely indirect, peripheral and inconsequential association but rather active, direct, and integral to the commission of extrajudicial killing and torture. See Chen, 513 F.3d at 1259.

What followed was a period of mass state terror in which torture, murder, and disappearance threatened the entire population of El Salvador. The Salvadoran Armed Forces carried out targeted assassinations of civilians as well as indiscriminate large-scale massacres of civilians. The Court is not persuaded that widespread extrajudicial killings and torture of this scale perpetrated by members of the Salvadoran Armed Forces can be attributed to Respondent not having control over his military. On the contrary, Respondent as Minister of Defense exercised more power and control over the Salvadoran Armed Forces than his predecessors. Had he wished to use his power to end the pattern of extrajudicial killings and torture by his military, he would have been heartily supported by the civilian-military junta as well as by the United States Embassy. The Court has considered the entire record, including the many events not specifically discussed in this decision. Indeed, only a fraction of these horrific incidents presented by DHS in its voluminous filings has been described in detail in this decision. The magnitude of the killings and torture by the Salvadoran Armed Forces, coupled with evidence that Respondent did not make any genuine effort to end these practices, lead this Court to conclude that these atrocities formed part of Respondent's deliberate military policy as Minister of Defense. The Court has already noted that, in his defense, Respondent explained that killings and torture were committed because "circumstances would occur that made a certain situation."

Assuming that statement is true, the Court finds that it was due to the fact that Respondent not only permitted or allowed these circumstances to occur, but also created a policy which fostered an atmosphere within the military of El Salvador in which these atrocities could be committed with impunity. Considering Respondent as an individual, the office he held, the power he derived from that office both as a matter of fact and through the law, any explanation to the contrary by the Respondent, particularly in light of the numerous and large-scale incidents of extrajudicial killing, defies plausibility. The Court finds that Respondent assisted or otherwise participated in the following specific incidents of extrajudicial killing:

Combined units of the Salvadoran Armed Forces, with the cooperation of the Honduran military, engaged in the coordinated slaughter of between 300 and 600 civilians at Rio Sumpul. The Court finds that, due to the coordination across branches of the Salvadoran military and with the military of a foreign nation within a contested border zone, Respondent either knew or should have known his subordinates committed the extrajudicial killings at Rio Sumpul and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. The Court finds that his contemporaneous denial that the Rio Sumpul massacre had occurred and his failure to conduct an investigation constitute actions that resulted in advancing the violent activities of the Salvadoran Armed Forces by sending the message that members of the armed forces would not be investigated for the slaughter of civilians. See id., at 452. The Court finds that his personal conduct in this regard, as Minister of Defense, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

Members of the Salvadoran Armed Forces massacred 12 civilians in San Francisco Guajoyo. The Court finds that Respondent either knew or should have known his subordinates committed these extrajudicial killings. See Matter of D-R-, 25 I&N Dec. at 453. Although Respondent had the legal responsibility to hold members of the armed forces accountable for extrajudicial killings, he took no action to identify and punish the members of his military responsible for killing the San Francisco Guajoyo cooperative members. Thus, the Court finds that Respondent did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See id. Respondent's complete failure to investigate the San Francisco Guajoyo massacre resulted in advancing the violent activities of the Salvadoran Armed Forces by fostering an atmosphere of impunity within the military while under his command. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense of El Salvador, was not merely indirect, peripheral and inconsequential association but rather his imperviousness to the massacres committed by his troops was active, direct and integral to the commission of extrajudicial killings. See Chen, 513 F.3d at 1259.

The Salvadoran Armed Forces participated in the assassinations of the six FDR leaders. This assassination was planned by Roberto D'Aubuisson, founder of death squads, architect of Archbishop Romero's assassination, and co-conspirator at San Luis Finca. Respondent and D'Aubuisson were in direct contact during this time period. Despite evidence that Respondent knew his security forces were responsible for the murders of the six FDR leaders, he denied their involvement and failed to conduct an adequate investigation into these extrajudicial killings. Thus, the Court finds Respondent knew or should have known that his subordinates committed the extrajudicial killings of the FDR leaders, and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-,

25 I&N Dec. at 453. The Court finds that Respondent's denials and failure to investigate those responsible resulted in advancing the violent activities of the Salvadoran Armed Forces while under his command. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense of El Salvador, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

Members of the National Guard were responsible for the extrajudicial killings of the four American churchwomen. The Court finds that Respondent knew or should have known that his subordinates committed the extrajudicial killings of Ita Ford, Maura Clarke, Dorothy Kazel, and Jean Donovan, and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. The Court finds that Respondent's denials of the involvement of the security forces and sham investigations resulted in advancing the violent activities of the Salvadoran Armed Forces while under his command. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense of El Salvador, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

Members of the National Guard were responsible for the extrajudicial killing of Jose Rodolfo Viera Lizama, Michael P. Hammer, and Mark David Pearlman at the Sheraton Hotel in San Salvador. The Court finds that Respondent knew or should have known that his subordinates committed these extrajudicial killings and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. Instead, the Court finds that Respondent's sham investigations and

failure to punish Lopez Sibrian, Avila Avila, and Denis Moran resulted in advancing the violent activities of the Salvadoran Armed Forces while under his command by creating an atmosphere of impunity and protection for the perpetrators. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

The Treasury Police murdered at least 24 civilians in Soyapango. The Court finds that Respondent knew or should have known that his subordinates committed the extrajudicial killings at Soyapango and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. Even though the Treasury Police was considered beyond repair due to human rights abuses by its members and despite demands from the United States government and the Christian Democratic Party of El Salvador to remove Director of the Treasury Police Francisco Moran in the wake of the Soyapango massacre, Respondent did not do so. Respondent, as the Minister of Defense, had the power investigate and discharge Moran from the armed forces, but Respondent protected him and continued to allow Moran's Treasury Police to carry out, with impunity, additional extrajudicial killings and torture. Respondent's complete failure to investigate Director Moran resulted in advancing the violent activities of the Treasury Police by fostering an atmosphere of impunity within the Salvadoran Armed Forces while under his command. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense, was not merely indirect, peripheral and inconsequential association but rather his protection of Francisco Moran after the Soyapango massacre by the Treasury Police was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

The Court now turns to the massacre of at least 1,000 civilians at El Mozote. This massacre, appalling in scale and severity, was carried out by members of the Salvadoran Armed Forces, including the Atlacatl Battalion, as part of an operation called "Operation Rescue." The very notion that the terror visited upon the peasants of El Mozote could be considered some sort of "rescue" underscores the pervasive and ongoing antagonistic attitude of the Salvadoran military toward the civilian population of El Salvador, an attitude that Respondent was responsible for creating and allowing to thrive. The Court takes special note of the massacre at El Mozote not only because of the number of unarmed civilians whose lives were cut short by the ruthless conduct of the Salvadoran military, but also because of the systematic way in which it was carried out and the brazen cruelty to which the victims were subjected prior to their deaths. Further, the military perpetrators of these horrors made no effort to conceal the victims or what had been done to them – the bodies were left unburied and in plain sight. The Court finds that these are the actions of military personnel unconcerned that their superiors would find such conduct improper or worthy of investigation. With every extrajudicial killing by the Salvadoran military that went uninvestigated and unpunished by Respondent, the violent activities of the armed forces were reinforced and an atmosphere emerged that made possible the brutal extrajudicial killings of almost the entire population of El Mozote. The Court finds that Respondent knew or should have known that his subordinates committed extrajudicial killings at El Mozote and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. Instead, the Court finds that Respondent's denials of the massacre and his failure to investigate resulted in advancing the violent activities of the Salvadoran Armed Forces while under his command. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of



Defense, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

The Atlacatl Battalion, which had participated in the El Mozote massacre, subsequently killed over 200 unarmed civilians at El Calabozo. The Court finds that Respondent knew or should have known that his subordinates committed the extrajudicial killings at El Calabozo and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. The Court finds that Respondent's denial that any massacre occurred, and failure to investigate adequately, if at all, resulted in advancing the violent activities of the Salvadoran Armed Forces while under Respondent's command. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

The military slayed 16 civilians at Las Hojas and Agua Santa. The Ministry of Defense inquiry into this massacre resulted in a cover-up and the obstruction of a judicial inquiry. The Court finds that Respondent knew or should have known that his subordinates committed the extrajudicial killings at Las Hojas and Agua Santa and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. The Court finds that the Ministry of Defense's sham investigation, obstruction of judicial inquiry, and cover-up resulted in advancing the violent activities of the Salvadoran Armed Forces while under Respondent's command. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense, was not merely

indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259.

Based on the foregoing, the Court finds that Respondent assisted or otherwise participated in the commission of extrajudicial killings in each of the events described above, individually and in the aggregate.

In addition to these specific extrajudicial killings, the Court finds that Respondent knew or should have known that his subordinates committed extrajudicial killings throughout El Salvador during his tenure as Minister of Defense and that he did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-, 25 I&N Dec. at 453. Dead bodies bearing signs of torture were heaped in piles on the streets of the capital city, along well-traveled highways, in shopping centers, and in parking lots of prestigious hotels. Tortured corpses, some beheaded, some dismembered, were left to decay in the Playon Body Dump, accessible only with the consent of the military. Respondent has admitted that the Salvadoran Armed Forces, during his tenure as Minister of Defense, committed extrajudicial killings. Yet Respondent rebuffed reform, protected death squad plotters, denied the existence of massacres, failed to adequately investigate assassinations and massacres, and failed to hold officers accountable for killing their fellow countrymen. Respondent, as Minister of Defense of El Salvador, created an atmosphere of impunity in which members of the armed forces would not be investigated, prosecuted, sanctioned, or discharged for atrocities visited upon civilians. The Court notes that Ambassador White stated that it was Respondent's sworn duty to protect the citizens of El Salvador but that he instead "made thousands of victims because he refused to take charge of that responsibility." The Court agrees

with Ambassador White and finds that not only did Respondent fail to take charge of that responsibility, Respondent established policies to bring about the demise of these victims.

Thus, the Court finds that Respondent's actions resulted in advancing the violent activities of the Salvadoran Armed Forces while under Respondent's command. See id. at 452. The Court further finds that Respondent's personal conduct in this regard, as Minister of Defense, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of extrajudicial killing. See Chen, 513 F.3d at 1259. Accordingly, the Court finds that Respondent assisted or otherwise participated in the commission of extrajudicial killings in El Salvador during his tenure as Minister of Defense.

Turning to the charge pursuant to INA § 212(a)(3)(E)(iii)(I), the Court finds that by creating within the Salvadoran Armed Forces the atmosphere of impunity and antagonism toward the civilian population described above, Respondent assisted or otherwise participated in the following specific incidents of torture: the torture, by members of the National Guard, of Dr. Juan Jose Romagoza Arce; the torture, by the Treasury Police, of the unnamed individual referenced in the November 1981 cable from the United States Embassy in El Salvador; and the torture, by members of the National Police, of the unnamed Salvadoran Green Cross member previously discussed in this decision. Not only was each of these ghastly incidents of torture conducted within military installations, all of them occurred in capital city of San Salvador. The evidence is clear that the torture of Dr. Romagoza and the Salvadoran Green Cross member occurred within the *headquarters* of the National Guard and the National Police, respectively. The Court finds that Respondent knew or should have known that his subordinates committed these acts of torture. See Matter of D-R-, 25 I&N Dec. at 453. The Court finds that Respondent did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to

punish the perpetrators. See id. The Court finds that Respondent's failure to investigate and punish torturers within the armed forces resulted in advancing the violent activities of the Salvadoran Armed Forces while under his command. See id. at 452. The Court further finds that Respondent's personal conduct in this regard, as Minister of Defense, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of acts of torture by his military. See Chen, 513 F.3d at 1259. Accordingly, the Court finds that Respondent assisted or otherwise participated in the commission of acts of torture in each of the specific events described above, individually and in the aggregate.

In addition to the specific incidents of torture above, the Court finds that Respondent assisted or otherwise participated in acts of torture throughout El Salvador during his tenure as Minister of Defense. Tortured bodies were left on public display: bodies bearing signs of torture were heaped in piles on the streets of the capital city, along well-traveled highways, in shopping centers, and in the parking lots of upscale hotels. Tortured bodies were left to decay in the Playon Body Dump, an area accessible only with the consent of the military. Dozens of young people were tortured in the El Zapote military barracks. That Respondent, given his position as the Minister of Defense, could not have known about torture of this scale conducted within each branch of his military is inconceivable to this Court. Respondent told the Court that he did everything possible to rid the armed forces of the attitudes behind these atrocities. Yet Respondent initiated no investigations into reports of torture by his military, nor were any alleged torturers within the Salvadoran Armed Forces prosecuted during Respondent's tenure as Minister of Defense. Consequently, the Court finds that Respondent knew or should have known that his subordinates committed acts of torture and did not take reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators. See Matter of D-R-,

25 I&N Dec. at 453. The Court finds that Respondent's failure to investigate and punish torturers within his armed forces resulted in advancing the violent activities of the Salvadoran Armed Forces while under his command. See id. at 452. The Court finds that Respondent's personal conduct in this regard, as Minister of Defense, was not merely indirect, peripheral and inconsequential association but rather was active, direct and integral to the commission of acts of torture. See Chen, 513 F.3d at 1259.

Based on the foregoing, the Court finds that Respondent assisted or otherwise participated in the commission of acts of torture, individually and in the aggregate, throughout El Salvador during his tenure as Minister of Defense.

The Department of Homeland Security has met its burden of establishing by clear and convincing evidence that Respondent is inadmissible as charged.

#### **IV. Conclusion**

In summary, upon careful review of the entirety of the record, and for the specific reasons discussed above, the Court finds that the Department of Homeland Security has established by clear and convincing evidence that all the allegations in the charging documents are true and correct, and that Respondent is inadmissible pursuant to INA § 212(a)(3)(E)(iii)(II) on the following individual bases:

1. Respondent assisted or otherwise participated in the extrajudicial killing of Archbishop Oscar Arnulfo Romero y Galdamez on March 24, 1980;
2. Respondent assisted or otherwise participated in the extrajudicial killings of at least 300 individuals on May 14, 1980 at Rio Sumpul;
3. Respondent assisted or otherwise participated in the extrajudicial killings of 12 individuals on May 29, 1980 in San Francisco Guajoyo;
4. Respondent assisted or otherwise participated in the extrajudicial killings of *Frente Democratico Revolucionario* leaders Enrique Alvarez Cordoba, Juan

Chacon, Enrique Escobar Barrera, Manuel de Jesus Franco Ramirez, Humberto Mendoza and Doroteo Hernandez on November 27, 1980 in San Salvador;

5. Respondent assisted or otherwise participated in the extrajudicial killings of the four American churchwomen Ita Ford, Maura Clarke, Dorothy Kazel, and Jean Donovan on December 2, 1980;
6. Respondent assisted or otherwise participated in the extrajudicial killings of Jose Rodolfo Viera Lizama, Michael P. Hammer, and Mark David Pearlman on January 3, 1981 at the Sheraton Hotel in San Salvador;
7. Respondent assisted or otherwise participated in the extrajudicial killings of 24 individuals on April 7, 1981 in Soyapango;
8. Respondent assisted or otherwise participated in the extrajudicial killings of at least 1,000 individuals on December 10 – 12, 1981 in El Mozote;
9. Respondent assisted or otherwise participated in the extrajudicial killings of at least 200 individuals on August 22, 1982 in El Calabozo;
10. Respondent assisted or otherwise participated in the extrajudicial killings of 16 individuals on February 23, 1983 at Las Hojas and Agua Santa; and
11. Respondent assisted or otherwise participated in the extrajudicial killings of countless civilians committed by members of the Salvadoran Armed Forces while under Respondent's command.

In addition, upon careful review of the entirety of the record, and for the specific reasons discussed above, the Court finds that the Department of Homeland Security has established by clear and convincing evidence that Respondent is inadmissible pursuant to INA § 212(a)(3)(E)(iii)(I) on the following individual bases:

1. Respondent assisted or otherwise participated in the torture of Juan Jose Romagoza Arce;
2. Respondent assisted or otherwise participated in the torture of the unnamed individual referenced in the United States Embassy cable of November 1981;
3. Respondent assisted or otherwise participated in the torture of the unnamed Salvadoran Green Cross member; and

4. Respondent assisted or otherwise participated in the torture of countless unnamed individuals tortured by members of the Salvadoran Armed Forces while under Respondent's command.

In light of the foregoing, the following orders with be entered:

**ORDERS**

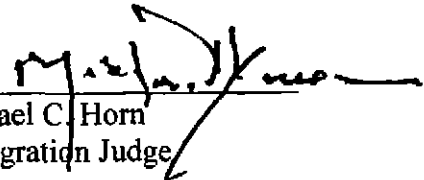
**IT IS HEREBY ORDERED** that all factual allegations contained in the Notice to Appear, as amended by the Form I-261, are true and correct.

**WHEREFORE, IT IS FURTHER ORDERED** that the charge of removability pursuant to section 212(a)(3)(E)(iii)(II) is **SUSTAINED**.

**WHEREFORE, IT IS FURTHER ORDERED** that the charge of removability pursuant to section 212(a)(3)(E)(iii)(I) is **SUSTAINED**.

The Court will notify the parties through a separate notice concerning the addressing of relief from removal.

DATED this 26th day of February 2014

  
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Michael C. Horn  
Immigration Judge

Cc: Alina Cruz, Esq. and Alejandrina G. Cruz, Esq.  
Loren G. Coy and Gina Garrett-Jackson, Assistants Chief Counsel

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## ENDNOTES

<sup>1</sup> Exh. 16, Tab GGGGGG.

<sup>2</sup> Id.; see also Respondent's Form I-589, Request for Asylum in the United States, dated March 1, 1990 which has not been marked into evidence, though it was submitted to the Court by Respondent on February 25, 2013.

<sup>3</sup> Exh. D. The Court notes that the English translation of the Spanish-language document submitted by Respondent at Exhibit D was prepared by his counsel.

<sup>4</sup> Exh. 16, Tab GGGGGG.

<sup>5</sup> Exh. 2, Tab A; Exh. 16, Tab GGGGGG; Exh. 11.

<sup>6</sup> Exh. 16, Tab GGGGGG.

<sup>7</sup> Id.

<sup>8</sup> Exh. 11 at 32; Exh. 16, Tab GGGGGG.

<sup>9</sup> Exh. 16, Tab GGGGGG.

<sup>10</sup> Exh. 11 at 31.

<sup>11</sup> Id.; Exh. 3, Tab C at 57.

<sup>12</sup> Id.

<sup>13</sup> Exh. 3, Tab A at 14, 16-17.

<sup>14</sup> Exh. 11 at 32-33.

<sup>15</sup> Exh. 7, Tab TTTT; Exh. 11.

<sup>16</sup> Id.

<sup>17</sup> Exh. 11 at 28 n.65; Exh. 3, Tab A at 16.

<sup>18</sup> Exh. 7, Tab SSS at 157.

<sup>19</sup> Exh. 11 at 20. Exh. 11 at 20.

<sup>20</sup> Exh. 3, Tab A at 12.

<sup>21</sup> Id. at 13.

<sup>22</sup> Id.

<sup>23</sup> Exh. 3, Tab A at 14.

<sup>24</sup> Id. at 16.

<sup>25</sup> Exh. 11 at 38.

<sup>26</sup> Id. at 34.

<sup>27</sup> Id.

<sup>28</sup> Id. at 38.

<sup>29</sup> Id. at 39.

<sup>30</sup> Exh. 16, Tab GGGGGG.

<sup>31</sup> Exh. 7, Tab JJJJ.

<sup>32</sup> Exh. 11 at 37.

<sup>33</sup> Id. at 43.

<sup>34</sup> Id. at 44.

<sup>35</sup> Exh. 5, Tab FF.

<sup>36</sup> Id.

<sup>37</sup> Exh. 11 at 35.

<sup>38</sup> Id.

<sup>39</sup> Id. at 36.

<sup>40</sup> Exh. 10, Tab YYYYYY.

<sup>41</sup> Exh. 10, Tab ZZZZZ; Exh. 11 at 36.

<sup>42</sup> Exh. 7, Tab TTT; see also Exh. 11 at 37.

<sup>43</sup> Exh. 7, Tab TTT.

<sup>44</sup> Id.; Exh. 11 at 37.

<sup>45</sup> Exh. 11 at 37.

<sup>46</sup> Id.

<sup>47</sup> Id. at 45, 51.

<sup>48</sup> Id. at 51.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Exh. 8, Tab XXXX; see also Exh. 11 at 46.



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<sup>52</sup> Id.  
<sup>53</sup> Id.  
<sup>54</sup> Id.  
<sup>55</sup> Exh. 3, Tab S; Exh. 11 at 46.  
<sup>56</sup> Id.; Exh. 8, Tab XXXX.  
<sup>57</sup> Exh. 3, Tab A at 3.  
<sup>58</sup> Id.  
<sup>59</sup> Id. at 23.  
<sup>60</sup> Id. at 28.  
<sup>61</sup> Exh. 5, Tab VV.  
<sup>62</sup> Id.  
<sup>63</sup> Id.  
<sup>64</sup> Id.  
<sup>65</sup> Exh 3, Tab A at 22.  
<sup>66</sup> Exh. 3, Tab C at 58.  
<sup>67</sup> Exh. 3, Tab C at 58. See also Exh. 8, Tab XXXX at 76.  
<sup>68</sup> Exh. 11 at 25; Exh. 7, Tab IIII.  
<sup>69</sup> Exh. 7, Tab IIII.  
<sup>70</sup> Exh. 11 at 54; see also Exh. 3, Tab C.  
<sup>71</sup> Exh. 11 at 55.  
<sup>72</sup> Exh. 11, Table 1 at 96-99.  
<sup>73</sup> Exh. 11 at 56.  
<sup>74</sup> Id.  
<sup>75</sup> Id.; Exh. 5, Tab GG.  
<sup>76</sup> Id.  
<sup>77</sup> Exh. 11 at 54.  
<sup>78</sup> Exh. 5, Tab GG.  
<sup>79</sup> Exh. 11 at 58.  
<sup>80</sup> See, e.g., Exh. 11, Appendix 3.  
<sup>81</sup> Exh. 11 at 70.  
<sup>82</sup> Id.; see also Exh. 10, Tab DDDDDD.  
<sup>83</sup> Exh. 11 at 72.  
<sup>84</sup> Id.  
<sup>85</sup> Id.  
<sup>86</sup> Exh 3, Tab C at 84.  
<sup>87</sup> Id.  
<sup>88</sup> Id. See also Exh. 3, Tab O.  
<sup>89</sup> Exh. 3, Tab C at 84.  
<sup>90</sup> Exh. 11 at 73.  
<sup>91</sup> Id.  
<sup>92</sup> Id.  
<sup>93</sup> Id. at 74.  
<sup>94</sup> Id. at 75.  
<sup>95</sup> Exh. 4, Tab W.  
<sup>96</sup> Id.  
<sup>97</sup> Exh. 3, Tab R at 433; see also Exh. 11 at 75.  
<sup>98</sup> Exh. 3, Tab R at 434.  
<sup>99</sup> Exh. 5, Tab II at 802. See also Exh. 6, Tabs NNN; OOO.  
<sup>100</sup> Exh. 8, Tab DDDDD.  
<sup>101</sup> Exh. 3, Tab C at 91.  
<sup>102</sup> Id. at 92.  
<sup>103</sup> Exh. 6, Tab OOO.  
<sup>104</sup> Exh. 11 at 77.  
<sup>105</sup> Id.  
<sup>106</sup> Id.

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107 Id.  
108 Exh. 3, Tab C at 92.  
109 Id. at 77.  
110 Id. at 78.  
111 Id. at 77-78.  
112 Id. at 94.  
113 Id.; see also Exh. 10, Tab SSSSS.  
114 Exh. 11 at 81.  
115 Exh. 3, Tab C at 96.  
116 Id.  
117 Id.  
118 See id.  
119 Id.  
120 Exh. 11 at 83.  
121 Id.  
122 Id.  
123 Id.  
124 Id.  
125 Id. at 86.  
126 Id.  
127 Id. at 85 n 260; see also Exh. 3, Tab C at 176.  
128 Exh. 3 Tab C at 176.  
129 Exh. 11 at 86.  
130 Id. at 440.  
131 Id.  
132 Exh. 3, Tab S. See also Exh. 5, Tab CC at 781.  
133 Exh. 11 at 440.  
134 Exh. 3, Tab C at 144; Exh. 11 at 87.  
135 Id.  
136 Id.  
137 Id.  
138 Exh. 11 at 87; Exh. 3, Tab C at 144.  
139 Exh. 11 at 87; see also Exh. 10, QQQQQ.  
140 Exh. 11 at 87; Exh. 3, Tab C at 144.  
141 Exh. 11 at 88; 446.  
142 Id. at 88.  
143 Exh. 3, Tab C at 145.  
144 Id. at 146.  
145 Exh. 11 at 91.  
146 Exh. 5, Tab KK.  
147 Id.  
148 Exh. 5, Tab LL.  
149 Id.  
150 Exh. 3, Tab C at 144.  
151 Id. at 151. (Emphasis added).  
152 Id. at 150.  
153 Id.  
154 Exh. 11 at 99.  
155 Exh. 3, Tab C at 156.  
156 Exh. 11 at 93; 446.  
157 Exh 10, QQQQQ.  
158 Exh. 3, Tab C; Exh. 11 at 451.  
159 Exh. 3, Tab C at 155.  
160 Id. at 156.  
161 Id. at 155.

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<sup>162</sup> Exh. 3, Tab C at 106; Exh. 11 at 453; see also Exh. 8, Tab CCCCC.  
<sup>163</sup> Exh. 11 at 453; Exh. 3, Tab C at 108.  
<sup>164</sup> Id.  
<sup>165</sup> Exh. 3, Tab C. at 109-10.  
<sup>166</sup> Id. at 57.  
<sup>167</sup> Id.  
<sup>168</sup> Exh. 7, Tab TTT; Exh. 11 at 9.  
<sup>169</sup> Exh. 7, Tab TTT.  
<sup>170</sup> See Exh. 8, Tab QQQQ.  
<sup>171</sup> Id.  
<sup>172</sup> Exh. 11 at 19.  
<sup>173</sup> See id. at 10; 127-432.  
<sup>174</sup> Exh. 11 at 433-453.  
<sup>175</sup> Exh. 3, Tab C.  
<sup>176</sup> Id.  
<sup>177</sup> See Exh. 4, Tab X.  
<sup>178</sup> Exh. 3, Tab M.  
<sup>179</sup> Id.  
<sup>180</sup> Id.  
<sup>181</sup> Id.  
<sup>182</sup> Exh. 3, Tab J.  
<sup>183</sup> Id.  
<sup>184</sup> Id.  
<sup>185</sup> Id.  
<sup>186</sup> Id.  
<sup>187</sup> Exh. 3, Tab I.  
<sup>188</sup> Exh. 6, Tab CCC.  
<sup>189</sup> Exh. 6, Tab DDD.  
<sup>190</sup> Exh. 6, Tab EEE.  
<sup>191</sup> Id.  
<sup>192</sup> Exh. 11 at 18.  
<sup>193</sup> Id.  
<sup>194</sup> Exh. 6, Tab FFF.  
<sup>195</sup> See Exh. 1.  
<sup>196</sup> Exh. 3, Tab M.  
<sup>197</sup> Exh. 3, Tab I.  
<sup>198</sup> See Exh. 5, Tab XX. See also Exh. 5, Tabs ZZ; AAA at 965.  
<sup>199</sup> See also Exh. 5, Tab ZZ.