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NO. 95-16779
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MARIA SISON AND JAIME PIOPONGCO,

Plaintiffs-Appellants,

vs .
ESTATE OF FERDINAND MARCOS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
OPENING BRIEF FOR PLAINTIFFS-APPELLANTS JOSE MARIA SISON AND JAIME PIOPONGCO

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STATUTES

MISCELLANEOUS

NO. 95-16779
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MARIA SISON AND JAIME PIOPONGCO,) CASE NO.: 95-16779
Plaintiffs-Appellants,) MDL NO. 840
) CASE NO. 86-9225
vs.) CASE NO. 87-0138
ESTATE OF FERDINAND MARCOS,)
Defendant-Appellee.)

STATEMENT OF JURISDICTION

1. The district court had jurisdiction in case no. 86-9225 under 28 U.S.C. § § 1331, 1350, 1367 and the Torture Victim Protection Act.

2. The district court had jurisdiction in case no. 87-0138 under 28 U.S.C. § 1331, 1332, 1367 and the Torture Victim Protection Act.

3. The final judgment in these cases was filed on August 11,1995 ER II 331. (1) Plaintiffs filed a timely Notice of Appeal on September 6, 1995. ER I 335. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF ISSUES

1. Whether a victim of torture must present separate evidence of damages in the damages phase of a bifurcated trial after a jury has rendered a liability verdict in his favor finding that he had been tortured, when no notice of this requirement was ever given by the district court and the court instructed the jury to consider evidence in all phases of the trial in assessing compensatory damages.

2. Whether the district court abused its discretion in denying appellant Sison's motion to reopen the trial to read portions of his liability phase testimony to the jury in the compensatory damages phase of the trial.

3. Whether the district court abused its discretion in denying appellant Sison's motion for a new trial.

4. Whether victims of cruel, inhuman or degrading treatment or punishment may sue for damages under § 28 U.S.C. §§ 1331, 1332 or 1350.

5. Whether the trial court erred in refusing to instruct the jury with respect to appellant Piopongco's state law claims brought pursuant to diversity jurisdiction.

6. Whether the district court erred in denying appellant Jose Maria Sison an award of nominal damages and a pro rata share of the exemplary damage award.

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

These cases were brought by three victims of torture, disappearance, summary execution, and prolonged arbitrary detention directed by late Philippine dictator Ferdinand Marcos. (2)The cases were filed in district court in Hawaii and served personally on Ferdinand Marcos in early 1986. After the death of Ferdinand Marco. on September 28, 1989, the Estate of Ferdinand Marcos, represented by Imelda Marcos and Ferdinand Marcos, Jr., was substituted as defendant.

In July 1986, the cases were dismissed based on the act of state doctrine. This Court reversed that decision in June 1989 and remanded the cases back to the district court. *Hilao v. Marcos,* 878 F.2d 1438 (9th Cir. 1989). In 1990 an application was made to consolidate all human rights cases before an MDL judge for pretrial proceedings. Judge Manuel Real, from the Central District of California, was assigned to preside over the consolidated class action and direct action cases. ER I 35.

Although the claims in the class action and direct action cases were similar, the complaints in the direct action cases raised additional legal claims, including claims of prolonged arbitrary detention, cruel, inhuman or degrading treatment or punishment, and a variety of state law claims. ER I 1, 24.

In July 1991, Judge Real granted class plaintiffs' request that the trial be bifurcated so that the processing of as many as 10,000 class damage claims would begin only after a liability verdict. ER I 37. The trial was later bifurcated and theexemplary damages phase of the trial was held before the compensatory damages phase. ER III 103.

The *Sison* and *Piopongco* cases went to trial with the class action in *Hilao v. Marcos*, 86-390, and two other direct action cases, *Ortigas v. Marcos*, C86-0975, and *Clemente v. Marcos*, C86-01449, in September 1992. At the end of the trial the jury rendered a liability verdict in favor of almost all of the plaintiffs in the consolidated cases. ER III 99-102. Separate verdicts were rendered in the class action and in the direct action cases.

The jury found defendant liable for the Jose Maria Sison's torture.(3)However, the trial judge did not allow his claim of cruel, inhuman and degrading treatment or punishment to go to the jury. ER III 61-62. Similarly, the jury rendered a liability verdict for plaintiff Jaime Piopongco for torture and prolonged arbitrary detention. However, the trial judge would not allow his claims for cruel, inhuman and degrading treatment or punishment, or his state law claims for assault, battery, intentional infliction of emotional distress, and intentional destruction of business to go to the jury. ER II 61-62.

The exemplary damages phase(4)of the trial was held in February 1994 before the same jury. ER III 103-166. After a one day trial, at which no new testimony about human rights abuses was introduced, the jury issued a $1.2 billion exemplary damages award.(5)ER III 162. The district court decided that this was to be an aggregate award to be divided pro rata among all class members and direct action plaintiffs. ER III 157.

The compensatory damages phase of the trial was held in January 1995 before the same jury. This phase was subdivided between the class action and direct action plaintiffs. The class action portion of the trial proceeded first and resulted in a verdict and a separate final judgment which was entered on February 3, 1995. CR 562, 568. The Estate's appeal from that judgment is pending before this Court in No. 95-15779.

The compensatory damages phase of the trial in the direct action cases took place on January 19 and 20, 1995, before the same jury. ER III 197-246. In the *Sison* and *Piopongco* cases the Estate of Francisco Sison received a jury verdict of $400,000.00 and appellant Jaime Piopongco received a jury verdict of $175,000. CR 566; ER II 389. The district court, on its own motion, would not allow the jury to render a verdict for appellant Sison, on the ground that he did not introduce any new evidence of his damages inthe damages phase of the trial. ER III 213-218, 222-227. The district court denied plaintiff Sison's request to reopen the proceedings to reintroduce his liability phase testimony and dismissed all of his claims.(6)Id.

After these verdicts the Estate and appellant Sison filed motions for a new trial. ER II 174-323. Sison's motion was denied. ER III 247-253. The district judge imposed remittiturs on the Estate of Francisco Sison and Jaime~ Piopongco requiring them to accept reduction of their jury verdicts to $100, 000 and $75,000, respectively, or the Estate's motion for a new trial would be granted. Id. These remittiturs were reluctantly accepted and a final judgment in the *Sison* and *Pioponaco* cases was filed on August 11, 1995. ER II 331.

The *Sison* and *Piopongco* appellants filed a timely Notice of Appeal on September 6, 1995. ER II 335. The Estate did not file a notice of appeal or a cross-appeal, thus the judgments in favor of the Estate of Francisco Sison and Jaime Piopongco are final. The Estate of Francisco Sison raises no issues in this appeal. Appellant Jaime Piopongco raises no issues relating to his judgment for torture and prolonged arbitrary detention. Appellant Piopongco raises issues only with respect to the two claims -- cruel, inhuman or degrading treatment or punishment, and his state law claims for assault, battery, intentional infliction of emotional distres andintentional destruction of his business -- that the district court would not allow the jury to decide.

Footnotes
(1) "ER I" and "ER II" refers to the first and second volumes of Appellants' Excerpts of Record which include relevant portions of the Clerk's Record ("CR"). "ER III" refers to the third volume of Appellants' Excerpts of Record which includes relevant portions of the Reporters Transcript. Return to Text
(2) The Estate of Francisco Sison was represented by family members Florentina Sison, Amelia Sison, Dr. Ramon Sison and Jose Maria Sison. Appellants make no claims in this appeal regarding issues relating to Francisco Sison. The judgment as to the Estate of Francisco Sison is final in all respects.Return to Text
(3) Appellant Sison and his wife Julietta Sison, who live in the Netherlands, testified in the liability phase of the trial by video tape deposition. ER III 13. The record of this testimony is the video tape deposition taken in Utrecht, the Netherlands, in January 1992 for trial purposes. ER II 204-320. The parties went through an extensive court-supervised process of designating and counter-designating portions of the deposition transcripts to be used at trial. CR 172, 254, 256, 259-270, 284.Return to Text
(4)The district court consistently used the term "phase" to describe the different parts of a single trial before the same jury. ER III 153, 187, 225, 239.Return to Text
(5)The only witness at the exemplary damages trial was an expert witness, Caesar Parlade, who testified about the amount of money in the Marcos Estate. ER III 107.Return to Text
(6)At the time of the January 1995 damages phase of the trial, plaintiff Sison's video testimony was physically with this Court for the February 1995, argument in *Hilao v. Estate of Marcos*, No 94-16739. ER II 203.Return to Text

B. FACTUAL BACKGROUND

Jose Maria Sison, was a leading opponent of the Marcos regime. He was arrested in 1977; immediately thereafter Marcos personally interrogated him. ER II 228-230. He was then subjected to water torture and other extreme physical abuse including several days of beatings. ER II 237-244. This was followed by a seven month period during which he was manacled continuously by one hand and one foot to a cot, denied the use of his eye glasses, and confined in a small, suffocatingly hot room with no natural light. ER II 246-253, 260-261. He was allowed neither exercise nor reading materials, and was not told how long these conditions would continue. ER II 248, 251-251. He spent the rest of his eight-and-a-half year detention in solitary or near solitary confinement. ER II 256.

Jaime Piopongco was politically active in the Liberal Party and owned a radio station. Immediately after the declaration of martial law, agents of Marcos searched Piopongco's home and closed and destroyed his radio station. ER III 17, 26-27. Piopongco hid until he was arrested in November 1972. ER III 31-42. After initially being detained in Camp Crame, he was taken to Malacanang where he was held incommunicado, interrogated by high ranking military officials, and subjected to mock executions. ER III 2324, 34-44. He was then transferred to Camp Crame where he faced a death threat. ER III 45-46. In late December he was released, but was informed the next day that his release had been "countermanded by the President" and he was placed under house arrest. ER III 49. Although Piopongco was never charged or tried, he remained under armed surveillance in his own home for more than four and one-half years. ER I7I 26. During that time he was required to report on a weekly basis to a military officer; each time he did so the officer threatened him. ER III 49. In addition, he was required to feed and house the guards' assigned to his home, and endured social isolation and humiliation on account of the

guards presence. ER III 25, 51.

SUMMARY OF ARGUMENT

This appeal addresses a few discrete issues arising out of the *Sison v. Marcos* and *Piopongco v. Marcos* cases in the context of a consolidated trial of a human rights action involving nearly 10~000 torture, disappearance, and summary execution victims of Ferdinand Marcos.

Appellant Sison appeals from the inexplicable *sue sponte* dismissal of his torture claims by the district court at the very end of this litigation because Sison introduced no, new evidence of damages in the compensatory damage phase of this bifurcated trial. As the district court put it in dismissing Sison's damage claim, "some people can be tortured and not have any damage at all." ER III 224. This bizarre logic has no place or foundation in our jurisprudence.

Appellant Sison testified at length in the liability phase of the trial about his brutal torture directed by Marcos. The jury found that he had suffered severe pain and suffering when it rendered a liability verdict in his favor. Yet, Sison was denied the opportunity to have the jury award him damages for that pain and suffering. The grounds for this arbitrary and groundless decision remain as much a mystery today as they were when the district court took Sison's claims from the jury.

Appellants also seek to overturn the district court's refusal to allow the jury to decide their claims that they were subjected to cruel, inhuman or degrading treatment or punishment. The district court erred when it found that this customary international law norm was too "vague" to be enforced. The customary law prohibition against cruel, inhuman or degrading treatment or punishment is universally accepted, and the conduct appellants complained of is at the core of this international law prohibition.

Appellant Piopongco also appeals from the district court's refusal to allow the jury to decide his state law claims for assault, battery, intentional infliction of emotional distress, and intentional destruction of property. The district court refused to allow these claims to go to the jury because they were not international law violations. However, as a United States citizen Piopongco brought these claims under diversity jurisdiction and the district court erred in dismissing them.

Finally, appellant Sison appeals from the district court's denial of his claim for nominal damages and a share of the February 1994 exemplary damage award. Sison was entitled to at least nominal damages based on the jury's liability verdict.

STANDARD OF REVIEW

The issues in this appeal, with two exceptions, present questions of law for which the standard of review is *de novo*. *See, e.g., Doe v. Petaluma City School District,* 54 F.3d 1447, 1449 (9th Cir. 1995); *Vollrath Co. v. Sammi Corp*. 9 F.2d 1455, 1459 (9th Cir. 1993). Whether the

district court erred in denying appellant Sison's motions to reopen the trial and for a new trial are reviewed under an abuse of discretion standard. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research. Inc.*, 401 U.S. 321 (1971)*; Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990).

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT DISMISSED APPELLANT JOSE MARIA SISON'S CLAIMS FOR DAMAGES AT THE END OF THE COMPENSATORY DAMAGES PHASE OF THE TRIAL.

A. Factual and Procedural Background.

In the liability phase of the trial, the jury concluded that appellant Sison was subjected to torture and therefore suffered severe pain and suffering. (7)The record of that phase of the trial is replete with uncontested evidence to substantiate that finding. ER II 233-275. Sison testified that during interrogation on November 13, 1977, while he was blindfolded and shackled, he was subjected to excruciatingly painful fist blows to the upper part of his chest and on his floating ribs and solar plexus. The uncertainty as to where the blows would land, coupled with death threats and threats to bump his head against the wall, added to the pain. ER II 234-238. After the beatings, his four limbs were manacled to the metal frame of a cot. Guards who stood watch over him during the night prevented him from sleeping and threatened him repeatedly with death. ER II 240. The following day, while he was still manacled to the cot, a face towel was put over his nose and mouth and water was poured into his nostrils. At the same time he was threatened with death and electric shock torture. Sison testified that during the six hours of this "water cure" torture, he felt as though he were drowning. ER II 241-243.

Even after the water cure torture stopped, Sison remained in isolation, manacled to the cot by his limbs, in a small boarded up cell with no natural light for 18 months. ER II 244-246. For the first four months, he was allowed no exercise, no access to sunlight, no use of his eyeglasses, no visitors, and no reading materials. He testified that during this period he felt "extreme pain, almost undescribable, the boredom and this is a feeling that would persist for so long as I was in that cell. The feeling that tons of lead would -- were falling on my brain." ER II 250-252, 261.

He testified that this was the worst part of his detention, because "there was combination of psychological and built-in physical torture, but the main thing was psychological. " ER II 258. There were times I think it would be better I was dead. That's how extreme the punishment was. n ER II 259. Throughout that period he never knew how long the torture would continue, and he feared it would last until he went mad or died. ER II 260.

Except for a two year period from 1980 until 1982, when his wife was held in his cell with

him, Sison was held in solitary confinement until his release in 1986. ER II 254-256. While in custody he endured physical pain and suffering including wounds from handcuffs that were so tight that the metal would cut his flesh with the slightest movement, headaches as a result of the denial of the use of his eyeglasses, inadequately treated lung congestion, and suffering as a result of extreme temperature shifts in his cell and the prison's failure to provide him with blankets during the cold winter months. ER II 251, 261-263. He also suffered nightmares and muscle atrophy caused by his torture. ER 257.

When the compensatory damages phase of the trial in the direct action cases began on January 19, 1995, ER III 197. appellant Sison's counsel made it clear in his opening statement that no additional evidence of appellant Sison's damages would be introduced in this phase of the trial. ER III 199. ("In the case of Jose Maria Sison we will not present any new testimony in this phase of the trial."). Neither defense counsel nor the court made any comment or objection in response.

At the end of plaintiffs' case, the defendant put on no evidence and made no post-trial motions. However, the district judge, on its own motion, "suddenly dismissed appellant Sison's case on the ground that Sison did not introduce any damages evidence in this phase of the trial. ER III 213.

The district court seemed to have believed that Sison had testified in person in the liability phase of the trial and that the Estate might be disadvantaged by his non-appearance in this phase. ER III 246. However, Sison had previously testified by video deposition and the Estate had always been free to introduce any portion of the deposition transcript it chose in its case. ER II 277-310. Defendant at no time claimed any prejudice.

The district court took the position that Sison was required to introduce new evidence of his damages in the compensatory damages phase of the trial. The court never indicated what rule or order it believed appellant had violated in relying solely on his liability phase on his testimony of severe pain and suffering in support of his claim for damages. Though the district court later stated that there was no confusion in the court's mind about such requirements, ER III 248, the court never shared these requirements with the litigants. Furthermore, the court never explained the contradiction between its ruling dismissing Sison and damage claims and its instructions to the jury(8)that it should consider liability phase testimony in rendering its compensatory damage awards. (9)

(7)The jury instruction defining torture in the liability phase read as follows: Torture means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering ... whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.... (emphasis added). ER III 88-89.Return to Text

(8)This instruction was also given in the exemplary damage phase of the trial, ER III 154, and at the end of the class action segment of the compensatory damages phase of the trial. ER III 239.Return to Text

(9)The denial of Sison's motions to reopen the trial and for a new trial are discussed in 5' II and III, infra.Return to Text

B. There Was Ample Evidence To Support A Substantial Award Of Compensatory Damages To Appellant Sison For His Severe Pain and Suffering.

During the liability phase of his trial appellant Sison introduced overwhelming testimony of brutal physical and psychological torture. His testimony amply supported the jury's verdict that he had been subjected to "severe pain and suffering." In the compensatory damages phase of the trial, Sison sought no special damages.(10)He sought only compensation for his severe pain and suffering as presented to the same jury at the September 1992 liability trial, no more, no less

In support of its ruling, the district court made the remarkable statement that "some people can be tortured and not have any damage at all." ER III 224. This callous statement underscores the absurdity of the district court's decision to dismiss appellant Sison's claims. Simply put, it is impossible, logically, legally and as a matter of human experience, for a person to be tortured and not suffer any damages. The very definition of torture requires a plaintiff to demonstrate that they have suffered *severe pain and suffering*. Thus, the district court erred as a matter of law in dismissing, *sue sponte*, appellant Sison's claims.

C. Appellant Sison Was Not Required To Reintroduce His Liability Phase Testimony In The Compensatory Damages Phase Of The Trial Before The Same Jury.

The district court *never* disclosed to the parties that they were taking part in three completely "separate and unconnected trials. Moreover, the entire conduct of all of these proceedings before the same jury over a period of more than two and a half years was at odds with the decision the district court made to dismiss Sison's claims. Indeed, the court's instructions to the jury throughout post-liability phase proceedings were that the jury was to consider evidence introduced at all phases of the trial in determining damages.

Trying these cases in three phases was presumably done pursuant to Rule 42(b) of the Federal Rules of Civil Procedure. However, there is no requirement in F.R.C.P 42(b) that evidence admitted in one phase of a bifurcated trial must be readmitted formally in another phase of that trial. The rationale for bifurcation is to "further convenience, avoid prejudice, or be conducive to expedition and economy." *See Magna Pictures Corp. v. Paramount Pictures Corp*. 265 F. SUPP. 144, 153 (C.D. Cal. 1967) Thus, where liability and damages are to be tried in separate proceedings, it is preferable to conduct both phases before the same jury, as that is "the more expeditious, economical and less time-consuming procedure." *See O'Donnell v. Watson Bros. Transp.. Co.* 183 F. Supp. 577 (D.C. Ill. 1960). The main reason that it is more expeditious for the same jury to determine both liability and damages is that evidence heard in the first phase does not have to be repeated in the second. This was especially so in this case where the district court's instructions to the jury were unequivocal; in determining damages, the jury was to "*consider all evidence from the trial on liability as well as evidence that you have heard during the compensatory damages phase of the direct action case*. n ER III 239. (emphasis added) This was the consistent rule in this case, and appellant Sison's reliance on his liability phase testimony of his severe pain and suffering in support of his claim for compensatory damages was fully in accord with that rule.

This is no doubt why defendants did not object to Sison's reliance on his prior testimony. Indeed, the defendant never made a motion or argument that Sison's claims should be dismissed. ER III 213-227. All of the plaintiffs relied on the evidence introduced in the liability phase of the trial, without formal reintroduction, during the exemplary damages phase of the trial in February 1994. ER III 103-161. During the compensatory damages phase, class counsel specifically relied on liability phase exhibits and testimony, including testimony introduced by the *Sison/Piocongco* plaintiffs. ER III 115-143. That reliance is further evidence of the common understanding of all counsel and the court that liability phase testimony and exhibits were in evidence during the subsequent phases of the trial.

Courts generally disfavor bifurcation in cases such as this, in which issues of liability and damages are "so interwoven that [they] cannot be submitted to the jury ... without confusion and uncertainty which would amount to a denial of a fair trial."(11)United*Airlines Inc. v. Wiener*, 286 F. 2d 302, 305 (9th Cir.), cert. denied, 366 U.S. 924 (1961). Bifurcation in such cases "must be grounded upon a clear understanding between the court and councel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next." *United States Gypsum Co. v. Schievo Bros*. 668 F.2d 172, 181 (3d Cir. 1981), *cert denied*, 456 U.S. 961 (1982), (*citing Response of Carolina Inc. v. Leasco Response. Inc*. 537 F.2d 1307, 1324 (5th Cir. 1976)).

Prior to January 1995, the district court issued no orders requiring that admitted liability phase testimony or exhibits be reintroduced in the compensatory damages phase of the trial. None of the plaintiffs identified exhibits or testimony from the earlier phases of the trial in their witness or exhibit lists for the compensatory damages phase. In the class' compensatory damages hearing, plaintiffs made no written or oral motion to reintroduce liability phase testimony. ER III 171, 182. The jury instructions given in the compensatory damage phase in both the class and the direct action plaintiffs expressly directed the jury's attention to evidence received at the earlier liability phases. ER III 186-187(12)The fact

The fact that the evidence of Sison's damages for pain and suffering was presented at the liability phase provided no basis for the district court to require, without notice, that testimony from the liability phase to be formally reintroduced in the compensatory damages phase. There is no precedent in the case law, no applicable rules of procedure, no: any order of the district court supporting this requirement.

D. The Court's Ruling To Take Appellant Sison's Damage Claims From The Jury Was Fundamentally Unfair And Violated Sison's Right To Due Process And His Right To A Trial By Jury.

Sison made clear in their opening argument that they did not intend to repeat evidence already submitted to the jury in the liability phase and that no additional evidence of damages would be introduced at the compensatory damages phase of the trial. ER III 199. Nonetheless, the court waited until after the direct action plaintiffs had rested before informing counsel that new evidence of damages must be produced in the compensatory damages phase of the trial. The court's failure to inform counsel before they rested of its previously undisclosed requirement that testimony be reintroduced was fundamentally unfair. *See Response of Carolina. Inc. supra*, 537 F.2d at 1324 (bifurcation of liability and damage phases must be grounded in a clear understanding of what proof will pass from one phase to the next).

Due process protections apply with full force to non-resident alien parties in litigation before United States courts. *Asahi Metal Industries Co. v. Superior Court*, 480 U.S. 102 (1987). It is a fundamental principle of due process that litigants should be informed of the rules at trial before they are applied. There was no notice in any ruling, court decision or prior court order that liability phase testimony had to be reintroduced into the compensatory damage phase to be considered

by the jury. All of the court's prior actions had been to the contrary. This *sua sponte* ruling violated appellant Sison's due process rights and his right to have the jury decide his damage claims.

(10)Sison waived such damages explicitly at his January 1992 deposition.Return to Text
(11) In this case, had the trial of the *Sison and Piopongco* plaintiffs' claims not been consolidated with those of the class, there would have been no need for the bifurcation of the liability and damages phases and the jury could have issued damage awards based on the testimony in the first phase.Bifurcation would have been contrary to the court's interest in judicial efficiency. Bifurcation was ordered exclusively to deal with issues arising in the class action concerning the manner in which individual class damage claims would be processed before and during trialReturn to Text
(12)("The evidence from which you are to decide, the facts consists of sworn testimony of the witnesses both on direct and cross-examination, regardless of who called the witnesses, *in the entire three stages of this trial*... " (emphasis added)).Return to Text

II.

THE DISTRICT COURT ERRED IN REFUSING TO REOPEN THE TRIAL SO THAT APPELLANT SISON COULD REINTRODUCE HIS LIABILITY PHASE TESTIMONY IN SUPPORT OF HIS DAMAGE CLAIM.

A. Procedural Background.

As soon as the district court dismissed appellant Sison's claims, appellant's counsel immediately made a motion to reopen the trial to read to the jury portions of Sison's liability phase testimony. ER III 216, 227-228. This motion came at the end of the first and only day of trial. All plaintiffs had rested, and the Estate rested without calling any witnesses.

The district court asked Sison's counsel to deliver the excerpts of the deposition testimony Sison wished to read the court's clerk and opposing counsel that night. ER III 218. This was promptly accomplished. ER II 201-203. The Estate raised no objection to Sison's designation of trial testimony, nor did it file or state any objection to Sison's motion. ER III 214-227.

The following morning the district court denied the motion. ER III 227-228.

B. The Applicable Standard.

The denial of a motion to reopen is reviewed for an abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research. Inc.*, 401 U.S. 321, 331 (1971). Though the criteria guiding a trial court's discretion are flexible, it is an abuse of discretion if refusal to reopen works an "injustice" in a particular case. *Rivera-Flores v. Puerto Rico Telephone Co.*, 64 F.3d 742, 746 (1st Cir. 1995).

The material factors that should be considered by the trial court are whether (1) the evidence

sought to be introduced is especially important and probative; (2) the moving party's explanation for failing to introduce the evidence is bona fide; and (3) reopening will cause no undue prejudice to the nonmoving party. *Id. See also*, *Joseph v. Terminx Int'l Co*., 17 F.3d 1282, 1285 (lOth Cir. 1994). *See generally*, 5A James W. Moore, Moore's Federal Practice, 59. 04[13], at 59-33 (2d.ed 1993).

C. The Standard Applied.

1. Importance of Evidence.

The evidence at issue here was vital. If the motion had been granted it is certain that Sison would have received a substantial damage award. The denial of the motion led to the dismissal of all of Sison's claims after a decade of litigation.

2. Bona Fide Explanation.

Courts have recognized that it may amount to an abuse of discretion for a trial court to decline to reopen where the moving party has demonstrated "reasonably genuine surprise." *Air Et Chaleur. S.A. v. Eliot Janway,* 757 F.2d 489, 495, (2nd Cir. 1985); *see also, Bivera-Flores, supra*, 64 F.3d at 746.

In this case, Sison's counsel was genuinely astonished by the trial court's ruling. On January 10, 1995, the trial court had instructed the same jury in the class action compensatory damage phase of the trial to consider all liability phase testimony in its deliberations. ER III 186-187. It similarly had done so in the February 1994 exemplary damages phase. ER III 154. No order or statement of the court had ever indicated a different rule. Indeed, Sison's counsel was entitled to rely on this established practice and to rely on Sison's extensive liability phase testimony about his suffering in support of his damages claim, just as he had done in exemplary damages phase. ER III 136-139. Even if Sison's counsel was in error, there can be no doubt that the court's ruling came as a "genuine surprise." At a minimum, the district court's procedures were extremely confusing and inconsistent.

3. Prejudice To Non-Moving Party.

Sison's motion came minutes after all plaintiffs and the Estate rested their cases. ER III 213. The motion came before the jury had been instructed or began its deliberations.

Sison proposed to read approximately 30 minutes of his liability phase testimony and no new testimony. This testimony had already been heard by the jury and was subject to cross-examination previously. The Estate had the ability to introduce any portions of Sison's trial deposition in response to this testimony. The issue in the liability phase -- whether Sison had been subjected to "severe pain and suffering" was the same issue before the jury in the compensatory damages phase of the trial.

At no point did the Estate argue that it would be prejudiced in any way or argue against Sison's motion. This is because there was utterly no possibility of prejudice of the defendant in these circumstances.

In addition, granting Sison's motion would have entailed minimal delay. The proposed testimony was made available to the Estate's lawyers on the same night and was already well known to them. *See, Capital Maine Supply. Inc. v. M/V Roland Thomas*, 719 F.2d 104, 107 (5th Cir. 1983) (no abuse of discretion in granting motion to reopen "where the missing testimony can be made available without undue delay."); *see also, Rivera-Flores*, 64 F.3d at 748.

The district court expressed concern that liability phase testimony might come in without an opportunity for the defendant to cross-examine. ER III 214.(13)But defendant had already cross-examined Sison in two separate depositions knowing that Sison would testify by video tape deposition at trial. Thus, defendant was free to introduce admissible portions of its cross-examination of plaintiff Sison concerning his claims that he suffered severe pain and suffering in both the liability and compensatory damages phase of the trial. Defendant neither suffered nor complained of any such prejudice before this Court's *sua sponte* sua sponte ruling. There is absolutely no basis for any finding of prejudice to defendant.

4. The "Injustice" to Sison.

By January 1995, Appellant Sison had been a plaintiff in this action for nearly nine years. He had won a jury verdict that Ferdinand Marcos was responsible for his barbaric torture. His testimony was an important basis for the exemplary damages verdict. The district court's refusal to reopen the case so that testimony already in evidence could be presented to the jury wiped out everything that plaintiff Sison had accomplished in this action and left him with nothing.(14)The dismissal

of appellant Sison's claims is a paradigm of injustice and this Court should restore Appellant Sison's liability verdict and allow a new jury to render justice by returning a compensatory damages judgment based on Sison's liability phase testimony of his excruciating pain and suffering caused by Ferdinand Marcos.

III.

APPELLANT SIS0N'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

Sison filed a motion for a new trial in response to the dismissal of his claims. This motion was denied on April 24, 1995. The district court declined to address the points made in Sison's motion other than to state that the requirement to present new damages testimony had been clear to the court. ER III 248.

A motion for a new trial invokes the sound judicial discretion of the trial court. *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1452 (9th Cir. 1988). A trial court "has discretion to grant a new trial.... to prevent ... a miscarriage of justice." *Rattray v. National City*, 51 F.3d 793, 800 (9th Cir. 1994), *citing Roy v. Volkswagon. Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990).

For all of the reasons set forth above, the dismissal of plaintiff Sison's claims was a miscarriage of justice. It was an abuse of discretion for the district court not to grant plaintiff's motion for a new trial on damages.

(13)It is possible that the district court made this comment based on its erroneous recollections that appellant Sison had testified in person at the liability phase of the trial. ER III 218 ("my recollection is Mr. Sison appeared at that time.")Return to Text
(14)In denying Sison's request to read certain portions of his prior testimony, the court appeared to insist that Sison play his video tape liability testimony to the jury in precisely the same form that it was earlier presented as a condition of reopening plaintiff Sison's case. It was impossible for plaintiff to meet this odd requirement because, as a result of a collateral appeal, the original videotape was no longer in the court's files, having been sent to the this court for a February 1995 argument in a related appeal. See note 6, supra.Return to Text

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS FOR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT ON THE GROUND THAT SUCH CLAIMS WERE TOO VAGUE.

A. Introduction.

In their complaints, appellants Jose Maria Sison and Jaime Piopongco alleged claims for cruel, inhuman or degrading treatment or punishment in violation of international. ER I l, 24. Evidence in support of these claims was presented at trial. The District Court refused to instruct the jury with respect to plaintiffs' claims of cruel, inhuman or degrading treatment or punishment on the ground that the concept is "too vague." Instead, the jury was instructed to issue a general verdict in each plaintiff's favor only if it found defendant liable for his torture, summary execution, disappearance, or prolonged arbitrary detention.ER III 83-95. The jury found for both plaintiffs and against the defendant. ER I 152A. But it did not specify which acts of defendant were torture and which were cruel, inhuman or degrading treatment or punishment and thus outside the scope of deliberation.

The district court erred in refusing to submit plaintiffs' claims for cruel, inhuman or degrading treatment or punishment to the jury. Cruel, inhuman or degrading treatment or punishment not only violates customary international law, but such claims are enforceable by victims of such conduct in that cruel, inhuman or degrading treatment or punishment is sufficiently "specific, universal and obligatory" to be judicially recognizable in light of the specific circumstances of a particular case. *Hilao v. Marcos* 25 F. 3d 1467, 1475 (9th Cir. 1994)

B. Cruel. Inhuman, Or Degrading Treatment or Punishment Is Prohibited Under Customary International Law.

Numerous United States courts have recognized that both torture and cruel, inhuman or degrading treatment or punishment violate customary international law. *Filartiga v. Peha Irala*, 630 F. 2d 876, 890 (2d. Cir. 1980); *Tel Oren v. LibYan Arab Republic*, 726 F.2d 7,4, 781 tD.C.Cir. 1984)(Edwards, J. concurring); *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F. 2d 1385, 1397 (5th Cir. 1985); *Paul v. Avril*, 901 F.Sup. 330 tS.D. Fla. 1994); *Xuncax v. Gramajo*,

886 F. Supp. 162, 386 (D. Mass., 1995). In reaching that conclusion, U.S. courts have drawn heavily on international and regional human rights treaties and agreements that uniformly link the two forms of ill-treatment and prohibit both equally.

The political branches of our government have similarly recognized the international law norm prohibiting cruel, inhuman or degrading treatment or punishment. In its ratification of the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States consciously bound itself to prevent cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction.

C. Cruel, Inhuman Or Degrading Treatment or Punishment Is Sufficiently "specific, Universal And Obligatory" To Be Actionable In United States Courts.

The sheer number of treaties prohibiting cruel, inhuman or degrading treatment or punishment, coupled with their broad ratification by countries in all regions of the world, attests to the universality of the prohibition. The treaties also establish that the norm is obligatory. While many human rights treaties make some provision for derogation from the obligations they impose in time of public emergency that threatens the life of the nation, all those that do specifically exclude from derogation the prohibition against cruel, inhuman or degrading treatment or punishment.

During the process of United States ratification of both the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Executive Branch and the Senate took pains to demonstrate that cruel, inhuman or degrading treatment or punishment does not defy definition. Parallel reservations to both treaties provide:

That the United States considers itself bound by [the prohibition against cruel, inhuman or degrading treatment or punishment] to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth amendments to the Constitution of the United States.
S. Exec. Report (Sen.) 101-30 101st Cong., 2d Sess. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 13 (1990); 138 Cong. Rec. S. 4781, S4783 (Sept. 1992). This reservation reveals the political branches understanding that, to the same extent that these core constitutional provisions are clear and precise in their meaning, so to is the norm agains cruel, inhuman or degrading treatment or punishment.

United States courts have differed over whether the prohibition against cruel, inhuman or degrading treatment or punishment committed abroad is sufficiently specific -- or definable -- to be actionable here. In *Forti v. Suarez Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988) the district court concluded that because international law provides no universally recognized definition, the norm is not actionable under the Alien Tort Statute. On the other hand, in *Xuncax*, 886 F. Supp. at 187, the district court wrote:

It is not necessary that every aspect of what might comprise a standard such as "cruel, inhuman or degrading treatment" be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute "torture" or "arbitrary detention" in order to

recognize certain conduct as actionable misconduct under that rubric. Accordingly, any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of cruel, inhuman or degrading treatment' and is actionable before this Court under Section 1350.
This court should adopt that the holding in *Xuncax v. Gramajo* is the proper one.

1. The Cruel, Inhuman or Degrading Treatment Or Punishment Alleged In This Case Is At Least As Specific As Illtreatment Or Punishment That Violates The Fifth, Eighth, Or Fourteenth Amendments Of The United States Constitution.

While plaintiffs did not plead violations of the United States Constitution, had the cruel, inhuman and degrading treatment they allege been perpetrated by United States officials it would have violated constitutional due process provisions.

Like the international norm, the United States Constitution's Eighth Amendment prohibition against cruel and usual punishment has never been precisely defined.Yet that has not prevented the Supreme Court from examining, in over 100 cases, whether cruel and unusual punishment has been inflicted. Vold, *supra*, n. 21 at n.108.

Eighth Amendment protections against cruel and unusual punishment spply only after a person has been convicted of a crime. *Ingraham v. Wright*, 430 U.S. 651 (1977). However, substantive due process protections against cruel and unusual treatment under the Fifth and Fourteenth Amendments come into play whenever government action, in and of itself, is "egregiously unacceptable, outrageous, or conscience-shocking." *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990). In the case of persons who have been arrested, the Supreme Court has held that their due process rights are "at least as great as the Eighth Amendment protections available to a convicted person." *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983).

In this case plaintiffs suffered cruel, inhuman and degrading treatment throughout years of custody, during which neither was convicted of a crime. Their mistreatment was egregiously unacceptable, outrageous and conscience-shocking by any objective standard, and surpassed, by far, every threshold established by the Supreme Court for Eighth Amendment violations.

Moreover, plaintiffs uncontestedly demonstrated that Marcos, acting under color of law, either directed or conspired with Philippine military forces to mistreat them, or had knowledge that Philippine military forces were mistreating them but failed to take effective measures to prevent the mistreatment from occurring. Defendant's conduct thus met the most stringent subjective requirement ever set by the Supreme Court in assessing whether cruel and unusual punishment has been inflicted: "malicious and sadistic conduct for the purpose of causing harm." *Hudson*, 503 U.S. at 10.

Thus, had plaintiffs suffered similar mistreatment in the United States, brought their claims under the U.S. Constitution, and offered the level of proof provided in this case, no court in the land would have refused to submit their claims to a jury, nor, plaintiffs submit, would any jury have rejected them.

2. International Bodies Have Similarly Found Cruel, Inhuman Or Degrading Treatment Or Punishment In Cases Involving Circumstances Far Less Egregious Than Those Suffered By Plaintiffs.

The lack of a precise definition of cruel, inhuman or degrading treatment or punishment similarly has not prevented international courts or treaty bodies from recognizing such conduct in the context of specific circumstances. *See e.g., Ireland v. United Kingdom,* 25 Eur. Ct. H.R. (ser. A.) 41 (1978). As the Human Rights Committee established to monitor compliance with the International Covenant on Civil and Political Rights stated in its recent General Comment on Article 7 of that treaty, "The Covenant does not contain any definition of [torture or cruel, inhuman or degrading treatment or punishment] nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment and treatment; the distinctions depend on the nature, purpose and severity of the treatment applied." GAOR, 47 Sess. Supp. No. 40 (A/47/40), annex VI.A, General Comment 20 (44) (art. 7), 1992.

On the other hand, international bodies have been very clear about what types of conduct fall within the parameters of cruel, inhuman or degrading treatment or punishment. Thus, in *The Greek Case*, the European Commission on Human Rights indicated its view that "torture" comprises inhuman and degrading treatment and "inhuman treatment" comprises degrading treatment. Inhuman treatment is defined as "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable." 12 YB of Eur. Conv. on H.R., *The Greek Case*, at 186 (1969) Treatment or punishment of an individual is degrading "if it grossly humiliates him before others or drives him to act against his will or conscience." *(Id.)*

The cruel, inhuman or degrading treatment that plaintiffs have proven in this case is at least as egregious, if not more egregious, than that found by international bodies to amount to cruel, inhuman or degrading treatment or punishment. For example, in *Albert Womah Mukong v. Cameroon*, Report of the HR Comm. Vol. I, GAOR 49th Sess., Supp. 40 (A/49/40), 1992, p. 73, 180. The Human Rights Committee found that:

quite apart from the general conditions of detention, the author has been singled out for exceptionally harsh and degrading treatment. Thus, he was kept detained incommunicado, was threatened with torture and death and intimidated, deprived of food, and kept locked in his cell for several days on end without the possibility of recreation.... In view of the above, the Committee finds that Mr. Mukong has been subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant."
Id. para. 9.4. In *Bouton v. Uruguay*, Report of the HR Comm., GAOR. 36th Sess., Supp. No. 40 (A/36/40) Annex XIV, 1981, para. 13, the Human Rights Committee found inhuman and degrading treatment in a case in which the evidence consisted, *inter alia*, of the statement that "she was forced to stand for 35 hours, with minor interruptions; that her wrists were bound with a strip of coarse cloth which hurt her and that her eyes were continuously kept bandaged. During day and night she could hear the cries of other detainees being tortured. During interrogation she was allegedly threatened with "more effective way. than conventional torture to make her talk.. *Id*., para. 2.3.

Because defendants conduct with respect to appellants Sison and Piopongco would clearly violate the Fifth , Sixth and Fourteenth Amendments of the United States Constitution, and because it was at least at egregious as the conduct found by international bodies to violate international law prohibitions against cruel, inhuman or degrading treatment or punishment, the district court erred in refusing to submit these claims to the jury.

15. Jose Maria Sison testified that he was detained in isolation, manacled to a cot by his limbs, in a small boarded up cell with no natural light for 18 months. ER 246-248. For four months, he was allowed no exercise, no access to sunlight, no use of his eyeglasses, no visitors,

and no reading materials. ER II 250-252, 261. Throughout that period he never knew how long the ill-treatment would last. ER II 260. In addition, he was held in solitary confinement for approximately five and one-half years. Throughout his detention he endured extreme temperature shifts in his cell and the prison's failure to provide him with blankets during the cold winter months. ER III 251, 261-263.
Jaime Piopongco presented evidence that he was held incommunicado in Malacanang Palace for seven days. ER II 23-24, 38. After he was taken back to Camp Crame, guards trained a machine gun on him and other prisoners following radio reports of an assault on Imelda Marcos. He feared that if Mrs. Marcos died, the prisoners would be fired upon. ER III 45-46. After his release into house arrest, he was repeatedly threatened by the military officer to whom he had to report. ER III 49-50. During more than four and one-half years of house arrest, he had to house and feed his guards and he faced humiliation and was shunned by friends and relatives. ER III 25, 51-52.

16. Specifically, the Court reasoned that such treatment is: "too vague because of the things that the Restatement tof Foreign Relations Law of the United States, Third] talks about is gross matters and I don't know how anybody is going to define gross in that respect because gross, by definition, at least in Webster's Dictionary, means glaringly noticeable because of inexcusable badness or objectionableness,now I don't know what that means. That's just too vague a measure." ER III 61. This line of reasoning misconstrues the Restatement. The Restatement specifically lists categories of acts that violate customary international law. Sec. 702 (Customary International Law of Human Rights) provides that a state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights. (emp. added). "Cruel, inhuman, and degrading treatment" and "a consistent pattern gross violations of internationally recognized human rights" are wholly separate and distinct categories. The "vagueness" of the latter is of no bearing in determining the justiciability of the former.

17. *See, e.g*, Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71, art. 5; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force, Mar. 23, 1976, G.A. Res. 2200, 21 Un GAOR Sup. (No. 16), at 52, U.N. Dec. 1/6316 (1966), 999 U.N.T.S. 171, art. 7; the Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 9 Dec. 1975, G. A. Res. 3452 (XXX), 30 U.N. GAOR Supp. (No. 34), U.N. Dec. A/1034, at 91 (1975); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, entered into force, June 28, 1987, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51, at 197 (1984); American Convention on Human Rights, signed Nov. 22, 1969, entered into force, July 18, 1g78, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doe. 21, rev. 6, art. 5(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1g50, entered into force, Sept. 3, lg53, 313 U.N.T.S. 222, art. 3; African Charter on Human and Peoples' Rights, adopted June 27, 1981, entered into force, Oct. 21, 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, art. 5.

18. *See, e.g.*, in the *Hostages Case* (U.S. v. Iran), 1980 I.C.J. 3, the Executive Branch invoked the international law prohibition against cruel, inhuman or degrading treatment or punishment in its case against Iran for taking hostage U.S. embassy personnel. U.S. foreign assistance legislation prohibits certain types of U.S. aid to countries that engage in cruel, inhuman or degrading treatment or punishment. *See, e.g.*, 22 U.S.C.Section 262d(a)(1); 22 U.S.C. Section 2304(d)(1).

19. As of January 1, 1995, 129 countries had ratified the International Covenant on Civil and Political Rights and 85 had ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment. An even higher percentage of countries eligible to do so

have ratified the three regional conventions. Jean-Bernard Marie, *International Instruments Relating to Human Rights: Classification and status of ratifications as of 1 January 1995*, 16 Human Rights Law Journal 80-83 (1995).

20. *See e.g.* , International Covenant on Civil and Political Rights, art. 4(2); European Convention on Human Rights and Fundamental Freedoms, art. 14; American Convention on Human Rights, art. 27. See also Body of Principles for the Protection of All Person under Any Form of Detention or Imprisonment, Principle 6, G.A. Res. 43tl73, 43 U.N. GAOR Supp. (No. 49), U.N. Doc. A/43t49, at 297 (1988)(-No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.")

21. In this legislative report on the treaty, the Senate explained the relationship between torture and cruel, inhuman or degrading treatment or punishment: "Torture is at the extreme end of cruel, inhuman or degrading treatment." *Id*.

22. Indeed, this was recognized by the Framers, who expressed concern about its vagueness during the drafting process, but were nonetheless determined to check unfettered government power to punish. See Jonathan A. Vold, "*The Eighth Amendment 'Punishment' Clause after Helling v. McKinney: Four Terms, Two Standards. and a Search for a Definition*." 44 DePaul L. Rev. 215 (1994)

23. *See also Wells v. Franzen*, 777 F. 2d 1258 (7th Cir. 1985). Instead of limiting the Eighth Amendment's reach through a precise definition, the Court has adopted a flexible standard that incorporates "the evolving standards of decency that mark the progress of a maturing society," *Hudson v. McMillan*, 503 U.S. 1, 8 (1992); *Trop v. Dulles*, 356 U.S. 86, 101 (1958), and objective and subjective standards of proof. *Helling v.McKinney*, 113 S. Ct. 2475 (1993); *Gregg v. Georgia*, 428 U.S. 153 (1976).

24 *See, e.g., Rhodes v. Chapman*, 452 U.S. 337 (1981) (conditions of confinement that result in "unquestioned and serious deprivation of basic human needs" or which "deprive inmates of the minimal civilized measure of life's necessities" can form the basis of an Eighth Amendment violation); *Hudson v. McMillan*, 503 U.S. 1 (1992) (citing to *Whitlev v. Albers*, 475 U.S. 312 (1986) (unnecessary and wanton infliction of pain constitutes cruel and unusual punishment).

25. *See also Tyrer Case*, 26 Eur. Ct. H.R. (ser.A) 15, at pare. 30 (1978) (distinctive element of degradation is degree of humiliation adjudged according to circumstances of individual case.)

26. *See also, F. Birindwa ci Birhashwirwa and E. Tshisekediwa Mulumba v. Zaire*, Report of the HR Comm., Vol. II, GAOR 45th Sess., Supp. 40 tA/45/40), 1990, p.84 (deprivation of food and drink for four days after arrest and subsequent internment under unacceptable sanitary conditions amounts to inhuman treatment); *Dwayne Hylton v. Jamaica*, Report of the HR Comm., Vol. I, GAOA 49th Sess., Supp. 40 (A/49/40), 1992, p. 79, 83 (death threats directed at detainee by warders when detainee is aware that others had been killed amounts to cruel and inhuman treatment). *Antonaccio v. Uruguay*, Report of the HR Comm., GAOR 39th Sess., Sup. No. 40 (A/37/40) 1985 (solitary confinement for three months and denial of medical care) *Marais v. Madacascar*, Report of HR Comm. GAOR 38th Sess., Supp. No. 40, (A/38/40), p. 141 (incommunicado detention in a small cell (1 m. by 2 m.) in solitary confinement for eighteen months ; *De Voituret v. Uruguay*, Report of HR Comm. GAOR 39th Sess. Supp. 40, (A/39/40), 1987, p. 164 (solitary confinement for several months in a cell almost without natural light); *Wight v. Madaaascar*, Report of the HR Comm., GAOR 40th Sess., Supp. No. 40 Doc (A/40/40), p. 171 (periods of incommunicado detention, chained to a bed spring on the floor with minimal clothing, and severe rationing of food).

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