

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANE DOE I, JANE DOE II, HELENE PETIT, )  
MARTIN LARSSON, LEESHAI LEMISH, and )  
ROLAND ODAR, )  
 )  
Plaintiffs, )  
 ) Civil Action No.  
v. )  
 )  
LIU QI, and DOES 1-5, inclusive, )  
 )  
Defendant(s). )

**AFFIDAVIT OF PROFESSOR JORDAN J. PAUST**

BEFORE ME, the undersigned authority, on this day personally appeared *Jordan J. Paust* known to me to be the person whose name is subscribed to the following instrument and, having been duly sworn, upon his oath, deposes and states the following:

1. I am a Law Foundation Professor of International Law at the Law Center of the University of Houston. I have also been a Visiting Edward Ball Eminent Scholar University Chair in International Law at Florida State University (spring, 1997) and a Fulbright Professor at the University of Salzburg, Austria (1978-1979), teaching jurisprudence and international and comparative law; and I have served on several committees on international law, human rights, international law as law of the U.S., terrorism, and the use of force in the American Society of International Law, the American Branch of the International Law Association, and the American Bar Association. I am Co-Chair of the American Society's International Criminal Law Interest Group. I was also the Chair of the Section on International Law of the Association of American Law Schools, and I was on the Executive Council and the President's Committee of the American Society of International Law. Among relevant books are: J. PAUST, J.

FITZPATRICK, J. VAN DYKE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* (West Group, American Casebook Series, 2000); J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (1996); J. PAUST, M.C. BASSIOUNI, *ET AL.*, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (1996) and (2 ed. 2000). I have also published over 135 articles, book chapters, papers and essays in law journals in Belgium, Canada, China, England, Germany, Greece, Israel, Japan, The Netherlands, and the U.S.: at Yale, Harvard, Stanford, Columbia, Michigan, Virginia, Cornell, Texas, Duke, the American Journal of International Law, and elsewhere--many of which address treaties, customary international law, jurisdiction, the Alien Tort Claims Act, and the incorporation of international law into U.S. domestic law.

2. In the following pages I will address the human rights to freedom of religion, freedom from arbitrary detention based on religion or belief, and freedom from torture and cruel, inhumane or degrading treatment or punishment; relevant crimes against humanity; leadership responsibility under international law; and several issues concerning the nature, purpose, application and effects of the Alien Tort Claims Act (ATCA) (28 U.S.C. § 1350) and the Torture Victim Protection Act (TVPA) (Public Law 102-256, 106 Stat. 73 (1992)), the nature of customary international law, and human rights of access to courts and to an effective remedy.

## **I. THE HUMAN RIGHT TO FREEDOM OF RELIGION OR BELIEF AND THE RELATED FREEDOM FROM ARBITRARY DETENTION BASED ON RELIGION OR BELIEF.**

3. All of the major human rights instruments affirm the customary human right of freedom of religion or belief, including freedom from discrimination on the basis of religion or belief. *See, e.g.*, United Nations Charter, arts. 1 (3), 55 (c) (state duty through art. 56: “universal

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to...religion”); International Covenant on Civil and Political Rights, art. 18 (1)-(2), 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR or International Covenant]; Universal Declaration of Human Rights, art. 18, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948); African [Banjul] Charter on Human and Peoples’ Rights, art. 8, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1981); American Convention on Human Rights, art. 12 (1)-(2), O.A.S. Treaty Ser. No. 36 (1969), 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9 (1), 213 U.N.T.S. 221, Eur. T.S. No. 5 (1950), revised by Protocol 11; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. G.A. Res. 36/55, 36 U.N. GAOR, Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981). Textwriters confirm that freedom of religion is a customary human right. *See, e.g.*, MYRES S. MCDUGAL, HAROLD D. LASSWELL, LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 36-37, 653-87 (1980).

4. It is clear from the human rights instruments that the freedom of thought, conscience and religion has both absolute and derogable qualities. For example, per text of the relevant instruments the freedom to have or to adopt a religion or belief is absolute and nonderogable. Also see ICCPR Human Rights Committee, General Comment No. 22, at para. 3, U.N. Doc. A/48/40, pt. I (20 July 1993) (ICCPR does “not permit any limitations whatsoever.... These freedoms are protected unconditionally”), reproduced at <http://www.1.umn.edu/humanrts/gencomm/hrcomms.htm>. Similarly, “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” ICCPR, *supra* art. 18 (2). Only the freedom to “manifest” one’s religion “may be subject...to...limitations,” and such limitations must be “prescribed by law and...necessary to

protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

*See, e.g.*, ICCPR, *supra* art. 18 (3); American Convention, *supra* art. 12 (2)-(3); European Convention, *supra* art. 9 (2). Thus also, detention of persons because of their religion or belief would be *per se* arbitrary and impermissible detention -- a separate and alternative violation of human rights law. *See, e.g.*, ICCPR, *supra* art. 9 (1); African Charter, *supra* art. 6; American Convention, *supra* art. 7 (1) and (3); European Convention, *supra* art. 5 (1); Universal Declaration, *supra* arts. 3 and 9; *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9<sup>th</sup> Cir. 1998); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987); *Abebe-Jira v. Negewo*, 1993 WL 814304 at \*4 (N.D. Ga. 1993), *aff’d*, 72 F.3d 844 (11<sup>th</sup> Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan.1980). Detention of persons because of particular manifestations of religion or belief would not necessarily be “arbitrary” detention, but limitations of time, place and manner would have to meet the human rights test concerning permissible derogations noted above.

5. The human right to religious freedom has also been prominent in U.S. history and

U.S. courts have recognized the human right to freedom of religion. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 173-76, 195, 222 n.93, 250 ns. 413-414, 332, 339-41 (1996). The U.S. Congress has also recognized the customary nature of the human right to religious freedom or belief. *See, e.g.*, International Religious Freedom Act, 22 U.S.C. §6401 (a) (2) (“Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments.”).

## **II. THE HUMAN RIGHTS TO FREEDOM FROM TORTURE AND CRUEL,**

## **INHUMANE, OR DEGRADING TREATMENT OR PUNISHMENT.**

6. All of the major human rights instruments also recognize the customary and nonderogable human rights to freedom from torture and cruel, inhumane, or degrading treatment or punishment. *See, e.g.*, ICCPR, *supra* art. 7; African Charter, *supra* art. 5; American Convention, *supra* art. 5 (1)-(2); European Convention, *supra* art. 3; Universal Declaration, *supra* art. 5; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (10 Dec. 1984). Numerous U.S. cases have also recognized the customary and nonderogable human right to freedom from torture. *See, e.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11<sup>th</sup> Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9<sup>th</sup> Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9<sup>th</sup> Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 882-84 (2d Cir. 1980); *Jama v. U.S. I.N.S.*, 22 F. Supp.2d 353, 363 (D.N.J. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987). Cases have also recognized the customary and nonderogable right to freedom from cruel, inhumane, or degrading treatment or punishment. *See, e.g.*, *Mehinovic v. Vuckovic*, 2002 WL 851751 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345, 1360-61 (S.D. Fla. 2001); *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995); *Abebe-Jira v. Negewo*, 1993 WL 814304 (N.D. Ga. 1993), *aff'd*, 72 F.3d 844 (11<sup>th</sup> Cir. 1996). The U.S. Congress has also recognized that gross violations of human rights include “torture or cruel, inhumane, or degrading treatment or punishment, prolonged arbitrary detention without charges, or other flagrant denial to life, liberty, and the security of person.” 22 U.S.C. § 262 d(a).

7. The authoritative Human Rights Committee created under the International

Covenant on Civil and Political Rights has also recognized that states should report “the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, ...*whether committed by public officials or other persons acting on behalf of the State*, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetuating prohibited acts, must be held responsible.” ICCPR Human Rights Committee, General Comment No. 20 (1992), para. 13, in U.N. Doc. HRI/GEN/1 (4 Sept. 1992), at 29-32 (emphasis added). The Committee added that states have a duty to afford protection against such acts “*whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*” and “States must not deprive individuals of the right to an effective remedy.” *Id.* para. 2 (emphasis added).

### **III. RELIGIOUS PERSECUTION IS A CRIME AGAINST HUMANITY.**

8. Religious persecution is a crime against humanity under customary international law. Customary international law instruments addressing persecution-type crimes against humanity recognize that persecution on religious grounds is a crime against humanity. *See, e.g.*, Charter of the International Military Tribunal at Nuremberg, art. 6 (c) (“persecutions on...religious grounds”), *reprinted in* JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 142-43 (2000) [hereinafter ICL DOCS.]; Control Council Law No. 10, art. II (1) (c) (“persecutions on...religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”), *reprinted in* ICL DOCS., *supra* at 152. Other international criminal law instruments addressing persecution-type crimes against humanity provide the same recognition. *See, e.g.*, Statute of the International Criminal Tribunal for Former Yugoslavia, art. 5 (h) (“persecutions on...religious grounds”), U.N. S.C. Res. 827 (1993), *reprinted in* ICL DOCS.,

*supra* at 170-71; Statute of the International Criminal Tribunal for Rwanda, art. 3 (h) (“[p]ersecutions on...religious grounds”), U.N. S.C. Res. 955 (8 Nov. 1994), *reprinted in* ICL DOCS., *supra* at 199; Rome Statute of the International Criminal Court, art. 7 (h) (“[p]ersecution against any identifiable group or collectivity on...religious...grounds”), adopted by the U.N. Diplomatic Conference, July 17, 1998, *reprinted in* ICL DOCS., *supra* at 208.

9. Textwriters also confirm the customary nature of the prohibition of religious persecution. *See, e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, INTERNATIONAL CRIMINAL LAW 857-62, 864-65, 869-71, 878, 880, 905 (2000); *see also* MCDOUGAL, LASSWELL, CHEN, *supra* at 36-37, 354. Additionally, crimes against humanity under customary international law need not be systematic or widespread, although some instruments constituting special international criminal tribunals limit the jurisdiction of the tribunals to crimes that are either widespread or systematic. *See, e.g.*, PAUST, BASSIOUNI, *ET AL.*, *supra* at 906-07, 915-16; *see also* *Mehinovic v. Vuckovic*, 2002 WL 851751 at \*23 (N.D. Ga. 2002)(“the Rome Statute’s definition of crimes against humanity may be narrower in scope than the customary law definition”). Further, the number of direct victims of a crime against humanity can be small, *e.g.*, as few as 1, 3, 5 or 8 persons. *See, e.g., id.* at 870 (93 children), 882-83, 906 n.\*. As violations of customary international law, crimes against humanity are actionable through the Alien Tort Claims Act, 28 U.S.C. § 1350. *See, e.g.,* *Kadic v. Karadzic*, 70 F.3d 232, 236, 241-42 (2d Cir. 1995)(“crimes against humanity” and genocide, which is a species of crimes against humanity); *Mehinovic v. Vuckovic*, 2002 WL 851751 at \*23 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Latios*, 157 F. Supp.2d 1345, 1360 (S.D. Fla. 2001); *Hirsh v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997)(genocide, which is a species of crimes against humanity, is a blatant violation of human rights); *Forti v. Suarez-Mason*, 694 F. Supp.

707, 710 (N.D. Cal. 1988)(disappearance as crime against humanity). Other cases recognizing the customary nature of the prohibition of crimes against humanity include: *Quinn v. Robinson*, 783 F.2d 776, 799-800 (9<sup>th</sup> cir. 1986); *Wiwa v. Royal Dutch Shell Petroleum Co.*, 2002 WL 319887 at \*9 (S.D.N.Y. 2002). At the international level, it is recognized that the International Criminal Court can award reparations to victims of crimes against humanity, including “restitution, compensation and rehabilitation.” See Rome Statute for the International Criminal Court, *supra* art. 75, *reprinted in ICL DOCS.*, *supra* at 243. The International Criminal Tribunal for Former Yugoslavia can render decisions concerning responsibility of perpetrators that are “final and binding” as to responsibility and it is recognized that “[p]ursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.” See ICTY Rules of Procedure and Evidence, art. 106 (B)-(C) (1994), *reprinted in ICL DOCS.*, *supra* at 194.

#### **IV. LEADER RESPONSIBILITY.**

10. Under customary international law, leaders (*de facto* or *de jure*) are responsible for acts and omissions of those under their control in accordance with a three-part criminal negligence “knew or should have known” test. The general test includes responsibility for negligence or dereliction of duty if a leader, under the circumstances, should have known that persons under his or her authority or control had committed, were committing or were about to commit relevant infractions; the leader had an opportunity to act; and the leader took no reasonable corrective action. *See, e.g.*, PAUST, BASSIOUNI, *ET AL.*, *supra* at 27-33, 46-76, 88-99; JORDAN J. PAUST, JOAN M. FITZPATRICK, JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 310-11 (2000); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 175-85 (1972)



[hereinafter Paust, *My Lai*]. Complicity is a separate type of alternative responsibility under international law. *See, e.g.*, PAUST, BASSIOUNI, *ET AL.*, *supra* at 39-43; Paust, *My Lai, supra* at 165-69; *Barrueto v. Larios*, 2002 U.S. Dist. Lexis 10323 (S.D. Fla. 2002); *see also* para. 7 *supra*. Leader responsibility has been recognized in U.S. cases. *See, e.g.*, *In re Yamashita*, 327 U.S. 1, 14-16 (1946); *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 777-78 (9<sup>th</sup> Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 239, 242 (2d Cir. 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 171-72 & n.3 (D. Mass. 1995), also quoting Senate Report No. 249, 102d Cong., 1<sup>st</sup> Sess. 9 (1991); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1537-38 (N.D. Cal. 1987).

## **V. GENERAL PRINCIPLES FOR DETERMINING CUSTOMARY AND TREATY-BASED INTERNATIONAL LAW.**

### **A. Customary obligations need not be specifically defined.**

11. Principles of customary international law need not be specifically defined. On the contrary, such principles need only be “sufficiently determinable”. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 781 (“definable”); *Xuncax v. Gramajo*, 886 F. Supp. at 187; *Forti v. Suarez-Mason*, 672 F. Supp. at 1540-42 (“definable,” “sufficient consensus to evince a customary international human rights norm”); *id.*, 694 F. Supp. at 710-11 (“sufficient to establish”); *see also Kadic v. Karadzic*, 70 F.3d at 238 (courts ascertain the content of the law of nations); *Filartiga v. Pena-Irala*, 630 F.2d at 880, 887 (“sufficiently...defined” and courts are bound). Further, customary human rights guaranteed to all persons under the U.N. Charter are “evidenced and defined by the Universal Declaration of Human Rights.” *Filartiga*, 630 F.2d at 880-82. More generally, the judiciary has the competence and responsibility to identify and clarify customary international law. *See, e.g.*, *The Paquete Habana*, 175 U.S. at 700 (“must be

ascertained and administered by the courts of justice”); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (same); *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-75 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (same); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798-99 (D. Kan. 1980); PAUST, *supra* at 6-8, 46-47 ns.53-55, and cases cited (also addressing sources, evidences, and proof of customary international law *id.* at 3-4, 19-28 ns.17-29).

**B. There is no requirement that customary international law be based in “universal” consent.**

12. There is no requirement that customary international law be based in “universal” consent. All that is required is that there be general recognition of or assent to a customary norm (*i.e.*, general patterns of supportive legal expectation or *opinio juris*). *See, e.g., The Paquete Habana*, 175 U.S. 677, 694 (1900); *The Scotia*, 81 U.S. (14 Wall.) 170, 187-88 (1871)(“generally accepted”); *Filartiga*, 630 F.2d at 881 (“general” assent); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d at 1359; *Xuncax v. Gramajo*, 886 F. Supp. at 187 (“It is not necessary that every aspect of what might comprise a standard [under customary international law] be fully defined and universally agreed upon before a given action...is clearly proscribed under international law....”); *Forti v. Suarez-Mason*, 694 F. Supp. at 709 (“To meet this burden, plaintiffs need not establish unanimity among nations. Rather, they must show a general recognition among states that a specific practice is prohibited.”); PAUST, *supra* at 1-3, 10-11 ns.2-4, 15-18 n.14, and cases cited; JORDAN J. PAUST, JOAN M. FITZPATRICK, JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 25, 35-36, 83-84, 92-94, 96-98, 131 (2000); Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT’L & COMP. L. 147, 151-52 & n.15 (1995/96).

**VI. THE ATCA PROVIDES PLAINTIFFS’ CAUSES OF ACTION AND RIGHTS TO A**

## REMEDY FOR VIOLATIONS OF CUSTOMARY AND TREATY-BASED HUMAN RIGHTS.

### A. The ATCA provides a cause of action for violations of both treaty-based and customary international law.

13. As recognized by numerous cases and opinions since the time of formation of the ATCA, the ATCA provides a cause of action or right to a remedy for violations of international law, and the only relevant inquiry is whether suit is brought by an alien, for a tort only, alleging a violation of international law (*i.e.*, customary international law or any treaty of the United States). *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-75 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Amerada Hess*, 830 F.2d 421, 424-25 (2d Cir. 1987), *rev'd on other gds.*, 488 U.S. 428 (1989); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 777, 779-80 (Edwards, J.); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-82, 884-85, 887 (2d Cir. 1980); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345, 1349 (S.D. Fla. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 441-43 (D.N.J. 1999); *Jama v. U.S. I.N.S.*, 22 F. Supp.2d 353, 362-63 (D.N.J. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. at 1539-40; *Guinto v. Marcos*, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1379 (W.D.N.Y. 1985)(court can fashion remedies); 26 Op. Att'y Gen. 250, 252-53 (1907); 1 Op. Att'y Gen. 57, 58 (1795). PAUST, *supra* at 203, 206-08, 212, 281 ns.560-61, 282 ns.570-71. Judge Bork's view to the contrary in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 798 (Bork, J.) was in error, opposed by Judge Edwards, and has not been followed. *See, e.g., Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 442 n.20 (Bork's "highly criticized opinion," "reasoning is flawed"); *Kadic*, 70

F.3d at 238; *Forti*, 672 F. Supp. at 1539. Congress has also reaffirmed that the ATCA involves “suits based on...norms that already exist or may ripen in the future into rules of customary international law”. See H.R. Rep. No. 102-367, at 3-4 (1991), quoted in *Kadic*, 70 F.3d at 241, and *Doe v. Islamic Salvation Front*, 993 F. Supp. at 7; see also *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 443.

14. The ATCA is congressional legislation that executes, implements, and expressly incorporates by reference all treaties of the United States. See, e.g., *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345, 1359-60 (S.D. Fla. 2001); *Ralk v. Lincoln County*, 81 F. Supp.2d 1372, 1380 (S.D. Ga. 2000); PAUST, FITZPATRICK, VAN DYKE, *supra* at 194; PAUST, *supra* at 207, 282 n.571, 371-72; Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 327 & n.126 (1999) [hereinafter Paust, *Human Rights Treaties*]; Paust, *Suing Karadzic*, 10 LEIDEN J. INT’L L. 91, 92 (1997). The ATCA performs the very role that implementing legislation plays with respect to non-self-executing treaties and provides a cause of action and a remedy. Thus, treaties that are not self-executing for the purpose of creating a private cause of action are executed or implemented by the ATCA. Further, human rights treaties addressed in this case are clearly distinguishable in any event since they provide rights enforceable by private parties, access to domestic courts, and the right to an effective remedy. Additionally, it is not the prerogative of courts to rewrite the ATCA to apply merely to some treaties but not to others or to use limitations that Congress has not chosen.

15. For example, human rights obligations under Articles 55 (c) and 56 of the U.N. Charter to ensure universal respect for and to observe human rights, as supplemented by the authoritative Universal Declaration of Human Rights, have been found to be not wholly

self-executing. *See, e.g., Filartiga*, 630 F.2d at 881-82. Nevertheless, the ATCA executes or implements such obligations and provides a relevant cause of action for human rights violations. Similarly, the U.S. declaration of non-self-execution concerning the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), if even valid, makes the Covenant partly, but not wholly, non-self-executing. *See, e.g., PAUST, FITZPATRICK, VAN DYKE, supra* at 75-76, 190, 193-94, 397-98. The declaration expressly does not apply to or limit the reach of Article 50, which applies to all provisions of the Covenant and mandates their application in all parts of a federated state without any limitations or exceptions whatsoever, and the special meaning of the declaration affirmed by the Executive is merely that the treaty itself does not directly create a cause of action in U.S. courts--thus, indirect use through statutes such as the ATCA or in other ways is not limited. *See Paust, Customary International Law and Human Rights Treaties, supra* at 322-27. In any case, the ATCA executes the Covenant since it provides a relevant cause of action for any treaty-based human rights violation. *Id.* at 327 & n.126. Even wholly non-self-executing treaties can be incorporated indirectly through statutes such as the ATCA and TVPA. PAUST, *supra* at 62-64, 92, 97-98, 134-35 n.84.

16. Further, customary international law is reflected in some human rights treaties. Customary international law has been directly incorporable without a statutory base since the beginning of the United States. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 422-23 (1815); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-60 (1795); *Filartiga v. Pena-Irala*, 630 F.2d at 886-87 & n.20; *Henfield's Case*, 11 F. Cas. 1090, 1101-04 (Jay, C.J.), 1107-08, 1120 (Wilson, J.) (C.C.D. Pa. 1793) (No. 6,360); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 442 n.20; PAUST, *supra* at 5, 7-8, 29-30 n.32, 34 n.38, 40-42 ns.44-46, 47-48 ns.54-58, 207. In any event, customary international law, as part of the law of

nations, is also incorporated by reference through the ATCA.

17. More generally, treaties are to be construed in a broad manner in favor of rights that may be claimed under them, and thus are to be construed to protect express and implied rights and in a manner not limiting of the reach of private rights or corresponding duties. *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *United States v. Payne*, 264 U.S. 446, 448 (1924) (“Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do....”); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879) (same), *citing Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830); *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) (“Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever have this right, it is to be protected.”).

**B. Courts must apply international law as it has evolved.**

18. When identifying violations of international law actionable under the ATCA, the judiciary must apply international law as it has evolved. *See, e.g., Kadic*, 70 F.3d at 238, 241; *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev’d on other gds.*, 488 U.S. 428 (1989); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J.); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (also addressing

*The Paquete Habana*, 175 U.S. 677, 694 (1900) and *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796)); *Maria v. McElroy*, 68 F. Supp.2d 206, 233 (E.D.N.Y. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 445 (D.N.J. 1999); *Jama v. U.S. I.N.S.*, 22 F. Supp.2d 353, 362-63 (D.N.J. 1998); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 n.18 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987); PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 206, 281-82 n.562 (1996).

**C. An original purpose of the ATCA was to avoid a “denial of justice” to alien plaintiffs.**

19. An original purpose of the ATCA was to avoid a “denial of justice” to aliens in violation of customary international law by providing them access to our courts with respect to injuries received here or abroad at the hands of U.S. or foreign nationals. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 782-83 (Edwards, J.), also *quoting* THE FEDERALIST NO. 80 (A. Hamilton) and adding: “Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s territory”; *see also* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711, cmts. a, c, e, RN 2 (3 ed. 1987)(denial of access to courts, judicial denial of human rights, and denial of remedies for injury inflicted by state or private persons); PAUST, *supra* at 199, 258-61 ns.479, 481; 385 n.87; 1 Op. Att’y Gen. 57, 58 (1795) (Bradford, Att’y Gen.)(aliens can sue U.S. private perpetrators of infractions abroad). An early case also involved a suit by an alien plaintiff against an alien with respect to conduct abroad. *See Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607)(British representative of claimant against Spanish perpetrator). That very purpose would be defeated if alien plaintiffs could not sue Defendant(s) for violations of customary and treaty-based international law occurring in China.

**D. Human rights of access to courts and to an effective remedy are also at stake.**

20. There is also a human right of access to courts and to an effective remedy at stake under treaty-based and customary human rights law. *See, e.g.*, the following:

- Universal Declaration of Human Rights, art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”), U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948) [customary right, also binding through the U.N. Charter;

- American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) (1948), art. XVIII (“Every person may resort to the courts to ensure respect for his legal rights.”) [customary right, also binding through article 3 (k) of the O.A.S. Charter;

- International Covenant on Civil and Political Rights, art. 14 (1), 999 U.N.T.S. 171 (Dec. 9, 1966) (“All persons shall be equal before the courts and tribunals. In the determination of...his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal...”);

- General Comment No. 13, Report of the Human Rights Committee, 39 U.N. GAOR, Supp. No. 40, at 143, U.N. Doc. A/39/40 (Twenty-first Session 1984), paras. 1-3 (Article 14 of the International Covenant assures “equal access to courts”), in International Human Rights Instruments, U.N. Doc. HRI/GEN/1 (4 Sept. 1992), at 13, and in PAUST, FITZPATRICK, VAN DYKE, *supra* at 267;

- General Comment No. 20 (1992), para. 15 (“right to an effective remedy, including compensation...”), in U.N. Doc. HRI/GEN/1, *supra*, at 32;

- *Golder v. United Kingdom*, 18 Eur. Ct. H.R., Ser. A, paras. 34-35 (1975), in which, construing Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (done 4 Nov. 1950), which is similar to Article 8 of the Universal Declaration of Human Rights, the European Court of Human Rights stated: “One can scarcely conceive of the rule of law without there being a possibility of having access to the courts....The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognized’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.”);

- *Soering v. United Kingdom*, 161 Eur. Ct. H.R., Ser. A, No. 161, para. 120 (7 July 1989), 11 Eur. Hum. Rts. Rep. 439 (1989)(adding that Article 13 has an “effect...to require the provision of a domestic remedy allowing the competent ‘national authority’ both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.”);



- *Chumbipuma Aguirre, et al. v. Peru* (Barrios Altos Case), Judgement of 14 March 2001, Inter-American Court of Human Rights, para. 41 (domestic amnesty laws cannot eliminate responsibility “for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance”);

- *The Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-American Court of Human Rights, Ser. C/4, para. 174, *reprinted in* 28 I.L.M. 291 (1989) (holding that the American Convention on Human Rights imposes on each state party a “legal duty to...ensure the victim adequate compensation”);

- *Report No. 61/01, Case No. 11.771* (Catalan Lincoleo v. Chile), Inter-American Commission on Human Rights, April 16, 2001 (ruling that Chile’s amnesty law preventing criminal investigation and prosecution of those involved in disappearance, torture, and extrajudicial killing impermissibly interfered with right of claimant to obtain reparations through civil courts);

- *Report No. 36/96, Case No. 10.843*, paras. 68, 105, 112, Inter-American Human Rights Commission, October 15, 1996 (ruling that Chile’s 1978 Amnesty Decree Law violated Article 25 of the American Convention on Human Rights because “the [human rights] victims and their families were deprived of their right to effective recourse against the violations of their rights”).

*See also Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) (“The Covenant not only guarantees foreign citizens equal treatment in the signatorie’s courts, but also guarantees them equal access to these courts.”); PAUST, *supra* at 7, 75 n.97, 198-203, 256-72 ns.468-527, *passim*; Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT’L L. 351, 360-71, 378 (1991).

21. Human rights “guaranteed to all by the [United Nations] Charter” [59 Stat. 1031, T.S. No. 993, done 26 June 1945; a treaty ratified by the U.S. and Peru] are “evidenced and defined by the Universal Declaration of Human Rights” and “Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’” *Filartiga*, 630 F.2d at 882, also *quoting* U.N. G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028

(1971); *see also Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. at 796-97 (use of Universal Declaration); PAUST, *supra* at 181, 191, 198-200, 228 n.182, 246 n.372, 256 n.468, 286 n.595, 436-37 n.48. The authoritative 1970 Declaration on Principles of International Law recognizes: “Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.” *Id.* The U.N. Charter, a treaty ratified by the U.S., sets forth these obligations in Articles 55 (c) and 56, and the U.S. has met such obligations in part through application of statutes such as the ATCA. Also, the U.S., and all states in the Americas, are bound by the American Declaration of the Rights and Duties of Man, which is now a legally authoritative indicia of human rights protected through Article 3 (k) of the O.A.S. Charter, done April 30, 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394, T.I.A.S. No. 2631, amended by the Protocol of Buenos Aires, done 27 Feb. 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 [a treaty ratified by the U.S. and Peru; *see also id.* arts. 44, 111]. *See, e.g.*, Advisory Opinion OC-10/89, I-A, Inter-Am. Court H.R., Ser. A: Judgments and Opinions, No. 10, para. 45 (1989); FRANK NEWMAN, DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 261-62, 269 (1990); MCDOUGAL, LASSWELL, CHEN, *supra* at 198, 316; PAUST, *supra* at 287 n.595. Additionally, the “General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR” (the International Covenant on Civil and Political Rights) and are “authoritative.” *See Maria v. McElroy*, 68 F. Supp.2d at 232; *United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997)(“the Human Rights Committee has the ultimate authority to decide whether parties’ clarifications or reservations have any effect.”); Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40, U.N. Doc. A/49/40, para. 5 (“General comments...are intended... [among other purposes] to clarify the requirements of the Covenant....”); *see also United States v. Duarte-*

*Acero*, 208 F.3d 1282, 1285 n.12, 1287-88 (11<sup>th</sup> Cir. 2000).

## **VII. THE TORTURE VICTIM PROTECTION ACT (TVPA) PROVIDES CAUSES OF ACTION FOR TORTURE AND PRECLUDES CLAIMS TO IMMUNITY.**

### **A. TVPA provides a cause of action and precludes immunity.**

22. The Torture Victim Protection Act (TVPA) provides alternative causes of action for torture and extrajudicial killing as defined therein and precludes claims to immunity. The TVPA is expressly designed “[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.” Public Law 102-256, 106 U.S. Stat. 73 (1992), preamble. Unlike the Alien Tort Claims Act (ATCA), there are only two violations of international law addressed (*i.e.*, torture and extrajudicial killing) and there is a limited set of potential defendants. Liability under the TVPA is limited to “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation” subjects an individual to covered human right deprivations. *Id.* Sec. 2 (a). In the case at hand, Plaintiffs have alleged that the Defendant, as Mayor of Beijing, is an individual under actual authority of China, which places him within the statutory coverage. He would also be liable if under “apparent” authority or “color of law” of China. Interestingly, by expressly creating a cause of action against persons acting under actual authority of a foreign state, Congress has enacted legislation that is unavoidably inconsistent with and necessarily obviates judicially created common law notions of immunity, including the common law-based doctrine of “act of state.” The very purpose of the legislation is to guarantee a civil remedy against state actors and others covered with respect to torture or extra judicial killing. The U.S. Senate Report added: “A state that practices torture and summary execution is not one that

adheres to the rule of law. Consequently, the [TVPA] is designed to respond to this situation by providing a civil cause of action in U.S. courts” and the Senate Judiciary “Committee does not intend the ‘act of state’ doctrine to provide a shield from lawsuit for” individual perpetrators. Senate Report No. 249, 102d Conf., 1<sup>st</sup> Sess. 3, 8 (1991).

**B. The ATCA and TVPA preclude use of the “act of state” doctrine.**

23. More generally, both the ATCA and TVPA, as facially inconsistent federal statutes, trump mere common law doctrines of “act of state.” See Paust, *Suing Karadzic, supra* at 97-98 & n.52; *see also* RESTATEMENT, *supra* § 443 (2) and cmts. d, g, j (subject to modification by acts of Congress). Also, the act of state doctrine would apply only with respect to lawful public acts of a foreign state, and not to acts *ultra vires* or in violation of international law. *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467, 1470-72 (9<sup>th</sup> Cir. 1994); *Kadic v. Karadzic*, 70 F.3d at 250; *In re Estate of Marcos Litigation*, 978 F.2d 493, 496-98, 500 (9<sup>th</sup> Cir. 1992); *Liu v. Republic of China*, 892 F.2d 1419, 1432-33 (9<sup>th</sup> Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9<sup>th</sup> Cir. 1988)(*en banc*), *cert. denied*, 490 U.S. 1035 (1989); *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied sub nom., New York Land Co. v. Republic of the Philippines*, 481 U.S. 1048 (1987); *Filartiga v. Pena-Irala*, 630 F.2d at 889; *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5<sup>th</sup> Cir. 1962); *Xuncax v. Gramajo*, 886 F. Supp. at 175-76; *Paul v. Avril*, 812 F. Supp. at 212; *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980); International Military Tribunal at Nuremberg, Opinion and Judgement (Oct. 1, 1946)(“The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position...and cannot obtain immunity while acting in

pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”); PAUST, *supra* at 210, 276-79; PAUST, FITZPATRICK, VAN DYKE, *supra* at 707-12; RESTATEMENT, *supra* §443, cmt. c and RN 5.

#### **VIII. SECTION 1331 PROVIDES AN ALTERNATIVE BASIS FOR JUDICIAL RELIEF.**

24. Since international law is part of the law of the United States, 28 U.S.C. § 1331 provides an alternative basis for both general judicial and subject matter jurisdiction. *See, e.g., Abebe-Jira v. Negewo*, 1993 WL 814304 (N.D. Ga. 1993), *aff'd*, 72 F.3d 844 (11<sup>th</sup> Cir. 1996); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1538, 1544 (N.D. Cal. 1987); PAUST, *supra* at 7; RESTATEMENT, *supra*, § 111, cmt. e and RN 4; Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 304-05 & n.24 (1999).

25. Chief Justice Marshall recognized in 1810 that our judicial tribunals “are established...to decide on human rights.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810). Federal courts had been using human right precepts prior to Chief Justice Marshall’s affirmation of judicial authority and responsibility, and have done so ever since. *See, e.g.,* PAUST, *supra* at 182-98, 228-56. The Executive has also recognized: “The...international law of human rights...endows individuals with the right to invoke international law, in a competent forum....As a result, in nations like the United States where international law is part of the law of the land, an individual’s fundamental human rights are in certain cases directly enforceable in domestic courts....” Memorandum of the United States as Amicus Curiae in *Filartiga v. Pena-Irala*, at 20, reprinted in 19 I.L.M. 585, 602-03 (1980). More generally, federal courts have applied customary international law since the dawn of the United States. *See, e.g.,* PAUST, *supra* at 5-9, 29-30 n.32, 34 n.38, 40-42 ns.44-46, 44-48 ns.50-57; *The Nereide*, 13 U.S. (9 Cranch) 388,

422-23 (1815); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276-77 (1808); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (customary law of nations is universal and binding), 237 (“National or federal judges are bound by duty and oath” re: application of international law), 272, 276 (1796); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J.); *Filartiga*, 630 F.2d at 886-87, citing Supreme Court case; *Henfield’s Case*, 11 F. Cas. at 1107-08 (Wilson, J., on circuit); *Maria v. McElroy*, 68 F. Supp.2d at 233; *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. at 795-800.

## **IX. SELF-EXECUTION OF THE INTERNATIONAL COVENANT IS NOT A PROBLEM IN THE U.S.**

26. Self-Execution of the International Covenant on Civil and Political Rights is not a problem in the U.S. Although the U.S. instrument of ratification for the International Covenant contains a declaration that much (but not all) of the articles are “non-self-executing,” such a declaration functions as a reservation that is fundamentally inconsistent with the object and purpose of the treaty and, under international law, which is supreme federal law, is thus void *ab initio* and can have no legal effect. *See, e.g.*, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum, Hum. Rts. Comm., General Comment No. 24 (52), paras. 7-9, 11-12, 20, at 3-5, 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), *reprinted in* PAUST, *supra* at 374-76; PAUST, *supra* at 361-68, 373-76; Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT’L L. 659, 671 & ns.43-44 (1997) [hereinafter Paust, *Race Based*].

27. Even if portions of the treaty were “non-self-executing” in a general sense or in the special sense preferred by the Executive upon adoption relating merely to the creation of a private cause of action directly under the treaty (*see, e.g.*, Executive Explanation, S. REP. NO.

102-23, 102d Cong., 2d Sess., Explanation of Proposed Reservations, Understandings and Declarations, at 19 (“*The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts.*”)(emphasis added), *reprinted in* 31 I.L.M. 645, 657 (1992) [hereinafter Executive Explanation]; Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CINN. L. REV. 423, 467, 470 (1997); Paust, *Race Based*, *supra* at 672 n.45), there is no problem with respect to use of the International Covenant’s guarantees though either the Alien Tort Claims Act or the Torture Victim Protection Act, since both statutes execute relevant treaty law and each form of congressional legislation provides a private cause of action and right to a remedy. Additionally, the declaration concerning the International Covenant is *not* a general declaration of non-self-execution, but one that is expressly limited. It merely addresses Articles 1-27 and expressly does not apply to Article 50. Article 50 reaches back to all “[t]he provisions” of the Covenant and mandates, consistently with the command of the U.S. Constitution: “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.” Such “shall” language is mandatory and self-executory. *See* PAUST, *supra* at 55-59, 62, 69-71, 74, 110, 112. Indeed, this was recognized in the formal Executive Explanation concerning the Covenant, *supra*, *reprinted in* 31 I.L.M. at 656-57: “In light of Article 50 (‘The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions’), it is appropriate to clarify that...*the Covenant will apply...the intent is not to modify or limit U.S. undertakings* under the Covenant.... [It is] intended to signal to our treaty partners that the U.S. *will implement* its obligations *by appropriate legislative... and judicial means, federal or state....*”)(emphasis added). The ATCA and TVPA are such federal means of implementation.

28. Thus, even if the declaration of non-self-execution were operative and not void *ab*

*initio*, the Covenant is partly self-executing, has the force and effect of law, and is supreme federal law. *See, e.g.*, Paust, *Human Rights Treaties, supra* at 325-30. Moreover, the declaration should be interpreted consistently with Article 50 of the Covenant to preserve rights, since treaties are to be construed in a broad manner to protect express and implied rights. *See, e.g.*, para. 17 *supra*.

29. Importantly also, the declaration is further limited by its special meaning. As noted above, the intent was merely to clarify that the Covenant not be used directly to “create a private cause of action”. Thus, in view of the limited nature of the declaration (*e.g.*, it does not inhibit the reach of Article 50) and its special meaning (*i.e.*, that it merely not be used directly to create a cause of action), the Covenant can be self-executing for every other purpose. *See, e.g.*, *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11<sup>th</sup> Cir. 2000); *id.*, 132 F. Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001). The Executive Explanations assure that the declaration does not make the Covenant generally non-self-executing (*i.e.*, it was intended to be partly self-executing) and that it does not generally inhibit the legal status of the Covenant as supreme federal law for use by federal and state courts, as long as the Covenant is not used directly to create a cause of action.

30. Additionally, even generally non-self-executing treaties can be used indirectly as



aids for interpretation of other laws, defensively in civil or criminal contexts, for supremacy or preemptive purposes. *See, e.g.,* PAUST, *supra* at 62-64, 68, 97-98, 134-35, 369-70, 383-84 ns.54-66, 74; de la Vega, *supra* at 457 n.206, 460, 467, 470; Paust, *Race Based, supra* at 672 n.45. Thus, such treaties can be invoked by individuals seeking relief under treaty-enhanced interpretations of federal statutes, especially since federal statutes must be interpreted consistently with treaties. *See, e.g., Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); PAUST, *supra* at 107-08 n.9; Paust, *Human Rights Treaties, supra*, at 327. Additionally, such federal statutes can serve an ‘executing’ function whether or not the Covenant is partly self-executing, especially since the primary purpose of non-self-execution is to assure that there is some statutory or other legal base for bringing a relevant claim. *See* PAUST, *supra* at 179, 192-93, 226 n.163, 246-47 ns. 380-81 and 383-84, 371-72, 385 n.88; RESTATEMENT, *supra* § 111, cmt. h (“There can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement....”). For example, even if the Covenant cannot be used directly to create a cause of action, the ATCA and the TVPA create causes of action and provide any needed “execution” of treaty-based human rights. *See, e.g.,* PAUST, FITZPATRICK, VAN DYKE, *supra* at 194; PAUST, *supra* at 207, 256, 282 n.571, 385. The ATCA actually expressly “incorporates by reference” treaties of the United States. Concerning incorporation by reference, *see, e.g., United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-62 (1820); *Ex parte Quirin*, 317 U.S. 1, 27-30 (1942); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-82 (2d Cir. 1980). A federal statute need not even refer to international law in order to function as supplementary legislation. *See, e.g., United States v. Arjona*, 120 U.S. 479, 488 (1887). Statutes that do all the more clearly perform such a function.

31. For the foregoing reasons, it is my opinion that Plaintiffs have actionable

claims against Defendant(s) under the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA), and alternatively under 28 U.S.C. § 1331, for torts in violation of the law of nations and treaties of the United States concerning the human right to religious freedom; freedom from detention based on religious or other beliefs; the human rights to freedom from torture and cruel, inhumane, or degrading treatment or punishment; and crimes against humanity.

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Jordan J. Paust

Subscribed and sworn to before me by the said Jordan J. Paust on  
this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

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Notary Public