UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA GONZALEZ-VERA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 1:02 CV-02240 (HHK)
	)	
HENRY A. KISSINGER, *et al.*,	)	
	)	
Defendants,	)	
	)	

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

The plaintiffs respectfully request that the Court deny the Defendants' Motion to Dismiss. For the reasons set forth in the enclosed Memorandum of Points and Authorities, the Court has subject matter jurisdiction over the plaintiffs' claims, and the Complaint asserts legal theories that are cognizable as a matter of law. The plaintiffs respectfully request an order (1) granting oral argument and an evidentiary hearing; (2) denying the defendants' Mot. to Dismiss; (3) striking the Certification of Scope of Employment; (4) striking the United States' entry of appearance for the individual defendant; (5) and striking or excluding Section A of the defendants' Memorandum of Points and Authorities, in support of their Mot. to Dismiss except to the extent that Section A contains admissions of liability.

WHEREFORE the plaintiffs respectfully move for the relief described above.

Respectfully submitted,

/s/

Michael E. Tigar, Esq.
1025 Connecticut Ave, NW, Suite 1012
Washington, D.C. 20036.
Tel. (202) 467-8583
Fax. (410) 573-2500
D.C. Bar No. 103762
ATTORNEY FOR PLAINTIFFS

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CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND CROSS-MOTION TO STRIKE CERTIFICATION OF SCOPE OF EMPLOYMENT

On November 13, 2002, several victims of gross human rights violations in Chile filed a civil action against Defendant Henry Kissinger,[1] in both his individual and official capacity, as well as against the United States of America. The plaintiffs seek compensatory and punitive damages against Defendant Kissinger and the United States, as well as declaratory relief. The plaintiffs allege that the defendants knowingly and maliciously provided practical assistance and encouragement to those who harmed the plaintiffs with reckless disregard for the lives and well-being of the plaintiffs and their families.[2] The plaintiffs allege that such assistance and encouragement had a substantial effect on the perpetration of the violations against them. On February 28, 2003, the defendants filed a Certification of Scope of Office or Employment ("Certification") as well as a Motion to Dismiss the Complaint ("Mot. to Dismiss") for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted. For the reasons stated below, the Court has subject matter jurisdiction over the plaintiffs' claims, and the Complaint asserts legal theories that are cognizable as a matter of law. The plaintiffs respectfully request an order (1) granting oral argument and an evidentiary hearing; (2) denying the defendants' Mot. to Dismiss; (3) striking the Certification of Scope of Employment; (4) striking the United States' entry of appearance for the individual defendant;[3] (5) and striking or excluding Section A of the defendants' Memorandum of Points and Authorities, in support of their Mot. to Dismiss, except to the extent that Section A contains admissions of liability.

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[1] Defendant Kissinger served as Assistant to the President for National Security Affairs from January 20, 1969-November 3, 1975. He served as Secretary of State from September 22, 1973-January 20, 1977.

[2] The Complaint states the following claims: forced disappearance; torture; cruel, inhuman or degrading treatment; crimes against humanity; summary execution; violence against women; arbitrary detention; false imprisonment; wrongful death; assault and battery; and intentional infliction of emotional distress.

[3] Plaintiffs respectfully remind the Court that they seek a judgment against Defendant Kissinger, not Richard Helms, as Defendants misstated in their Mot. to Dismiss at 29.

INTRODUCTION

The tenor of the defendants' Mot. to Dismiss contradicts the history of judicial review in United States law. Chief Justice Marshall said the denial of a judicial remedy for a wrong is such an "obloquy" on American justice that it should not be tolerated save under the most limited conditions. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Among other assertions, the plaintiffs maintain that Defendant Kissinger and the United States do not retain immunity for their participation in extrajudicial killings and forced disappearances. The plaintiffs confidently expect that these allegations can be proven to a jury. In *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673-74 (D.D.C. 1980), Judge Joyce Hens Green rejected Chile's immunity arguments and held the Pinochet[4] junta liable for murdering Orlando Letelier and Ronni Karpen Moffitt in Washington, D.C. Now, domestic defendants are sued for assisting and encouraging the junta's human rights abuses. As established in *Letelier*, such conduct can never stand as non-justiciable and the perpetrators can never be shielded by immunity. 488 F. Supp at 671.

The United States has a well established history of holding human rights violators accountable for violations of international law. At the end of World War II, the United States took the lead in drafting the London Agreement, which recognized state and individual responsibility for acts in violation of international law. *See* Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.I.S. 280; *see also* BRADLEY F. SMITH, THE ROAD TO NUREMBERG 10 (1981) ("The central fact is that the Nuremberg Trial System was created almost exclusively in Washington by a group of American government officials."); Panel Session, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L.

[4] General Augusto Pinochet Ugarte was the dictator of Chile from 1973-1990.

PROC. 56 (1986) (discussing the impact and precedent of the Nuremberg trials). The London Agreement made clear that one's official capacity does not automatically confer immunity. London Agreement, Art. 1. The Agreement also made clear that lower level officials cannot escape liability by saying they were "just following orders." *See* Constitution of the International Military Tribunal, Arts. 7, 8. The United States joined with all members of the infant United Nations in approving the judgment of the Nuremberg Tribunals. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 66 (1992). These historic precedents have led in later decades to judicial decisions in this country and abroad supporting the accountability for all parties that commit human rights abuses.[5]

Ultimately, this case is about the defendants' role in aiding and abetting, conspiring to commit, and/or condoning the actions of known human rights violators in perpetrating extreme violence against the plaintiffs. As a result of the defendants' actions, the plaintiffs were subjected to direct, extreme physical, and mental harm resulting from the well founded fear of persecution and/or from the belief that their disappeared loved ones were being tortured. To this day, the plaintiffs continue to suffer due to additional and continuing harm resulting from their lack of knowledge of the whereabouts of their loved ones.

Defendant Kissinger's conduct constitutes a clear violation of peremptory norms of international law that can never be within the proper scope of employment. Therefore, the

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[5] *See, e.g. Letelier,* 488 F. Supp. at 674; *In re Estate of Ferdinand Marcos, Human Rights Litigation,,* 25 F.3d 1467, 1472 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (holding former president of the Philippines Ferdinand Marcos liable for acts of torture and execution because his acts were "clearly outside the scope of his authority as President"). *See also*, VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, Vol. 1. 64-65 (1998) (stating the United States was the first country to officially support the ICTR); Secretary Madeline Albright, U.S. Dept. of State Dispatch, June 1999, *Statement Before the Senate Appropriations Committee on Foreign Operations*, Washington D.C., May 20, 1999 ("We are continuing to work, through military and diplomatic means…to support the International Criminal Tribunal for the former Yugoslavia."); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 1999) 2 W.L.R. 827, *reprinted in* 38 I.L.M. 581 (1999) (holding former General Pinochet did not enjoy immunity as a former head of state for torture violations in Chile).

Certification by Defendant United States is improper. The instant action is justiciable, Defendant Kissinger is not shielded by immunity, and the Complaint states cognizable claims. Furthermore, the plaintiffs maintain that the United States Government should not enjoy sovereign immunity in this case. The plaintiffs therefore respectfully request that the Court deny the defendants' Motion to Dismiss and strike Defendant Kissinger's Certification.

STATEMENT OF THE CASE

The defendants' attempt to introduce disputed factual allegations at this procedural stage is improper, and therefore Section A of the defendant's Mot. to Dismiss at 2-6 should be stricken from the record. Nevertheless, to the extent that Section A contains admissions of liability,[6] it is admissible pursuant to Fed. R. Evid. 801(d)(2) and *United States v. GAF*, 928 F.2d 1253 (2d Cir. 1991). Insofar as the defendants have filed a motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b), rather than a motion for summary judgment, the court must presume that all the plaintiffs' allegations are true; resolve all doubts and inferences in favor of the plaintiffs; and view the Complaint in the light most favorable to the plaintiffs. *Albright v. Oliver*, 510 U.S. 266, 267 (1994). The defendants cannot both assume the veracity of all factual allegations in the Complaint for purposes of the present Motion, and at the same time introduce new factual allegations that are in dispute. *See, e.g.*, Mot. to Dismiss at 2-6, 8-12. In addition to requesting that Section A of the defendants' Mot. to Dismiss be stricken from the record for purposes of the present motion, the plaintiffs further request a hearing to resolve any factual disputes in connection with this Motion.

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[6] The plaintiffs ask the Court to take judicial notice that the defendants admit the United States provided weapons to coup plotters planning to kidnap Chilean General Schneider. Mot. to Dismiss at 4, n.2. Additionally, this Court should take judicial notice that the CIA maintained relationships "with Chilean security officers, a number of whom were implicated in human rights abuses." Mot. to Dismiss at 6. Although the defendants claim that these relationships existed without condoning the repression, the fact remains that defendants paid a government official whose policies consistently and intentionally included abuse of fundamental human rights. *See infra*, discussion of Contreras, at 15.

The plaintiffs emphasize that the quoted material in the Complaint comes from United States Government documents, most of which were not available to the plaintiffs until very recently.[7] Many of the defendants' factual assertions, on the other hand, come not from official government documents, but from Defendant Kissinger's self-serving version of events as stated in his book THE WHITE HOUSE YEARS. Mot. to Dismiss at 8-9 (citing HENRY KISSINGER, THE WHITE HOUSE YEARS 569, 572 (Little Brown 1979). If the defendants wish to include Defendant Kissinger's statements in the record, then the plaintiffs would agree to depose him. The official documents upon which the plaintiffs rely demonstrate that the defendants assisted and encouraged those who caused the plaintiffs harm, substantially aiding and abetting the commission of such violations. Further, as will be discussed below, these documents indicate that Defendant Kissinger acted outside the scope of his employment. In fact, in the legislative history of the Hinchey Amendment, Congressman Hinchey states that "it is important for us to take action to ensure that these kinds of *illegal activities* do not occur in the future." (Intelligence

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[7] Although the plaintiffs rely on ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS: AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, UNITED STATES SENATE, S. Rep. No. 94-465 (1975) ("Church Report") and REPORT ON CIA ACTIVITIES IN CHILE ("Hinchey Report"), Sept. 18, 2001, *available at* http://foia.state.gov/Reports/HincheyReport.asp as a source for their factual assertions, the plaintiffs do not consider either report as a final and conclusive determination of all the facts or of the defendants' liability in a court of law. As a point of clarification, all references to the Hinchey Report refer to what the defendants characterized as a Congressional request "that the Director of Central Intelligence submit a report to designated committees of the House and Senate a [sic] report [sic] 'describing all activities of officers, covert agents, and employees of all elements in the intelligence community' with respect to: Allende's assassination in 1973; Pinchot's [sic] accession to power; and subsequent human rights violations by the Pinochet government." Mot. to Dismiss at 4-5, n.4. The plaintiffs additionally rely on documents recently declassified during 1999-2000 that supplement the information contained in both the Church and the Hinchey Reports. *See* U.S. Department of State Office of the Spokesman Press Statements on the Chile Declassification Project, *available at* http://www.secretary.state.gov/www/briefings/statements/1999/ps990630.html, http://www.secretary.state.gov/www/briefings/statements/1999/ps991008b.html, and http://www.secretary.state.gov/www/briefings/statements/2000/ps001113b.html. Nevertheless, there are still some documents that are relevant to a determination of the plaintiffs' claims that have not been released to the public. *See* U.S. Department of State Office of the Spokesman June 30, 1999 Press Statement on the Chile Declassification Project, *available at* http://www.secretary.state.gov/www/briefings/statements/1999/ps990630.html (stating that a number of documents have not been released, and that certain information has been withheld from some of the released documents).

Authorization Act for Fiscal Year 2000, Pub. L. No. 106-120, 113 Stat. 1606 (1999) ("Hinchey Amendment") (emphasis added)).

Because the defendants presented an inaccurate depiction of the historical events, it is necessary to emphasize specific facts that contradict the defendants' assertions. The defendants blatantly mischaracterize the 1976 conversation between Defendant Kissinger and Pinochet at the meeting of the General Assembly of the Organization of American States as one that did not indicate Defendant Kissinger's sympathy toward Pinochet's goal of eliminating any ideological opposition. Mot. to Dismiss at 11, n.6. Having full knowledge of the atrocities committed against opposition groups by the Pinochet regime,[8] Kissinger said behind closed doors, "[T]he speech is not aimed at Chile. I wanted to tell you about this. My evaluation is that you are a victim of all left-wing groups around the world, and that your greatest sin was that you overthrew a government which was going Communist." *See* Memorandum of Conversation on U.S.-Chilean Relations between Henry Kissinger and Augusto Pinochet, Chile Project (#S199900030), June 8, 1976 at 2. The defendants conveniently omitted this portion of Kissinger's comments.

The defendants correctly note that Defendant Kissinger indeed mentioned that the United States wanted the Chilean government to improve its human rights record. The defendants neglect to recognize, however, that Defendant Kissinger was advised by his own staff to notify Pinochet that the United States did not condone such action.[9] Defendant Kissinger failed to

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[8] *See* Memorandum from William D. Rogers to the Sec'y of State, Chile Project Department of State declassified document #S19900006 at 4 (Declassified to supplement the Hinchey Report) (May 26, 1976). This is a briefing report sent from Henry Kissinger's Assistant, William Rogers, to Kissinger with regards to the upcoming meeting with Pinochet at the OAS conference. The document states, "a great number of human rights violations have occurred and abuses continue—arbitrary arrest, disappearance, detention without trial, torture—despite the fact that we can see no significant threat to the regime." *Id.* at 2-3.

[9] Chile Project Department of State declassified document #S19900006 at 3 (stating "The most important U.S. objectives in Chile, thus, are to improve human rights practices and to make it publicly clear that we do not approve of what is going on.").

communicate the U.S. government's position by expressly disavowing Congressional disapproval of Pinochet's oppressive tactics,[10] thereby condoning Pinochet's human rights violations.

Moreover, the defendants' cursory reading of this document fails to reflect that Defendant Kissinger's statement, "[w]e are not out to weaken your position," was intentionally ambiguous. Mot. to Dismiss at 11, n.6. It is consistent with the text of the Hinchey Report that Defendant Kissinger was referring to Pinochet's efforts in supporting repression abroad. At this stage, this Court must interpret the facts in the light most favorable to the plaintiffs. *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1292 (9th Cir. 1997) (*rev'd on other grounds*, 525 U.S. 432 (1999) (affirming the maxim that the court cannot judge a claim on the facts at the 12(b)(6) stage). The resolution of any factual dispute would therefore be improper at this stage.

Additionally, Defendants argue that United States-Soviet tension justified Kissinger's unlawful, *ultra vires* conduct. Mot. to Dismiss at 8-9. The Church Report clearly rejects this explanation. "As the discussion of National Intelligence Estimate in Section IV of this paper makes clear the more extreme fears about the effects of Allende's election were ill-founded; there never was a significant threat of a Soviet military presence." Church Report at 28.

Similarly, the historical record contradicts Defendants' assertion that "there is no hard evidence of direct U.S. assistance to the coup." Mot. to Dismiss at 4. Covert funding to the Pinochet junta, approved by the subcommittee of the National Security Council, the 40 Committee, that was chaired by Defendant Kissinger and charged with approving such operations continued into 1974. This was well after the United States became aware of the ongoing practice of torture and extrajudicial killing.

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[10] *Id.* at 2. "Congress is now debating further restraints on aid to Chile. We are opposed."

It is duplicitous of the defendants to declare that the "U.S. did not condone the repression"[11] when the Hinchey Report states, "[i]n more than one case, in light of the contacts' service affiliation and position, it seemed likely that they [CIA] were involved in, knew about or covered up human rights abuses. . . . There is no doubt that some CIA contacts were actively engaged in committing and covering up serious human rights abuses." Hinchey Report at 11, 14.

The defendants mention that the CIA did "continue contact, for intelligence gathering purposes, with Chilean security officers, a number of whom were implicated in human rights abuses." Mot. to Dismiss at 6. The Hinchey Report highlights the specific relationship with the CIA and the notorious human rights abuser, Manuel Contreras Sepúlveda ("Contreras").[12] However, the defendants fail to acknowledge that the CIA knew Contreras was the "principal obstacle to a reasonable human rights policy within the Junta. . . ." Hinchey Report at 11. Furthermore, the "contact" with the CIA included assistance in the form of a payment to Contreras in 1974. *Id.*

The historical record cited by the plaintiffs accurately reflects that the defendants knowingly provided practical assistance and encouragement to the Chilean repressive regime with reckless disregard for the lives and well-being of the plaintiffs and their families. The defendants' attempt to color this Court's interpretation of the historical record contradicts fundamental rules of civil procedure and the defendants' version of the facts should therefore be stricken from the record.

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[11] *See* Mot. to Dismiss at 6.

[12] *See* Hinchey Report at *11, *available at* http://foia.state.gov/Reports/HincheyReport.asp. Contreras was the head of the Chilean Directorate of National Intelligence ("DINA"), the military force that sought to eliminate all ideological opposition to Pinochet's regime. Contreras was recently indicted for the murder of General Carlos Prats.

ARGUMENT

I. POLITICAL QUESTION DOCTRINE DOES NOT BAR ADJUDICATION OF THIS CASE.

A. This case entails the adjudication of individual rights.

Because the facts at issue involve the aiding and abetting of human rights abuses, rather than the elaboration of policy, this case is justiciable. The plaintiffs acknowledge that government officials' ability to negotiate freely in making policy determinations is crucial to democracy and the maintenance of security of this nation.[13] As such, the plaintiffs are not questioning the propriety of U.S. policy toward Communist states.[14] Rather, the plaintiffs are challenging the defendants' role in assisting grave human rights violations. Aiding in the commission of these abuses is not—and cannot be—considered policy. The political question doctrine is not an immunity shield. Nor is it a mechanism to guarantee impunity. To allow the defendants to enjoy impunity for their role in assisting in the commission of human rights abuses by relying on a doctrine founded in the Constitution of the United States of America contradicts the most fundamental precept of our nation's Judiciary—judicial review. No one, not even a head of state, as we have learned through the trial of Slobodan Milosevic, is free to commit atrocities that debilitate and degrade the human spirit.

Indeed, the United States government has recognized that the Judiciary is the appropriate Branch to address human rights violations:

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[13] The defendants' curious reference to events that occurred across the globe in the Suez Canal, Jordan, and the Middle East—apparently an attempt at confusing the facts and issues at hand—is therefore of no consequence. Mot. to Dismiss at 8.

[14] The defendants seem to be confused by the plaintiffs' inclusion of factual background regarding the environment surrounding the coup. Mot. to Dismiss at 10-15. The plaintiffs are not asking this Court to judge the defendants for actions taken in maintaining foreign relations with Chile. In no instance have the plaintiffs questioned the appropriateness of the U.S. government's decision to inhibit Allende's rise to power as the defendants have suggested. Mot. to Dismiss at 12. Rather, the plaintiffs firmly maintain that they are seeking adjudication of claims of personal injury with regard to the defendants' involvement in aiding and abetting, assisting, condoning, and conspiring to commit harm against the plaintiffs.

> [T]he protection of fundamental human rights is not committed exclusively to the political branches of government. . . . The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.

Brief of Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (reprinted in 12 HASTINGS INT'L & COMP. L. REV. 34 (1988) and 19 I.L.M. 585).[15]

After struggling to bring their perpetrators to justice for thirty years, the plaintiffs implore this Court to sanction the defendants for their role in this tyranny. Quite simply, to refuse to review the defendants' connection to these atrocities would amount to a great failure of the very purpose of the U.S. Judiciary—to protect individual rights. In coining the concept of political question in *Marbury v. Madison*, in which the Court granted review of Marbury's claim of infringement upon his individual rights by the Executive, Chief Justice Marshall wrote, "[I]t is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress. . . . *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Justice Marshall continued: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury*, 5 U.S. at 170.

One hundred seventy-seven years later, this Court echoed Justice Marshall's conclusion. In *Letelier v. The Republic of Chile*, Judge Joyce Hens Green wrote the following in considering

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[15] Courts share this concern. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) ("judges should not reflexively invoke [the political question doctrine] to avoid difficult and somewhat sensitive decisions in the context of human rights").

the scope of the discretionary function exception to the Federal Tort Claims Act and Foreign Sovereign Immunities Act: "Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law." *Letelier*, 488 F. Supp. 665, 673 (D.D.C. 1980). Judge Green's assertion is particularly instructive, as the discretionary function exception is based on the separation of powers doctrine.[16] The separation of powers interests that guide the political question doctrine therefore do not allow Executive officers the discretion to assist in the commission of extreme abuses such as summary execution and crimes against humanity.

B. *Baker v. Carr* analysis reveals that this case is ripe for adjudication.

Because the instant case involves the vindication of individual rights, application of the *Baker v. Carr* factors[17] illustrates that this case is justiciable. *Baker v. Carr*, 369 U.S. 186 (1962). To begin, this case involves standards that are very familiar to this Court. To adjudicate these claims, this Court need only apply the applicable body of law, not Defendant Kissinger's personal recollection of the "complicated" events. Mot. to Dismiss at 14 (citing HENRY KISSINGER, THE WHITE HOUSE YEARS 658 (Little Brown 1979)). Courts have recognized that the political question doctrine is not invoked merely because the acts in question arise from a complex situation, such as civil war. *See The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2003 WL 1339181, at *50 (citing *Kadic,* 70 F.3d 232.) Rather, adjudication of the claims at

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[16] *See Industria Panificadora v. United States*, 763 F. Supp. 1154 (D.D.C. 1991), *aff'd*, 957 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Blessing v. United States,* 447 F. Supp. 1160 (E.D. Pa.1978).

[17] *See Baker*, 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.")

hand would involve the Court to place narrow focus on the issues of, *inter alia*, third-party liability, international law claims, and domestic tort claims. Standards that would guide the Court's determination are readily available.[18]

As previously stated, assisting in the commission of serious violations of international and domestic law by an official does not call into question the foreign policy of the United States. *See* Baker, 369 U.S. at 211 ("Not every issue related to foreign relations . . . is constitutionally committed for resolution by the Executive.). Therefore, adjudication of the instant action would not require this Court to make an initial policy determination, nor disregard any political decision already made.[19] Simply put, the defendants' support of human rights abuses was not part of the United States Government's anti-Communist policy. Rather, their acts resulted from their illegal implementation of that policy through *ultra vires* acts. Courts have held that challenges to the implementation of foreign policy decisions, unlike challenges to foreign policy decisions, are justiciable. *See DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*,

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[18] *See, e.g.*, the District of Columbia wrongful death statute, D.C. Code § 16-2701. *See also, e.g.*, *Talisman* at *50 ("The Court's function is to determine whether [defendants] violated international law by committing certain acts. The standards of behavior under international law are judicially ascertainable."). Mehinovic *v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (April 2002) (holding officer liable for violations of international law for third-party liability under the ATCA); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D. Fla 2002) (holding former Chilean officer responsible for international law violations for third-party liablity under the ATCA).

[19] The cases upon which the defendants rely to express that courts have been reluctant to interfere with foreign policy are inapplicable to the case at hand, as foreign policy is not at issue in this case. The court in *Committee of United States Citizens Living in Nicaragua v. Reagan* declined to dismiss the case on political question grounds. 859 F.2d 929, 933-34 (D.C. Cir. 1988). Moreover, any analogy to the discussion in *Committee* is inapplicable because the plaintiffs sought an end to U.S. military support for the Contras—support which was approved by the normal channels of government. *Id.* at 932-33. In the instant action, the plaintiffs are not judging the wisdom of sending military aid to Chile. Rather, they are challenging the *ultra vires* acts of the defendants in providing unlawful assistance to human rights abusers. Likewise, the defendants' emphasis on *Sanchez-Espinoza v. Reagan* is improper. 770 F.2d 202 (D.C. Cir. 1985) (declining to hold that the political question doctrine bars consideration of the appropriateness of United States military aid to the Contras). Although the court in *Industria Panificadora, SA v. United States* dismissed the plaintiffs' claims on political question grounds, the facts are distinguishable from those in the case at hand, because unlike the plaintiffs in *Industria*, the plaintiffs in the instant action are not seeking to impose an affirmative duty of care upon the U.S. Armed Forces. 763 F. Supp. 1154 (D.D.C. 1991). The defendants' reliance upon *Chaser Shipping Corp. v. United States* is similarly misplaced. 649 F. Supp. 736 (S.D.N.Y. 1986) (holding that political question doctrine bars evaluation of whether due care was used in the mining of a Nicaraguan harbor). The plaintiffs are not questioning the propriety of support for U.S. military intervention in Chile. To the contrary, they are seeking justice for the harms they suffered as a result of the non-discretionary acts of the defendants.

810 F.2d 1236, 1238 (D.C. Cir. 1987) (holding the political question doctrine inapplicable because of the distinction between challenges to foreign policy decisions themselves, which are nonjusticiable, and challenges to implementation of foreign policy, which are justiciable); *Population Inst. v. McPherson*, 797 F.2d 1062, 1068-70 (D.C. Cir. 1986) (holding that whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1511-15 (D.C. Cir. 1984), *vacating as moot sub nom. Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985) (holding the government's construction and operation of a military training camp on a plaintiff's private property in Honduras did not present a political question because the plaintiff did not seek to challenge the lawfulness of the United States military presence, but rather whether the government could run military exercises on his private land when that land had not been lawfully expropriated), *vacated on other grounds*, 471 U.S. 1113 (1985).

Additionally, Congress has condemned U.S. involvement with Chile,[20] and the Executive Branch itself has expressed regret regarding U.S. support for Chile.[21] Therefore, adjudicating the personal injuries of Plaintiffs would not disrespect the other Branches of government, nor would

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[20] The Church Committee condemned Defendant Kissinger's efforts to conceal his involvement in the attempted coup plot in 1970 as "an abdication of responsibility, and a perversion of democratic government." S. Rep. No. 465, 94th Cong., 1st Sess. 277-278 (1975). *See* Hinchey Report at *14 (questioning the involvement of the defendants in Chilean human rights abuses).

[21] In response to a question about U.S. support for the 1973 coup in Chile, Secretary of State Colin Powell recently remarked that such support "is not a part of American history that we're proud of." *Interview on Black Entertainment Television's Youth Town Hall*, (Feb. 20, 2003) *available at* http://www.state.gov/secretary/rm/2003/17841.htm. Former Ambassador Edward Korry expressed his disapproval for Defendant Kissinger's support for a coup, likening it to "a Bay of Pigs failure." *See* Washington-Santiago exchanges bearing on role of Chilean military in Allende election, *available at* http://www.foia.state.gov/documents/nscchile3/00009566.pdf. The current U.S. Ambassador in Chile, Hon. William Brownfield, expanded on Secretary Powell's statements by saying "we did not say things when we should have said something; or said things that maybe we should not have said, or had opportunities we did not take," *available in Spanish at* http://diario.elmercurio.com/nacional/politica/noticias/2003/2/24/303313.htm?id=303313). The news was applauded by the Chilean government, and made the front pages of all major newspapers in Chile under headlines such as "U.S. mea culpa for 1973 coup." A spokesperson of the Chilean government, Mr. Heraldo Muñoz, said that the Chilean government was pleased with Secretary Powell's recognition of U.S. intervention in 1973, *available at* http://story.news.yahoo.com/news?tmpl=story&u=/nm/20030222/pl_nm/chile_usa_pinochet_dc_1.

it involve the making of multifarious pronouncements by the Branches.

Finally, resolution of the issues in the instant action through international law and domestic tort law is squarely within the power of the judiciary—the branch of government most appropriately suited for resolving these claims. *See* U.S. CONST. art. III, § 2, cl.1; *Marbury*, 5 U.S. at 170; *Klinghoffer v. S.N.C. Achille Lauro*, 730 F. Supp. 854 (S.D.N.Y. 1990), *vacated on other grounds*, 937 F.2d 44 (2d Cir. 1991) (holding that acts of piracy, as violations of international law, do not pose political questions, and stating that the branch of government to which disputes in tort are committed is "none other than our own—the Judiciary").

Analysis of the separation of powers doctrine, upon which the first *Baker* factor is based, is instructive. In *Powell v. McCormack*, the Supreme Court held that "political questions are not justiciable primarily because of the separation of powers within the Federal Government." 395 U.S. 486, 518 (1969). Nonetheless, the separation of powers doctrine does not prohibit the courts from assuming their traditional role of protecting fundamental rights. *See Ramirez de Arellano v. Weinberger*, 745 F.2d at 1514-15 (holding that the political question doctrine "is a tempting refuge . . . susceptible to indiscriminate and overbroad application" and therefore the Judiciary cannot rely on the doctrine to "give the Executive *carte blanche* to trample the most fundamental liberty and property rights . . . "), *vacated on other grounds*, 471 U.S. 1113 (1985), *rev'd*, 788 F.2d 762 (D.D.C. 1986). *See also* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR, 147, 148 (1990) (arguing that "the trend toward executive insulation from judicial review in foreign affairs is a relatively recent development, which finds little support in our constitutional traditions. . . . [Historically] the courts have played a pivotal role in maintaining . . . the constitutional principle of balanced institutional participation.").

Furthermore, the separation of powers rationale does not extend to situations where the officials of the Executive Branch contravenes to the implied will of Congress. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress . . . [his actions] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."); s*ee also Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (Marshall, J., dissenting) (concurring in the majority's disavowal of the political question doctrine and affirming writ of mandamus where the Secretary of Commerce "substitute[d] . . . his judgment for Congress' on the issue of how best to respond to a foreign nation . . . [and] flouted the express will of Congress"). *See* Intelligence Authorization Act of 1997, Pub. L. No. 104-293, § 302, 110 Stat. 3461 (1996) ("The authorization of appropriations by this Act shall not be deemed to constitute authority for the conduct of any intelligence activity which is not otherwise authorized by the Constitution or the laws of the United States.").

For the foregoing reasons, the plaintiffs respectfully request that this Court reject the defendants' Mot. to Dismiss because, *inter alia*, this case does not pose a political question.

II. SOVEREIGN IMMUNITY SHOULD NOT SHIELD UNITED STATES FROM DAMAGES IN THIS CASE.

Because Defendant Kissinger was acting outside the scope of his employment, Certification by the United States Government is improper, and therefore sovereign immunity is not a bar to the claims against Defendant Kissinger. Even if this Court were to approve the Attorney General's Certification, the United States cannot be immune from civil liability for violations of *jus cogens* norms.

As stated in the Complaint, the United States does not enjoy sovereign immunity for violations of peremptory norms of international law from which no person or state may claim

immunity, and principles of comity require that the United States not be granted immunity where immunity is denied to foreign nations.[22] Compl. at ¶ 13. Where sovereign immunity conflicts with the limited array of fundamental norms of international and domestic law, sovereign immunity should not serve as an impenetrable doctrine but rather should be construed narrowly. Specifically, sovereign immunity should be narrowly construed when the United States commits *jus cogens* violations. Congress itself has expressly indicated that the Executive is not authorized to commit unlawful acts, much less violations of fundamental norms, in the name of national security. *See* Intelligence Authorization Act of 1997, Pub. L. No. 104-293, § 302, 110 Stat. 3461 (1996) ("The authorization of appropriations by this Act shall not be deemed to constitute authority for the conduct of any intelligence activity which is not otherwise authorized by the Constitution or the laws of the United States.").

The defendants argue that the absence of an express waiver of sovereign immunity should serve as an absolute bar to judicial review of all the plaintiffs' claims. Mot. to Dismiss at 20. However, this case is clearly distinguishable from cases cited by the defendants because the plaintiffs allege violations of *jus cogens* norms. The defendants cite the following: *In re Sealed Case, No 99-3091*, 192 F.3d 995 (D.C. Cir. 1999) (addressing whether the Office of Independent Counsel had violated the grand jury secrecy rule, and could invoke sovereign immunity); *U.S. v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (addressing issues surrounding a bank officer withdrew funds from his company's corporate account, sent part of the money to the IRS, and after which the IRS claimed sovereign immunity to protect itself from suit); *Lane v. Pena*, 518 U.S. 187 (1996) (examining a case in which a student was separated from the merchant marine academy for having diabetes, and sued the government for discrimination based upon his medical

[22]By allowing foreign sovereigns to be haled into U.S. Courts by enacting the Foreign Sovereign Immunities Act, Congress expressed its endorsement of the restrictive doctrine of sovereign immunity.

disability); and *Floyd v. District of Columbia*, 129 F.3d 152 (D.C. Cir. 1997) (exploring a situation where a retired U.S. Secret Service agent sued the District of Columbia and the U.S. for failure to increase Secret Service retirement benefits). None of these cases alleges violations of *jus cogens* norms.

Where the United States has violated *jus cogens* norms by assisting in the commission of crimes against humanity, arbitrary detentions, torture, summary executions, forced disappearances, and violence against women,[23] the government cannot shield itself from immunity. *See Letelier v. Republic of Chile,* 488 F. Supp. 665, 673 (D.D.C. 1980) (holding that no state has discretion "to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law . . . and were it to be demonstrated that a foreign state has undertaken any such act in this country, that foreign state could not be accorded sovereign immunity").

The defendants argue that the requirement of an express waiver is absolute because the power to authorize damage awards belongs to Congress. Mot. to Dismiss at 22. The acts complained of have been the subject of two congressional investigations and Congress has condemned the CIA for contact with individuals in Chile who "actively engaged in committing and covering up serious human rights abuses." Hinchey Report at *14 (Sept. 2000) *available at* http://www.foia.state.gov/Reports/HincheyReport.asp. Furthermore, the legislative history of the TVPA demonstrates an intent to abolish notions of sovereign immunity for harms such as torture. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992

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[23] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. N (1986), (considering the following to be *jus cogens* violations: genocide, slavery, murder or disappearance, torture, arbitrary detention, and systematic racial discrimination.) Violence against women includes rape, which is considered to be a form of torture. *See Unocal*, 2002 WL 31063976 (9th Cir. 2002) at *8, *reh'g granted*, 2003 WL 359787 (9th Cir. 2003).

U.S.C.C.A.N. 84, 87 ([S]overeign immunity would not generally be an available defense [under the TVPA]"). Clearly, Congress never intended to immunize such conduct and "it is . . . not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico v. Hoffman,* 324 U.S. 30, 35 (1983).

The plaintiffs' claims of *jus cogens* violations involve the most fundamental norms of international law. The closest domestic counterpart to these norms can be found in the Fourteenth Amendment's prohibition of deprivation of life, liberty, or property without due process of law. In *Banco Nacional de Cuba v. Sabbatino,* the Supreme Court recognized that one of the considerations that should be taken into account when evaluating the appropriateness of judicial review is the fundamental nature of the right at issue.

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. 376 U.S. 398, 428 (1964).

Because the plaintiffs have alleged *jus cogens* violations, a waiver of sovereign immunity is not necessary. Whereas prior litigation in this area of law has focused on whether a government has "at some point indicated its amenability to suit," *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995) (holding Germany had not waived its sovereign immunity), the more relevant inquiry is whether a state may act as a sovereign when violating the most fundamental norms of international justice, or *jus cogens* norms. *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7 (1996) (interpreting that "[w]hen a state violates human rights law it must know and expect that its intentional acts in violation of international law are outside the sphere of protectable

sovereign acts, that it can be held responsible, and that it can be judged by law" on extensive review of international and domestic law). The plaintiffs submit that states are incapable of acting as sovereigns while violating the limited array of *jus cogens* norms because the essential meaning of *jus cogens* is both mutually exclusive of, and superior to, sovereign immunity.

Defendants' reliance on *Princz* for the proposition that the United States cannot claim sovereign immunity for violations of *jus cogens* norms is misplaced. Mot. to Dismiss at 22. In *Princz,* the D.C. Circuit declined to hold that violations of *jus cogens* norms constitutes an implied waiver of *foreign* sovereign immunity. *Princz* is not binding in the present action because the holding was expressly premised upon the rationale behind foreign sovereign immunity, namely principles of "comity and grace." 26 F.3d at 1169. "Such an expansive reading of §1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations." *Id.* at 1174 n.1. The holding does not preclude U.S. courts from adjudicating claims against the United States because adjudication of the instant action will not overburden U.S. courts, nor will it hinder foreign relations.

Moreover, the contradictory nature of the doctrine of absolute sovereign immunity and *jus cogens* is apparent in *Princz*:

> [A] state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated. The rise of *jus cogens* norms limits state sovereignty in the sense that the general will of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations. *Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity.

26 F.3d at 1182 (Wald, J. dissenting). *See also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) ("The legitimacy of the

Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal.").

Far from novel, the principle that sovereign immunity does not apply when a state violates peremptory norms has become commonplace. *See e.g.*, Statute of the International Tribunal for Yugoslavia, May 23, 1993, art. 7 (reflecting the "no immunity" principle); *Regina v. Bow Street Metropolitan Stipendiary Magistrate (No. 3)*, 2 All E.R. 97, 170 (H.L. 1999) (Millett, L., opinion of) (the "Pinochet litigation"); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 160 (2002) ("We are obligated to preserve the legality of the regime even in difficult decisions. Even when the artillery booms and the Muses are silent, law exists and acts and decides what is permitted and what is forbidden . . . [t]hat is our role and our obligations as judges.") (quoting *H.C. 2161/96, Rabbi Said Sharif v. Military Commander*, 50(4) P.D. 485, 491); Ilias Bantekas, *State Responsibility in Private Civil Actions—Sovereign Immunity and Jus Cogens Norms*, 92 AM. J. INT'L L. 765, 766 (1998) (summarizing *Prefecture of Voiotia v. Federal Republic of Germany, Case No.* 1378/1997, in which the Court of First Instance of Leivadia, Greece held that where a state acts in breach of a rule of *jus cogens*, that state loses its right to invoke sovereign immunity); Garland A. Kelley, *U.S. v. The World: Does Customary International Law Supersede a Federal Statute*, 3 TEX. REV. L. & POL. 353, 363 (1999) ("At a minimum, this small core of international standards, or 'peremptory norms,' is binding on states *regardless* of consent or considerations of sovereign immunity.") (emphasis added). *Jus cogens* are nonderogable. If this principle is to have any doctrinal meaning and practical effect, sovereign immunity, a judge-made rule,[24] cannot operate

[24] *See* Kenneth Davis, Administrative Law Treatise 6-7 (2d ed. 1984) (quoting Blackstone) (noting sovereign immunity is derived from English common law).

to insulate a state from violations of peremptory norms. Nonderogability and state impunity are mutually exclusive. By their definition, peremptory norms must extinguish sovereign immunity. Where a state violates a nonderogable *jus cogens* norm, "the state cannot be performing a sovereign act entitled to immunity." *Princz*, 26 F.3d at 1182 (Wald, J., dissenting).

III. FEDERAL COMMON LAW DOES NOT DISPLACE DISTRICT OF COLUMBIA LAW.

Notwithstanding the Supreme Court's clear holding in *Mitchell v. Forsyth, supra*, and its repeated statements that federal common law will displace state law only in a very "few and restricted instances," *Atherton v. FDIC,* 519 U.S. 213, 225 (1997), the defendants nonetheless assert that federal common law should displace District of Columbia law. The defendants maintain that position despite Defendant Kissinger's role (a substantial portion of which occurred in the District of Columbia) in the torture, summary execution, and forced disappearance of Chilean victims. The defendants believe imposing liability in such circumstances would interfere with the government's ability to "get its work done." Mot. to Dismiss at 24. Under this rationale, states would essentially be precluded from *ever* applying their own laws—regardless of the egregiousness of the conduct at issue—to federal officials, as long as the officials were purportedly acting to further the work of the government. The defendants' sweeping claims of immunity are also utterly unsupported by precedent and thus ultimately unavailing.

To support their claim of absolute immunity, the defendants rely upon *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), in which the Supreme Court held that state law may be displaced by federal common law when two conditions are met: (1) the case involves a "uniquely federal interest," *id.* at 504-06; and (2) "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law or the application of state

law would frustrate specific objectives of federal legislation," *id.* at 507 (internal quotations and citations omitted). Neither of these conditions is met here.

First, this case does not involve a "uniquely federal interest," but instead presents tort claims of the kind routinely reviewed by courts in the District of Columbia.[25] Although the defendants correctly note that the *Boyle* Court identified "the civil liability of federal officials for actions taken in the course of their *duty*" as an area of "peculiarly federal concern, warranting the displacement of state law," *id.* at 505 (emphasis added), the plaintiffs' Complaint charges Defendant Kissinger with responsibility for torture, summary execution, and forced disappearance claims. As the plaintiffs discuss below, *infra*, Section IV(A)(3) "Certification of Scope of Employment Improper," such conduct simply cannot and does not fall within the "official acts" or "duties" of the National Security Advisor and/or the Secretary of State.[26]

Because the conduct challenged in this case goes well beyond either the individual defendant's official acts or duties, the "uniquely federal interest" necessary to displace state law with federal common law is absent. The defendants' reliance on the general statement that, like the work of the civilian defense contractor charged with negligence in its design and repair of military equipment in *Boyle*, the plaintiffs' lawsuit "plainly implicates the government's ability to 'get its work done,'" is misguided. Mot. to Dismiss at 24. The *Boyle* Court cited this "interest in getting the Government's work done," as the basis for its extension of the "uniquely federal

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[25] *See, e.g., Daskalea v. District of Columbia*, 227 F.3d 433 (D.C. Cir. 2000) (intentional infliction of emotional distress); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001) (same); *Anderson v. Prease*, 445 A.2d 612, 613 (D.C. 1982) (same); *Long v. District of Columbia*, 820 F.2d 409 (D.C. Cir. 1987) (summary execution); *Wagner v. Islamic Republic of Iran*, No. Civ. A. 00-1799, 2001 WL 1424312 (D.D.C. 2001) (same); *District of Columbia v. Hawkins*, 782 A.2d 293 (D.C. 2001) (same).

[26] Although *Boyle* explicitly describes only "the civil liability of federal officials for actions taken *in the course of their duty*," 487 U.S. at 505 (emphasis added), as a "uniquely federal interest," other courts have indicated even more clearly that this "uniquely federal interest" does not extend to the issue of civil liability for federal officials acting *outside* the scope of their employment. *See, e.g. Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 127 (2d Cir. 1999) ("uniquely federal interests…arise only in a few areas, such as … the liability of federal officers *for official acts*" (emphasis added)); *cf. Brown v. Nationsbank Corp.*, 188 F.3d 579, 589 (5th Cir. 1999), *cert. denied* 530 U.S. 1274 (2000) ("The liability of private defendants for actions taken at the direction of agents *acting within their authority* is a unique federal interest." (emphasis added)).

interest" from "an official performing his duty as a federal employee" to "an independent contractor performing its obligation under a federal procurement contract." 487 U.S. at 505. The Court's statement provides no support, however, for defendants' efforts to extend *Boyle* to include civil liability for federal officials acting outside the scope of their authority. Moreover, under the defendants' theory, virtually any conduct that was outside the scope of a federal official's authority but nonetheless was alleged to implicate the government's interest in "getting its work done" could constitute a "uniquely *federal* interest." This plainly cannot be the case.

Furthermore, the defendants do not identify, as required by *Boyle*, any specific conflict between "the government's ability to 'get its work done'" and the application of District of Columbia law to Defendant Kissinger's conduct. Rather, they simply move on, alleging that displacement of District of Columbia law is necessary because the plaintiffs' lawsuit "implicates another, more particular area of uniquely federal interest—the conduct of our nation's foreign affairs." Mot. to Dismiss at 24. Defendants rely on a line of cases, including *Hines v. Davidowitz*, 312 U.S. 52, (1941), and *United States v. Pink*, 315 U.S. 203 (1942), to *Zschernig v. Miller*, 389 U.S. 429 (1968), *reh'g denied*, 390 U.S. 974 (1968), and *Crosby v. Natl. Foreign Trade Council,* 530 U.S. 363 (2000) in which the Supreme Court upheld the federal government's exclusive right to conduct the nation's foreign relations. These cases are inapposite. To the extent that these cases present a "uniquely federal interest,"[27] the interest articulated in these cases is not merely the federal government's interest in conducting foreign relations *per se*, but rather the federal government's interest in an exclusive right to conduct foreign relations in order to ensure that the nation speaks with "one voice," or presents a unified

[27] As the First Circuit noted in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 50 (1999), *cert. granted,* 528 U.S. 1018 (1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), "some degree of state involvement in foreign affairs is inevitable: 'in the governance of their affairs, states have variously and inevitably impinged on U.S. foreign relations.'" L. Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 162 (2d ed. 1996).

foreign policy to the outside world. *See, e.g.*, *Crosby*, 530 U.S. at 381 (noting that differences between federal and Massachusetts sanctions against Burma "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments"); *Zschernig*, 389 U.S. at 441 ("The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy."); *Pink*, 315 U.S. at 232 ("If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power."); *Hines*, 312 U.S. at 66 ("It cannot be doubted that both the state and the federal [alien] registration laws belong to that class of laws which concern the exterior relation of this whole nation with other nations and governments" (internal quotations and citations omitted)).

Crosby, *Zschernig*, *Pink*, and *Hines* are inapplicable because a "uniquely federal interest" in a national foreign policy is clearly not present in this case. Unlike the state conduct at issue in each of those four cases, holding Defendant Kissinger accountable under District of Columbia tort law for his *ultra vires* conduct in the foreign policy and national security arenas will neither create foreign policy (particularly insofar as the challenged conduct occurred over thirty years ago) nor have any effect on the nation's ability to speak with "one voice" in its foreign policy.

Defendants would have this court believe that any statute that touches upon foreign affairs must be displaced by federal common law. A recent Supreme Court case that addressed California's method of taxing multinational corporations clearly rejects this notion. *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994). In that case opponents of such taxation method sought preemption to support their claim that the statute "impair[ed] federal

uniformity in an area where federal uniformity is essential" by "prevent[ing] the Federal Government from 'speaking with one voice' in international trade." *Id.* at 320 (internal citations omitted). In rejecting this challenge, the Supreme Court greatly reformed the essential components of the federal common law of foreign relations. First, it rejected the foreign relations test and made clear that courts have no authority to identify effects and weigh them against the competing interests of the states. *Id.* at 328. Instead, the Court emphasized that it was the job of "Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy." *Id.* at 331. Congress has not enacted a statute that is in conflict with the District of Columbia's ability to hold Defendant Kissinger liable for wrongful death, false imprisonment, assault and battery, and intentional infliction of emotional distress.

Finally, the plaintiffs urge the Court to reject the defendants' overbroad claim that federal common law must displace District of Columbia tort law in this case because "[t]o do otherwise would all but invite foreign nationals displeased with our nation's foreign policy to bring suit for damages in local courts across the country, or even perhaps seek injunctions in those forums." Mot. to Dismiss at 28. Putting to one side the degree to which the defendants' claim raises issue not present in this case—the plaintiffs do not seek injunctive relief, and their Complaint contains concrete claims regarding Mr. Kissinger's *ultra vires* conduct, rather than a mere "displeasure" with foreign policy. In considering an analogous issue, the Supreme Court rejected the former Attorney General's claims of absolute immunity for the performance of national security functions. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). The Court explained that the "spate of litigation does not . . . seriously undermine our belief that the Attorney General's national security duties will not tend to subject him to large numbers of frivolous lawsuits," *Id.* at 522,

adding that it did "not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." *Id.* at 524.

Because the plaintiffs' Complaint implicated neither a "uniquely federal interest" nor a significant conflict between the operation of District of Columbia law and a federal policy or interest, this case does not present one of the "few and restricted instances" in which the displacement of state law by federal common law is warranted, and Defendant Kissinger does not enjoy immunity from suit under District of Columbia law.

IV. COMPLAINT PRESENTS COGNIZABLE CLAIMS AGAINST DEFENDANT KISSINGER NOT BARRED BY IMMUNITY

A. The Westfall Act does not bar claims against Defendant Kissinger.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in part at 28 U.S.C. §§ 2671, 2674, 2679), commonly known as the "Westfall Act," confers upon federal employees immunity[28] from suit for a "negligent or wrongful act or omission" while acting within the scope of employment. Defendant Kissinger contends that because he was acting within the scope of his employment, he is entitled to Westfall immunity, and the United States should substitute him as a defendant. Mot. to Dismiss at 20-21.

1. The Westfall Act does not confer immunity over conduct outside the scope of Defendant Kissinger's employment.

Defendant Kissinger is not immune from suit under the Westfall Act because his actions or omissions fall outside the scope of his employment. Substitution by the United States as a defendant is therefore improper and Defendant Kissinger can be held individually liable. The

[28] Despite Defendant Kissinger's characterization of Westfall immunity as a form of absolute immunity, the plaintiffs note that absolute immunity is conferred only upon judges, legislators, prosecutors, presidents, and executives performing adjudicative functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). It is well established that "qualified immunity represents the norm" for "executive officials in general." *Id.*

Attorney General's Certification is not determinative of the question and is subject to review by this Court.[29] The plaintiffs are entitled to and respectfully request such review. Additionally, certification that an employee was acting within the scope of employment involves settling issues of fact that require an evidentiary hearing and reasonable discovery.[30]

Defendant Kissinger's definition of what falls within the scope of his employment is infinitely broad. While accepting as true all the allegations of egregious violations of peremptory norms of international law for purposes of the present motion, Defendant Kissinger nevertheless presents to this court a Certification maintaining that such violations fall perfectly within his duties as a U.S. employee. Mot. to Dismiss 20-21. In effect, Defendant Kissinger suggests that the scope of employment of an Assistant to the President for National Security Affairs and a Secretary of State includes *carte blanche* power to encourage, aid and abet, and conspire to commit grave human rights violations, without the knowledge, much less approval, of key members of the Executive Branch and/or members of the Legislative Branch. This assertion is simply too broad.

An act is within the scope of employment only if: (1) it is the kind of act the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master. *Haddon v.*

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[29] *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (holding Certification subject to judicial review and commenting that Certification "does not conclusively establish as correct the substitution of the United States as defendant in place of the employee"); *Kimbro v. Velten*, 30 F.3d 1501 (D.C. Cir. 1995), *cert. denied*, 515 U.S. 1145 (1995) (finding Certification only *prima facie* evidence that employee was acting within the scope of employment; holding Certification order reviewable by the court after reasonable discovery allows a plaintiff the opportunity to meet burden of challenge to Certification; and holding that "following reasonable discovery" when "there is a material dispute as to the scope of employment issue the district court must resolve it at an evidentiary hearing"). It must be noted that the United States Government, through a brief of *amicus curiae*, supported reviewability of the Certification in *Gutierrez de Martinez*.

[30] The plaintiffs respectfully request an evidentiary hearing on the issue of whether Defendant Kissinger's actions fall outside the scope of his employment.

United States, 68 F.3d 1420, 1423-24 (D.C. Cir. 1995) (*citing Mosley v. Second New St. Paul Baptist Church,* 534 A.2d 346, 348 n.4 (D.C. 1987), relying on RESTATEMENT (SECOND) OF AGENCY § 229 (1957). In the instant case, Defendant Kissinger fails to meet the *Haddon* threshold for acting within the scope of employment. Specifically, crimes against humanity, extrajudicial killing, torture, arbitrary detention, violence against women, and forced disappearance— violations of *jus cogens* norms—cannot be the kind of acts duly employed officials within the Executive Branch are employed to perform. It is simply inconceivable that Defendant Kissinger, in either his capacity as Advisor to the President or as Secretary of State, was hired to encourage and aid known human rights violators, and foment a coup with full knowledge of the carnage that would follow.[31]

Furthermore, it is untenable to argue that Defendant Kissinger's "master," in this case both Congress and the President, expected or encouraged Defendant Kissinger to promote U.S. interests abroad through support and encouragement of known human rights violators. Although Defendant Kissinger argues that the United States Government's policy during the pertinent period was to prevent the spread of Communism, he fails to recognize that it was never government policy to support or condone human rights abusers, especially in times of peace. In fact, both the Executive and Legislative Branches have questioned whether Defendant Kissinger's actions in Chile constituted a legitimate U.S. policy. The Executive Branch has publicly declared the need to judge "the extent to which U.S. actions undercut the cause of

[31] *See* 50 U.S.C. § 402 (1994) (designating the Assistant to the President for National Security Affairs as chairperson of both the Committee on Foreign Intelligence and the Committee on Transnational Threats, charged with the task of conducting annual reviews of national security interests, identifying the intelligence required to meet such interests, and conducting an annual review of the elements of the intelligence community). *See* Complaint at ¶¶44-45 (noting that Kissinger as Chairman of the National Security Council's 40 Committee asked the CIA to provide him with an assessment of the results if a coup should occur). The assessment revealed that a coup would result in 10,000 deaths. "Carnage would be considerable and prolonged, i.e. civil war." In spite of reservations expressed in the 40 Committee's Assessment, Kissinger continued to direct the CIA to instigate a coup. Members of the 40 Committee objected that Kissinger's request would "provoke chaos in Chile . . . which is unlikely to be bloodless." *Id.*

democracy and human rights in Chile." *See* U.S. Department of State Office of the Spokesman Press Statement on the Chile Declassification Project, June 30, 1999, *available at* http://www.secretary.state.gov/www/briefings/statements/1999/ps990630.html. Additionally, as noted *infra*, Secretary Powell commented on February 2003 that, as Secretary of State, he was "not proud" of the U.S. role in the September 11, 1973 coup.[32] The Legislative Branch has twice deemed it necessary to investigate the events at issue, first in the 1970s and again in the 1990s. (See Hinchey and Church Reports). In sum, the Executive and Legislative Branches simply do not want to equate Defendant Kissinger's *ultra vires* conduct with anti-Communism policy that existed at the time.

In furtherance of Defendant Kissinger's activities outside the scope of his employment, the CIA sent a cable to its officers in Santiago that instructed them "to continue their work of promoting a successful coup in spite of 'other policy guidance' that they may receive from other branches of the U.S. government."[33] Such action clearly violates the United States Government's fundamental principles of oversight, separation of powers, and accountability. Under no circumstance could it be construed as an action taken within an officer's proper scope of employment.

For the foregoing reasons, the plaintiffs respectfully request that this Court strike the Certification of Scope of Employment. In the alternative, we respectfully request leave to take discovery and ask that an evidentiary hearing be set on this matter.

2. The Westfall Act does not confer immunity over conduct actionable under the Alien Tort Claims Act.

The Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), provides both jurisdiction and a cause of action and therefore falls within one of the two exceptions to the Westfall Act immunity

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[32] *See* note 20, *infra*.
[33] *See* Central Intelligence Agency Interim Comm. Rpt. at 242, Oct. 16, 1970.

provision. *See* 28 U.S.C. § 2679(b)(2)(B) (Congress preserved a federal employee's individual liability for claims "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized"). Defendant Kissinger contends that "[w]ith the possible exception of any claim under the Torture Victims Protection Act . . . the Westfall Act disposes of all of the plaintiffs' claims against Dr. Kissinger, including the claims under treaty, international law and the Alien Tort Claims Act." Mot. to Dismiss at 21. Defendant Kissinger wrongly asserts that the ATCA is merely a jurisdictional statute which does not confer a private cause of action and therefore the liability-preserving exception of 28 U.S.C. § 2679(b)(2)(B) does not apply to ATCA claims. Mot. to Dismiss at 22.

Since *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the leading case interpreting the ATCA,[34] all jurisdictions that have addressed this issue in binding decisions have held that the ATCA provides both a cause of action and a federal forum where aliens may seek redress for torts committed in violation of international law. *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) ("§1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law…without recourse to other law as a source of the cause of action"); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) *cert. denied*, 513 U.S. 1126 (1995) (joining the Second Circuit "in concluding that the [ATCA] creates a cause of action for violations of specific, universal and obligatory international human rights standards…"); *Kadic,* 70 F.3d at 246 (rejecting Judge Bork's concurring opinion in *Tel-Oren* and holding that the ATCA provides a cause of action for "violations related to genocide, war crimes, and official torture"); *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1130-31 (C.D. Cal. 2002) (holding that "the ATCA both confers federal subject matter

[34] Defendant Kissinger concedes that *Filartiga* and Judge Edwards' concurring opinion in *Tel-Oren* stand for the proposition that the ATCA "authorize[s] a cause of action for aliens seeking redress for violations of international law." Mot. to Dismiss at 22, n.10.

jurisdiction and creates an independent cause of action for violations of treaties or the law of nations"); *John Doe I v. Unocal Corp.*, 2002 WL 31063976 at *8 (9th Cir. 2002), *reh'g. granted*, 2003 WL 359787 (9th Cir. 2003) (the ATCA also provides a cause of action, as long as "plaintiffs ... allege a violation of 'specific, universal, and obligatory' international norms as part of [their] ATCA claim"); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1358 (S.D. Fla. 2001) (same); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (same); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (holding that "[t]he plain language of the statute and the use of the words 'committed in violation' strongly implies that a well pled tort if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]"); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir.) (same), *cert. denied*, 519 U.S. 830 (1996).[35]

There is no majority opinion in this jurisdiction that has held otherwise. *See, e.g.*, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.5 (D.C. Cir. 1985) ("[N]othing in today's decision necessarily conflicts with the decision of the Second Circuit in *Filartiga v. Pena-Irala*"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-96 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Edwards, J., concurring) (concluding the ATCA provides a cause of action); *but see id.* (Bork, J., concurring).[36] In *Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 8 (D.D.C. 1998), this court suggested that the Second Circuit's interpretation of the ATCA and international law stated in *Kadic* is "far more timely than the interpretations set forth

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[35] *See* Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485 (2001) (arguing that all three branches of government have tacitly endorsed ATCA litigation).

[36] Congress rejected Judge Bork's reading of the ATCA in *Tel-Oren* in the legislative history of the TVPA. *See Islamic Salvation Front*, 993 F. Supp. at 8; *see also Abebe-Jira*, 72 F.2d at 241 (citing H.R. Rep.No. 367, 102 Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86, for the proposition that codification of *Filartiga* was necessary in light of Judge Bork's concurrence in *Tel-Oren*).

in *Tel-Oren*."[37] *See also Doe v. Lumintang*, *available at* http://cja.org/cases/Lumintang_Docs/Lumintang_Judgment.html (Sept. 10, 2001) (finding torture, summary execution, crimes against humanity and cruel, inhuman and degrading treatment are actionable claims under the ATCA). Because it is clear that the ATCA provides a cause of action, the plaintiffs' ATCA claims satisfy the § 2679(b)(2)(B) exception.

Defendant Kissinger cites *United States v. Smith*, 499 U.S. 160, 173-74 (1991), apparently for the assertion that "it is clear that § 1350 creates no substantive rights or duties" Mot. to Dismiss at 22. This statement is at best misleading. *Smith* involved the application of the *Gonzalez Act*, 10 U.S.C. § 1089 related to medical malpractice by a federally employed doctor. Nowhere in the opinion, dissent, or even the syllabus does *Smith* make even passing reference to "§ 1350." Therefore, it is certainly not clear that "§ 1350 creates no substantive rights or duties" For the reasons set forth above, the ATCA is widely recognized as a statute under which an individual would be individually liable, and therefore the Westfall Act's § 2679(b)(2)(B) exception preserves Defendant Kissinger's individual liability for claims under the ATCA.[38]

3. The Westfall Act does not confer immunity over conduct actionable under the Torture Victims Protection Act.

The Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note, Pub. L. No. 102-256, 106 Stat. 73 (1992) ("TVPA") "provides for a federal cause of action for torture and execution

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[37] *Kadic v. Karadzic* followed the *Filartiga* line of cases that have found the ATCA to provide a cause of action for torts committed in violation of international law. *Kadic*, 70 F.3d at 238.

[38] Defendant Kissinger cites *Alvarez-Machain* for the proposition that the Westfall Act bars "personal capacity damages claims for violations of treaties or the law of nations." Mot. to Dismiss at 30. Defendant Kissinger broadly overstates the holding in *Alvarez-Machain*. *Alvarez-Machain* did not address personal damages claims. Rather, the court held that where a U.S. official acting within the scope of employment violates international law, substitution of the United States for the official is proper under the Liability Reform Act. *Alvarez-Machain v. United States,* 266 F.3d 1045 (9th Cir. 2001), *reh'g granted*, 284 F.3d 1039 (9th Cir. 2002). Further, Defendant Kissinger fails to cite *Jama v. U.S. Immigration and Naturalization Serv.*, 22 F. Supp. 353 (D.N.J. 1998), which held that INS officials could be held individually, and personally, liable under the ATCA for violations of customary international law for acts committed under color of law but outside the scope of employment.

committed anywhere in the world." *Islamic Salvation Front,* 993 F. Supp. at 9. Similar to the plaintiffs' ATCA claims for torts in violation of international law, the TVPA claims for torture and extrajudicial killing fall within the liability-preserving exception of § 28 U.S.C. § 2679(b)(2)(B). Although the defendants call into doubt whether the TVPA provides a cause of action, they fail to cite any case to support such argument. Mot. to Dismiss at 29. While "assuming for argument's sake that a claim under the TVPA falls within the exception to absolute immunity provided in 28 U.S.C. § 2679(b)(2)(B)," Defendant Kissinger contends that "the complaint nevertheless states no cognizable claim against Dr. Kissinger or Ambassador Helms [sic] under the TVPA."

a. Defendant Kissinger's interpretation of the Torture Victims Protection Act ignores well established principles of third-party liability.

Defendant Kissinger first argues that the TVPA claims are not actionable because he was not acting "under actual or apparent authority, or color of law of any foreign nation. . . ." TVPA § 2(a), 102 Stat. at 73. Defendant Kissinger's limited interpretation of the TVPA is not only tenuous, unnatural, and excessively narrow, but also contradicts congressional intent in drafting the TVPA, the Vienna Convention on the Law of Treaties, the United Nations Charter, the Convention Against Torture ("CAT"), and the International Covenant on Civil and Political Rights ("ICCPR").

Defendant Kissinger's restrictive view would require U.S. courts to protect aliens solely and exclusively from torture by foreign officials, instead of requiring precisely what the title says: protect victims of torture.[39] Here, the people who, in a sense, "pulled the trigger" were foreign nationals acting under color of foreign law. International and common law principles of

[39] Defendant Kissinger relies on former President Bush's statement that he believes the TVPA should not apply to U.S. Armed Forces or law enforcement operations. Mot. to Dismiss at 29, n.14. Defendant Kissinger is not a member of the "U.S. Armed Forces or law enforcement operation. . ." No such entities are involved in this action.

third-party liability establish that the defendants can nevertheless be held liable for the torture and extrajudicial killings committed by those they aided and abetted. *See Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D.Ga. 2002) ("United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law."); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1332 (S.D. Fla 2002) ("the ATCA reaches conspiracies and accomplice liability"); *Unocal Corp.*, 2002 WL 31063976 at *10 ("the standard for aiding and abetting under the ATCA is … knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.")

This theory of third-party liability is similar to that raised in the French trial of the Gaullist politician Maurice Papon for aiding the Nazis. He said that he was not a Nazi. No matter, said the French courts. Even if one has to be a Nazi to be guilty of war crimes under French law, one who aids and abets Nazis is as guilty as they are. Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France,* 50 HASTINGS L.J. 1, 81 (1998). This same principle applies in American law. If an offense can only be committed by someone having a particular qualification, one may not be an accomplice without possessing that qualification. Therefore, an individual assisting another acting under color of foreign law implicitly acts under color of foreign law himself. To take a more familiar situation, it is a crime for a bank employee to steal or misapply bank funds. A non-employee may nonetheless be guilty of aiding and abetting the bank employee. *See, e.g., United States v. Morrow*, 177 F.3d 272 (5th Cir. 1999), *cert. denied sub nom. Cox v. U.S.*, 528 U.S. 932 (1999) (sales representative aided and abetted bank vice president). The plaintiffs contend that the Chilean authorities were acting under color of Chilean law and with the support and

collaboration of the defendants, and therefore Defendant Kissinger can be liable for claims under the TVPA.

In construing the terms "actual or apparent authority" and "color of law," courts are instructed to look to principles of agency law. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. Therefore there is a substantial issue of material fact as to the type of relationship that existed between Defendant Kissinger and the Chilean repressive regime, and as to the effect that relationship had on the perpetration of the harms alleged.[40]

b. Defendant Kissinger's interpretation of the Torture Victims Protection Act is contrary to international principles of treaty obligations, statutory construction, and congressional intent.

Article 103 of the United Nations Charter asserts that states may not set forth rights and obligations that conflict with those obligations a member state has undertaken under the UN Charter. The *obligation* of the United States to protect against and provide a remedy for acts of torture and extrajudicial executions cannot be limited to claims brought by foreign nationals against foreign nationals. (emphasis added) Such a narrow reading of the TVPA would limit the rights of torture victims as well as conflict with U.S. obligations under the UN Charter.

Pacta sunt servanda ("agreements of parties must be observed") is one of the most fundamental principles of public international law. The Vienna Convention on the Law of Treaties, Article 26 (1969). Here, Congress agreed to observe in good faith the obligation under the UN Charter and other international agreements to provide a remedy for victims of torture and extrajudicial killing, regardless of where the violations took place. Reinforcing the duty to

[40] Any dispute as to whether the acts alleged in the Complaint are actionable under theories of third-party liability or are acts "under actual or apparent authority, or color of law of any foreign nation" is a material fact improper for resolution at this preliminary stage. *See Islamic Salvation Front*, 993 F. Supp. at 9 (declining to determine a color of law issue with respect to TVPA jurisdiction at the preliminary stage because of a factual dispute).

observe these obligations in good faith, the introductory language to the TVPA states that it is "[a]n Act to 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." 28 U.S.C. § 1350 note. The TVPA was expressly created by Congress to carry out the obligations, rights, and purposes[41] of the CAT and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (ratified by the Senate on October 27, 1990); *see also* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991).[42] This Convention defines torture[43] as:

> [A]ny act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as … punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons, … when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

CAT, 1465 U.N.T.S. 85, 113, Art. I.

Almost two hundred years ago, Chief Justice Marshall enunciated the following long-standing rule of construction: "an act of congress ought never to be construed to violate the law

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[41] The legislative history of the TVPA clearly demonstrates the United States' strong commitment to carry out in good faith the purpose of the CAT. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87 ("Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law. . . [S]overeign immunity would not generally be an available defense [under the TVPA]. . . The Convention Against Torture obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts. One such obligation is to provide means of civil redress to victims of torture.")

[42] Congress' concern about excluding U.S. officials from liability under the TVPA was based on the premise that no U.S. official would participate in torture or extrajudicial killing. This was not an intentional exclusion.

[43] "Torture" is also defined in the ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force in the United States, Sept. 8, 1992) states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to the comments to Article 7, "[t]he aim of the provisions of article 7… is to protect both the dignity and the physical and mental integrity of the individual whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." The comment expresses that those "who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible." Articles 3 and 6 of the ICCPR provide that the right to life shall be protected by law.

of nations, if any other possible construction remains . . . ." *The Charming Betsy*, 6 U.S. 64, 67 (1804), quoted in *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953), *also quoted* in *Filartiga*, 630 F.2d at 887. Defendant Kissinger's restrictive construction of the TVPA violates the law of nations because it is incompatible with the purpose of the CAT. At a minimum, the CAT allows victims of torture who are nationals of a State Party to sue offenders of any nationality. The TVPA is a legislative measure adopted by Congress expressly to implement the scope and purpose of the CAT in the United States.[44] Defendant Kissinger's interpretation incorrectly limits the scope of the TVPA to preclude lawsuits if the torturer is a U.S. official. Such a narrow interpretation is inconsistent with the rule of statutory construction first espoused by Chief Justice Marshall in 1804 because it limits the rights of victims of torture and violates the duty of the United States to fulfill in good faith its obligations under the U.N. Charter and under the Convention Against Torture.

c. The Torture Victims Protection Act can be applied retroactively.

Defendant Kissinger incorrectly claims that "even if the TVPA were not limited to those who act under color of foreign law, it could not be applied retroactively." Mot. to Dismiss at 29. On the contrary, it is well established that the TVPA can be applied retroactively because the statute does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Estate of Cabello*, 157 F. Supp. 2d at 1362 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 245 (1994)).

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[44] The TVPA is not the only time Congress has addressed the definition of torture. Congress also defined torture under 18 U.S.C. § 1340 as "an act committed by a person acting under the color of law" and not under color of *foreign* law.

In *Cabello* the court held that the TVPA could be applied retroactively to acts of torture that occurred in Chile in 1973 because "[t]he enactment of the TVPA was not the law's first proscription of extrajudicial killing, [or] torture . . ., as the ATCA had already provided aliens with a cause of action in federal court to recover for the commission of these torts, prohibited by 'the law of nations or a treaty of the United States.'" *Cabello*, 157 F. Supp. 2d at 1362. The *Cabello* court cited a number of international treaties and agreements, such as Articles 3, 6, and 7 of the ICCPR as well as the London Agreement, which established the International Military Tribunal at Nuremberg, to demonstrate that acts of torture and extrajudicial killing had been universally condemned well before 1973. *Id.* at 1366. Other jurisdictions have also held that the TVPA can be applied retroactively. *See Xuncax*, 886 F. Supp. at 177 (concluding there has been a universal prohibition against torture since the Universal Declaration of Human Rights was written in 1948, and also concluding that the retroactive application of the TVPA is proper); *Filartiga*, 630 F.2d at 880 (holding that international law has long condemned and prohibited torture). Therefore, the TVPA can be applied retroactively, because the violations alleged herein involve violations of standards and norms long prohibited and no new duty was imposed on Defendant Kissinger.

For the foregoing reasons, the plaintiffs' claims against Defendant Kissinger under the TVPA are cognizable, can be applied retroactively, and satisfy the § 2679(b)(2)(B) exception to the Westfall Act.

4. The plaintiffs are entitled to declaratory relief because the Westfall Act is not applicable to non-monetary claims.

The Westfall Act does not preclude the plaintiffs' claims against Defendant Kissinger for declaratory relief because the Act applies only to actions that seek monetary damages.[45] Defendant Kissinger claims that the plaintiffs are not entitled to declaratory relief pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, because they have not alleged that they will suffer from future harm. Mot. to Dismiss at 19 . Defendant Kissinger has neglected the fact that the loved ones of many of the plaintiffs have disappeared. The continuous suffering the plaintiffs experience because of the uncertainty surrounding the fates of their loved ones will clearly continue to harm the plaintiffs in the future. A declaratory judgment from this Court would relieve such harm by compelling the release of documents that would provide the plaintiffs with an accurate record of what happened to their loved ones.

5. The Westfall Act does not confer immunity over Defendant Kissinger's intentional torts.

As stated in Section IV(A), *supra*, the Westfall Act confers upon federal employees immunity from suit for a "negligent or wrongful act or omission" while acting within the scope of employment. Defendant Kissinger fails to meet either of these two prongs. The plaintiffs have established that Defendant Kissinger was not acting within the scope of employment. Additionally, Defendant Kissinger's acts in violation of norms of customary international law were not negligent but intentional. Indeed, by definition, the plaintiffs' claims of forced disappearance, torture, cruel, inhuman or degrading treatment, crimes against humanity,

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[45] *See* 28 U.S.C. § 2679(b)(1) (stating that the Westfall Act applies to claims arising from acts or omissions committed by U.S. employees while acting within the scope of their employment, and that the Act "is exclusive of any other civil action or proceeding *for money damages* by reason of the same subject matter against the employee") (emphasis added).

summary execution, violence against women, arbitrary detention, and false imprisonment are intentional torts.[46]

The Supreme Court has expressly stated that under the Westfall Act, the federal government will assume liability for the negligent acts of its employees, but will not assume liability for employees who intentionally commit torts. *Dalehite v. United* States, 346 U.S. 15, 45 (1953) (holding that the "statute requires a negligent act."); *see also Laird v. Nelms,* 406 U.S. 797 (1972). Furthermore, the Supreme Court has held that when interpreting the Westfall Act, courts should proceed on the "strong presumption that Congress intends judicial review." *Gutierrez* at 424, *citing, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-73 (1986); *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Thus Defendant Kissinger may not acquire immunity for the international law claims under the Westfall Act.

6. The Westfall Act does not confer immunity over international law claims actionable under 28 U.S.C. § 1331.

Although the issue has not been decided in this jurisdiction, some district courts have held that section 1331 provides an independent basis for subject matter jurisdiction for international law violations in the human rights arena such that claims that arise out of these violations may be actionable in federal courts. *See, e.g.*, *Bodnar v. Banque Paribas et al.*, 114 F. Supp. 2d 117, 127 (E.D.N.Y. 2000); *Forti*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987). These

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[46] *See, e.g.*, 18 U.S.C. § 2340 defining torture as an intentional act committed by a person acting under the color of law; 18 U.S.C. § 1350 note (TVPA) (defining extrajudicial killing or summary execution as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court"); Rome Statute of the International Criminal Court Article 7, *available at http://www.un.org/law/icc/statute/romefra.htm* (defining crimes against humanity as including the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" including political identity); *Id.* (defining forced disappearance as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time"); *Id.* (including rape and violence against women as crimes against humanity, and further including within the category of crimes against humanity "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.")

decisions have been based on the well established principle that international law is enforceable in the United States as federal common law. *See, e.g.*, *The Nereide*, 13 U.S. 388, 423 (1815); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Thus, a case presenting claims arising under customary international law arises under the laws of the United States for purposes of federal question jurisdiction through section 1331. *Forti*, 672 F. Supp. at 1544; *Kadic,* 70 F.3d at 246 (noting that it is a "settled proposition that federal common law incorporates customary international law").

As mentioned above, Congress preserved a federal employee's individual liability for claims "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). Actions against individuals for international law violations can be authorized under section 1331. *Filartiga*, 603 F.2d at 888, n.22 (deciding that the international law claims were actionable under the ATCA, but mentioning that the same reasoning would apply to international tort actions brought under section 1331). In fact, comparing the language of both the ATCA and section 1331, one can see remarkable similarities. Section 1331 states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The ATCA similarly states that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. As mentioned above at Section IV(A)(2), the ATCA has been uniformly held to provide a cause of action for aliens who allege a tort in violation of the law of nations, otherwise known as customary international law. Because federal law incorporates international law, then a tort claim in violation of customary international law necessarily arises under "laws, or treaties of United States." *See, e.g.*, *In re Estate of Ferdinand E. Marcos Human*

Rights Litigation, 978 F.2d 493, 502 (9th Cir. 1992), *aff'd*, 25 F.3d 1467 (9th Cir. 1994). Thus, torts in violation of customary international law are actionable not only through the ATCA, but also through section 1331. Because the plaintiffs' claims of customary international law are enforceable and actionable through section 1331, an individual may violate section 1331 through breaching customary international law. Therefore, because an individual would be liable for claims based on violations of customary international law under section 1331, such claims fall under the second exception to the Westfall Act grant of immunity, and Defendant Kissinger can be held liable for their violation. Section 2679(b)(2)(B).

B. Defendant Kissinger does not enjoy qualified immunity.

Defendant Kissinger attempts to invoke absolute immunity for his acts giving rise to the plaintiffs' claims. It is well established, however, that "qualified immunity represents the norm" for "executive officials in general." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). In *Harlow*, the Supreme Court established that the purpose of qualified immunity is to protect government officials from insubstantial claims. *Id.* at 806. The Court stated that, "as recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Id.* A suit against a *former* government official for actions that occurred almost thirty years ago can hardly be said to interfere with any of the former official's duties. The Supreme Court also made clear that the protection of qualified immunity is not a license for government officials to act unlawfully. *Id.* at 819. The Court held that high-level Executive officials enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Applying this standard demonstrates:

1) Violations of *jus cogens* norms and other norms of customary international law are violations of statutory rights actionable under the ATCA, TVPA, and section 1331 and therefore no qualified immunity may attach; and

2) A reasonable person would have known that conduct that furthers grave human rights violations including torture, summary execution, arbitrary detention, forced disappearance, violence against women, cruel, inhuman or degrading treatment, and crimes against humanity, violates clearly established rights.

While *Harlow* asserts resolution of qualified immunity issues is an objective question of law, the Supreme Court has recently held that factual determinations may be necessary when evaluating an immunity claim.[47] The plaintiffs assert that Defendant Kissinger would not be entitled to qualified immunity under an objective or a subjective standard. Objectively, Defendant Kissinger cannot claim that his actions were reasonable because he had knowledge that his participation in grave human rights abuses violated clearly established rights.[48] Subjectively, the plaintiffs have alleged sufficient facts demonstrating Defendant Kissinger's liability for the claims alleged.[49] Defendant Kissinger is therefore not entitled to qualified immunity for these claims, and the Motion to Dismiss should be denied.

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[47] *See e.g., Scheuer v. Rhodes*, 416 U.S. 232, 242-43 (1974) (noting that "[i]f the immunity is qualified…the scope of that immunity will necessarily be related to facts"); *Behrens v. Pelletier*, 516 U.S. 299 (1996) (noting that more the legally relevant factors bearing on the immunity issue may change throughout the pretrial proceedings as the factual record is developed further); *see also Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995) (emphasizing issues of reasonableness of clearly established right are factual questions for the jury to decide); *McGaughey v. City of Chicago*, 664 F. Supp. 1131, 1138 (N.D. Ill. 1987), vacated in part, 690 F. Supp. 707 (N.D. Ill. 1988) (highlighting that the *Harlow* standard works "better in theory than in practice…because it often will be impossible to assess the objective reasonableness of the defendant's conduct without a resolution of the factual disputes surrounding the incident from which the action arises.").

[48] The plaintiffs' claims arose out of events that occurred in the 1970s. At that time, a reasonable person would have known that the violations alleged in the complaint were clearly established in both domestic and international law. The right to be free from torture and extrajudicial killing, for example, is embodied in the Fourteenth Amendment's right to life, and liberty. Similarly, the District of Columbia preserves liability for wrongful death, assault and battery, false imprisonment, and intentional infliction of emotional distress. Furthermore, international treaties and agreements, such as Articles 3, 6, and 7 of the ICCPR as well as the London Agreement, which established the International Military Tribunal at Nuremberg, have demonstrated that acts of torture and extrajudicial killing had been universally condemned well before 1973. *Cabello*, 157 F. Supp. 2d at 1366; *see also Xuncax*, 886 F. Supp. at 177 (concluding there has been a universal prohibition against torture since the Universal Declaration of Human Rights was written in 1948).

[49] Although factual allegations should be interpreted in the light most favorable to the plaintiffs, because Defendant Kissinger introduced factual allegations that dispute the plaintiffs' version of the facts, the plaintiffs respectfully request an evidentiary hearing in order to resolve those disputes.

CONCLUSION

U.S. courts have helped develop a meaningful body of international human rights law through ATCA decisions. The increasing number of cases brought in U.S. courts to redress violations of customary international law has signaled a positive step for the global human rights movement. In fact, the promotion of democracy and human rights has always been the cornerstone of U.S. foreign policy. All three branches of the U.S. government have praised and supported the use of U.S. courts to remedy international human rights violations. U.S. courts have rightly exercised their power to judge the actions of foreign sovereigns, heads of state, and other government officials, if and when, there has been a violation of customary international law. Courts have exercised their power despite the political nature of all cases involving human rights, because by definition, human rights violations are political. Violations of peremptory norms of human rights are violations that no state, no sovereign, and certainly no federal employee can ever be allowed to commit with impunity. When thousands of people die, disappear or are tortured, that is when judicial systems, international and/or domestic, step in to indicate their perpetrators have crossed the line of permissible conduct.[50]

The key to understanding why U.S. courts have been so effective in exercising jurisdiction over these claims and in remedying these violations is to understand that all permissible conduct has boundaries. The law allows everyone to act freely up to a certain degree. If a person acts outside these legal lines, he or she must confront the judiciary. Concepts

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[50] *Siderman,* 965 F.2d at 715 ("The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal."). See also *Princz* (Wald, J. dissenting) at 1182 "The Nuremberg trials thus permanently eroded any notion that the mantle of sovereign immunity could serve to cloak an act that constitutes a 'crime against humanity'... Because the Nuremberg Charter's definition of crimes against humanity includes what are now termed *jus cogens* norms, a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated... *Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity."

of immunity extend this line a little further, thus allowing some types of actions by government employees to remain within the boundaries of permissible conduct. Nevertheless there are boundaries. No matter how much the lines of permissible conduct expand, they have never, should never, and can never expand to the extent of allowing violations of peremptory norms of international law. If *jus cogens* norms apply only selectively, it makes them irrelevant. The international community, of which the United States is a member, has agreed that these peremptory norms are the definitive limit of permissible conduct, and the United States has been highly involved in the design, implementation, and enforcement of these universal and binding rules. To hold that torture, forced disappearance, arbitrary detention, violence against women, and extrajudicial killing are not violations of peremptory norms, or to hold that such conduct is permissible would be an insult to the very concept of justice, the rule of law, and human rights.

For the foregoing reasons, the defendants' Motion to Dismiss should be denied. Further, he Certification of Scope of Employment should be struck, and the plaintiffs respectfully request an evidentiary hearing.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAURA GONZALEZ-VERA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:02-CV-02240 (HHK)
	)	
HENRY A. KISSINGER, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

The Court having been fully apprised of the plaintiffs' Consolidated Opposition to defendants' Motion to Dismiss and Cross-Motion to Strike Certification of Scope of Employment, and having considered that plaintiffs' established judicially cognizable claims and subject matter jurisdiction, it is hereby

ORDERED that the defendants' Motion to Dismiss is denied; plaintiffs' Motion to Strike Certification of Scope of Employment is granted; Part B of defendants' Memorandum of Points and Authorities, "Statement of the Case," is stricken under Fed. R. Civ. P. 12(b), except to the extent that the Statement contains admissions of liability; United States' entry of appearance for the individual defendants is stricken.

Dated this ____ day of _____, 200__.

_____
UNITED STATES DISTRICT JUDGE

Michael E. Tigar
1025 Connecticut Ave. NW, Suite 1012
Washington, D.C. 20036
DC Bar No. 103762
ATTORNEY FOR PLAINTIFFS

Richard Montague
Senior Trial Attorney
Torts Branch, Civil Division
Department of Justice
Box 7146 Washington, D.C. 20044