UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, *et al.*,	:	
	:	
Plaintiffs,	:	02 CV 2307 (JG) (CLP)
- against -	:	
	:	
JOHN ASHCROFT, *et al.*,	:	
	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION OF THE UNITED STATES TO BE SUBSTITUED AS DEFENDANT

CENTER FOR CONSTITUTIONAL RIGHTS
Jennifer Green (JG 3169)
Shayana Kadidal
Nancy Chang (NC 5331)
Rachel Meeropol (RM 3878)
Matthew Strugar

666 Broadway, 7th Floor
New York, New York 10012
Tel.: (212) 614-6464
Fax: (212) 614-6499

Attorneys for Plaintiffs

Defendants to this action have moved to dismiss Claims 9, 10, and 11 under the Alien Tort Statute and the Vienna Convention on Consular Relations ("VCCR") on the ground that the United States should be substituted as sole defendant under the Westfall Act, Defs. Br. at 74-79, and the United States has moved for substitution as the sole defendant on these claims. Plaintiffs allege clear violations of international law, and their claims under the Vienna Convention and the Alien Tort Statute ("ATS") are exempt from the Westfall Act because they arise under a statutory cause of action.

I. PLAINTIFFS HAVE ADEQUATELY PLED CLAIMS UNDER THE VIENNA CONVENTION AND THE ALIEN TORT STATUTE

While Defendants neither concede nor contest that any of Plaintiffs' international human rights law claims are actionable, *see* Gov't Br. at 2 n.1,[1] Plaintiffs have clearly alleged violations of the Vienna Convention's requirement of consular access and violations of the law of nations which are specific, definable, and universally condemned.[2]

A. Plaintiffs Were Denied the Right to Consular Notification as Required by the Vienna Convention and Customary International Law (Claim 11).

Plaintiffs have stated a claim for denial of their right to consular notification under the Vienna Convention and customary international law. In addition to being a direct treaty

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[1] Should the Government or Defendants raise any new arguments against these claims, Plaintiffs reserve the right to respond in future briefing.

[2] In *Alvarez-Machain*, the Court held that the Alien Tort Statue authorizes federal courts to recognize federal common law claims for violations of international norms with definite content and acceptance among civilized nations." 124 S. Ct. at 2766 (citing *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)). These norms are "specific, universal and obligatory." *Id.*. The *Sosa* court explicitly endorsed the reasoning of *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing ATS claim for torture); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (same); *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring) (endorsing legal principles in *Filartiga*).

violation, the right to consular notification is protected under customary international law.[3] The VCCR itself,[4] international case law[5] and domestic regulations[6] clearly define the right to consular notification. Scholars Decl. at 29-42. The "universal" nature of the right is most evident in the widespread ratification of the Convention.[7] U.S. State Department policy statements and international judicial opinions[8] have recognized both the "universal" and "obligatory" nature of the right.

Plaintiffs' factual allegations make out a clear violation of this right. The communications blackout to which Plaintiffs were subjected made it impossible for consular officials to access the Plaintiffs and class members at MDC. Third Am. Compl. at ¶ 100. Similarly, Plaintiffs and class members were either not advised of their right to seek assistance

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[3] A right is part of customary international law if it is "definable," "universal" and "obligatory." *Sosa*, 124 S.Ct. at 2766; *Filártiga*, 630 F.2d at 881-88; *Kadic v. Karadzic*, 70 F.2d 232, 239 (2d. Cir. 1995)

[4] *See* VCCR, Art. 36 ("a person detained in a foreign country has the right to contact his embassy and the "competent authorities of the receiving State shall ... inform the person concerned without delay of his rights").

A proposed Venezuelan amendment that would have eliminated the individual right of consular communication was withdrawn after generating strong opposition from other member states. 2 Official Records at 37, 38, 84, 85. See also comments by United States and United Kingdom. 2 United Nations Conference on Consular Relations: Official Records at 337, U.N. Doc. A/Conf. 25/16, U.N. Sales. No. 63.X.2 (1963) [hereinafter Official Records].

[5] *See, e.g., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court (October 1, 1999) at Part II Definitions [hereinafter Advisory Opinion].

[6] The Department of Justice regulations provide that every time a foreign national is detained or arrested, the arresting official shall inform the detainee of his right to consular notification. 28 C.F.R § 50.5(a)(1). Similarly, DHS regulations require every detained alien to be notified of their right to communicate with their consul. 8 C.F.R. § 236.1(e).

[7] The product of broad international debate, the Convention has been ratified by more than 160 states since its adoption in April 1963. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 568 (VCCR "represents the broadest agreement possible").

[8] The International Court of Justice has recognized the existence of a right to consular notification. *See, e.g., LaGrand Case* (F.R.G. v. U.S), Final Judgment (June 27, 2001), at ¶ 74, available at http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm. The Inter-American Court has also recognized the right's obligatory nature. Advisory Opinion Part XIII, at ¶ 141(1).

from their consulate or coerced into waiving that right unknowingly. *Id.* at ¶ 101. When Plaintiffs did request to contact their consulates, those requests were denied. *Id.*

B. Plaintiffs Were Subjected to Arbitrary Detention (Claim 9) and Cruel, Inhuman, or Degrading Treatment (Claim 10), Which Are Universally Condemned Human Rights Abuses Cognizable Under the Alien Tort Statute

1. Plaintiffs Were Held in Prolonged Arbitrary Detention

Prolonged arbitrary detention is condemned in all major international human rights instruments. Scholars' Decl. at 1-9 and 12-19. While no clear line demarcates the point at which detention becomes "prolonged arbitrary detention," the Supreme Court in *Sosa* left little if any room for doubt that the facts alleged by Plaintiffs—detention of "many months" without legal justification and without procedural protections—rise to the level of "prolonged arbitrary detention" in violation of customary international law.[9] *Sosa*, 124 S. Ct. at 2768-69.

Plaintiffs were detained on the pretext of immigration violations for up to eight and a half months. Third Am. Compl. ¶¶ 182, 199. Four of the Plaintiffs were held without notice of the charges on which they were being held for between four and seventeen days. *Id*. at ¶ 78. All were denied bond on a blanket basis without an individualized assessment as to whether they posed a flight risk or danger. *Id*. at ¶ 79. And, after their immigration proceedings had ended and they were ready to return to their home countries, Plaintiffs were kept in detention for an additional 100 to 200 days solely for the purpose of a baseless criminal investigation, without provision of notice of the reasons for their detention or an opportunity for a hearing to contest those reasons. *Id*. at ¶¶ 160, 166, 178, 180, 188, 199, 208, 210, 213, 248-49, 264, 272, 280, 284.

[9] The Court found that this standard was not met in the particular case before it and carefully limited its holding to the facts of that case – "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment." *Sosa*, 124 S.Ct. at 2769.

They were held completely incommunicado for up to two weeks, and then given extremely limited access to attorneys thereafter. *Id.* at ¶¶ 69, 82, 87-99, 230.

2. Cruel, inhuman or degrading treatment

Plaintiffs have also stated a claim for cruel, inhuman or degrading treatment. Such treatment has been universally condemned in international law. Scholars Decl. at 19-29. All branches of the United States government have recognized the norm against such treatment. As to the Executive Branch, "in *United States v. Iran*, 1980 I.C.J. 3, the United States argued that even though at that time neither the United States nor Iran had ratified treaties proscribing [cruel, inhuman or degrading treatment], they were nevertheless bound by the norm." In giving its advice and consent in 1990 to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the U.S. Senate reaffirmed this position.[10] Courts too have recognized cruel, inhuman, or degrading treatment as a discrete and well-recognized violation of customary international law, and have thus found it to be a separate ground for liability under the ATCA.[11]

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[10] The Senate gave its advice and consent in 1990, 136 Cong. Rec. S17486-92 (daily ed., Oct. 27, 1990), but the treaty did not become effective for the United States until 1994. Other United States law also recognizes cruel, inhuman or degrading treatment as a violation of internationally recognized human rights. *See* 22 U.S.C. § 262d(a)(1) (stating United States policy to seek to channel international assistance away from those countries that violate internationally recognized human rights including cruel, inhumane, or degrading treatment); 22 U.S.C. 2304(d)(1) (defining internationally recognized human rights to include cruel, inhuman, or degrading treatment). The Department of State's Country Reports detail state acts that violate the international norm against torture as well as the norm against cruel, inhuman, or degrading treatment. *See, e.g.*, Country Reports on Human Rights Practices for 2003 *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/.

[11] *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995). *See also*, *Abebe-Jira v. Negewo,* 72 F.3d 844, 847 (11th Cir. 1996); *Najarro de Sanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1397 (5th Cir. 1985); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347-49 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp 2d. 1345, 1361 (S.D. Fla. 2001); *Wiwa v. Royal Dutch Petroleum Co.*, WL 319887, 7-9 (S.D.N.Y. 2002); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437-38 (S.D.N.Y. 2002).

Plaintiffs have clearly alleged cruel, inhuman, or degrading treatment. Plaintiffs and class members were routinely subjected to physical violence. Third Am. Compl. ¶¶ 86, 102.[12] Necessary medical care was withheld, *id*. at ¶125-27, 176, and Plaintiffs were subjected to physical threats and verbal abuse, *id*. at ¶¶ 159, 186, 195, 198, 217-18, 268, 282. Plaintiffs were also subjected to religious discrimination and other degrading treatment and conditions.[13] Many of these actions caused serious mental or physical suffering and were undertaken without justification or with the specific intent of humiliating the plaintiffs. Under such circumstances, the facts alleged in the Third Amended Complaint constitute cruel, inhuman or degrading treatment under international law. Scholars Decl. at 23-29.

II. Claims based on Vienna Convention Violations Should Proceed Against the Individual Defendants

Plaintiffs seek damages for Defendants' failure to notify consular officials of the foreign citizen Plaintiffs' detention and to notify Plaintiffs of their right to contact their consulates. Defendants and the United States are correct in their assertion that the exclusive remedy

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[12] Defendants abused Plaintiffs and class members by: (1) slamming them against the wall, at times so badly as to cause serious physical injury, *id*. at ¶¶ 103, 153, 154, 194-95, 197, 214, 215, 228, 234, 243; (2) bending and twisting their arms, hands, wrists and fingers, *id*. at ¶¶ 103, 154, 195, 197, 214, 216, 241; (3) lifting them by their arms or handcuffs, *id*. at ¶¶ 103, 214; (4) stepping on their leg restraint chains, causing them to experience pain, bleeding, and injury; *id*. at ¶¶ 103, 174, 195, 197, 214-15, 227, 235, 237-38; and (4) beating them, *id*. at ¶¶ 103, 154, 205.

[13] Defendants interfered with Plaintiffs' ability to practice their religion by withholding the Koran, refusing to provide them with a Halal diet, and interfering with their ability to pray. *Id.* at ¶¶ 107, 128 157-58, 268. Plaintiffs were subjected to repeated, unnecessary and abusive strip searches involving sexual abuse, *id.* at ¶¶ 107, 111-16, 153-54, 228, 232, 234, 239, 247. They were deprived of adequate hygiene items, *id.* at ¶¶ 122-24, 155, 173, 193, 207, 229 and kept from sleeping, *id.* at ¶¶ 117-19, 155, 173, 193, 229. They were held completely incommunicado for up to two weeks, and then given extremely limited access to visitors or attorneys thereafter. *Id.* at ¶¶ 69, 82, 87-99, 230. They were routinely transported with shackles, waist chains, and leg chains, *id*. at ¶¶ 110, 155, 174, 194, 199, 232, and detained in extremely restrictive, solitary confinement for twenty-three to twenty-four hours a day, *id*. at ¶¶ 81, 120, 121, 155-56, 173, 175, 192, 193, 206, 207, 229, while being denied an adequate opportunity for recreation. *Id.* at ¶¶ 120-21, 155, 173, 193, 207, 229.

provision of the Westfall Act does not apply to claims against federal employees based on a violation of the Constitution or federal statutory law. Gov't Br. at 3, citing 28 U.S.C. §§ 2679(b)(2)(A) and (B). As a statutory exception to the applicability of the Westfall act, Plaintiffs' claims under the Vienna Convention on Consular Relations ("VCCR") should proceed. The VCCR is a treaty of the United States (ratified October 22, 1969; entered into force on December 24, 1969, 21 U.S.T. 77), and the Supremacy Clause of the Constitution provides that treaties of the United States are the "law of the land" equivalent to federal statutes. U.S. Const. art. VI, cl. 2.[14] "[A]n Act of Congress ... is on full parity with a treaty." *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion); *see also Breard v. Greene*, 523 U.S. 371, 376 (1998).

The Supremacy Clause places ratified treaties on the same footing as federal statutes; where a self-executing treaty confers rights on individuals, a court "resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Edye v. Robertson*, 112 U.S. 580, 599 (1884). Defendants err in their statement, Govt. Br. at 7 n.3, that Article VII, Clause 2 makes a "distinction" between federal constitutional, statutory and treaty provisions; instead, this Article recognizes the equal status of laws of the United States made pursuant to the Constitution and all treaties.[15] Treaties and statutes are on equal footing, as indicated by the "last in time rule."[16]

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[14] Defendants concede, as they must, that a treaty ratified by the United States is the law of the land, citing *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996). Gov't Br. at 7.

[15] *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed *on the same footing,* and *made of like obligation,* with an act of legislation...") (emphasis added); *see also United States v. Alvarado-Torres* 45 F. Supp. 2d 986, n.3 ("furthermore, as law of the Land, courts must give a treaty *the same consideration as a federal statute*") (emphasis added), *aff'd,* 230 F.3d 1368 (9th Cir. 2000).

[16] *Breard v. Greene*, 523 U.S. 371, 376, (1998) ("An Act of Congress ... is on a full parity with a treaty, and ... when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." (Internal quotation marks omitted)).

An individual may assert private rights under a treaty if a private right of action is provided expressly or by implication. *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18 (2d Cir. 1988).[17] To be directly enforceable in U.S. courts, the treaty must: (1) "prescribe a rule by which the rights of the private citizen or subject may be determined" (*Edye v. Robertson*, 112 U.S. at 598-599), and (2) be self-executing.

As to the first prong, the VCCR plainly ensures each detainee the personal, individual right to consular notification and requires that the United States give full effect to that right.[18] It unambiguously confers a private right of action on foreign nationals in case of its violation. The drafting history reaffirms the widespread concern with the question of individual rights (*see supra* n.4, ¶ 2). United States government practice reinforces this conclusion through codification in federal regulations (*see supra* n.6) and through internal government policy statements.[19] As to the second, the VCCR is a self-executing treaty—requiring no further federal

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Whitney v. Robertson, 124 U.S. at 194-95 ("If the two are inconsistent, the one last in date will control the other"); *Kappus v. Comm'r*, 337 F.3d 1053, 1057 (D.C. Cir. 2003) (endorsing *Whitney* and *Breard*; "[t]he question for us, therefore, is which of the two—the Treaty or the statute—is the 'latest expression of the sovereign will.'").

[17] *See also Edye v. Robertson*, 112 U.S. 580, 598 (1884) ("[A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other ... which are capable of enforcement as between private parties in the court of the country.").

[18] When interpreting a treaty, United States courts first look to its plain language. *Eastern Airline, Inc. v. Floyd*, 499 U.S. 530, 534 (1991). The "text emphasizes that the right of consular notice and assistance is the citizen's. [citing VCCR, art. 36(1)(b)(2)]. The language is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government." *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J. concurring). "The clarity of these provisions, viewed in their context, admits of no doubt." *LaGrand Case*, at ¶¶ 74, 77.

[19] U.S. Dep't of State, 7 Foreign Affairs Manual § 411.1 (1984). In 1986, the Department of State released a bulletin to law enforcement agencies providing that "[t]he arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention." *See* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 599 (1997) (discussing United States Department of State Notice, October 1986). Furthermore,

implementing legislation to be enforceable in United States courts.[20] Based upon the Supreme Court's statement that the VCCR "arguably confers on an individual the right to consular assistance following arrest," *Breard v. Greene*, 523 U.S. 371, 376 (1998), a number of district courts have held that the VCCR creates a private right against individual defendants.[21] The cases cited by Defendants are not on point.[22] International decisions from the International Court of Justice and the Inter-American Court of Human Rights also confirm that the VCCR creates a private right of action.[23]

III. The Alien Tort Claims Act (ATS), 28 U.S.C. § 1350, Is Within the Statutory Claims Exception to the LRA

Plaintiffs' ATS claims are similarly exempt from the Westfall Act. The Government misreads *United States v. Smith*, 499 U.S. 160 (1991), as holding that the Westfall Act precludes

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this duty is reiterated in the Department of State's Handbook, which declares, "[w]hen foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified." Consular Notification and Access, Part I, at 3.

[20] S. Exec. Rep. No. 91-9, app., at 5; *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J. concurring); *Standt v. City of New York*, 153 F. Supp. 2d 417, 423 n.3 (S.D.N.Y. 2001); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 932 (C.D.Ill. 1999).

[21] *Standt*, 153 F. Supp. 2d 417; *Anthony v. City of New York*, 00 Civ. 4688 (OLC), 2002 U.S. Dist. LEXIS 7189 (S.D.N.Y. Apr. 25, 2002); *United States ex rel Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931 (C.D.Ill. 1999); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999); *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 989 (S.D.Cal. 1999); *United States v. Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D.Ill. 1999); *United States v. $69,530.00 in United States Currency*, 22 F. Supp. 2d 593, 594 (W.D.Tex. 1998); *United States v. Rodrigues*, 68 F. Supp. 2d 178 (E.D.N.Y. 1999).

[22] The cases cited in footnote 4 of the Governments' Brief deal with, respectively, suppression of evidence and dismissal of an indictment in a criminal context and do not decide the issue of whether there is a private right of action. *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56 (1st Cir. 2000). In addition, defendants' reference to *Li* is only to a concurring opinion. *See Standt*, 153 F.Supp.2d at 429 ("The remedy of civil damages for a plaintiff who alleges he was unlawfully detained without consular notification is much less 'drastic' than suppressing incriminatory evidence or dismissing an indictment against a properly charged criminal defendant.").

[23] *See* IACHR Advisory Opinion, Part XIII, at ¶ 141(1) (recognizing individual rights and indicating that a state's failure to comply with VCCR norms incurs international responsibility for which an appropriate remedy must be provided).

federal statutory claims that incorporate other sources of law. In *Smith*, the plaintiffs did not allege any federal statutory claims, *id.* at 162 n.1. The Supreme Court merely rejected plaintiffs' argument that the Gonzalez Act, 10 U.S.C. § 1089, which limits the liability of military medical personnel for torts committed within the scope of their employment, somehow created a federal cause of action that would fall within the statutory claims exception of the Westfall Act. The Court held that the Gonzalez Act could not be "violated" because "nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians." 499 U.S. at 174.[24] The ATS, *unlike* the Gonzalez Act, is intended specifically to create liability, not limit it.[25]

The Government further cites *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003) (en banc) *reversed on other grounds sub nom. Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), which purported to apply the *Smith* analysis to the ATS. Adopting the district court's reasoning without extensive discussion, the court concluded that the ATS does not fall within the statutory claims exception because "a claim under the ATCA is based on a violation of international law, not of the ATCA itself." *Id.* at 631. In doing so, the *Alvarez-Machain* court

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[24] In fact, the Gonzalez Act was passed in response to the court's decision in *Henderson v. Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), which held that an Army physician did not have absolute immunity for a tort committed within the scope of his employment. Further, the court found that the Westfall Act simply added to the immunity that Congress created in the Gonzalez Act.

[25] Rather than illustrating the "wide breadth of the exclusive remedy provision," Gov't Br. at 3, *Smith* simply found that whatever "causes of action Congress sought to preserve ... a malpractice suit alleging a 'violation' of the Gonzalez Act cannot have been one of them." 499 U.S. at 174-75. Contrary to the government's assertion, the ATS is not similar in relevant part to 28 U.S.C. § 1331 and similar statutes. Gov't Br. at 5. 42 U.S.C. § 1983, which only provides suit against state actors and does not apply to federal government actors, is not subject to the FTCA, nor was it contemplated when the FTCA was drafted.

failed to recognize that the ATS incorporates preexisting international law to create federal rights.[26]

Rather than support the Motion for Substitution, the Supreme Court's ruling in *Sosa* in fact supported the analysis that plaintiffs' ATS claims are statutory exceptions to the FTCA. The Court held that "positive law [such as the ATS] was frequently relied upon to reinforce and give standard expression to the "brooding omnipresence' of the common law." *Sosa*, 124 S. Ct at 2760. By giving "standard expression" to the common law, the ATS itself incorporates those standards and imposes the duty of care required by the law of nations. Unlike the Gonzalez Act in *Smith*, which contained no reference to law or standards, the ATS is "violated" where the law of nations is violated.

Finally, the legislative history of the Westfall Act is clear that the statutory claim exception was created to "ensure that preexisting remedies protected by a statute would not be affected." *Smith*, 499 U.S. at 182 (Stevens, J., dissenting). The Westfall Act "'*does not change the law*, as interpreted by the Courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal Statutes.'" *Id.* at 183 n.9 (quoting H.R. Rep. No. 100-700 at 7 (1988) (emphasis added)). Adopting Defendants' position would thwart Congressional intent to ensure that preexisting remedies, such as those created under the ATS, remain intact.

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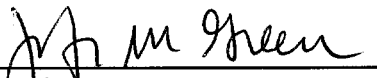
[26] In another context, the RICO statute prohibits certain "racketeering activity," 18 U.S.C. § 1962(a), but incorporates the principles of state substantive law to define such activity under 18 U.S.C. § 1961(1). Violations of the RICO provision fall within the statutory claims exception. *Timberline Northwest, Inc. v. Hill*, No. 96-35763, 1998 U.S. App. LEXIS 5453, at *5 (9th Cir. Mar. 17, 1998) (citing *Smith*); *Wright v. Linhardt*, 2000 WL 92810 (D. Or.) at *11, *13.

CONCLUSION

Defendants' motions should be denied.

Dated: January 11, 2005
New York, New York

Respectfully submitted,



Jennifer Green (JG 3169)
CENTER FOR CONSTITUTIONAL RIGHTS

Shayana Kadidal
Nancy Chang (NC 5331)
Rachel Meeropol (RM 3878)
Matthew Strugar

666 Broadway, 7th Floor
New York, New York 10012
Tel.: (212) 614-6464
Fax: (212) 614-6499

Attorneys for Plaintiffs

Of Counsel:
Cynthia Soohoo
HUMAN RIGHTS CLINIC
COLUMBIA LAW SCHOOL
435 West 116th Street, Box C-16
New York, New York 10027

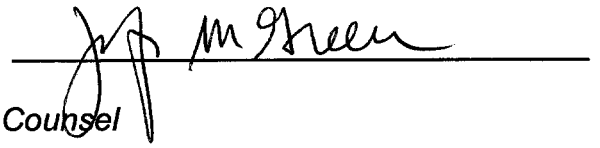
Paul Hoffman
SCHONBRUN, DE SIMONE, SEPLOW,
HARRIS & HOFFMAN, LLP
723 Ocean Front Walk
Venice, California 90201
Tel.: (310) 396-0731

On the Brief:
Beth Stephens

Certificate of Service

I, Jennifer Green, certify that on January 11, 2005, I caused the foregoing Plaintiffs' Memorandum in Opposition to Motion of the United States to Be Substituted as Defendant on Claims Brought Under the Alien Tort Statute in *Turkmen v. Ashcroft*, 02 CV 2307 (JG) (CLP) (E.D.N.Y.) to be served electronically on the counsel for defendants listed below for whom an email address is provided. I also caused the foregoing to be mailed by regular mail to all counsel listed below.

Dated: January 11, 2005



List of Counsel

Counsel for Defendant John Ashcroft
Dennis Barghaan and Larry Gregg
Office of the United States Attorney, E.D. Va.
Civil Division
2100 Jamieson Avenue
Alexandria, VA 22314
Dennis.Barghaan@usdoj.gov
Larry.Gregg2@usdoj.gov,

Counsel for Defendant Robert Mueller
Craig Lawrence
U.S. Attorneys Office, D.D.C.
Civil Division
555 4th St NW
Washington, DC 20001
Craig.Lawrence@usdoj.gov

Counsel for Defendant James Ziglar
William Alden McDaniel, Jr.
Law Offices of William Alden McDaniel, Jr.
McDaniel, Bennett & Griffin
118 West Mulberry Street,
Baltimore, MD 21201-3606
wam@wamcd.com

Counsel for Defendant Dennis Hasty
Michael L. Martinez, Esq.
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
MMartinez@crowell.com

Counsel for Defendant Michael Zenk
Allan N. Taffet, Esq.
Duval & Stachenfeld LLP
300 East 42nd Street
New York, NY 10017
ataffet@dsllp.com

Counsel for Defendant Steven Barrere
James G. Ryan
Cullen and Dykman Bleakley Platt LLP
Garden City Center
100 Quentin Roosevelt Blvd
Garden City, New York 11530-4850
jryan@cullenanddykman.com
jmclaughlin@cullenanddykman.com

Counsel for Defendant William Beck
Robert Goldman
73 Spring Street, Suite 402
New York, NY 10012

Counsel for Defendants SidneyChase, Michael Defrancisco,
Richard Diaz, Mario Machado, Brian Rodriguez and Scott Rosebery,
Alan E. Wolin
Wolin & Wolin
420 Jericho Turnpike Suite 215
Jericho, New York 11753

Counsel for Defendant Raymond Cotton
Nicholas G. Kaizer
Law Offices of Richard Ware Levitt
148 East 78th Street
New York, New York 10021
nkaizer@richardlevitt.com
rlevitt@richardlevitt.com

Counsel for Defendant Howard Gussak
Kenneth C. Murphy
Simon & Partners LLP
30 Rockefeller Plaza, 42nd Floor
New York NY 10112
kcmurphy@simonlawyers.com

Counsel for Defendant Raymond Mickens
Michael Rosenstock
Law Offices of E. Michael Rosenstock, PC
55 Maple Avenue, Suite 206
Rockville Centre, NY 11570
emrosenstock@rosenstocklaw.com

Counsel for Defendant Marcial Mundo
James F. Matthews
Matthews & Matthews
191 New York Ave.
Huntington, NY 11743
jmatthewslaw@aol.com

Counsel for Defendant Jon Osteen
David A. Koenigsberg
Menz Bonner & Komar LLP
350 Park Avenue, 25th Floor
New York, NY 10022
dkoenigsberg@mbklawyers.com

Counsel for Defendant Clement Shacks
Barry M. Lasky
Lasky and Steinberg, P.C.
595 Stewart Avenue, Suite 410
Garden City, N.Y.
lspc595@aol.com

Counsel for Defendant James Sherman
Thomas M. Sullivan
Shaw Bransford Veilleux & Roth, PC
1100 Connecticut Avenue NW, Suite 900
Washington, D.C. 20036
TSulliva@shawbransford.com

Counsel for Defendant Elizabeth Torres
Rocco G. Avallone
Christina Leonard
1981 Marcus Avenue, Suite 227
Lake Success, NY 11042-1016

Counsel for Defendant Christopher Witschel
Corin & Byczek
P.O. Box 7777
New Hyde Park, NY 11042

Counsel for Defendant United States
Ernesto H. Molina, Jr.
U.S. Dept. of Justice
Civil Division
Office of Immigration Litigation
1331 Pennsylvania Ave., NW
Suite 8038N
Washington, DC 20004
Ernesto.H.Molina@usdoj.gov