UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KASIPPILLAI MANOHARAN, *et al*.,

Plaintiffs,

v. Civil Action No. 11-235 (CKK)

PERCY MAHENDRA ("MAHINDA")
RAJAPAKSA,

Defendant.

_____/

MOTION TO SERVE DEFENDANT BY ALTERNATIVE MEANS NOT PROHIBITED BY INTERNATIONAL AGREEMENT

I.
INTRODUCTION

Come now Plaintiffs, through their undersigned attorney, and move this Court to authorize the service of the Complaint and Summons on the Defendant by means not specifically enumerated in Rule 4 of the Federal Rules of Civil Procedure and not prohibited by international agreement as provided for in subsection (f)(3). Fed. R. Civ. P. 4(f)(3). The alternate means of service proposed are elaborated below.

II.
HISTORY OF SERVICE ATTEMPTS

The Defendant is a citizen and resident of Sri Lanka, which is a signatory to the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention"). Plaintiffs attempted to serve the Complaint and Summons on the Defendant via the Hague Convention by use of an agent, Process

Forwarding International, on June 1, 2011. The Sri Lankan Ministry of Justice refused to deliver the Complaint and Summons on Defendant by invoking a national security excuse under Article 13 of the Hague Convention.[1] Second Status Report Re Service Of Process, August 12, 2011.

Plaintiff also attempted service by mail to Defendant's address in Colombo, Sri Lanka, and to the Sri Lankan Embassy in Washington, D.C. Receipt of the mailed packages of the Complaint and Summons was refused in both cases. Plaintiffs' Status Report Regarding Efforts to Effectuate Service on Defendant Rajapaksa, May 31, 2011.

Plaintiff also attempted to serve Defendant with the Complaint and Summons personally during his visit to a Buddhist Temple in Queens on September 24, 2011. Service was unsuccessful because Defendant was surrounded by bodyguards who prevented Plaintiff's agent, Mark Potkewitz, from approaching him. Mark Potkewitz and Luke Dier attempted to serve the Summons and Complaint on the Defendant at the New York Buddhist Vihara at 214-22 Spencer Avenue, Queens Village, NY, 11427-1821, the morning of September 24, 2011. Mr. Potkewitz and Mr. Dier entered the temple at approximately 9:51 AM, EST, were interrogated as to the purpose of their visit, and after showing their state driver's licenses were granted entry and permission to take photographs of the interior. Mr. Potkewitz took photographs throughout the service attempt. Exhibit A. At approximately 10:12 AM, Mr. Potkewitz and Mr. Dier were instructed to leave the temple because of the imminent arrival of the Sri Lankan

[1] The Ministry also argued a sitting head of state immunity from service of process.
[2]Bonnie Malkin, Australian couple served with legal documents via Facebook (2008),

President, i.e., the Defendant. After asking to meet the President, or, at the very least, to have their photographs taken with him, Potkewitz and Dier were escorted out of the temple and witnessed the arrival of a Sri Lankan official Town Car with diplomatic license plates. The President was not allowed to leave the Town Car until the two departed the area. To ensure their departure, two of the Defendant's bodyguards followed Potkewitz and Dier around the street corner and down the block until they rounded a corner of a commercial street. The direct and circumstantial evidence indicating Defendant is seeking to evade service seems overwhelming. Exhibit B.

III.
APPLICABLE LEGAL STANDARD

Rule 4(f)(3) commits the authorization of alternative methods of service to the Court's "sound discretion." The decision to allow alternative methods of service under Rule 4(f)(3) is committed to the court's "sound discretion." *Rio Properties, Inc. v. Rio International Interlink,* 284 F. 3d 1007, 1016 (9th Cir. 2002). *See also Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries,* 353 F.3d 916, 921 (11th Cir. 2003), *cert. denied,* 543 U.S. 814 (2004) (motions for service of process under Rule 4(f)(3) are "subject to an abuse of discretion standard because the plain language of the rule stipulates that the district court 'may' direct alternative means of service"). But plaintiffs should not be required to "attempt […] every permissible means of service of process before petitioning the court for alternative relief." *Rio Properties, Inc. v. Rio International Interlink,* 284 F.3d 1007, 1016 (9th Cir. 2002).

Rule 4(f)(3) forecloses courts from authorizing alternative means of service that are prohibited by international agreement. *Id*. at 1015. As elaborated below, none of the alternate methods of service proposed in this motion is prohibited by international agreement.

Plaintiffs must persuade the court that "the facts and circumstances of the present case necessitate [...] [the court's] intervention." *Id.* at 1016. Despite the fact that Rule 4(f) does not denote any hierarchy or preference for one method of service over another, and "service of process under Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief' [but, instead,] ... merely one means among several which enables service of process on an international defendant," *Id.* at 1015, a district court, in exercising the discretionary power permitted by Rule 4(f)(3), may require the plaintiffs to show that they have reasonably attempted to effectuate service on defendant and that the circumstances are such that the district court's intervention is necessary to obviate the need to undertake methods of service that are unduly burdensome or that are untried and likely to be futile. *FMAC Loan Receivables v. Dagra,* 228 F.R.D. 531, 534 (E.D.Va. 2005). *See also Williams v. Advertising Sex LLC,* 231 F.R.D. 483, 486 (N.D.W.Va. 2005).

The plaintiff must also demonstrate that the proposed methods of service comport with constitutional notions of due process. See *Rio Properties,* 284 F.3d at 1016-17. This requirement is satisfied by showing that the alternative means of service sought are "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) .

IV.
ARGUMENT

Plaintiffs propose eight (8) alternate methods of effectuating service of the Complaint and Summons that satisfy the precedent set in the *Mullane* court that service "… be … reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Neither are any of the plaintiffs' proposed means of service prohibited by international agreement. They are as follows:

1) Mail to a District of Columbia Post Office Box Maintained by Defendant;

2) Service via Publication in Sri Lanka;

3) Service via Facebook;

4) Service via Twitter;

5) Service via Tamil Opposition Website;

6) Service via Email;

7) Service via Fax; and,

8) Service via District of Columbia Lobbying Firms Contracted by the Sri Lankan government.

1) DISTRICT OF COLUMBIA POST OFFICE BOX

For his 2010 re-election campaign, the Defendant, or his *de facto* agents ("agents"), acquired a U.S. Post Office Box at "Mahinda - People's President" PO Box 34017 Washington, DC 20043 US," to receive donations from supporters living in the United States. An Internet Domain, http://www.mahinda-peoplespresident.com/,

("Campaign Website") was also registered for use as a campaign tool under the U.S. Post Office Box ("P.O. Box"). Exhibit C, Exhibit D. Furthermore, the Campaign Website lists the same P.O. Box as the domain registry as an address to which supporters can send checks to the Defendant's campaign. The site urges, "No matter which part of the world you live, we need your support. Sign onto our movement to re-elect Mahinda today: http://mahinda-peoplespresident.com/stand-with-mahinda/" (http://www.mahinda-peoplespresident.com/mission-statement/, accessed 2011-09-27). Exhibit E. The site links to the campaign Facebook ("Official Facebook Page") and Twitter ("Official Twitter Account") accounts, and features several messages signed from the Defendant to his supporters both during the campaign and after the election. Exhibit F, Exhibit G, Exhibit H, Exhibit I.

Furthermore, Defendant, or his agents, provided certain information to service/broker from whom they acquired the domain. Using an online WHOIS service, a website upon which a user can key in a URL to see publicly available domain registration information, Plaintiffs discovered the contact information (including emails, telephone and fax numbers, and addresses) used to secure the domain www.mahinda-peoplespresident.com. Exhibit D. The registration contains the minimum amount of information available. The registrant, the Defendant or his agents, used the provider as the technical contact and listed only the P.O. Box under both the Registrant and Administrative contact fields. While the Registrant field only contains the P.O. Box, the Defendant or his agents, listed the provider's 1-877 number and Los Angeles telephone number (1.877.578.4000 and 1.310.564.2007). Despite the lack of candor on behalf of

the registrants, Plaintiffs believe that the address listed under the registration to be genuine since it is also listed on the website as a portal through which supporters can send donations. Exhibit J.

Since the site, dedicated to the reelection of the Defendant, boasts personal messages from the Defendant to supporters, and links to his Official Facebook Page and Official Twitter Account, it is reasonable to conclude that any documents sent to the P.O. Box will be forwarded to the Defendant. And service by mail to Defendant's post office box in the United States is not prohibited by any international agreement.

2) SERVICE VIA PUBLICATION

Since the *Mullane* court "[had] not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning," Plaintiffs submit publication is a sufficient means to effectuate service to a Defendant who, as indicated by the response to Plaintiffs' Hague Convention service attempt, is aware of Plaintiffs' filed suit, desires not to acknowledge Plaintiffs' efforts to serve the complaint. *Mullane*, 339 U.S. at 317. Sri Lanka's civil code authorizes service via publication. In *Chandratileke v. Moonesinghe*, the Sri Lankan "[c]ourt directed substituted service by publication in the newspapers" in a civil suit where an attorney, Chandratileke, defaulted on a promissory note to the plaintiff, Moonesinghe." *Dhammika Chandratileke v. Susantha Mahes Moonesinghe*, SLR - 303, Vol 2 (1992), available at http://www.lawnet.lk/docs/case_law/slr/HTML/1992SLR2V303.htm. Exhibit K. Since Sri Lankan civil procedure allows for service via publication, Plaintiffs urge this Court to authorize publication in newspapers

of general circulation in Colombo, Sri Lanka, that nation's capital, to effectuate service of the Summons and Complaint on Defendant.

The Government of Sri Lanka crowns the Defendant with absolute power, which is employed to conduct a campaign of suppression and violence against opposition media outlets. Lasantha Wickramatunga, editor of the Sunday Leader, was assassinated in the street after a scathing column critical of the Sri Lankan Government (http://www.huffingtonpost.com/2009/01/08/lasantha-wickramatunga-sr_n_156206.html, http://news.bbc.co.uk/2/hi/south_asia/7817422.stm, http://english.aljazeera.net/news/asia/2009/01/2009186338574412.html). The Defendant or his agents monitor the Sri Lankan press meticulously to kill dissent and dissenters alike. Publication of the Complaint and Summons in a Sri Lankan newspaper of general circulation is reasonably calculated to provide actual notice to the Defendant as required by the *Mullane* standard. Service by publication is not prohibited by any international agreement.

3) SERVICE VIA FACEBOOK

Plaintiffs propose service of the Complaint and Summons via the Defendant's Facebook page.

Recently, the Australian Capital Territory's Supreme Court allowed counsel to serve documents to Defendants via the social networking site, Facebook. Counsel determined that the Facebook accounts in question contained the correct dates of birth for each of the defendants, confirmed the email accounts listed on the Facebook pages

matched those on record for the defendants, and further found evidence that the co-defendants were identified as friends with one another via the service.[2]

Palo Alto-based Facebook, which boasts over 750 million active users, allows for the creation of an "official page" for musicians, artists, public figures, et al. The Defendant possesses and maintains an official Facebook page that is regularly updated. Exhibit L, Exhibit M. Many public figures have and maintain their own Facebook pages or have staff members who maintain them. The primary purpose of an official Facebook page is to disseminate the views of, and news about, the represented party.

Service via Facebook, while already accepted by the Australian Capital Territory Supreme Court, has also found growing acceptance in the United States. The Utah State Courts' website, for example, advises visitors that they may use electronic means of alternative service. The Court posted, "[e]ven though you cannot find the person to be served, you may know where they accept communications: email; mail to a friend or relative; a social network, such as Facebook; a text number or phone number; or a Twitter name. With the court's permission, you might be able to send the complaint and summons directly to the person by mail, email or social media. Or the court might allow you to publish the complaint and summons on the State Courts Public Notices webpage, the

[2]Bonnie Malkin, Australian couple served with legal documents via Facebook (2008), available at http://www.telegraph.co.uk/news/newstopics/howaboutthat/3793491/Australian-couple-served-with-legal-documents-via-Facebook.html, (last visited Aug. 25, 2011).

Utah Press Association's Legal Notices (utahlegals.com) webpage, or in a newspaper and notify the person that the documents are there."[3]

No international agreement prohibits service via Facebook.

4) SERVICE VIA TWITTER

Twitter, a microblogging social networking service, has over 200 million users and is actively used by journalists, political figures, pop culture icons, and newsmakers worldwide. Many leading political figures and organizations, such as U.S. President Barak Obama (@BarakObama), the Holy See (@HolySee), and the Supreme Court (@USSupremeCourt), (@SCOTUSOpinions). In 2009, a British court allowed service of an injunction via Twitter to a blogger.[4]

The Defendant is tied to two Twitter accounts: @mahindar2010, and @mahinda4people, the latter of which directly links to the website, http://www.mahinda-peoplespresident.com/, and is linked to from the Website. The website provides a tangible link to the Defendant and implies a degree of oversight and awareness of the campaign's Twitter-based activities. Exhibit N, Exhibit O. The Official Twitter Account @mahinda4people follows only one other account, @mahindar2010, which strengthens the link between the two Official Twitter Accounts and implies an instrumentality. Exhibit P.

[3] http://www.utcourts.gov/howto/service/service_of_process.html (last visited Sept. 27, 2011)

[4] Jan Colley, Press Association, Blog served with injunction via Twitter, available at http://news.bbc.co.uk/2/hi/8285954.stm, (last visited Sept. 27, 2011)

Rule 4(f)(3) prescribes service "by other means not prohibited by international agreement, as the court orders." Fed. R. Civ. P. 4(f)(3). Plaintiffs know of no international prohibition to service via Twitter. As the Court noted in *New England Merchants*, "[c]ourts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut." *New England Merchants Nat. Bank v. Iran Power*, 495 F. Supp. 73 (S.D.N.Y. 1980).

5) SERVICE VIA TAMIL OPPOSITION WEBSITE

Since the Sinhalese Buddhist majority has maligned the ethnic Tamil minority as "terrorists" or "insurgents," Plaintiffs can reasonably assume that the Sri Lankan Defense Ministry meticulously monitors its opponents among the Tamil diaspora. Exhibit Q.

Because of continuous government monitoring of Tamilnet (http://www.tamilnet.com/), Plaintiffs submit that publication of the Complaint and Summons upon the front page of this opposition website would be reasonably calculated to provide actual notice to the Defendant and would not be prohibited by international agreement.

6) SERVICE VIA EMAIL.

Plaintiff also proposes to serve the Complaint and Summons on Defendant via email addresses for Sri Lankan government officials within the Defendant's inner circle. The Sri Lankan Government has a website for the Cabinet Office: http://www.cabinetoffice.gov.lk/infor_search_min_detail.asp?mInNo=501&CStr=A, which lists the email address president@presidentsoffice.lk, for the Presidential Secretariat, and prsec@presdentsoffice.lk for Mr. Lalith Weeratunga, Secretary to H.E. the President. The site also lists Mr. Shasheendra Rajapaksa, Private Secretary to H.E. the President, and provides the email address shasheendra28@presidentsoffice.lk. Plaintiffs submit service of the Complaint and Summons to the email addresses of these three presidential officials would be reasonably calculated to provide actual notice to the Defendant. Exihibit Q. The case law supports this type of service by email.

Courts have authorized several methods that satisfy the *Mullane* Standard. In *Rio Properties, Inc. v Rio Intern. Interlink*, 284 F. 3d 1007 (9th Cir. 2002), Judge Trott elaborated "trial courts have authorized a wide variety of alternative methods of service including publication, ordinary mail, mail to the defendant's last known address, delivery to the defendant's attorney, telex, and most recently, email." *Id.* at 1016. Judge Trott added, "As obvious from its plain language, service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by international agreement. No other limitations are evident from the text. In fact, as long as court-directed and not prohibited by an international agreement, service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country." See *Mayoral-Amy v. BHI Corp*., 180 F.R.D. 456, 459 n. 4 (S.D. Fla. 1998). The Court continued:

> We acknowledge that we tread upon untrodden ground. The parties cite no authority condoning service of process over the Internet or via email, and our own investigation has unearthed no decisions by the United States Courts of Appeals dealing with service of process by email and only one case anywhere in the federal courts. Despite this dearth of authority, however, we do not labor long in reaching our decision. Considering the facts presented by this case, we conclude not only that service of process by email was proper — that is, reasonably calculated to apprise RII of the pendency of the action and afford it an opportunity to respond — but in this case, it was the method of service most likely to reach RII.
>
> To be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond. *See Mullane,* 339 U.S. at 314, 70 S.Ct. 652. In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance. As noted by the court in *New England Merchants,* in granting permission to effect service of process via telex on Iranian defendants:
>
> Courts ... cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper ... ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut. *(Id.)*

Id. at 1017.

Rio set a standard adhered to in subsequent decisions. In *In re Potash*, Judge Rueben Castillo observed, "Courts have found that service via email and fax are reasonable under Rule 4(f)(3). *MacLean-Fogg Co. v. Ningbo Fastlink Equip*. Co., 2008 U.S. Dist. 931 (N.D. Ill. 2008) (concluding that service of process via email and fax comports with constitutional notions of due process and may be authorized under Rule 4(f)(3)); see also *Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002) (determining that email service was properly ordered by the district court using its

discretion under Rule 4(f)(3))" *In Re Potash Antitrust Litigation*, 667 F. Supp. 2d 907, 932 (N.D. Ill. 2009).

New York courts recognize email as a means by which one can effectuate service in what the *Rio* court called a "technical Renaissance" *Rio*, 284 F. 3d at 1017. In *Hollow v. Hollow*, the Court elaborated,

> [i]t suffices that the prescribed method is one 'reasonably calculated, under all the circumstances, to apprise [the] interested part[y] of the pendency of the action.' *Mullane,* 339 U.S. at 314; *Bossuk v Steinberg*, 58 N.Y.2d 916 (1983); see also, *Harkness v Doe*, 261 A.D.2d 846, 847 (4th Dept. 1999). Here, the court finds that service directed to the defendant's last known email address, as well as service by international registered air mail and international mail standard, is sufficient to satisfy the due process requirements of Civil Practice Law and Rules § 308 (5).

Hollow v. Hollow, 193 Misc. 2d 691, 696 (2002)

Service by email is not prohibited by any international agreement.

7) SERVICE VIA FAX

Plaintiffs propose service of the Complaint and Summons by FAX to the below officials enumerated on the website for the Cabinet Office of the Government of Sri Lanka:

1. The President, Presidential Secretariat, Colombo 01. Fax: 2542919

2. His. Excellency Mahinda Rajapaksa, President of the Democratic, Socialist, Republic of Sri Lanka, Fax 2542919

3. Mr. Lalith Weeratunga, Secretary to H.E. the President, Fax : 2472100

4. Mr. Gamini S. Senerath, Additional Secretary, Office of the Chief of Staff, Presidential Secretariat, Fax: 2542871

5. Mr. Shasheendra Rajapaksa, Private Secretary to H.E. the President, Fax: 2437950 Exhibit R.

The *New England Merchants* Court allowed service via telex as early as 1980. *New England Merchants,* 495 F. Supp. 73, 81, (S.D.N.Y. 1980). Plaintiffs submit that transmitting the Complaint and Summons to the FAX numbers set forth above is reasonably calculated to provide actual notice to the Defendant and is not prohibited by any international agreement.

8) SERVICE VIA DISTRICT OF COLUMBIA LOBBYING FIRMS CONTRACTED BY THE GOVERNMENT OF SRI LANKA.

The Sri Lankan Government has, over the past ten (10) years, contracted various lobbying firms and agents to perform tasks and roles ranging from online reputation management and grassroots efforts (Qorvis Communications, 1201 Connecticut Ave Suite 500 Washington, DC 20036), to advising on media and information services, press releases, and speeches (Hegdes Strategies, P.O. Box 42401, Washington, D.C. 20015), to "[assisting]" the Government of Sri Lanka "in its relationship with the United States, including obtaining support for a free trade agreement with the United States" (Patton Boggs Foreign Agents Registration Act Disclosure dated 2003 December 15) (Patton Boggs LLP, 2550 M Street, NW, Washington, D.C., 20037) Exhibit S, Exhibit T, Exhibit U, Exhibit V. Due to The large lobbying fees paid to these registered foreign agents justifies the inference that they maintain regular correspondence with Defendant, and would share immediately the Summons and Complaint with Defendant if served upon

them. Plaintiffs thus propose service to the Defendant care of the signatories of the Foreign Agents Registration Act Disclosure filings at the following:

H.E. Mahinda Rajapaksa
c/o Matthew Lauer
Qorvis Communications,
1201 Connecticut Ave Suite 500
Washington, DC 20036

H.E. Mahinda Rajapaksa
c/o Steve Hegdes
P.O. Box 42401
Washington, DC 20015

H.E. Mahinda Rajapaksa
c/o Stuart Pape
Patton Boggs LLP
2550 M Street, NW,
Washington, D.C. 20037

Service on Defendant's foreign agents would be reasonably calculated to provide actual notice to Defendant and is not prohibited by international agreement.

V.
PERSONAL JURISDICTION

Granting Plaintiffs' motion for alternate service would not be an empty exercise because the case for personal jurisdiction over defendant is substantial. The law treats the extrajudicial killings alleged in the complaint as universal wrongs against all of mankind that have been constructively perpetrated everywhere in the world, including in the District of Columbia.

A) LEGAL STANDARD

Personal jurisdiction has significant roots international law. *Pennoyer v Neff*, 95 U.S. 714 (1877), the seminal case on personal jurisdiction, "relied heavily on

international law notions of territorial limitations on sovereignty." KAREN HALVERSON, IS A FOREIGN STATE A "PERSON"? DOES IT MATTER? PERSONAL JURISDICTION, DUE PROCESS, AND THE FOREIGN SOVEREIGN IMMUNITIES ACT, 34 N.Y.U. J. INT'L L. & POL. 115, 119-28 (2001).

Modern personal jurisdiction jurisprudence stems from *Pennoyer*, *supra*, and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *International Shoe* demanded that assertions of personal jurisdiction be consonant with "traditional notions of fair play and substantial justice" pursuant to the due process clauses of the Fifth and Fourteenth Amendments. *Id.*, 326 U.S. at 316; U.S. CONST., AM. V, XIV. Accordingly, a "defendant's conduct and connection with the forum state" must be "such that he should reasonably anticipate being haled into court there." *Burnham v. Superior Court of Cal., County of Marin,* 495 U.S. 604, 623 (1990), citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Reasonable anticipation generally follows a defendant purposefully availing himself of "the privilege of conducting activities" in the territory of the forum, "thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). In sum, personal jurisdiction fastens on defendants who are "present in the territory of a forum," or who have established constitutionally inoffensive "minimum contacts" there. *International Shoe*, 326 U.S. at 316.

Activities "purposefully directed" at a forum establish minimum contacts if they are not "random, isolated, or fortuitous," especially when the alleged cause of action "arises out of" those activities. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774

(1984); *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 414 (1984). "[A] State may dispense with in-forum personal service on nonresident defendants in suits arising out of their activities in the State." *Burnham,* 495 U.S. at 623, citing generally *Helicopteros Nacionales*, 466 U.S. 408. "Even when the cause of action does not arise out of or relate to [the defendant's] activities in the forum State, due process is not offended by a State's subjecting [the defendant] to its *in personam* jurisdiction" when it has been carrying on "consistent and systematic" business in the forum. *Helicopteros Nacionales*, 466 U.S. at 414-415, citing *Perkins v. Benguet Consolidated Mining Co.,* 342 U. S. 437, 438, 445 (1952).

Finally, jurisdiction is always proper wherever a defendant's actions were intended to cause, and caused, tortious injury in the forum jurisdiction. *Calder v. Jones*, 465 U.S. 783, 787, 789 (1984).

B) THE TORTURE VICTIMS PROTECTION ACT

The instant lawsuit is brought pursuant to the Torture Victims Protection Act of 1991 ("TVPA"), which establish civil causes of action torture and extrajudicial killings under color of foreign law that violate the law of nations. The TVPA provides:

> (a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.
> (b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

> (c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

28 U.S.C. § 1350, note § 2.

Extrajudicial killings, which the instant case alleges, are defined as follows:

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

28 U.S.C. § 1350, note § 3(a).

The TVPA is appended to the Alien Tort Claims Act (ATCA). 28 U.S.C. § 1350, note § 2. The ATCA creates a broader civil remedy for international law violations. It grants United States District Courts "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.

(C) ALLEGED CAUSES OF ACTION VIOLATE UNIVERSAL PRINCIPLES OF INTERNATIONAL LAW

The TVPA clarifies that torture and extrajudicial killings constitute flagrant violations of universally accepted international law principles, which are the bedrock of civilization itself. The Judiciary Committees of both the Senate and the House of Representatives pronounced "torture" and "extra-judicial killings," as defined in the statute, clear violations of customary international law. S. Rep. 102-249, at 6 (1991), citing Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug, 12, 1949, art. 3, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S.

31; H. Rep. 102-367, Part I, at 2-3, 5 (1991), citing "article 3 common to the four Geneva Conventions of 1949." The eventual passage of the TVPA constituted a congressional endorsement of that analysis.

Article I Section 8 of the United States Constitution permits Congress "to *define* and punish […] Offenses against the Laws of Nations." U.S. CONST. ART. I § 8; *Ex Parte Quirin*, 317 U.S. 1, 28 (1942) (emphasis added). Thus, the determination by Congress that extrajudicial killings violate universal principles of international law binds this Court.

Judge Edwards of the United States Court of Appeals for the District of Columbia Circuit has expressed agreement with congressional condemnation of extrajudicial killings as universal international law violations. In *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied,* 470 U.S. 103 (1985), he concluded that extrajudicial killings, including "murder or causing the disappearance of individuals" and "summary execution," violated international law norms. *Id.* at 781, citing RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED)§ 702 (TENT. DRAFT NO. 3, 1982); BLUM & STEINHARDT, FEDERAL JURISDICTION OVER INTERNATIONAL HUMAN RIGHTS CLAIMS: THE ALIEN TORT CLAIMS ACT AFTER *FILARTIGA V. PENA-IRALA,* 22 HARV. INT'L L.J. 53, 90 (1981). The United States District Court for the District of Columbia reached the same conclusion in *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 262 (D.D.C. 1985), *rev'd on other grounds,* 736 F. Supp. 1 (D.D.C. 1990), which held:

> Under Articles 55 and 56 of the United Nations Charter, each member state pledges to take action to promote "universal respect for, and observance of, human rights and fundamental freedoms." 59 Stat. 1033, 1045-46 (1945). These obligations are given further substance in subsequent documents. Article 3 of the Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N. Doc. A/1810 (1948), mandates the protection of "life, liberty and security of person." […] The international community […] reaffirmed its commitment to these rights in the International Covenant on Civil and Political Rights, G.A.Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), and again in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki 1975), Department of State Bulletin Reprint, Sept. 1, 1975.

Additional courts have emphatically agreed. In *De Sanchez v. Banco Central de Nicaragua*, 770 F. 2d 1385, 1397 (5th Cir. 1985), the Fifth Circuit held that the "right not to be murdered" is among the "basic rights" of all human beings which "have been generally accepted — and hence incorporated into the law of nations." And in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D.CA 1987), the United States District Court for the Northern District of California found that "[t]he proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory." *Suarez-Mason* cites a litany of authorities to support its conclusion. *Id.,* citing Universal Declaration of Human Rights, Art. 3, G.A. Res. 217A, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Art. 6, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N.Doc. A/6316 (1966); American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36, OAS Off. Rec. OEA/Ser. 4 v/II 23, doc. 21, rev. 2 (English ed. 1975).

The explicit intent of Congress, in combination with these decisions, renders the universal lawlessness of extrajudicial killings clear. Plaintiffs have plausibly alleged that

Defendant RAJAPAKSA was criminally responsible for several extrajudicial killing under color of foreign law. All of Plaintiffs' factual allegations and reasonable inferences therefrom must be credited pre-trial. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

D) *HOSTIS HUMANI GENERIS*

The Senate and House Judiciary Committees touted the TVPA as a codification of *Filartiga v. Pena-Irala*, 630 F. 2d 876, 884 (2nd Cir. 1980) which held that, for purposes of civil liability, the flagrant violator of international law "has become—like the pirate and slave-trader before him—*hostis humani generis,* an enemy of all mankind." S. Rep. 102-249, at 4 (1991); H. Rep. 102-367, at 3-4 (1991). All TVPA violators are *Hostii Humanis Generis* due to the equivalent egregious status of torture and extrajudicial killings under international law. See *supra*, at § (C).

As *Hostii Humani Generis* ("*Hostii*"), TVPA violators are subject to the doctrine of universal jurisdiction. The Senate Judiciary Committee report on the TVPA explicitly states that "[s]tates have the option, under international law, to decide whether they will allow a private right of action in their courts for violations of human rights that take place abroad," and, "according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over 'offenses of universal interest.'" S. Rep. 102-249, at 5 (1991), citing RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 404 (TENT. DRAFT NO. 6, 1985), *United States v. Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991); *see also* H. Rep. 102-367, at 3-4 (1991). Indeed, if that were not true, the TVPA would be first cousin to a munificent bequest in a pauper's will. The majority of TVPA violations

would escape civil sanctions for lack of personal jurisdiction. TVPA applies only when domestic remedies are unavailable to the legal representatives of victims of extrajudicial killings. And few TVPA violators can be expected to vacation or otherwise physically enter the United States to expose themselves to service of a TVPA Complaint and Summons.

The doctrine of universal jurisdiction has been authoritatively described thus: "A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 404. It confers both personal and subject matter jurisdiction over a defendant based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction. The basis for universal jurisdiction is that some offenses are "so heinous that they contradict the interests of the entire international community" and consequently "all nations have an obligation to apprehend and punish the perpetrators of these regardless of where the unlawful acts occur." PUTTING THE WORLD'S OPPRESSORS ON TRIAL: THE TORTURE VICTIM PROTECTION ACT, 15(3) HUMAN RIGHTS QUARTERLY 605, 616 (1993).

It is now generally agreed by international legal scholars that universal jurisdiction covers the slave trade, genocide, war crimes, and torture, which are all seen as offenses against mankind. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404. Spain invoked universal jurisdiction in an attempt to try Pinochet

for crimes committed in Chile, CURTIS A. BRADLEY, UNIVERSAL JURISDICTION AND US LAW, 2001 U. CHI. LEGAL F. 323, 324 (2001), and Israel invoked universal jurisdiction to try Adolf Eichmann, whom it had abducted from Argentina, *Attorney General of Israel v. Eichmann,* 36 Intl. L. Rep. 277, 298-304 (Sup. Ct. Israel 1962).

The United States Court of Appeals for the Ninth Circuit, Third Circuit, and District of Columbia Circuit concur that the *International Shoe* "minimum contacts" is no barrier to suits against *Hostii*. *United States v. Shi*, 525 F. 3d 709, 723 (9th Cir. 2008); *United States v. Martinez-Hidalgo*, 993 F. 2d 1052, 1056 (3rd Cir. 1993); *United States v. Yunis*, 924 F. 2d 1086, 1091 (D.C. Cir. 1991). Each holds that "[d]ue process does not require a nexus between [*Hostii*] and the United States because the universal condemnation of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found." *Id.*, 525 F. 3d at 723, citing *United States v. Martinez-Hidalgo,* 993 F.2d 1052, 1056 (3d Cir.1993).

Admittedly, *Shi*, *Martinez-Hidalgo*, and *Yunis* all involved criminal prosecutions rather than civil lawsuits. But this Court has repeatedly held that distinction irrelevant. In *Von Dardel*, 623 F. Supp. at 254, the District Court held that "[t]he concept of universal violations is not limited to criminal jurisdiction, but extends to the enforcement of civil law as well." *Id.*, citing RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 404 (TENT. DRAFT NO. 2, 1981), comment *b*.

Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998) echoed *Von Dardel*'s universal jurisdiction analysis. There, the District Court justified asserting personal jurisdiction over the Islamic Republic of Iran and a host of individual non-

resident aliens in a multi-million dollar lawsuit arising from terrorism sponsorship by declaring that because "international terrorism is subject to universal jurisdiction, Defendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States." *Id.* at 14.

The application of universal jurisdiction to both civil and criminal cases by Congress and the District of Columbia is unassailable. Any doctrine that permits dispensing with the due-process-based "minimum contacts" test in criminal cases should apply *a fortiori* in civil cases due to the lesser liberty interest at stake for civil defendants. *In re Winship*, 397 U.S. 358, 363-64 (1970). The extrajudicial killings alleged in Plaintiffs' Complaint expose Defendant, despite his status as a sitting head of state, to criminal prosecution outside Sri Lanka before the International Criminal Court for war crimes or crimes against humanity. Rome Statute of the International Criminal Court, Art. 7 § 1(a)(i); Art. 8 § 2(a)(i), (b), (c), (e); Art 27.

Congress intended courts adjudicating TVPA cases to apply the doctrine of universal jurisdiction. S. Rep. 102-249, at 5 (1991). So doing would be consonant with international law, especially since Congress is permitted to define it. *Supra,* § (C), . An alternate interpretation of the TVPA would contradict the fundamental principle of statutory construction that a statute should not be construed so as to render any part of it "inoperative or superfluous, void or insignificant." 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973). "A presumption exists against a construction yielding that result." *Tel-Oren*, 726 F. 2d at 778, citing *Federal Trade*

Commission v. Manager, Retail Credit Co., Miami Branch Office, 515 F.2d 988, 994 (D.C. Cir. 1975).

According to the well-plead allegations of the Plaintiffs, Defendant RAJAPAKSA is *hostis humani generis*. His crimes fall under the universal jurisdiction umbrella. Defendant RAJAPAKSA should therefore reasonably expect to be haled into court anywhere. The "traditional notions of fair play and substantial justice" venerated in *International Shoe* would be satisfied if defendant is forced to litigate in this forum.

E) DEFENDANT WOULD PASS THE MINIMUM CONTACTS TEST

(i) The Minimum Contacts Requirement is Automatically Satisfied In Universal Jurisdiction Cases

Even if the "minimum contacts" test were held to be applicable to this Court's assertion of personal jurisdiction over Defendant RAJAPAKSA, it is satisfied.

By extending jurisdiction over the most heinous *jus cogens* violations worldwide, universal jurisdiction renders every violation of universal principles of international law, constructively speaking, purposefully perpetrated in every forum on earth. Thus, the TVPA claims alleged in this case constructively arise from activity in, and purposefully targeted at, the territory of this forum. According to *Keeton*, 465 U.S. at 774, that alone establishes that Defendant RAJAPAKSA has "minimum contacts" with the District of Columbia.

Also, TVPA violators are dubbed *hostii humani generis* because their transgressions are effectively injurious to everyone, in every jurisdiction. The *Calder* effects test, described *supra*, at § (A), labels unlawful actions substantially targeted at and

injurious in the territory of the forum "minimum contacts" sufficient to render a finding of personal jurisdiction there compliant with the Fifth Amendment's due process clause. *Calder*, 465 U.S. at 787, 789.

(ii) A Finding that this Court has Personal Jurisdiction Over Defendant RAJAPAKSA Would Be Bolstered by his Physical Contacts in the District of Columbia, and elsewhere in the United States.

Defendant RAJAPAKSA has several contacts in the District of Columbia or the United States generally that further lessen any surprise on his part that he would be forced to litigate TVPA claims in this Court.

- On information and belief, a Sinhalese Sri Lankan diaspora group called "Mahinda, People's President: Proven Leader for One Sri Lanka" is operated by the President or his agents. The organization maintains a P.O. Box in the District of Columbia and receives regular financial donations on his behalf. The organization maintains a website on which the Defendant regularly posts personal messages, and a working email address. Jurisdictional discovery would enable Plaintiffs to prove the magnitude of the post office contact.

- On information and belief, Defendant RAJAPAKSA regularly visits family in various regions of the United States, including suburbs of Houston, Texas, and Los Angeles, California. Jurisdictional discovery would enable Plaintiffs to prove the magnitude of this United States contact.

- Defendant RAJAPAKSA regularly visits a Buddhist Vihara in 21422 Spencer Ave., Queens, NY 11427 during visits to the United Nations. Jurisdictional discovery would enable Plaintiffs to establish the magnitude of this United States contact.

These contacts discredit the argument that this Court's exercise of personal jurisdiction over Defendant RAJAPAKSA for the universal crime of extrajudicial killings would offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. On the contrary, they demonstrate a regularity of contacts between Defendant RAJAPAKSA and the United States.

The physical presence and consistent fundraising of Defendant's campaign in Washington, D.C., *simpliciter*, demonstrates Defendant's doing business in this forum sufficient to satisfy due process and the District of Columbia long arm statute. Defendant has purposefully availed himself of "the privilege of conducting activities" in Washington, D.C., "thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475. Plaintiffs acknowledge that the claims they allege did not arise from Defendant's United States fundraising activities. But Defendant's sustained and significant activities in the District of Columbia are nevertheless relevant to the Court's determination of whether or not haling Defendant RAJAPAKSA into court in this forum would constitute "fair play" and satisfy the applicable District of Columbia long arm statute.

F) CONSTITUTIONAL PROTECTIONS MAY BE INAPPLICABLE TO DEFENDANT PRIOR TO A FINDING OF PERSONAL JURISDICTION

It is unclear whether Fifth and Fourteenth Amendment due process protections regarding personal jurisdiction can be invoked to protect Defendant RAJAPAKSA. Defendant is a non-resident alien outside the territorial boundaries of the United States. This Court recently held, *inter alia*, that "the Fifth Amendment does not extend to nonresident aliens outside the territorial boundaries of the United States. Thus, at the very least, it is considered settled law that nonresident aliens must be within the sovereign territory of the United States to stake any claim to the rights secured by the Fifth Amendment." *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 97-98 (D.D.C. 2007), citing *Pauling v. McElroy*, 278 F. 2d 252, 254 n.3 (D.C. Cir. 1960);

Johnson v. Eisentrager, 339 U.S. 763, 777-78 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Zadvydas v. Davis*, 533 U.S. 678, 682, 684-86 (2001) (internal citations omitted). As stated *supra* at § (A), modern limitations on asserting personal jurisdiction are rooted in the Fifth Amendment. Until Defendant RAJAPAKSA appears personally in the District of Columbia or this Court opts to assert personal jurisdiction over him, Defendant may be barred from making constitutional due process defenses.

G) THE DISTRICT OF COLUMBIA LONG ARM STATUTE

In addition to constitutional personal jurisdiction requirements, Defendant RAJAPAKSA also satisfies personal jurisdiction criteria of the District of Columbia's long-arm statute. It provides, in relevant part, that

> [a] District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's- […] (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia; (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia…

D.C. Code Ann. § 13-423(a) (1981).

The doctrine of universal jurisdiction renders the tortious injury caused by Defendant RAJAPAKSA's actions constructively committed in every jurisdiction in the world. *See supra*, § (D), (E)(i). Just as the universal nature of Defendant's actions establish minimum contacts between him and the District of Columbia pursuant to the

effects test described in *Calder v. Jones*, *supra*, they place him well within the reach of § 13-423(a)(3) of the D.C. long-arm statute.

If the allegation in *supra*, § (E)(ii) that Defendant RAJAPAKSA or his agents operate a presidential campaign office here is accurate, personal jurisdiction may also be appropriate pursuant to D.C. Code Ann. § 13-423(a)(4) (1981). Jurisdictional discovery would reveal the magnitude of Defendant's fund raising in the District of Columbia.

Furthermore, Washington, D.C. is under congressional control pursuant to Article I, section 8, clause 17 of the Constitution. The United States Congress is responsible for the applicable long arm statute. It would be strange to conclude that Congress intended United States Courts to generally assert jurisdiction over lawsuits brought against alien TVPA violators pursuant to the doctrine of universal jurisdiction, but to have created an exception for United States District Courts in the District of Columbia. D.C.

H) CONCLUSION

In sum, Plaintiffs' theory of personal jurisdiction over Defendant is well grounded in the facts alleged in the Complaint and the law. Plaintiffs' motion for alternative service is not a vain exercise to delay inevitable dismissal of the Complaint for lack of personal jurisdiction. Defendant may decline to interpose a personal jurisdiction defense, and Plaintiffs would seek jurisdictional discovery on the matter if necessary to go beyond the pleadings to establish personal jurisdiction. Accordingly, this Court should not balk over granting Plaintiffs' motion for alternate service by anticipating and deciding a possible personal jurisdiction defense after service of the Complaint and Summons have been effectuated.

VI.
THE T.V.P.A. BARS SITTING HEAD OF STATE IMMUNITY

Sri Lanka's Ministry of Justice has insinuated that Defendant is immune from Plaintiffs' TVPA claims under the doctrine of sitting head of state immunity incorporated in international common law. It would be premature for this Court to entertain that issue before ruling on Plaintiffs' motion for alternative service. But to provide this Court with a comfort level that granting the motion would not be an empty exercise, Plaintiffs' below have presented a persuasive prima facie case against sitting head of state immunity from TVPA claims.

A) PLAIN LANGUAGE

The plain language of the TVPA neither expressly nor impliedly carves out a sitting head of state exemption. The statute creates civil liability for extra-judicial killings under color of foreign law by "an individual." No category of persons in their individual capacities is identified or suggested as immune from TVPA claims. A sitting head of state is "an individual." There is no more ambiguity in the meaning of "an individual" than there is in the meaning of the word "is." The plain meaning of the statutory text is dispositive as to its interpretation unless it would yield absurd results. *Connecticut National Bank v. Germain,* 503 U.S. 249, 253-54 (1992); *Public Citizen v. Department of Justice,* 511 U.S. 39, 47n.5 (1994). But there is no absurdity in holding sitting heads of state accountable in civil damages under the TVPA for the universal crimes of torture or extrajudicial killings. Sitting heads of state may be prosecuted by the International Criminal Court under the 1998 Rome statute for war crimes or crimes

against humanity which are founded on torture or extrajudicial killings, as noted above. As of September 29, 2011, 139 countries are signatory to the Rome statute which has been ratified by or118 nations, and reflects international common law.[5] As of September 29, 2011, 139 countries are signatory to the Rome statute which has been ratified by or118 nations, and reflects international common law.[6] At present, the sitting president of Sudan is under indictment by the ICC for genocide. Col. Moammar Gaddafi, as sitting head of state of Libya, was indicted by the ICC for crimes against humanity. Accordingly, holding Defendant Rajapaksa accountable in civil damages under the TVPA for extrajudicial killings for which he could be criminally prosecuted and punished with life imprisonment by the ICC would be far from absurd. Indeed, in these circumstances, it would seem absurd *not* to subject Defendant to TVPA claims. That conclusion is fortified by the statutory purpose: to deter and to sanction extrajudicial killings under color of foreign law. A sitting head of state is endowed with more power to perpetrate such crimes than any other individual. In a quest to protect the fundamental human right to life, the urgency of deterring sitting heads of state from extrajudicial killings is greater than for any other class of individuals. No purpose relevant to deterring and punishing torture or extra-judicial killings would justify a distinction between criminal and civil sanctions against a sitting head of state. Indeed, the

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5 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en, (last visited Sept. 29, 2011).

6 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en, (last visited Sept. 29, 2011).

Convention Against Torture directs all signatories like the United States to enact laws that bolster the deterrent or sanctions for complicity in tort. See Article 14.

A "plain language" interpretation of the TVPA would be harmonious with the plain meaning rule applied to interpreting the Foreign Sovereign Immunities Act of 1976 to deny a sitting head of state exemption from suit in *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.C. D.C. 1998). There, United States District Judge Royce Lamberth declared regarding the so-called "Flatow Amendment" to the FSIA, that "[t]he provision does not qualify or in any way limit its application only to non-heads of state." *Id.* at 24. The plain language rule governed. Similarly, the United States Court of Appeals for the Seventh Circuit in *Ye v. Zemin* elaborated: "The FSIA does not, however, address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. 28 U.S.C. § 1603(a). Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 — with the Executive Branch." *Ye v. Zemin*, 383 F. 3d 620, 625 (7th Cir. 2004). In contrast, United States District Judge Jack Weinstein, in *Lafontant v. Aristide,* erred in his dismissal of the case brought by plaintiff Lafontant against the sitting head of state of Haiti. He ignored the plain language of the TVPA in favor of legislative history, contrary to the interpretive canons of the Supreme Court. *Lafontant v. Aristide*, 844 F. Supp. 128, 135 (E.D.N.Y. 1994).

C) LEGISLATIVE HISTORY

Legislative history does not contradict the plain language of the TVPA. No member of Congress in the course of hearings or debate on the legislation stated that sitting heads of state would be immune. That is readily understandable.

Virtually all expert commentary on a sitting head of state immunity agrees that the doctrine is morally and philosophically indefensible. It is vulnerable to Justice Oliver Wendell Holmes' reproach penned in The Path of the Law: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." THE PATH OF THE LAW, 10 HARVARD L. REV. 457 (1897).

D) SEPARATION OF POWERS

Interpreting the plain language of the TVPA to withhold a sitting head of state immunity raises no thorny constitutional separation of powers questions. Congress is empowered to enact sanctions for violations of the law of nations under Article I, section 8, clause 10 and the Necessary and Proper Clause. U.S. CONST. ART. I § 8. The Executive Branch is not constitutionally endowed with exclusive authority to decree legal rules or doctrines in any matter that might have international repercussions, like a suit against a sitting head of state. Congress is every bit as much a constitutional player in foreign affairs as is the President. See e.g. *Leal Garcia v. Texas*, 564 U. S. ____ (2011); *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006).

In sum, Plaintiffs have demonstrated a persuasive case for defeating any sitting head of state immunity defense that might be invoked by Defendant in a motion to dismiss or answer.

VII.
CONCLUSION

Plaintiffs submit that each of the alternate methods of service proposed satisfies the "reasonably calculated" threshold of *Mullane*. In addition, Plaintiffs submit that the individual methods of alternate service should be treated cumulatively in determining whether or not the "reasonably calculated" threshold would be satisfied. And as the discussions of personal jurisdiction and sitting head of state immunity demonstrate, granting Plaintiffs' motion for alternate service would not be an empty gesture. Accordingly, for the reasons set forth above, Plaintiffs' motion should be granted.

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Respectfully submitted,

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