UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

VATHSALA DEVI and SEETHARAM SIVAM PLAINTIFFS, v. SHAVENDRA SILVA, DEFENDANT.	)	No. 11-cv-06675 JPO ECF Case ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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TABLE OF CONTENTS

INTRODUCTION 1

I. Factual Background 1

II. Relevant Treaties and Statute 2

ARGUMENT 4

I. THIS COURT HAS JURISDICTION TO HEAR PLAINTIFFS' CLAIMS AGAINST DEFENDANT SILVA 4

A. The Court Has Jurisdiction in this Case Because Defendant Silva's Violation of *Jus Cogens* Norms Requires this Court to Reject His Claims to Immunity 4

B. Defendant Silva's Reference to a Diplomatic Note Has No Bearing on the Court's Jurisdiction over the Plaintiffs' Claims 5

C. The Court Has Jurisdiction over this Case Pursuant to its Obligation to Interpret Treaties Consistent with Congressional Intent 6

D. The Court Has Jurisdiction over this Case Pursuant to its Obligation to Interpret Federal Statutes Consistent with International Law 6

II. DEFENDANT SILVA IS NOT ENTITLED TO IMMUNITY THAT REQUIRES DISMISSAL PURSUANT TO § 254d 7

A. The VCDR, CPIUN, and Headquarters Agreement Do Not Confer Immunity for Torture and Extrajudicial Killing Committed Prior to Defendant's Appointment as a Diplomat 7

1. Article 31 of the VCDR does not confer immunity 7

a. Defendant Silva relies on inapposite authority 8

b. Article 31 confers immunity only for "official acts" or unofficial acts during a diplomat's mission 9

2. Section 11 of the CPIUN does not confer immunity 12

3. Section 15 of the Headquarters Agreement does not confer immunity 14

III. INTERNATIONAL LAW PRECLUDES APPLICATION OF IMMUNITY TO A DEFENDANT ACCUSED OF TORTURE AND WAR CRIMES 14

A. Plaintiffs Base Their Claims on Violations of Universal Human Rights Treaties..... 15

B. Defendant Silva Bases His Arguments on Instruments that Enjoy a Lower Status in the Normative Hierarchy of International Law..... 16

C. Defendant Silva Invokes the Protection of Principles that Yield to *Jus Cogens* Norms and Do Not Immunize Him..... 17

IV. PLAINTIFFS' SERVICE ON DEFENDANT WAS PROPER 18

CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

Aidi v. Yaron, 672 F. Supp. 516 (D.D.C. 1987) 8

Brzak v. United Nations, 551 F. Supp. 2d 313 (S.D.N.Y. 2008) 5

Brzak v. United Nations, 597 F.3d 107 (2d Cir. 2010) 8

Busby v. Alaska, 40 P.3d 807 (Alaska Ct. App. 2002) 10

Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005) 6

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) 15

In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992) 15

Marbury v. Madison, 5 U.S. 137 (1803) 6

Murray v. Charming Betsy, 6 U.S. 64 (1804) 6

Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994) 4

Reed v. Burns, 500 U.S. 478 (1991) 8

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) 6

Sarei v. Rio Tinto, PLC, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) 5

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) 4, 7

Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004) 9, 12

United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 6, 12

United States v. Belfast, 611 F.3d 783 (11th Cir. 2010) 4, 14, 16, 17

United States ex rel. Casanova v. Fitzpatrick, 214 F. Supp. 425 (S.D.N.Y. 1963) 5

131 Main Street Associates v. Manko, 897 F. Supp. 1507 (S.D.N.Y.1995) 18

Statutes and Legislative History

22 U.S.C. § 254d (2006) 2

Congr. Research Serv., *Legislative History of the Diplomatic Relations Act, Prepared for the Use of the Committee on Foreign Relations, United States Senate* (1979) 11

Convention on the Privileges and Immunities of the United Nations: Hearing on S.J. Res. 136 Before the Comm. on Foreign Affairs, 80th Cong. (1947) 13

Diplomatic Privileges and Immunities: Hearing and Markup Before the Subcomm. on International Operations of the Comm. on Int'l Relations H.R., 95th Cong., 1st Sess. (1977)……..…11

J. W. Fulbright, Convention on the Privileges and Immunities of the United Nations, S. Exec. Rep. No. 91-17 (1970) 12, 13, 14, 16

Rules

Fed. R. Civ. P. 4(e)(2)(B) 18

N.Y. C.P.L.R. § 308(2) (McKinney 2011) 18

Foreign and International Cases

Ferrini v. Federal Republic of Germany, 128 I.L.R. 658 (Cass. 2004) (Italy)..... 4

Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5)..... 15, 16

Judgment of Oshima (Nov. 12, 1948), *in* 103 The Tokyo Major War Crimes Trial 49823, 49823-24 (R. John Pritchard ed., 1998)..... 17

International Documents

Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, U.S.-U.N., June 26, 1947, 32 U.S.T. 4414.....3, 14, 16

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. 9

Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418. ..... 3, 16

REPORT OF THE SECRETARY GENERAL'S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA (2011) 2

Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) 17

U.N. Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Comm. Against Torture, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) 14, 15

United States, List of Issues for the Second Periodic Report of the United States of America, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/C/USA/Q/2 (2006) 9

Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 ..... 3, 10, 16

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 311 ..... 10, 15

Other Sources

AMNESTY INTERNATIONAL, WHEN WILL THEY GET JUSTICE? FAILURES OF SRI LANKA'S LESSONS LEARNT AND RECONCILIATION COMMISSION (2011) 2

M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 Law & Contemp. Probs. (1996) 17

Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?* 14 Eur. J. Int'l L. 907 (2003) 15, 16

INTERNATIONAL CRISIS GROUP, WAR CRIMES IN SRI LANKA, ASIA REPORT NO. 191 (2010) 2

INTRODUCTION

I. Factual Background

During the armed conflict in Sri Lanka, Defendant Shavendra Silva, a retired Major General of the Sri Lankan army, violated the *jus cogens* prohibition on torture and the international humanitarian law prohibitions on extrajudicial killings and attacks upon civilian populations. As the frontline general conducting Sri Lanka's brutal war against the ethnic minority Tamil population in northern Sri Lanka, Defendant Silva directly caused the Plaintiffs' suffering. Defendant Silva commanded the 58th military division that injured and killed the relatives of both Plaintiffs. In violation of international law, Defendant Silva and forces under his command deliberately attacked hospitals and civilians, including Plaintiff Sivam's father. Defendant Silva is also responsible for the ambush, torture, and extrajudicial executions of surrendering members of the Liberation Tigers of Tamil Eelam, including Plaintiff Devi's husband, in clear contravention of international law. Defendant Silva is liable under the Alien Tort Claims Act and Torture Victim Protection Act for these actions.

The overwhelming evidence that Defendant Silva is liable for *jus cogens* violations and war crimes compels the Court to deny the immunity Defendant Silva requests. By denying Defendant Silva's motion to dismiss on immunity grounds, this Court will honor the intentions of the treaty drafters who created the immunity protections, uphold the intent of the U.S. Congress that approved the relevant treaties, and most importantly, protect the interests of justice. The Plaintiffs in this suit seek only their day in Court before a jury of neutral fact-finders. Despite international outcry for an independent investigation into the allegations of war

crimes committed by the commanders of Sri Lanka's army during 2008 and 2009,[1] the Sri Lankan government has been uncooperative and obstructive. In recognition of the continued impunity of Sri Lanka's military generals, the international community, including United Nations experts, has called for global measures towards justice and accountability for victims in Sri Lanka and such efforts have sprung up in domestic courts around the world.[2]

II. Relevant Treaties and Statute

The issue before this Court is whether Defendant Silva is entitled to diplomatic immunity for acts of torture and extrajudicial killing, over which he exercised individual and command responsibility, prior to his appointment as a Permanent Representative to the Sri Lankan Mission to the United Nations. In his motion to dismiss, Defendant Silva claims that he is entitled to diplomatic immunity and that the Court must dismiss the Plaintiffs' claims for lack of subject matter jurisdiction. To support his motion, Defendant Silva cites 22 U.S.C. § 254d, a provision of the Diplomatic Relations Act of 1978 ("DRA"), which states that "any action or proceeding brought against an individual who is *entitled* to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . or under any other laws extending diplomatic privileges and immunities, shall be dismissed." 22 U.S.C. § 254d (2006) (emphasis added). Before the Court can dismiss this suit, the Court must first examine whether

[1] AMNESTY INTERNATIONAL, WHEN WILL THEY GET JUSTICE? FAILURES OF SRI LANKA'S LESSONS LEARNT AND RECONCILIATION COMMISSION 59 (2011) (calling for an international, independent investigation that can deliver truth, justice and reparations to the thousands of victims of violations committed during Sri Lanka's bloody war); REPORT OF THE SECRETARY GENERAL'S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA vii (2011) (recommending a mechanism to "[c]onduct investigations independently into the alleged violations, having regard to genuine and effective domestic investigations" of the alleged war crimes committed by LTTE and Sri Lankan security forces").

[2] INTERNATIONAL CRISIS GROUP, WAR CRIMES IN SRI LANKA, ASIA REPORT NO. 191 (2010) (asking the United States and other Member States to "[s]upport non-frivolous civil suits by or on behalf of alleged victims of the security forces or the LTTE, including by limiting claims of immunity").

Defendant Silva is "entitled" to immunity under the Vienna Convention on Diplomatic Relations ("VCDR"), the Convention on Privileges and Immunities of the United Nations ("CPIUN"), or the bilateral Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations ("Headquarters Agreement"). *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15; Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, U.S.-U.N., June 26, 1947, 32 U.S.T. 4414, 11 U.N.T.S. 11.

This Court has jurisdiction to hear the Plaintiffs' claims for four main reasons. **First**, because the Court has a duty to interpret the law consistently with both *jus cogens* norms and congressional intent, this Court has jurisdiction to hear the Plaintiffs' claims, notwithstanding Defendant Silva's assertion of diplomatic immunity. **Second**, Defendant Silva is not entitled to immunity that requires dismissal pursuant to § 254d. The provisions of the VCDR, the CPIUN, and the Headquarters Agreement that Defendant Silva cites do not confer blanket immunity from civil jurisdiction for claims of *torture* and *extrajudicial killing* committed *prior* to the diplomat's appointment to his mission. Rather, these provisions confer immunity for the diplomat's functions ("official acts") and a limited set of non-official activity committed *during* the time of the diplomat's mission. **Third**, even if these treaties would grant diplomatic immunity, international law precludes Defendant Silva from invoking diplomatic privileges that are based merely on reciprocity and mutual benefit, to bar Plaintiffs' claims, which are based on non-derogable *jus cogens* norms and universal obligations. **Fourth,** Plaintiffs' service on Defendant Silva was proper.

For these reasons, and in the interests of justice and fairness, the Court must deny Defendant Silva's motion to dismiss.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR PLAINTIFFS' CLAIMS AGAINST DEFENDANT SILVA

A. The Court Has Jurisdiction in this Case Because Defendant Silva's Violation of *Jus Cogens* Norms Requires this Court to Reject His Claims to Immunity

This Court should rule that it has jurisdiction over Defendant Silva because he violated *jus cogens* norms prohibiting torture and extrajudicial killing and, in doing so, effectively renounced his claim to diplomatic immunity. The non-derogable nature of *jus cogens* violations deprives a defendant of an immunity defense, just as treaties and actions that are contrary to *jus cogens* norms are void or otherwise deprived of their legitimacy. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715-16 (9th Cir. 1992) (stating that "a treaty that contravenes *jus cogens* is considered under international law to be void"); *Ferrini v. Fed. Republic of Germany*, 128 I.L.R. 658, 668 (2004) (sustaining an Italian citizen's suit against Germany despite claim to immunity because "the violation of mandatory norms designed to protect fundamental human rights implies a renunciation of the benefits and privileges [of immunity] accorded by international law"). *See also Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1182 (D.C. Cir. 1994) (Wald, J., dissenting) ("*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"). As U.S. courts have recognized, the prohibition on torture and extrajudicial killing are *jus cogens*. *See United States v. Belfast*, 611 F.3d 783, 809 (11th Cir. 2010) (affirming the *jus cogens* prohibition on torture in Article 2.2 of the Convention Against

Torture); *Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927, at *24 (9th Cir. Oct. 25, 2011) (recognizing "[t]he universal, obligatory, and specific nature of the *jus cogens* prohibition on war crimes").

B. Defendant Silva's Reference to a Diplomatic Note Has No Bearing on the Court's Jurisdiction over the Plaintiffs' Claims

The Court should accord no deference to the diplomatic note that Defendant Silva relies on in his motion to dismiss. Def.'s Mot. Dismiss 2. When the United States requests dismissal on the basis of diplomatic immunity, the United States appears in the action and files a formal suggestion of immunity pursuant to 28 U.S.C. § 517. *See Brzak v. United Nations*, 551 F. Supp. 2d 313, 316 (S.D.N.Y. 2008) (noting the United States' submission regarding immunity pursuant to 28 U.S.C. § 517). Here, the United States has neither appeared nor filed a suggestion of immunity. The diplomatic note Defendant Silva relies on is, therefore, not entitled to the same level of deference as a formal appearance and suggestion of immunity by the United States.

In any event, because Defendant Silva is appointed as a diplomat to the United Nations and not to the United States, this Court should independently determine Defendant Silva's claim of immunity without deference to the views of the U.S. Department of State. *See United States ex rel. Casanova v. Fitzpatrick*, 214 F. Supp. 425, 432-33 (S.D.N.Y. 1963) (suggesting that the Department of State's certification of a diplomat's status is not conclusive when the diplomat is a representative of a member state to the United Nations, because "[t]he United States has no say or veto power with respect to such representative of any member state"). Thus, even if the diplomatic note reflects the views of the U.S. Department of State, this Court should not defer to those views because Defendant Silva is a representative to the United Nations and outside of the authority of the U.S. Department of State.

C. The Court Has Jurisdiction over this Case Pursuant to its Obligation to Interpret Treaties Consistent with Congressional Intent

Defendant Silva asks this Court to disregard the nature of the allegations against him when considering his claim to immunity. *See* Def.'s Mot. Dismiss 3-4 (claiming "absolute immunity . . . regardless of the nature of the allegations"). Based on this Court's duty to "say what the law is," the Court must decide whether the VCDR, CPIUN, and Headquarters Agreement can be interpreted, consistently with congressional intent, to confer the "absolute" immunity that Defendant Silva claims. *Marbury v. Madison,* 5 U.S. 137, 178 (1803); *see Sanchez-Llamas v. Oregon,* 548 U.S. 331, 353-54 (2006) (affirming the judiciary's duty to interpret treaties); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940) (stressing the task of "constru[ing] the language so as to give effect to the intent of Congress"). Immediate dismissal on the immunity grounds that Defendant Silva requests is inappropriate here because Congress never intended to grant a diplomat appointed to the United Nations immunity for acts he committed *prior* to his appointment as a diplomat. Rather, Congress intended to grant immunity to such diplomats only for acts they commit *during* their tenure. *See infra* section II.

D. The Court Has Jurisdiction over this Case Pursuant to its Obligation to Interpret Federal Statutes Consistent with International Law

The Court must interpret § 254d in accordance with international law, which necessarily includes *jus cogens* norms. *See Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804) (declaring that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1347 (Fed. Cir. 2005) ("[C]ourts should interpret U.S. law, whenever possible, in a manner consistent with international obligations."). The Court's determination of Defendant Silva's motion to dismiss

pursuant to § 254d must take into account not only the treaties and the bilateral agreement that Defendant Silva cites, but also the *jus cogens* norms, which have "binding force" upon all states and protect fundamental human rights. *Siderman de Blake*, 965 F.2d at 715.

II. DEFENDANT SILVA IS NOT ENTITLED TO IMMUNITY THAT REQUIRES DISMISSAL PURSUANT TO § 254d

Defendant Silva is not entitled to diplomatic immunity under the VCDR, CPIUN, and Headquarters Agreement requiring dismissal of the Plaintiffs' claims pursuant to § 254d. Defendant Silva seeks dismissal based on a mere invocation of immunity, relying on Article 31 of the VCDR; Article IV, Section 11 of the CPIUN; and Article V, Section 15 of the Headquarters Agreement. Def.'s Mot. Dismiss 2-4. None of the treaties Defendant Silva cites, however, confer immunity for acts of *torture* or *extrajudicial killing* committed *prior* to Defendant Silva's appointment to his diplomatic mission. Moreover, the text, object, and purpose of these treaties, coupled with legislative documents of the U.S. Congress, demonstrate that the Court must deny Defendant Silva's motion to dismiss pursuant to § 254d.

A. The VCDR, CPIUN, and Headquarters Agreement Do Not Confer Immunity for Torture and Extrajudicial Killing Committed Prior to Defendant's Appointment as a Diplomat

1. Article 31 of the VCDR does not confer immunity

Defendant Silva argues that the scope of immunity provided under the VCDR is dispositive of the issues here. This is because Defendant Silva reads Section 11 of the CPIUN and Section 15 of the Headquarters Agreement to incorporate the VCDR by implication. Def.'s Mot. Dismiss 2. Defendant Silva asserts that he is entitled to "absolute" immunity under Article 31 of VCDR "regardless of the nature of allegations." Def.'s Mot. Dismiss 3-4. This assertion is wrong for several reasons.

a. Defendant Silva relies on inapposite authority

In support of his argument that he is entitled to "absolute" immunity for torture and extrajudicial killing committed prior to his appointment, Defendant Silva improperly cites dicta from *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010) as a "holding" on "absolute immunity." Def.'s Mot. Dismiss 3. *Brzak* concerned Article 39 of the VCDR and the scope of functional or "official acts" immunity. *Brzak*, 597 F.3d at 113. Because the Second Circuit was not analyzing the scope of immunity provided under Article 31, the Second Circuit's undefined use of the phrase "absolute immunity" cannot be considered controlling. "Absolute immunity" may mean different things, including even "functional immunity." *See, e.g., Reed v. Burns*, 500 U.S. 478 (1991) (holding that a prosecutor was entitled to "absolute immunity," i.e. for the performance of his prosecutorial duties). This underscores the need for the Court to analyze the intended scope of immunity provided by Article 31, with reference to the text, object, and purpose of the treaty, as well as Congress's intent.

Defendant Silva also relies on inapposite case law by citing *Aidi v. Yaron,* 672 F. Supp. 516, 518 (D.D.C. 1987), a decision which is not binding on this Court and which is distinguishable from the case at bar. Def.'s Mot. Dismiss 3-4. Unlike *Aidi,* in which plaintiffs brought claims for wrongful death and personal injury, Plaintiffs here bring claims alleging *international* wrongs expressly prohibited by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). *See Aidi v. Yaron*, 672 F. Supp. 516, 518 (1987) (considering plaintiffs' argument that customs of international law were relevant to diplomatic immunity, but noting that "this is not a suit charging . . . international crimes," but rather "a civil action seeking damages for . . . *wrongful death and personal injury*") (emphasis added). The CAT, it should be noted, entered into force in the United States subsequent to *Aidi*

and, thus, reflects the evolution of international law since the *Aidi* court decided the issue. Moreover, the CAT establishes a state's obligation to provide a remedy. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2, 14, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. The United States provides a remedy through the ATCA and the TVPA. *See* United States, List of Issues for the Second Periodic Report of the United States of America, 36th Sess., May 1-19, 2006, ¶ 5 U.N. Doc. CAT/C/USA/Q/2 (2006) (explaining that the ATCA and TVPA are available to comply with Article 2 obligations under CAT). Defendant Silva, therefore, cannot rely on cases, such as *Aidi* and *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), where plaintiffs did not raise the issue of whether *jus cogens* violations—which the U.S. government is bound to remedy under CAT—deprives Defendant Silva of any claim to diplomatic immunity. Def.'s Mot. Dismiss 3-4 (citing *Aidi*).

b. Article 31 confers immunity only for "official acts" or unofficial acts during a diplomat's mission

Contrary to Defendant Silva's assertion of "absolute" immunity, Def.'s Mot. Dismiss 3-4, Article 31 provides immunity from civil jurisdiction *only* for "official acts" and acts outside the diplomat's employment committed *during* his diplomatic mission. Article 31 of the VCDR does not confer immunity for acts that a diplomat committed *prior* to his appointment. This is demonstrated in the text, object, and purpose of the VCDR, as well as related congressional materials.

First, Defendant Silva cites no language from the VCDR indicating that he is entitled to blanket immunity from suit for *torture* and *extrajudicial killing*. Furthermore, the text of Article 31 indicates temporal limitations to the immunity conferred by Article 31 for *actions* that the

diplomat performs *while* on his mission. *See* VCDR art. 31(1)(a) ("*he holds* it on behalf of the sending State *for the purposes of the mission*"); *id.* art. 31(1)(b) ("agent is *involved . . . on behalf of* the sending State); *id.* art 31(1)(c) ("*exercised* by the diplomatic agent *in* the receiving State"). Other Articles of the VCDR demonstrate that the treaty contemplates two kinds of immunities. At the narrow end of the spectrum is functional immunity for "official acts," defined as "acts performed *in* the exercise of [a diplomat's] functions." *Id.* art. 38. At the broader end of the spectrum is "full diplomatic immunity," contemplated in Article 31 of the VCDR, which covers actions—whether function-related or non-function related—that are performed *while* the diplomat is on a mission. Thus, even if Defendant Silva is entitled to the immunity provided by Article 31, such immunity does not require dismissal pursuant to § 254d because Plaintiffs' claims pertain to actions *prior* to Defendant Silva's diplomatic appointment.

Second, in interpreting Article 31 the Court must consider the "object and purpose" of the Convention. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331 (stating that terms must be interpreted "in light of [the] object and purpose" of the treaty); *Busby v. Alaska*, 40 P.3d 807, 813 (Alaska Ct. App. 2002) (rejecting a defendant's interpretation of the U.N. Convention on Road Traffic because it contravened the object and purpose of the treaty). The preamble of the VCDR states, "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." VCDR, pmbl. The VCDR, thus, expressly distinguishes between privileges for the individual's exclusive benefit and privileges that support the purpose of his mission. Actions committed prior to a diplomat's appointment to the mission *necessarily* do not serve or support his diplomatic mission and, thus, fall outside of the scope of Article 31 protections.

Third, congressional documents demonstrate that Congress understood immunity from civil jurisdiction to relate to actions of a diplomat *while* he serves in his position in the United States. Prior to enactment of the DRA, Congress considered claims arising from traffic accidents in the United States to be the most "serious" form of non-functional immunity that diplomats received. *See generally Diplomatic Privileges and Immunities: Hearing and Markup Before the Subcomm. on International Operations of the Comm. on Int'l Relations H.R.*, 95th Cong., 1st Sess. (1977) (discussing the absence of remedies against diplomats for traffic accidents and parking violations). Because Congress was concerned about the damaging effects of diplomats' wrongful acts committed *inside* the United States and the inability of victims to obtain a remedy for injuries committed by diplomats, it enacted two provisions—28 U.S.C § 1364, which provides district courts with civil jurisdiction over claims against the insurance companies of diplomats, and 22 U.S.C. § 254e, which requires diplomats to carry liability insurance—as part of the DRA. *See* Congr. Research Serv., *Legislative History of the Diplomatic Relations Act, Prepared for the Use of the Committee on Foreign Relations*, United States Senate 22 (1979) (identifying the problems arising from diplomatic immunity as "(1) traffic accidents; (2) parking and traffic violations; (3) realty disputes; and (4) the payment of bills"). These provisions reflect that § 254d operates to grant immunity for diplomats' activities in the United States, not for their actions prior to their diplomatic appointment. Congress never considered or intended to bar claims such as those raised by the Plaintiffs here, which concern *jus cogens* violations by Defendant Silva prior to his appointment as a Permanent Representative.

To the extent that Article 31 applies to Defendant Silva, the text, object, purpose, and congressional materials related to Article 31 demonstrate that the scope of immunity to which he is entitled is narrower than the "absolute" blanket of immunity that Defendant Silva claims.

Instead, Article 31 provides Defendant Silva with immunity only for official acts and certain non-function activity that he commits *during* his mission.

2. Section 11 of the CPIUN does not confer immunity

Defendant Silva's interpretation of Section 11(g) of the CPIUN contravenes Congress's intent, which cannot be ignored, *see American Trucking Ass'ns*, 310 U.S. at 542 (declaring that statutory interpretation must give effect to congressional intent), and his interpretation lacks support in the text of Section 11. Defendant Silva asserts that Section 11(g) confers immunity for acts of torture and extrajudicial killing he committed *prior* to his appointment as a diplomat because it incorporates the protections of VCDR. Def.'s Mot. Dismiss 2. Section 11(g), which the Second Circuit Court of Appeals has dubbed "ambiguous," *Tachiona*, 386 F.3d at 215, states that a representative "shall, while exercising their functions and during their journey to and from the place of meeting, enjoy . . . such other privileges and immunities not inconsistent with the foregoing as diplomatic envoys enjoy."

Defendant Silva's proffered interpretation of Section 11(g) as a blanket grant of immunity is incorrect for several reasons. First, nothing in the plain language of Section 11(g) supports Defendant Silva's assumption that the drafters of the CPIUN intended to confer immunity for acts of torture or extrajudicial killing. To the contrary, congressional materials show that while Congress intended to confer "more than just 'functional' immunity," *Tachiona*, 386 F.3d at 218, Congress contemplated that immunity from civil jurisdiction would extend to only a limited set of acts outside the scope of his functions *performed while* the diplomat is on his mission. *See generally* J.W. Fulbright, Convention on the Privileges and Immunities of the United Nations, S. Exec. Rep. No. 91-17 (1970).

Reports from Senate hearings on the issue of whether the United States should accede to the CPIUN demonstrate that Congress contemplated extending immunity to a limited number of relatively minor offenses—parking tickets, rent payment disputes, and injuries resulting from traffic accidents. *Id.* By necessity, these activities would have occurred on U.S. soil *while* the diplomat was on his mission:

> Could we take a classic case of a civil situation and could we take a classic case of a criminal situation and then analyze for the Congress what happens . . . ? Now, the two classic situations that occur to me are, one, a civil suit for nonpayment of rent. You know, there is a big problem in New York about renting to U.N. personnel official quarters . . . . The other question is, suppose a man has FC or diplomatic plates on his car and he hits somebody and kills him and let's say it is a manslaughter charge or gross negligence charge . . . .

Id. at 28 (Statement of Senator Javits). Because Congress never discussed whether diplomats would be immunized for either egregious acts of violence, such as torture and extrajudicial killing, or for acts occurring prior to diplomatic appointment, Defendant Silva cannot suggest that Congress intended to immunize such acts, particularly because Congress requested briefing on the impact of accession to the CPIUN. *See id.* at 28 (indicating that Congress's understanding of the application of the CPIUN in specific cases would have a "material effect" on whether the U.S. acceded to the CPIUN). In debating the meaning of 11(g), members of Congress indicated a limit to the offenses that they intended to immunize. *See Convention on the Privileges and Immunities of the United Nations: Hearing on S.J. Res. 136 Before the Comm. on Foreign Affairs*, 80th Cong. 268 (1947) (Statement of Representative Frances P. Bolton) ("We certainly do not want to get muddled up in that old conflict which would permit a man to commit murder and go free"). Section 11(g) does not support the Defendant's assertion of immunity for acts of *torture* and *extrajudicial killing* committed *prior* to his appointment as Permanent Representative.

3. Section 15 of the Headquarters Agreement does not confer immunity

Defendant Silva argues that Article V, Section 15 of the Headquarters Agreement confers immunity for acts of torture and extrajudicial killing committed prior to his appointment as a Permanent Representative to the United Nations. Def.'s Mot. Dismiss 2. As with Article 31 of the VCDR and Section 11(g) of the CPIUN, Defendant Silva cites no text that supports his view that the drafters of this bilateral agreement intended to grant blanket immunity. Rather, Section 15 expressly states that, to the extent that a receiving state provides privileges and immunities, such protections are "subject to corresponding conditions and obligations." Headquarters Agreement, Section 15(4). Therefore, the Headquarters Agreement is subject to the same limitations as the CPIUN and VCDR, which do not immunize Defendant Silva from Plaintiffs' claims before this Court. *See* S. Exec. Rep. No. 91-17 at 14 (indicating that the privileges extended to resident representatives under the Headquarters Agreement and the CPIUN are the same).

III. INTERNATIONAL LAW PRECLUDES APPLICATION OF IMMUNITY TO A DEFENDANT ACCUSED OF TORTURE AND WAR CRIMES

Without disputing the allegations against him, Defendant Silva argues that, even if he is responsible for acts of *torture* and *extrajudicial killing*, he enjoys immunity from civil suit under the VCDR, the CPIUN, and Headquarters Agreement. Def.'s Mot. Dismiss 3. Defendant Silva urges the Court to prioritize his diplomatic immunity over *jus cogens* norms, which the Court may not do because *jus cogens* norms may never be displaced by other principles of international law. *See Belfast*, 611 F.3d at 809 (rejecting as without merit the argument that CAT does not apply in armed conflict); U.N. Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Comm. Against Torture, 36th Sess., May 1-19, 2006, ¶¶ 14-15, U.N. Doc. CAT/C/USA/CO/2

(July 25, 2006) ("[T]he application of the Convention [Against Torture]'s provisions *are without prejudice to the provisions of any other international instrument*.") (emphasis added).

A. Plaintiffs Base Their Claims on Violations of Universal Human Rights Treaties

Defendant Silva's entitlement to immunity under international law necessarily requires this Court to consider the hierarchical position that *jus cogens* norms enjoy in relation to the reciprocal benefits and privileges extended under the VCDR, CPIUN, and Headquarters Agreement. *See* Vienna Convention on the Law of Treaties, arts. 31, 53, 64, 71, May 23, 1969, 1155 U.N.T.S. 331 (requiring treaties to be interpreted in relation to other norms).

Plaintiffs base their claims on universal human rights treaties, such as the CAT, *see* Compl. 5, which contain obligations that are absolute and that affect all of mankind. *See In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992) (declaring that "the prohibition against official torture occupies a uniquely high status among norms of international law"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind"); Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?* 14 Eur. J. Int'l L. 907, 911 (2003) (noting that obligations under human rights treaties are "self-existent . . . [and are] 'towards all the world rather than towards particular parties'"). A court cannot suspend these obligations in part because such violations injure the international community as a whole. *See Belfast*, 611 F.3d at 811 (describing torture as a harm that "is quintessentially international in scope"); *Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5) (distinguishing *erga omnes* obligations, which are "towards the

international community as a whole" and are derived from human rights treaties, from "those [obligations] arising vis-à-vis another State in the field of diplomatic protection").

B. Defendant Silva Bases His Arguments on Instruments that Enjoy a Lower Status in the Normative Hierarchy of International Law

In contrast to the Plaintiffs' reliance on universal norms, Defendant Silva relies on the VCDR, CPIUN, and Headquarters Agreement, all of which are based on reciprocity and mutual, as opposed to universal, benefit. Def.'s Mot. Dismiss 2-3. The three instruments cited by Defendant Silva consist of "bundles of bilateral relations," which can "be suspended or terminated." *See* Pauwelyn, *supra*, at 911, 916; VCDR arts. 2, 4, 5 (emphasizing "mutual consent" and agreement between the diplomat's sending and receiving state); S. Exec. Rep. No. 91-17 at 7, 9 (stating that the United States acceded to the CPIUN because of its specific "interests" and "various measurable advantages" of being host to the United Nations). The VCDR, the CPIUN, and the Headquarters Agreement contain numerous suspension provisions, including instances where privileges must yield to justice. *See* VCDR, art. 32(1) ("[I]mmunity . . . may be waived by the sending state); CPIUN, art. IV, § 14 ("[A] Member . . . is under a duty to waive the immunity of its representative in any case where . . . immunity would impede the course of justice"); Headquarters Agreement § 13 (reserving the ability to apply U.S. law to a diplomat who abuses his privileges).

In resolving Defendant Silva's immunity argument, the Court must recognize that the bilateral nature of obligations and the existence of waiver provisions in the VCDR, CPIUN, and Headquarters Agreement demonstrate that the principles protected in these instruments enjoy a lower status in the normative hierarchy of international law than do absolute norms prohibiting torture and extrajudicial killing, which may never be displaced by other bodies of law. *Belfast*,

611 F.3d at 809 (rejecting the contention that legislation authorized by the CAT can be displaced).

C. Defendant Silva Invokes the Protection of Principles that Yield to *Jus Cogens* Norms and Do Not Immunize Him

The Court must deny Defendant Silva's motion to dismiss because the privileges he invokes yield to, and cannot displace, the universal and absolute human rights protections afforded under the CAT. Because acts of torture and war crimes are *jus cogens* crimes, they give rise to the obligation "not to grant impunity to the violators of such crimes." M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes,* 59 Law & Contemp. Probs. 4, 66-68 (1996). In practice, therefore, immunity doctrines may not be applied to bar judicial processes involving allegations of *jus cogens* crimes. *See Ferrini*, 128 I.L.R. at 668 (holding that "the violation of mandatory norms designed to protect fundamental human rights implies a renunciation of the benefits and privileges [of immunity] accorded by international law"); Judgment of Oshima (Nov. 12, 1948), *in* 103 The Tokyo Major War Crimes Trial 49823, 49823-24 (R. John Pritchard ed., 1998) (holding that nature of *jus cogens* violations deprived a Japanese diplomat of the "special defense" of immunity); Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. DOC. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) Principle 27(c) ("The official status of the perpetrator of a crime under international law . . . does not exempt him . . . from . . . *responsibility*"); *id.* Principle 31 ("Any human rights violation gives rise to a right to reparation . . . implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator").

IV. PLAINTIFFS' SERVICE ON DEFENDANT WAS PROPER

Service of process on Defendant Silva was proper. Consistent with the Federal Rules of Civil Procedure and the New York Rules of Civil Procedure, Plaintiffs delivered the Complaint and summons to Defendant Silva's residence, where a person over eighteen years of age received the documents. Fed. R. Civ. P. 4(e)(B)(2). Additionally, the Complaint was mailed to Mr. Silva's home, meeting the second requirement for proper service under the New York rules. N.Y. C.P.L.R. 308 (2) (McKinney 2011). Courts have held that service of a defendant through someone at the defendant's residence is proper. *See, e.g.*, *131 Main St. Assocs. v. Manko*, 897 F. Supp. 1507, 1524-25 (S.D.N.Y. 1995) (upholding service of process via an apartment tenant's doorman pursuant to Federal Rule of Civil Procedure 4(d)(1) "[b]ecause it was [the] doorman's job to serve as a link between the outside world and the tenants"). Plaintiffs have met every requirement for proper service.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendant Silva's motion to dismiss be denied.

Dated: November 8, 2011

Respectfully submitted,

__/s/_____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VATHSALA DEVI
SEETHARAM SIVAM

PLAINTIFFS

No. 11-CV-06675 JPO

- against -

AFFIRMATION OF SERVICE

SHAVENDRA SILVA

DEFENDANT

I, Ali Beydoun, declare under penalty of perjury that I have served a copy of the attached Plaintiff's Opposition to Defendant's Motion to Dismiss upon Timothy G. Nelson, Esq., whose address is Four Times Square, New York, New York 10036-6522 by Electronic Service and Federal Express.

Dated: Washington, DC
(town/city) (state)

November 8, 2011
(month) (day) (year)

/s/ Ali A. Beydoun
Signature

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