Alerte Belance v. Front Pour L'Avancement - Plaintiff's Memorandum of Law

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALERTE BELANCE,	)	
	)	
Plaintiff,	)	Civ. No. 94-2619
	)	(Judge Nickerson,
v.	)	Magistrate Judge Go)
	)	
	)	
FRONT POUR L'AVANCEMENT ET LE PROGRES HAITIEN (FRAPH), an unincorporated association,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

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INTRODUCTION

In the early morning hours of October 16, 1993, 32-year-old Alerte Belance, a market vendor and supporter of then-exiled

Haitian President Jean-Bertrand Aristide, was dragged from her home by armed members of the Defendant Front Pour L'Avancement et Le Progres [hereinafter FRAPH]. Ms. Belance was taken to an area outside Port-au-Prince known as "Titanyen," (a "killing field"), where she was brutally tortured: slashed repeatedly on her head, neck and arms with a machete, thrown under a bush and left for dead.

Miraculously, Ms. Belance survived, despite deep gashes in her head, mouth and neck, and despite losing her right forearm, parts of her tongue, and the hearing in her severed right ear. Having obtained political asylum, she now lives with her husband and their three children in New Jersey.

The attack against Alerte Belance was perpetrated by four members of the paramilitary group FRAPH, as part of FRAPH's pattern of organized and systematic violence against real and perceived opponents of the military regime. FRAPH was created and financed by the Haitian security forces. It committed egregious and widespread human rights abuses with complete impunity during the military regime, operating under the direction and control of, and in close coordination with, the Haitian army and police.

At the time Alerte Belance filed and served her complaint, FRAPH was present and doing business as an unincorporated association in New York State, and had an office in the Eastern District of New York. Plaintiff served the complaint on Lyonel Sterling, the managing agent of FRAPH's New York office, on June 1, 1994. Defendant having failed to appear in this action, Plaintiff seeks judgment by default on her claims pursuant to Federal Rules of Civil Procedure 55(b)(2).

On motion for default judgment, the Court must take as true all issues of fact as averred in the complaint. Pope v. United States, 323 U.S. 1, 12 (1944). After confirming that it has subject matter jurisdiction over this suit, this Court must determine the award of compensatory and punitive damages to which Plaintiff is entitled. United Food & Commercial Workers Union v. Centermark Properties Meriden, 30 F.3d 298, 301 (2d Cir. 1994).

This motion is based upon the allegations of the complaint, this memorandum of law and the following exhibits, which include documents obtained from the U.S. government in response to third party subpoenas, issued by the plaintiff:

Exhibit A: Declaration of Plaintiff Alerte Belance

Exhibit B: Excerpts from June 7, 1995 and December 28-29, 1995, Depositions of Emmanuel Constant

Exhibit C: Declaration of Anne Fuller, expert on human rights in Haiti and on Defendant FRAPH
Exhibit D: Declaration of William O'Neill, expert on Haitian law
Exhibit E: List of representative human rights abuses committed by FRAPH
Exhibits F1-F8:FRAPH, miscellaneous documents
Exhibits G1-G17: U.S. government documents concerning FRAPH
Exhibit H: Affidavit of International Law Scholars, submitted in Ortiz v. Gramajo, No. 91-11612, decided sub nom. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995)
Exhibit I: Summary of damage awards in prior Alien Tort Claims Act cases

Based on this submission, Plaintiff asks this Court to award substantial compensatory and punitive damages, sufficient to remedy-- at least in some measure -- the harm suffered by Ms. Belance and to punish and deter the egregious human rights abuses committed by Defendant FRAPH.

STATEMENT OF FACTS

A. Haiti: Background

Haiti has been the scene of decades of brutal human rights abuses. U.S. occupation forces withdrew in 1934, after a 20-year occupation, leaving behind an oppressive security apparatus that ruled Haiti for over fifty years, under the control of a series of dictators, including Francois Duvalier (1957-71) and his son Jean-

Claude Duvalier (1971-86). Ex. C, Declaration of Anne Fuller ¶8 [hereinafter Fuller Decl.]. Post-Duvalier democratic elections were scheduled for November 1987, but had to be postponed because of internal turmoil.

Pro-democratic forces seemed to have finally triumphed over the military with the December 1990 election of Father Jean-Bertrand Aristide as Haiti's first democratically elected president in history. Aristide took office in February 1991. Only six months later, however, a military junta led by the Commander-in-Chief of the Haitian Armed Forces, Lt. Gen. Raoul Cedras, overthrew President Aristide and installed a regime characterized by systematic human rights abuses, violence, and corruption. Fuller Decl. ¶9.

The overthrow of President Aristide was widely condemned. Under the auspices of the Security Council, the international community first fiercely protested, then negotiated, and finally intervened with military power in order to restore President Aristide to power. Fuller Decl. ¶¶ 10-13.

B. Systematic Human Rights Abuses Under the Military Regime

> After the coup, Amnesty International reported that the security forces and the thousands of civilians acting in collusion with them carry out a wide range of abuses with total impunity. The old repressive structures, which the deposed Aristide government had partly succeeded in dismantling, are back in place.

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Several human rights groups based in Haiti estimated that between October 1991 and August 1992 more than 3,000 extra-judicial executions took place, 90 percent of them in Port-au-Prince. Fuller Decl. ¶ 15. They characterized the military regime as massively abusive of human rights, an accusation which was confirmed by official international human rights missions to Haiti. Id. For instance, the Organization of American States reported:

> In May [1992], extra-judicial executions increased. Military, accompanied by armed civilians, made late-night incursions into poor neighborhoods of Port-au-Prince, searching houses and beating and shooting their inhabitants.

Organization of American States, Report on the Situation of Human Rights in Haiti (1993) at 21 [hereinafter O.A.S. Report 1993]. The U.S. State Department also reported that violent repression by the army, the police, and paramilitary groups acting under color of law were characteristic of General Cedras' rule. Ex. G1, pp. 3-4. Numerous cases of extrajudicial execution, disappearance, arbitrary detention, rape and other torture, extortion, assaults, and intimidation are listed in the reports of official human rights missions, non-governmental human rights groups and the press. Women were subjected to sexual and other violence because of the activities of family members, as well as their own political activities. See. e.g., O.A.S. Report 1993; Organization of American States, Report on the Situation of Human Rights in Haiti 1994 [hereinafter O.A.S. Report 1994]: Americas Watch/National Coalition for Haitian Refugees, Silencing a People: The Destruction of Civil Society in Haiti (1993); Human Rights Watch/National

5Coalition for Haitian Refugees, Terror Prevails in Haiti (April 1994); Human Rights Watch/National Coalition for Haitian Refugees, Rape in Haiti: A Weapon of Terror (July 1994).

> As noted in the 1993 Yearbook of the United Nations,
>
> The most serious and greatest incidence of human rights violations observed by the [U.N.] Mission included violations of the right to physical integrity and individual security, intended primarily to restrict or prohibit freedom of expression, of assembly and of peaceful association; . . . systematic beatings and torture; deaths in detention following torture; enforced disappearances, . . . and arbitrary executions, perpetrated by "zenglendos" (criminal recruits operating at night in the slums and working-class districts),paramilitary groups, bands of delinquents or State agents.

Yearbook of the United Nations (1993) at 340.

> Violations of human rights dramatically increased after the signing of the Governors Island Agreement in July 1993. Fuller Decl. ¶16. The O.A.S. Report 1993 observes,
> many people have been unlawfully detained, summarily executed, mistreated and tortured by members of the Armed Forces, the Police and civilian collaborators. In the majority of cases, the victims have been followers of the deposed President Jean-Bertrand Aristide; in other cases, the victims are people who were simply suspected of being Aristide supporters.

O.A.S. Report 1993 at 17.

C. The Defendant: FRAPH

> The Front Pour L'Avancement et Le Progres Haitians (Haitian Front for Advancement and Progress, FRAPH) was created in September 1993. Fuller Decl. ¶ 16; Ex. B, Deposition of Emmanuel Constant, December 28-29, 1995, Vol. I at 46 [hereinafter Second Constant Depo.]; Ex. B, Deposition of Emmanuel Constant, June 7, 1995, at 91, 92. [Hereinafter First Constant Depo.] FRAPH soon grew to bea strong presence throughout Haiti. First Constant Depo., at 91, 92. The State Department observed that "[t]he emergence of FRAPH, which operated in conjunction with the Fad' H [Haitian Armed Forces] in numerous localities, had aggravated the situation" in Haiti. Ex. G2, p. 5. This conclusion is underscored in the O.A.S Report 1994 which confirmed that after the signing of the Governors Island Agreement, "violations [were] being committed not only by section chiefs and their associates, but also by new 'militia' recently created by the Army to continue the repression." O.A.S. Report 1994 at 2.

1. FRAPH Acted Under Color of Law

> FRAPH was formed by "high-level military officials," Ex. G3, p. 2, and was from its creation "an army-created phenomenon." Ex. G4, p. 2. Operating with the support -- tacit and open -- of the

Haitian military, Fuller Decl. ¶ 16, FRAPH's purpose was to serve as "the vehicle and 'political cover' for the opposition among police, military and Duvalierist leaders to the Governors Island Accord . . . and the return of President Aristide." Ex. G5, p. 1. The U.S. government recognized FRAPH as nothing more than a "renta-mob group financed by the military," without "an independent ideology or base," designed to implement the military's most brutal and nefarious acts of violent political repression. Fuller Decl. ¶ 17; Ex. G6, p. 1.

FRAPH's leaders, Louis Jodel Chamblain and Emmanuel Constant, were both "prominent attache chieftains with close links to military figures like police chief Michel Francois and Duvalierist 'old guard' figures." Ex. G5, p. 2. Further persons closely connected to FRAPH were army chief of staff General Biamby and Cedras' wife. Fuller Decl. ¶17; EX. G6, p. 1.

FRAPH was supported by and cooperated with the Haitian Armed Forces. Id. Americas Watch and the National Coalition for Haitian Refugees wrote in April 1994: "FRAPH, which sounds like the French word for 'hit,' has been nurtured by the military since its emergence in September 1993." Americas Watch/National Coalition for Haitian Refugees, Terror Prevails in Haiti (April 1994) at 5. FRAPH members carried identification cards issued by the Haitian Armed Forces. Fuller Decl. ¶17; see Ex. F1. They "consistently operated, often violently, in support of the Cedras regime." Fuller Decl. ¶17; Ex. G6, p. 1.

FRAPH claimed to be a political party but never registered as such in Haiti and did not participate in the Haitian political process. The de jure government of President Aristide, the U.S. Department of State, and the U.S. Embassy in Port-au-Prince all regarded FRAPH as an "illegitimate paramilitary organization." Fuller Decl. ¶ 17; Ex. G7, p. 6. Although the Haitian Constitution prohibits the existence of any armed organization apart from the Haitian Armed Forces and the police, art. 263, ¶ 1, neither the Armed Forces nor the police made any attempt to block FRAPH's illegal activities. O.A.S. Report 1994 at 13,163. To thecontrary, the military government clearly supported FRAPH. Id. at 161. FRAPH also enjoyed the favor of the police, whose permission was necessary for all public demonstrations and marches. The U.S. Embassy in Haiti observed that "FRAPH demonstrations always have police officers assigned to accompany and provide crowd and traffic control." Ex. G5, p. 2. FRAPH used its "monopoly of power for financial gain as well as to subjugate and abuse the populace." Fuller Decl. ¶ 18.

2. FRAPH was responsible for Egregious International Human Rights Violations

FRAPH's thugs employed brutal violence in support of the repressive policies of the de facto government of General Cedras. In their systematic raids against suspected supporters of President Aristide, FRAPH cooperated with the police or the Armed Forces, and acted with the protection and assistance of those forces. Fuller Decl. ¶¶ 20-21; Organization of American States, Report on the Situation of Human Rights in Haiti (1995) at 33 [hereinafter O.A.S. Report 1995]. Exhibit E lists a sampling of just a small number of the violent human rights abuses for which FRAPH was responsible between its emergence in September 1993 and the restoration of President Aristide in September 1994, all committed under the authority of the de facto military regime.

As the list indicates, FRAPH was responsible for widespread murders, committed through arson as well as through disappearances and illegal detentions followed by killings. In nightly raids, members of FRAPH kidnapped Aristide supporters from poor neighborhoods and executed them. For example, on April 22, 1994,
9a raid on the Raboteau neighborhood by armed soldiers and members
-of FRAPH left at least 23 persons dead. Fuller Decl. ¶ 20: Ex. G8, p. 2; O.A.S. Report 1995 at 52.

Rapes by FRAPH members were also widespread. The O.A.S. Report 1995 found that,

> The primary instruments of the repression inflicted on women and children in Haiti have been rapes . . . committed by members of the army and police forces, their armed civilian auxiliaries, the attaches, paramilitary groups, and members of FRAPH, acting with complete impunity. . . . It always happens in the same way: armed men, frequently soldiers or FRAPH members, violently enter the house of a political militant to arrest him. When he is not there and the family cannot say where he is, the intruders turn against his wife, sister, daughter, or cousin.

O.A.S. Report 1995 at 39-40; Fuller Decl. ¶ 23. The O.A.S. specifically found that the rapes in Haiti constituted torture under international law. O.A.S. Report 1995 at 43-44.FRAPH also engaged in large-scale military operations, attacking villages, beating and otherwise abusing the inhabitants, and destroying their homes and possessions. Neighborhoods thought to be sympathetic to Aristide were invaded and besieged. Fuller Decl. ¶ 21: U.N./O.A.S. International Civilian Mission in Haiti, Press Release, Ref. CP/94/11 (March 30, 1994). Many of those who were not killed were detained and tortured. The Inter-American Commission on Human Rights wrote after its visit to Haiti in May 1994:

> The delegation . . . received numerous reports of arbitrary detention, routinely accompanied by torture and brutal beating by agents of the Armed Forces of Haiti and paramilitary groups, especially members of the Revolutionary Front for Advancement and Progress in

Haiti (FRAPH), who act in concert with the Armed Forces and Police.

10Inter-American Commission on Human Rights, Press Release No. 11/94 (May 20 1994); Fuller Decl. ¶ 22. FRAPH's targets included, among others, international observers, local human rights advocates, the U.S.S. Harlan County (as it tried to land carrying a contingent of U.N. peacekeepers), and Haitian government ministers trying to restore civilian rule.

In summary, FRAPH was responsible for hundreds of egregious violations of the most fundamental human rights. FRAPH "systematically perpetrated the most heinous human rights violations on the people of Haiti. Hundreds of instances . . . have been documented by human rights organizations and the international press alike." Fuller Decl. at 4, Summary of Conclusions. By so effectively intimidating those who sought the return of President Aristide -- including the United States government and international advocates, as well as the Haitian people -- FRAPH also bears responsibility for prolonging military rule in Haiti, thus contributing to thousands of additional human rights violations.

3. FRAPH was Present and Doing Business in the Eastern District of New York in June 1994

FRAPH was present and doing business in New York State at the time the complaint was filed. It maintained two offices, in Brooklyn and Far Rockaway, along with post office boxes in both communities. Complaint ¶ 8. At least three people represented FRAPH in New York: Lyonel Sterling, General Coordinator and managing agent of FRAPH New York; Rigaud Noel, Assistant General Coordinator of the local group; and Sylvestre Jean-Leger, a political organizer. Id.

11 FRAPH's activities included frequent media interviews by FRAPH representatives, as well as a stream of faxes, letters and paid advertisements to nongovernmental organizations, the U.S. media, U.S. government officials, and the United Nations. Complaint q 8; see Ex. F2-F8 (samples of FRAPH documents). FRAPH organized public demonstrations in New York.

FRAPH's political activities in New York were carried out in support of FRAPH's policies in Haiti. Its political statements were clearly anti-Aristide, pro-military government, in keeping with FRAPH's focus on discrediting the elected civilian government and bolstering the illegal military regime. See Ex. F2-F8.

D. Alerte Belance

1. Plaintiff's Ordeal

Alerte Belance lived with her husband, an ironworker, and their three children in Carrefour, Haiti. She sold rice in the market. Belance was an active supporter of Father Aristide during the election campaign in late 1990 and early 1991. Complaint ¶ 14; Ex. A, Declaration of Alerte Belance, ¶2 [hereinafter Belance Decl.]. Her husband was both an active supporter of Aristide and a member of the Front National pour Le Changement et la Democratie (National Front for Change and Democracy), a coalition of groups campaigning for Aristide s election.

After the military coup, Belance, her family, her neighbors, and her colleagues in the market began to experience intense political repression. People she knew were killed or disappeared. Members of FRAPH harassed small groups of people who gathered near

12their home to discuss politics. Her husband was repeatedly threatened by FRAPH, and at one point members of FRAPH came to their home and stole his tools. Complaint ¶14; Belance Decl. ¶4. Belance and her family left their home for several months to escape the threats, then returned to their home in order to support themselves financially. Id.

On October 16, 1993, at about 1:00 a.m., Belance and her husband were awakened by gunshots and banging at their door, as four armed men broke into the house. Complaint ¶15; Belance Decl. ¶5. They were the same FRAPH members who had come to the house previously and stolen her husband's tools. Belance Decl. ¶5. Both Belance and her husband assumed that the intruders were hunting for her husband: they had been "half-expecting, half-dreading" such a FRAPH attack. Id. Her husband dressed hurriedly and left through a secret window at the rear of the house that they had built for just such an emergency. Complaint ¶15; Belance Decl. ¶ 5.

The intruders asked for her husband, and told her they were from FRAPH. Complaint ¶16; Belance Decl. ¶6. Belance told them that her husband was not at home and insisted that she did not know where to locate him. One of the men asked her whether her husband was out celebrating the imminent return of his "father." Id. Two of the men then grabbed her by the legs, pulled her out of the

13house and threw her into a car. Both were armed, one with a machete, the other with a machine gun. Id.

The men drove Belance to a field outside of Port-au-Prince named Titanyen and known as the "killing field" because the bodies of murdered opponents of the military government were

regularly dumped there by their killers. Belance was pulled out of the car. She stood on her feet. One of the kidnappers approached her with a machete and began to torture her, striking her across the face and slicing through her ear. With a second blow to her face, he sliced across her nose, cutting her tongue and gums. Complaint ¶17; Belance Decl. ¶ 7. Belance threw herself to the ground and tried to protect her head with her arms; the assailant continued to strike her repeatedly with the machete. One blow sliced through her arm, almost severing it below the elbow. Complaint ¶17; Belance Decl. ¶ 8. She heard another of her torturers ask, "Are you done yet? Are you sure she's dead?" The attacker responded, "She must be dead." Complaint ¶17; Belance Decl. ¶ 9. They pulled her body toward some bushes, and left. Belance lost consciousness.

Belance regained consciousness the next morning. She managed to drag herself to the edge of the highway. A passing truck took her to the hospital, where a doctor predicted that she would not survive. Complaint ¶18; Belance Decl. ¶10. Her arm, hanging only by the skin, was amputated below the elbow and deep wounds to her neck, head, face, and mouth were treated. Complaint ¶18; Belance Decl. ¶11.

14 Members of FRAPH came to the hospital and asked the hospital staff about Belance's whereabouts. She was forced to hide within the hospital for several days to evade FRAPH, then slipped out of the hospital. Complaint ¶ 19; Belance Decl. ¶12. The doctors who had helped her also went into hiding, fearing that FRAPH would attack them because they had helped Belance. Belance Decl. ¶ 12. FRAPH continued to threaten to kill Belance, and she went into hiding to escape their threats. Complaint ¶19; Belance Decl. ¶ 12.

Three months after the attack, Belance obtained political asylum in the United States and flew with her husband and children to Newark, New Jersey. They spent two months in a homeless shelter, then obtained a place to live. Complaint ¶ 20; Belance Decl. ¶ 13.

Human rights expert Anne Fuller notes the attack on Alerte Belance by members of FRAPH is typical of FRAPH's pattern of human rights violations:

> Plaintiff Alerte Belance's account of the vicious attack she was subjected to by members of FRAPH is consistent in every respect with those reported by hundreds of other victims and documented by international observers. Belance's situation is exceptional only to the extent of her miraculous survival. There are many documented examples of individuals kidnapped by men, whom witnesses have recognized as members of FRAPH, individuals whose bodies were later discovered mutilated by machetes.

Fuller Decl. at pp. 4-5, Summary of Conclusions. Indeed, the FRAPH members who tortured Ms. Belance thought that they had succeeded in killing her as well.

15 2. Plaintiff's Damages

Belance continues to suffer chronic pain as a result of her physical injuries. She has difficulty sleeping. Her head and neck hurt; she is often dizzy and suffers from severe headaches. Some of her wounds became infected and were untreated for many months; as a result, they have not healed properly and remain painful. Complaint ¶ 20; Belance Decl. ¶ 15.

Belance is now deaf in her right ear as a consequence of the attack. The doctors in Haiti reattached her severed ear, but were unable to restore her hearing in that ear. The ear becomes infected frequently and fills with pus. Belance Decl. ¶ 16. She is missing her right hand and part of her right arm (she was right-handed before the attack), and wears a prosthetic arm. Id., ¶ 17. She also lost one finger and part of another on her left hand, and is unable to fully move that hand. Id., ¶ 19. She is missing the upper part of her mouth and all of her upper teeth, and can only eat soft or liquid food, because she is unable to chew. Id., ¶ 20. Her left eye was damaged by the machete blows; she cannot close it properly and it waters uncontrollably. Id., ¶ 21.

As a result of her injuries, Belance is unable to dress or bathe herself, to work, to perform household chores, or to care for her family as she would like. The family has no steady income. They sold all their belongings to pay for Belance's medical care. Id., ¶ 22.

Belance and her family, including her husband and children, suffer from deep psychological scars as a result of their ordeal.

16Compl. ¶ 20. Her children are unhappy in the United States and have had difficulty adjusting to life here. All three children are in poor health. Her 13-year-old son is beaten at school, and is homesick for Haiti and his life there. Belance Decl. ¶ 22. Belance herself is embarrassed by her physical appearance and her poverty. Id., ¶24. She dreams of returning to Haiti, but is uncertain about how her family would survive. Id., ¶ 26.

E. The Judiciary System in Haiti

Since September 19, 1994, when multinational forces were deployed, the human rights situation in Haiti has vastly

improved. Fuller Decl. ¶26. Nevertheless, the situation is still very fragile. Human Rights Watch--Americas/National Coalition for Haitian Refugees, Haiti: Security Compromised (March 1995). Paramilitary networks are no longer visible, but most of the weapons of FRAPH and similar groups have remained uncollected. Ex. G2, p. 11. Human rights violators are still at large. Fuller Decl. ¶ 26. There has been a noticeable increase in crime. Id.; Ex. G1, p. 4. Criminals arrested by the police are released because of difficulties with the courts. Fuller Decl. ¶ 27.

The problems with Haiti's administration of justice date back to the Duvalier regime, Fuller Decl. ¶ 28; Ex. G9, p. 4, and continued through the pre-Aristide governments. O.A.S. Report 1993 at 45, 55. During Aristide's first period in office, he was unable to make headway against the inadequacies of the judicial system. A U.N. expert reported in January 1992: "The current state of the administration of justice is disturbing. Despite the good will

17expressed by the Ministers in President Aristide's Government . . . the judicial system is still manifestly inadequate and corruption is widespread." Report on the Human Rights Situation in Haiti, U.N. Doc. E/CN.4/1992/50 (Jan. 31, 1992) at 3. The U.N. expert found that civil justice was virtually non-existent, and that "Haitian lawyers were afraid to represent their clients and were subject to intimidation. Generally speaking, people have no faith in lawyers, the courts or proceedings." Id. at 32. Under the Cedras regime, the judiciary completely collapsed. Ex. G9, p. 4; O.A.S. Report 1995 at 84. The O.A.S. delegation noted in May 1994 the "total absence" of functioning judicial institutions, which resulted in complete impunity for those committing human rights abuses. Ex. G10, p. 3.

Since Aristide was restored to power, little progress has been made in rebuilding the judiciary.

> The Duvaliers and subsequent military dictatorships intentionally undermined the rule of law and kept the legal system weak and ineffective. . . . Although the Aristide government and its principal international backers, especially the United States, have made legal reform a high priority, deep structural weaknesses in a justice system cannot be erased over night.

Fuller Decl. ¶28. The U.S. State Department concurs in this evaluation of the Haitian judiciary:

> The [Haitian] constitution provides for an independent judiciary and the right to a fair public trial. However, this right is widely and severely abridged, primarily because the judicial system is poorly organized and virtually moribund after years of governmental neglect and popular contempt dating back to the Duvalier era. Political figures across the spectrum recognize reform of the judicial system as critical; it is understaffed and its members lack training and adequate compensation. . . Although the government has asserted it will select
>
> 18 judges in accordance with the constitution, the parliament has not yet adopted legislation establishing the mechanisms necessary for selection of judicial personnel.

Ex. Gll, p. 10 (emphasis added). In its 1995 report on the situation in Haiti, the O.A.S. also found that "[i]n the present situation, there is no court that inspires confidence in the Haitian people that their civil or penal disputes can be settled." O.A.S. Report 1995 at 86. The Truth Commission created by President Aristide to investigate thousands of killings during his three years of exile is not expected to issue a report until sometime in 1996 and is empowered only to investigate, not to prosecute abuses.

The frustrating situation of the Haitian justice system was captured in September 1995 by President Aristide as he dedicated a monument to victims of human rights abuses during the Cedras regime. Explaining why the dedication ceremony took place in the middle of the night, President Aristide said: "We chose . . . the middle of the night because we are still in the night of injustice." Fuller Decl. ¶ 29.

F. Conclusion

Plaintiff Alerte Belance was horribly mutilated in the attack upon her by FRAPH. That attack forms the basis for this complaint. Ms. Belance views both her survival and the fact that the doctors were able to reattach her tongue as miracles. Belance Decl. at ¶

1927. She now feels that she was allowed to live and to speak so that she can "speak for the dead who cannot talk for themselves." Id., ¶ 30.

> It is a miracle that the doctors have been able to give my tongue back to me. I believe that it is so I can tell the rest of the world what is being done to my people. God left me alive as proof that this really happened in Haiti. Many people are not as lucky as I am and they die. God let it happen, but God left me alive to be proof of what goes on in Haiti so the carnage would stop.

Id., ¶ 26.

Ms. Belance asks this Court for an award of substantial compensatory damages, adequate to restore -- if only through economic compensation -- some small portion of that which was taken from her in the attack upon her by FRAPH. She also asks for an award of substantial punitive damages to express the international community's outrage and revulsion at the egregious abuse she suffered, along with so many other Haitians, and to deter other individuals and paramilitary organizations from committing such abuses in the future.

20 ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF'S CLAIMS OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT, AND ARBITRARY DETENTION UNDER THE ALIEN TORT CLAIMS ACT AND 28 U.S.C. § 1331. AND SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S MUNICIPAL TORT CLAIMS

A. The Alien Tort Claims Act Provides Jurisdiction Over Plaintiff's Claims

The Alien Tort Claims Act, 28 U.S.C. § 1350 [hereinafter ATCA or § 1350], provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

This action meets the three statutory criteria for jurisdiction: (1) Plaintiff is an alien seeking damages for (2) a tort committed by the Defendant which (3) violates established norms of international law.

Every federal court that has considered claims similar to those raised by Plaintiff has found that the Alien Tort Claims Act grants federal courts jurisdiction over such an action. The Second Circuit, which initiated the modern line of cases under the ATCA with its landmark decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), has twice reiterated its views, in Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987), rev'd on other grounds, 488 U.S. 428 (1989), and, most recently, in Kadic v. Karadzic,____ F.3d ____ , 1995 U.S. App. Lexis 28826 (2d Cir. Oct. 13, 1995). As the Court held in Amerada Hess, "[T]he Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law ofnations, then the district court has jurisdiction." 830 F.2d at 425.

The Second Circuit's interpretation of the ATCA has been followed by every court that has considered analogous claims, including the Ninth Circuit, Hilao v. Marcos, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 115 S. Ct. 934 (1995); Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S. Ct. 2960 (1993), and district courts around the country.

As in Filartiga, Kadic, and the cases in other jurisdictions, Plaintiff Alerte Belance is an alien suing for torts committed in violation of the law of nations. This court has jurisdiction over her claims of torture, cruel, inhuman or degrading treatment, and arbitrary detention committed by a nominally private organization operating under color of law of the de facto military regime in Haiti.

221. The Violations Alleged by Plaintiff Constitute Torts in Violation of the Law of Nations.

a. The Filartiga Standard and the Cause of Action for Torture

The Filartiga court established the standard for determining whether a particular human rights violation constitutes a tort "in violation of the law of nations" within the meaning of the ATCA. The appropriate inquiry was summarized by the Kadic court as follows:

> Filartiga established that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Id. at 881; see also Amerada Hess, 830 F.2d at 425. We find the norms of contemporary international law by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."' Filartiga, 630 F.2d at 880(quoting United States v. Smith, 18 U.S. (5 Wheat.) 153,160-61, 5 L. Ed. 57 (1820)). If this inquiry discloses that the defendant's alleged conduct violates
>
> 23 "well-established, universally recognized norms of international law," 630 F.2d at 888, as opposed to "idiosyncratic legal rules," id. at 881, then federal jurisdiction exists under the Alien Tort Act.

Kadic, slip op. at 9-10. In articulating the controlling standard, the Filartiga court found that torture triggers jurisdiction under the ATCA. There can be little doubt that that which was inflicted on Plaintiff Belance was torture and fits within the international definition of that tort., Torture as defined by international law encompasses

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from [her] or a third person information or a confession, punishing [the victim] for an act [she] or a third person has committed or is suspected of having committed, or intimidating or coercing [her] or a third person, or for any reason based on discrimination of any kind....

Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment, art. 1, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984). See Ex. H, Affidavit of International Law Scholars Affidavit, submitted in Ortiz v. Gramajo, No. 91-11612, decided sub nom. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) [hereinafter Int'1 Law Scholars Aff.] at 26. In this case, severe pain and suffering was inflicted on Alerte Belance in order to punish and intimidate her, her husband, and other supporters of

24exiled President Aristide. This abuse constituted torture under international law and within the jurisdiction of the ATCA.

Torture, of course, does not exhaust the list of violations encompassed within the ATCA. In Kadic, the Second Circuit asserted ATCA jurisdiction over claims of genocide and war crimes (whether committed by private or state actors) and over summary execution, as well as torture. Slip op. at 16-22. Other federal courts in several jurisdictions have both adopted the Second Circuit's analysis and extended it to encompass a broad range of offenses. Plaintiff's claims of cruel, inhuman or degrading treatment and arbitrary detention likewise fall within the jurisdiction of the ATCA.

25 b. Cruel, Inhuman or Degrading Treatment

The international norm prohibiting cruel, inhuman or degrading treatment is universally recognized by both declaratory and customary international law. The Universal Declaration of Human Rights, art. 5, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." All of the major human rights instruments treat this prohibition on equal footing with the prohibition against torture. Moreover, the prohibition against cruel, inhuman, or degrading treatment has been received into customary international law. International law scholars view cruel, inhuman or degrading treatment as a universal, obligatory, and definable international law violation, which triggers jurisdiction under the ATCA. See Ex. H, Int'l Law

26Scholars Aff. at 28-35. Several recent decisions have accepted ATCA jurisdiction over claims of cruel, inhuman or degrading treatment. Xuncax v. Gramajo, 866 F. Supp. at 185-89; Paul v. Avril, 901 F. Supp. 330 (final judgment); Abebe-Jiri v. Negewo, No.90-2010 (N.D. Ga. Aug. 20, 1993). The Xuncax court, in an extended analysis, concluded that there is a universal consensus as to a core set of conduct which violates the norm against cruel. inhuman or degrading treatment. 866 F. Supp. at 187. The United States has tied this definition to U.S. constitutional standards. Id. at 186-87. Acts which fall within the agreed-upon core constitute cruel, inhuman or degrading treatment:

> Accordingly, any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of "cruel, inhuman or degrading treatment" and is actionable before this Court under 1350.

Id. at 187. Plaintiff's cause of action for cruel, inhuman or degrading treatment thus states a claim within the jurisdiction of the ATCA.

27 c. Arbitrary Detention

Arbitrary detention is prohibited by numerous international human rights instruments, and international judicial decisions and recognized as an international law violation by all branches of the U.S. government. The federal courts have declared that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (lOth Cir.

281981). The International Law Scholars Affidavit defines an arbitrary detention as occurring "when a person is detained without warrant, probable cause, articulable suspicion or notice of charges and is not brought to trial." Ex. H, Int'1 Law Scholars Aff., at 38. The Restatement (Third) of the Foreian Relations Law of the United States (1987) [hereinafter Restatement (Third)] labels a detention arbitrary "if it is incompatible with the principles of justice or with the dignity of the human person." 702 cmt. h.

Although an issue of first impression within this Circuit, other courts have routinely asserted ATCA jurisdiction over claims of arbitrary detention. See Xuncax v. Gramaio, 886 F. Supp. at 184-85; Forti v. Suarez-Mason, 672 F. Supp. at 1541-42; Paul v. Avril, 901 F. Supp. 330 (final judgment); Abebe-Jiri v. Negewo, No. 90-2010 (N.D. Ga. Aug. 20, 1993); Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D. Cal. Apr. 22, 1987). The

International Law Scholars Affidavit defines the tort without reference to the length or place of the detention. Such claims have been allowed for arbitrary detentions ranging from less than a day to two months or longer. See, e.g., Avril, Xuncax decisions. Plaintiff's cause of

29action for arbitrary detention states a claim within the jurisdiction of the ATCA.

2. Defendant FRAPH Acted Under Color of Law and can be Held Liable for its Violations of International Law

Some, but not all, international law violations require state action, Kadic v. Karadzic, slip op. at 22-23, including the claims alleged by Plaintiff: torture, cruel, inhuman or degrading treatment, and arbitrary detention. The state action requirement is met in this case because FRAPH, a nominally "private" group, was created, financed and directed by the Haitian military government, and acted at its behest.

The Filartiga court held on the facts before it that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights." 630 F.2d at 878. The court was not called upon to define the outer limits of the "color of official authority" for purposes of liability under the ATCA. As noted above, however, Filartiga did articulate a standard for determining which norms of international law state claims under the ATCA. The determination as to who can violate established norms of international law must be made under the same analysis: "The evolving standards of international law govern who is within the [Alien Tort] statute's jurisdictional grant as clearly as they govern what conduct creates jurisdiction." Amerada Hess, 830 F.2d at 425.

a. Acts Performed Under Color of Law of a De FactoRegime Meet the State Action Requirement of International Law

In Kadic, the Second Circuit directly addressed the issue of whether an actor who was not a representative of a recognized government could be held to have violated international law. The Court held that political recognition by the United States was not a dispositive issue in determining the liability of non-state or quasi-state actors. Indeed the Court said,

> It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime -- sometimes due to human rights abuses -had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Id., slip op. at 25-26. The Court adopted the standard of the Restatement (Third) § 201: "Under international law a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Accord Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991). The Cedras regime, having seized thereins of government from President Aristide's lawful government, clearly met this definition of a de facto regime. The regime exercised control over the defined territory and permanent population of Haiti. It had the capacity to enter into agreements with other states.

In addition, the Kadic court recognized that far less would probably meet the requirements of state action under international law:

> Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

Id. at 26. Clearly, the illegal military regime in Haiti actedwith far more than the "semblance of official authority," and wielded "official power" in a manner that far exceeded any norms of "civilized conduct." As such, the actions of that regime and of its agents constitute "state action" within the meaning of international law and trigger jurisdiction under the ATCA.

The illegal military regime of Gen. Cedras, of which FRAPH was an agent, satisfied the standard for state action necessary to be held liable for the international torts alleged in this case. Thus, individuals or other entities acting under color of law of that regime can be held liable for their violations of international law.

b. As a Nominally Private Party Acting in Concert with the Military Regime, Defendant FRAPH Acted Under Color of Law

FRAPH, a nominally private association, violated international law because its activities were performed under color of state authority. International law obligations extend to acts performed by an "agent of the government" acting "under color of [state] authority." § 207(c) (1987). This state action requirement is analogous to the color of law requirement found in 42 U.S.C. §1983. Id., § 207 note 4. Indeed, the Restatement (Third) invokes the U.S. Supreme Court's "broad interpretation" of § 1983 as a guide to understanding the state action requirement of

international law. Id. This link between the domestic and international color of law requirements has been endorsed by judicial interpretation of the Alien Tort Claims Act and by Congress, in the legislative history accompanying the Torture Victim Protection Act: both the Senate and the House reports direct the courts to look to principles of liability under 42 U.S.C. 1983. S. Rep. No. 249, 102d Cong. 1st Sess. 8 (1992); H.R. Rep. No. 367, 102d Cong. 1st Sess. 5 (1992).

U.S. law has recognized that nominally private parties act under color of law in a broad range of circumstances. See. e.g., Lugar v. Edmondson Oil., 457 U.S. 922, 941 (1982). An otherwise private actor acts under color of law if "he has acted with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Id. at 937. Several tests have been used to determine whether a private actor is acting "under color of" state law for purposes of § 1983 liability, including evidence that the state has delegated a state function to the private actor, or the existence of a symbiotic relationship,close nexus, or conspiracy between the private actor and the state. Each of these tests is met here, where FRAPH was created by the military to serve as its agent in imposing violent repression on the civilian population. An "army-created phenomenon," according to the U.S. Department of State, FRAPH's purpose and function was to suppress political opposition to the Cedras regime and to eliminate supporters of President Aristide. FRAPH clearly acted under color of law.

This case concerns a vicious paramilitary group created and financed by the state to terrorize the civilian population. Without belaboring the obvious, a quick survey of § 1983 precedents demonstrates that such acts constitute violations committed undercolor of law--in this case, by the de facto military regime in Haiti.

The delegation of state functions to private actors transforms otherwise private action into state action. West v. Atkins, 487 U.S. 42, 54 (1988) (private physician who contracted with a state prison to treat inmates held to be state actor); Evans v. Newton, 382 U.S. 296, 299 (1966) ("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations"); Rojas v. Alexander's Dep't Store, 924 F.2d 406, 408 (2d Cir. 1990) (store security guard considered state actor because granted special powers under state law), cert. denied, 502 U.S. 809 (1991); Henderson v. Fisher, 631 F.2d 1115, 1118-19 (3d Cir. 1980), on remand, 506 F. Supp 579 (state action exists where private campus police were delegated state police power); Fernandez v. Diversified Info. Sys., 762 F. Supp. 1544, 1546 (D.P.R. 1991), aff'd, 957 F.2d 44 (1st Cir. 1992) (symbiotic relationship exists when defendant performs a traditionally public function); Ropy v. Skupien, 758 F. Supp. 471, 473 (N.D. Ill. 1991) (railroad police officer a state actor because police powers delegated by state).

FRAPH operated with the explicit and tacit cooperation of the Haitian police and security forces. In their systematic raids against suspected supporters of President Aristide, FRAPH frequently detained people, working in close cooperation with the police and the armed forces. Fuller Decl. ¶¶ 20-21; O.A.S. Report1995 at 33. The Cedras regime, by arming, organizing, and financing FRAPH, effectively delegated police power to a private party. FRAPH is therefore liable for the use or misuse of such authority. In effect, FRAPH served as the unofficial military police for the Cedras regime. By fulfilling and abusing a "traditional public function," i.e., exercising police power to maintain order throughout Haiti, FRAPH acted under the color of law.

The interrelationship between FRAPH and the Haitian military regime meets each of the other tests for state action under § 1983. For example, private action is transformed into state action when "the State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); Chan v. City ofNew York, 803 F. Supp. 710, 718 (S.D.N.Y. 1992), aff'd, 1 F.3d 96, (2d Cir. 1993); cert. denied, 114 S. Ct. 472 (1993); Hadaes v. Yonkers Racing Corp., 918 F.2d 1079, 1081 (2d Cir. 1990), cert. denied, 499 U.S. 960 (1991). FRAPH satisfies this "symbiotic relationship" test because (1) the military regime in Haiti provided FRAPH with financial and military support; (2) the Cedras regime gained politically and economically from the program of terrorism embarked upon by FRAPH; and (3) state officials founded FRAPH, coordinated their activities and provided FRAPH with police protection, issued FRAPH members military identification cards, and bore full responsibility for the acts of torture and summary execution of Haitian civilians committed by FRAPH members.

In addition, FRAPH satisfies the governmental nexus test, which holds that private action is performed "under color of state law" when there is a sufficiently "close nexus" between "the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Graseck v. Mauceri, 582 F.2d 203, 209 (2d Cir. 1978), cert. denied, 439 U.S. 1129 (1979); Chan v. City of New York, 803 F. Supp. 710 (S.D.N.Y. 1992), aff'd, 1 F.3d 96 (1993). A close nexusexists when there is "significant encouragement, either overt or covert, [so] that the choice must in law be deemed to be that of the government." Chan, 803 F. Supp. at 720, quoting San Francisco Arts & Athletics. Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987).

The facts indicate that the requisite close nexus existed, in that FRAPH engaged in its program of terror with the overt military and financial support of the Cedras regime. The

abduction, assault, and attempted murder of Alerte Belance was not a random, isolated act of violence, but a calculated act of political terror organized and supported by the military dictatorship under Cedras.

Evidence of conspiracy also satisfies the state action requirement of § 1983: a private party conspiring with a government official to violate an individual's civil rights acts under color of law and is liable. Adickes v. Kress & Co., 398 U.S. at 152; United States v. Price, 383 U.S. 787, 794 (1966); Hughes v. Benevolent Patrolmen's Assoc., 850 F.2d 876, 880 (2d Cir. 1988); Goldschmidt v. Patchett, 686 F.2d at 585; Smith v. United States,723 F. Supp. 1300, 1306, aff'd 964 F.2d 630 (7th Cir. 1992), cert.denied, 113 S.Ct. 1015 (1993). See. e.a., Leahy v. Board of Trustees of Communitv College District No. 508, 912 F.2d 917, 921 (7th Cir. 1990) (private union may act under color of law if it willfully participates in joint action with state agents); Malak v.Associated Physicians. Inc., 784 F.2d 277, 281 (7th Cir. 1986);Scheetz v. Mornina Call Inc., 747 F. Supp. 1515, 1520 (E.D. Pa.1990) (state action may be found if police conspire with newspaperto publish police reports); In re Jackson/Lockdown Cases, 568 F. Supp. 869, 877 (E.D. Mich. 1983) (characterizing private union, in conspiracy with prison guards to deprive prisoners of rights, as state actor).

The cooperation between the military regime and FRAPH show the necessary conspiracy to support a finding of state action: FRAPH was an "army-created phenomenon," Fuller Decl. ¶ 16, supported and financed by the Haitian armed forces. Fuller Decl. ¶ 17.

B. 28 U.8.C. § 1331 Provides Jurisdiction Over Plaintiffts International Law Claims

This Court has also subject matter jurisdiction over Plaintiff's claims of international law violations under federal question jurisdiction, 28 U.S.C. § 1331, which provides jurisdiction over "all civil actions arising under the constitution, laws, or treaties of the United States."

The Supreme Court has repeatedly held that fundamental norms of international law are incorporated into U.S. law as federal common law. The principle was set forth long ago by Chief Justice Marshall, who held in The Nereide that U.S. courts are "bound by the law of nations which is a part of the law of the land." 13 U.S. (9 Cranch) 388, 423 (1815); accord The Paquete Habana, 175 U.S. at 700. More recently, the Supreme Court directed federal courts to apply international law norms as part of the federal common law in a series of expropriation cases commencing with Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The principle is similarly well-established in this Circuit's jurisprudence:

> The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.

Filartiga, 630 F.2d at 886 (emphasis in original). The Supreme Court has also stated unequivocally that § 1331 jurisdiction "will support claims founded on federal common law as well as those of a statutory origin." Illinois v. Milwaukee, 406 U.S. 91, 100 (1972). Any other reading of § 1331, as the Court has held, would fail to give the word "laws" in the jurisdictional statute its "natural meaning," for the federal common law is assuredly a part of the "law . . . of the United States." Id.; 28 U.S.C. § 1331.

Cases which present claims grounded in customary international law -- and thereby federal common law -- "arise under" U.S. law for purposes of federal question jurisdiction. Indeed, in Filartiga this Circuit noted that jurisdiction could have been sustainedunder § 1331 as well as § 1350:

> We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. 1331. We prefer, however, to rest our decision upon the Alien Tort Statute, in light of that provision's close coincidence with the jurisdictional facts presented in this case.

630 F.2d at 887 n.22. A number of district courts have relied upon § 1331 jurisdiction in cases alleging violations of internationally protected human rights.33

Precedents from the nineteenth century prize cases to the twentieth century expropriation cases clearly establish the direct enforceability of customary international law in United States courts. See e.g., The Paquete Habana, 175 U.S. at 700 (ordering an award of damages to owners of fishing vessels seized during the Spanish-American war in violation of international law); Sabbatino, 376 U.S. at 427-437. The Martinez-Baca, Forti, and Abebe-Jiri rulings that 28 U.S.C. § 1331 confers jurisdiction over claims for torture and murder in violation of customary international law follow naturally from these property rights cases. Indeed, it would be perverse if United States courts were open to protect property rights but not to vindicate personal rights.Section 1331 provides jurisdiction over Plaintiff's claims.

C. This Court has 8upDlemental Jurisdiction over Plaintiff's Municipal Law Claims

The supplemental jurisdiction statute, 28 U.S.C. § 1367, provides jurisdiction over Plaintiff's municipal law claims for assault and battery, kidnapping, and intentional infliction of emotional distress. Where the federal court has original jurisdiction over a claim, it also has jurisdiction over related non-federal claims, provided the "other claims are so related to

claims within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Id. § 1367(a). Plaintiff's non-international claims arise out of the same conduct and the same abuses as her international tort claims, and therefore trigger this Court's supplemental jurisdiction.

II. THIS CASE RAISES NO ISSUE OF FORUM NON COVENIENS

Defendant has waived any forum non conveniens claim by its default for failure to plead or otherwise defend. As the Supreme Court has repeatedly held, if a defendant is properly served with process by a court with subject matter jurisdiction, the defendant waives all claims of venue by defaulting. Hoffman v. Blaski, 363 U.S. 335, 343 (1960); see also Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U.S. 177 (1929); Neirbo Co. v. Bethlehem Shipbuilding Corp.. Ltd., 308 U.S. 165 (1939).

Even if the court were to determine that it should explore the issue of forum non conveniens despite the default, no grounds exist for a dismissal in the instant case. While determining whether a plaintiff's choice of forum is a proper one usually turns upon a balancing of many public and private interests, a necessary first test is the availability of an adeauate alternative venue. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981). In this case, no adequate alternative forum is available. Although conditions in Haiti have vastly improved since the restoration of the civilian government, the Haitian judicial system is still "virtually moribund," according to the U.S. State Department. Ex.G 11, p. 10. The Organization of American States reached the same conclusion: "[T]here is no court that inspires confidence in the Haitian people that their civil or penal disputes can be settled." O.A.S. Report 1995 at 86. Ongoing violence in Haiti also makes it dangerous for
Plaintiff to litigate in that country. While FRAPH has been disbanded, its members continue at large and have been allowed to maintain their weapons. Having suffered so much in Haiti, Plaintiff should not be forced to return to that country, endangering her safety, in order to litigate her claims. Plaintiff's choice of this forum should not be disturbed.

III. PLAINTIFF IS ENTITLED TO COMPENSATORY AND PUNITIVE DAMAGES FOR TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT, AND ARBITRARY DETENTION

The defendant has violated fundamental international norms that bar torture, cruel, inhuman or degrading treatment, and arbitrary detention. International law and federal common law mandate that Plaintiff Alerte Belance be awarded damages to compensate for all pecuniary and non-pecuniary injuries resulting from Defendant's egregious violations of her internationally protected rights. Under international and federal common law, punitive damages are also necessary to punish and deter such egregious trespasses of international law.

A. International Law and Federal Common Law Govern the Damaqes Award

The classic framework for determining damages under the ATCA was articulated by Judge Nickerson in the decision on remand in Filartiqa v. Pena-Irala, 577 F. Supp. 860, 863 (E.D.N.Y. 1984). Filartiqa's exposition of damages has been espoused and applied by courts around the country in granting damages under the ATCA and the TVPA. It remains "the most thoughtful" treatment of the law to be applied in determining damages, and is generally applied by courts deciding similar cases.
Judge Nickerson noted that the "tort" that is the subject of the Alien Tort Claims Act is a wrong "in violation of the law of nations," not merely "a wrong actionable under the law of the appropriate sovereign state." Id. at 862-63. Thus, the court "should determine the substantive principles to be applied by looking to international law," which was incorporated into the common law of the United States upon the ratification of the Constitution. Id.

Following international choice of law principles, Judge Nickerson looked first to Paraguayan damage rules, but found that Paraguayan law did not permit punitive damages. Id. at 863-64. The court determined that "it is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture." Id. at 865. Invoking its common-law powers under § 1350, the court explicitly applied international law:

> The international law prohibiting torture established the standard and referred to the national states the task of enforcing it. By enacting Section 1350, Congress entrusted that task to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into the United States common law.

Id. at 863.
No court adjudicating a claim under the Alien Tort Claims Act has applied a different measure of damages. See Ex. I, Judgments in Prior ATCA and TVPA Cases. Following the Filartica district court's lead, federal courts have consistently applied international law, as incorporated in federal common law, to assesscompensatory and punitive damages. In Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D. Cal. Apr. 22, 1988) the court expressed the reasoning underlying this approach, holding that "[i]nternational law principles, as incorporated in United States common law, provide the proper rules for calculating the damages

to be awarded . . . ." Id. at 4. Every ATCA case against a defendant charged with gross human rights violations has awarded punitive and compensatory damages to the plaintiffs, regardless of the law of the country in which the human rights violations were committed. Indeed, in the interest of developing a uniform federal law of damages governing ATCA and TVPA claims, many courts have declined to consult local law, looking directly to federal common law.

In this case, Haitian law affords judges discretion in deciding damage awards. Ex. D, Declaration of William O'Neill, Haitian law expert, ¶¶ 10, 13. Haitian law provides for full compensatory damages for injuries, medical expenses, and all other related expenses related to the deterioration of a victim's health, as well as pain and suffering. Id., ¶ 11. Although Haitian law does not expressly provide for punitive damages as understood inU.S. law, its definition of compensatory damages incorporates a moral component that encompasses many of the concepts understood as "punitive" in U.S. law, including malice, the brutal nature of defendant's acts, and the financial situation of the defendant. Id., ¶ 12. Thus, under Haitian law, this court could make an award of quasi-punitive damages. A better approach, however, would be to look directly to international law, as incorporated into federal common law, to guarantee a full punitive damages award as well as to fully vindicate the international concerns underlying the ATCA, and to contribute to the development of a uniform law of damages in these cases.

B. Plaintiff is Entitled to Full Compensation for All Injuries Proximately Caused by Defendant's Acts

The federal common law of damages echoes the fundamental international standard that provides a victim compensation for all injuries caused by defendant's wrongful acts: "It is a principle of international law . . . that every violation of an international obligation which results in harm creates a duty to make adequate reparation." Velasquez-Rodriouez Case, IACourtHR, Judgment of July 21, 1989, ¶ 25, 11 Hum. Rts. L.J. 127 (1989) (awarding the family of a disappeared person damages for loss of earnings and psychological injuries). Under international law, reparations are conceived in terms meant to restore the victim to her status quo ante as far as is possible. To this end, the Permanent Court of International Justice defined reparation to include not only immediate and actual losses, but consequential injuries as well: Reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

Case Concerning the Chorzow Factory (Germany v. Poland), 1928 P.C.I.J. (Ser. A), No. 17, at 47.

Federal courts have awarded damages under the Alien Tort Claims Act for a broad range of physical, emotional and social harms comparable to the damages requested by Plaintiff in this case. In Filartiga, the court awarded the decedent's father and sister $375,000 for pain and suffering, loss of companionship, disruption of family life, funeral expenses, medical expenses, future medical expenses for treatment of psychological injuries, and lost income. 577 F. Supp. at 865. See also Paul v. Avril, 901 F. Supp. 330 (awarding six victims of torture and arbitrary detention between $2,500,000 and $3,500,000 in compensatory damages each); Xuncax v. Gramajo, 886 F. Supp. at 197-98 ($14 million in compensatory damages awarded to plaintiffs for pain, suffering and emotional distress related to summary execution, disappearance, torture, arbitrary detention and cruel, inhuman or degrading treatment); Todd v. Panjaitan, 1994 WL 827111 (D. Mass. 1994) (awarding $4 million in compensatory damages to mother and victim's estate for summary execution and pain and suffering); Forti v. Suarez-Mason, No. 87-2058 (N.D. Cal. Apr. 20, 1990) ($4 million in compensatory damages awarded against an Argentine general for injuries suffered by two plaintiffs and their relatives). In this case, Plaintiff's request for compensatory damages of $4 million for torture, cruel, inhuman or degrading treatment, and arbitrary detention is comparable to those awarded in prior cases. Plaintiff's physical suffering and emotional terror at being forcibly taken away from her home and severely tortured with a machete must be compensated. Plaintiff must also be compensated for the subsequent costs of escaping from Haiti and piecing together her life and that of her family, burdened, as she was, by physical handicaps and psychological trauma.

C. Plaintiff is Entitled to Punitive Damaces

Torture is universally condemned as a violation of fundamental human rights. Filartica v. Pena-Irala, 630 F.2d at 883-85. However, because the international community has few mechanisms of its own to punish violations such as those committed by FRAPH, domestic courts are called upon to enforce the international prohibition through the use of damage awards. See. e.g., Declaration on the Protection of All Persons from Being Subjected to Torture, art. 11, G.A. Res. 3452, 30 U.N. G.A.O.R. Supp. (No. 34), 91 U.N. Doc. A/1034 (1975) (states should provide compensation to victims of torture).

In this case, the Plaintiff looks to a U.S. federal court, and thus U.S. federal common law. The Filartiga opinion forms the bedrock of federal common law regarding punitive damages for human rights abuses: "[T]he objective of international law making torture punishable as a crime can only be vindicated by imposing punitive damages." Filartica, 577 F. Supp. at 863-64. Federal courts entering judgments in subsequent international human rights cases have all followed Filartiga and awarded punitive damages. See Exhibit I, Damage awards in prior

cases. See. e.g., Xuncax v. Gramajo 886 F. Supp. 162 (D. Mass. 1995) ($5 million punitive damages for summary execution, $2 million for torture); Todd v. Panjaitan 1994 WL827111 (D. Mass. 1994) ($10 million punitive damages for summary execution); Forti v. Suarez-Mason, No. 87-2058 (N.D. Cal. Apr. 25, lg90) ($4 million in punitive damages); Ouiros de Rapanort v. Suarez-Mason, No. 87-2266, (N.D. Cal. Apr. 11, 1989) ($30 million in punitive damages). No federal court has ever held that punitive damages could not be awarded in a case against an individual responsible for intentional human rights abuses.

Punitive damages are likewise proper by analogy to similar actions under federal common law. See~ e.o;, Bass v. Wallenstein, 769 F.2d 1173, ll90 (7th Cir. 1985) (punitive damages for wrongful death in a civil rights action permitted as matter of federal common law). A second analogous body of law has arisen under 42 U.S.C. § 1983, which can be likened to a domestic counterpart to international human rights law. The Supreme Court has consistently held that punitive damages are appropriate under § 1983 when the defendant's conduct was deemed willful, wanton, and malicious.Smith v. Wade, 461 U.S. 30, 51 (1983). The amount of punitive damages should correspond to both the seriousness of the wrong and the injury to the plaintiff:

> In ascertaining [damages] the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done willfully, or was the result of that reckless indifference to the rights of others . . . . In that case, the jury is authorized, for the sake of example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

Id. at 42, quoting Milwaukee & St. Paul Rv. Co. v. Arms, 91 U.S. 489, 493 (1876).

The defendant organization FRAPH unquestionably had an "evil motive" in torturing Alerte Belance with a machete and leaving her to die in the killing field. As in Filartiqa, a punitive damage award is necessary "for the sake of public example":

> Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example. To accomplish that purpose this court must make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense. Thereby the judgment may perhaps have some deterrent effect.

Filartiga, 577 F. Supp. at 866 (citation omitted). The Filartiga court awarded $10 million in punitive damages against an individual policeman guilty of an apparently isolated, albeit vicious, incident of torture. The present case demands a correspondingly large punitive damages award, since Defendant committed uncountable similar violations.

The nature and scope of the Defendant's acts, Defendant's evil motive, and the need for deterring such acts in the future allplace Plaintiff's prayer for at least $9 million in punitive damages squarely in line with the awards that federal courts regularly give in cases involving "far less reprehensible" conduct than that of this defendant. A punitive award of at least $9 million is thus both reasonable and appropriate.

CONCLUSION

Alerte Belance, the victim of horrific acts of torture and other abuses, is entitled to substantial compensatory and punitive damages commensurate with the egregious nature of the human rights violation committed by defendant FRAPH and with the horrible injuries the defendant organization inflicted upon her.

Respectfully submitted,

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Dated: January 9, 1995
New York, New York

1.Although not a party to this action, Mr. Sterling filed a purported "answer" in his individual capacity, but specified that he was not acting on behalf of Defendant FRAPH. (Paragraph 1 of Sterling's "answer" states: "Respondent is answering the complaint because a copy of same was served on him, but he is not a party to the case in litigation.") Since the submission of that

document, neither he nor anyone else appeared at this Court's October 1994 hearing and no one filed anything further.

2.Plaintiff also refers for general background to human rights reports prepared by the U.S. Congress and other organizations; manyof these documents were drafted with the participation of Plaintiff's experts Anne Fuller and William O'Neill.

3.As set forth in Plaintiff's Motion to Hold Decision in Abeyance, Plaintiff asks this Court to delay its decision pending full compliance by the U.S. government with Plaintiff's third party subpoenas. See Motion to Hold Decision in Abeyance and accompanying Declaration of Jennifer M. Green.

4.Amnesty International, Haiti: Amnesty International's Current Concerns (Nov. 1988) at 2.

5.Amnesty International, quoted in Maureen Taft-Morales, Haiti: The Struggle for Democracy and Congressional Concerns in 1994, Congressional Research Service (1994) at 9.

6.Constant acknowledges that he and Chamblain were founders and leaders of FRAPH and that he himself was "an advisor" to General Cedras. Second Constant Depo., Vol. I, at 40-41, 101, 113-16, Vol. II at 16, 21, 72.

7.I.e., President Aristide, who is often addressed as "Father Aristide." Under the Governors Island Agreement, negotiated in July 1993 but never implemented, President Aristide was scheduled to return to Haiti on October 30, 1993.

8.Harold Maass, Haitian Commission Seeks the Truth, Dallas Morning News, Oct. 27, 1995, at 41A; see Susan Benesch, Haitian Death-Probe Panel has Yet to Begin its Work, N. Y. Times, July 16, 1995, at A28.

9.See. e.g., Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993) (decision denying motion to dismiss); 901 F. Supp. 330 Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), modified, 694 F. Supp. 707 (N.D. Cal. 1988); Todd v. Panjaitan, No. 92-12255 (D. Mass. Oct. 26, 1994), 1994 WL 827111; Abebe-Jiri v. Negewo, No. 90-2010 (N.D. Ga. Aug. 20, 1993), appeal araued, No. 93-9133 (llth Cir. Jan. 10, 1995); Quiros de Ranaport v. Suarez-Mason, No. 87-2266 (N.D. Cal. Apr. 11, 1989); Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D. Cal. Apr. 22, 1987).

The unpublished decisions in Todd, Abebe-Jiri, Ouiros de Rapaport and Martinez-Baca are reproduced in Ex. I.

10.Rather than pursue her claim for "attempted summary execution," Plaintiff views the attempt to kill her -- which came agonizingly close to success -- as part of the torture she endured. In addition to her physical pain, Plaintiff suffered the psychological torture of hearing her torturers debate whether or not they had yet killed her.

11.Hilao v. Marcos, 25 F.3d 1467 (summary execution, torture); Traiano v. Marcos, 978 F.2d 493 (summary execution, torture); Xuncax v. Gramaio, 886 F. Supp. 162 (summary execution, disappearance, torture, arbitrary detention, cruel, inhuman or degrading treatment); Forti v. Suarez-Mason, 672 F. Supp. 1531, modified by 694 F. Supp. 707 (summary execution, disappearance, torture, prolonged arbitrary detention); In re Estate of Marcos Litication, D.C. No. MDL 840 (D. Haw. Feb. 3, 1995), appeal docketed, No. 95-15779 (9th Cir. May 5, 1995) (summary execution, torture, disappearance); Todd v. Panjaitan, 1994 WL 827111 (D. Mass. 1994) (summary execution, torture); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) (final judgment) (torture, cruel, inhuman or degrading treatment, arbitrary detention); Abebe-Jiri v. Neaewo, No. 90-2010 (N.D. Ga. Aug. 20, 1993), appeal argued, No. 93-9133 (llth Cir. Jan. 10, 1995) (torture, cruel, inhuman or degrading treatment, prolonged arbitrary detention); Ouiros de Rapaport v. Suarez-Mason, No. 87-2266 (N.D. Cal. Apr. 11, 1989) (summary execution); Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D. Cal. Apr. 22, 1987) (torture, prolonged arbitrary detention). See analysis of the status of torture under international law in Siderman de Blake v. Republic of Araentina, 965 F.2d 699, 713-719 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 941-42 (D.C. Cir. 1988).

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(summary execution); Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D. Cal. Apr. 22, 1987) (torture, prolonged arbitrary detention). See analysis of the status of torture under international law in Siderman de Blake v. Republic of Araentina, 965 F.2d 699, 713-719 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 941-42 (D.C. Cir. 1988).

The unpublished decisions in Todd, Abebe-Jiri, Ouiros de Rananort and Martinez-Baca are reproduced in Ex. I.

13.See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222; the American Convention on Human Rights, art. 5, opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doe. 6 at 27 (1980); International Covenant on Civil and Political Rights, art. 7, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717; African Charter on Human and Peoples' Rights, art. 5, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982). See also Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, adopted Dec. 9, 1975, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

14.See. e.g., Declaration of Tehran, Final Act of the International Conference on Human Rights 3, at 4, pare. 2, 23 GAOR, U.N. Doc. A/CONF. 32/41 (1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law).

15.The unpublished Abebe-Jiri decision is reproduced in Ex. I.

16.The Xuncax court thus rejected earlier concerns about the definability of cruel, inhuman or degrading treatment raised in Forti, 694 F. Supp. at 712.

> It is not necessary that every aspect of what might comprise a standard such as "cruel, inhuman or degrading treatment" be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute "torture" or "arbitrary detention" in order to recognize certain conduct as actionable misconduct under that rubric.

Xuncax at 187.

17.See Universal Declaration of Human Rights, arts. 3 & 9, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 tl948); American Convention on Human Rights, art. 7(3), opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doe. 6 at 27 (1980); International Covenant on Civil and Political Rights, art. 9, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222; African Charter on Human and Peoples' Rights, art. 6, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982).

18.See, e.g.. Hostages Case, 1980 I.C.J. 3, at pare. 91 ("Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."); Winterwerp Case, 33 Eur. Ct. H.R., (ser. A), at pare. 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as 'lawful. "').

19.See. e.g., Derian, Human Richts in United States Foreign Policy--The Executive Perspective, in International Human Rights Law and Practice 183 (J. Tuttle ed. 1978) (Assistant Secretary of State for Human Rights and Humanitarian Affairs, Patricia M. Derian, describing U.S. human rights policy as seeking "greater observation of all governments of the rights of the person including freedom from torture and cruel and inhuman treatment, freedom from the fear of security forces breaking down doors and kidnapping citizens from their homes, and freedom from arbitrary detention"); Fraser, Human Rights and United States Foreign Policy-The Congressional Perspective, in Tuttle, supra, at 173, 176.20.See also Forti v. Suarez-Mason, 672 F.Supp. at 1541 ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention."); De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) ("[T]he standards of human rights that have been generally accepted -- and hence incorporated into the law of-nations -- . . . encompass . . . such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; . . . and the right not to be arbitrarily detained.").

21.The unpublished decisions in Abebe-Jiri and Martinez-Baca are reproduced in Ex. I.

22.FRAPH may not claim sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. ⍰⍰ 1603 (a) and (b) (FSIA). The Cedras regime was refused recognition as the lawful

governmentof Haiti not only by the United States but also by the consensus of international opinion, while exiled President Aristide was universally recognized as Haiti's lawful leader. See Lafontant v.Aristide, 844 F. Supp. 128, 130 (E.D.N.Y. 1994) ("The United States government has consistently recognized Jean-Bertrand Aristide as the current lawful head-of-state of the Republic of Haiti."). Thus, neither the military regime nor its agencies and instrumentalities may claim sovereign immunity.

A finding of liability under the ATCA, based on the fact that the Cedras regime functioned as the de facto government of Haiti,does not confer sovereign immunity. A regime acts with sufficient authority to trigger the state action requirement of international law if it in fact exercises control of people and territory. Kadic v. Karadzic, slip op. at 24-26. Indeed, the Kadic court indicated that a regime could meet the state action test if it acted with "merely the semblance of official authority." Kadic, slip op. at 26. In contrast, immunity is a privilege afforded by the various nations of the world to other sovereign states as an act of comity. An illegal de facto regime has no claim to FSIA immunities.

Finally, even if FRAPH had acted on behalf of a lawful state entitled to FSIA protection, such immunity would be forfeited where the acts alleged were outside the scope of the lawful authority of the defendant. Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (egregious human rights violations are not activities within the lawful authority of the executive); Chuidian v. Philipoine Nat'1 Bank, 912 F.2d 1095, 1106 (9th Cir. 1990) (sovereign immunity will not shield an official who acts beyond the scope of his authority). Accord Tra~ano v. Marcos, 978 F.2d at 497. FRAPH's activities fall squarely within these holdings. To paraphrase the Second Circuit's language in Kadic, "the [defendant] has not had the temerity to assert in this Court that the acts [it] allegedly committed are the officially approved policy of a state." Slip op. at 40.

23.With the passage of the Torture Victim Protection Act, codified at 28 U.S.C. § 1350 (Note) (TVPA), in 1992, Congress indicated approval of such a definition of "state action." The TVPA provides a remedy for torture or summary execution committed by individuals acting "under apparent authority or color of law," a standard similar to the Kadic Court's discussion of the "semblance of authority." Since the TVPA represents, in part, a codification of the holding in Filartiga, see Lafontant v. Aristide, 844 F. Supp. 128, 138 (E.D.N.Y. 1994), its language is a useful guide to the meaning of the ATCA.

24.Section 1983 reaches conduct performed "under color of" state law. 42 U.S.C. § 1983; Adickes v. Kress & Co, 398 U.S. 144, 150, 166 (1969).

25.Forti v. Suarez-Mason, 672 F. Supp. at 1546 ("Claims for tortious conduct of government officials under 28 U.S.C. § 1350 may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983, where plaintiffs must allege both deprivation of a federally protected right and action 'under color of' state law.").

26.The Supreme Court has phrased the state action test in several different ways. The Court has said that a person acts under color of state law when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." United States v. Classic, 313 U.S. 299, 326 (1941). The Supreme Court has also explained that a party's conduct may be considered state action where the state 1) creates the legal framework governing the conduct, 2) delegates its authority to the private actor, e.g., West v. Atkins, 487 U.S. 42 (1988) or, 3) knowingly accepts the benefits derived from the unconstitutional behavior. NCAA v. Tarkanian, 488 U.S. 179 (1988).

27.Although private actors who become state actors by virtue of their use of government authority are within the scope of liability under § 1983, the immunity enjoyed by a state official does not attach to a private conspirator. See. e.g., Wyatt v. Cole, 504 U.S. 158, 166 (1992) (denying good faith immunity to private persons who conspire with state officials to violate constitutional rights); Dennis v. Sparks, 449 U.S. 24, 31-32 (1980) (conspirator acting with state judge acted under color of law, but judge's absolute immunity did not apply to private party); Goldschmidt v. Patchett, 686 F.2d 582, 585 (7th Cir. 1982) (immunity of prosecutor does not extend to those who conspire with him to violate civil rights of others). Thus even if the Cedras regime were a duly recognized, legitimate regime and therefore eligible for any immunity, FRAPH itself would not be immunized.

28. The mere participation of law enforcement officers may constitute state action. See. e.g., Soldal v. County of Cook, 942 F.2d 1073, 1075 (7th Cir. 1991) (en bane), rev'd on other grounds, 113 S. Ct. 538, 543-44 n.6 (1992) (state action for purposes of § 1983 possible when deputies stand by to preclude owner from opposing eviction); Booker v. City of Atlanta, 776 F.2d 272, 274 (llth Cir. 1985) (presence of police officer at repossession could show "intervention and aid" necessary to find state action by giving repossession "a cachet of legality"); Greco v. Guss, 775 F.2d 161, 168 (7th Cir. 1985) (state action present when deputy served warrant); Harris v. City of Roseburg, 664 F.2d 1121, 1127 (9th Cir. 1981) (police intervention and assistance during repossession constituted state action).

Many of the violations committed by FRAPH involved the participation of the Haitian policy and the armed forces. See Ex. E. On one occasion, witnesses reported that two known FRAPH

members, a soldier, and two police auxiliaries abducted Dady Pierre, an Aristide sympathizer. Pierre was subsequently discovered dead, his face disfigured with a machete. See Fuller Decl. ¶¶ 17, 20.

29.Courts have found a symbiotic relationship where a close financial relationship exists between the private party and the state. Jatoi v. Hurst-Eutess-Bedford Hosp. Auth., 807 F.2d 1214, 1221-22, modified on denial of reh'g, 819 F.2d 545 (5th Cir. 1987),cert. denied, 484 U.S. 1010 (1988) ("The private defendants cannot receive public funds, utilize public facilities, and serve a public purpose, yet insist that their private status forestalls any correction of a violation . . . .").

30.In addition, the 1987 Haitian Constitution requires the dissolution of any armed corps besides the army and the police. O.A.S. Report 1994 at 30. Nevertheless, the Haitian armed forces and Cedras' de facto government acquiesced in FRAPH's illegal activities. Id. at 161. The failure to stop FRAPH's unauthorized use of violence is tantamount to an implicit conspiracy to commit these brutal acts. See Cooper v. Molko, 512 F. Supp. 563, 568 (N.D. Cal. 1981) (conspiracies between states and private parties may occur via implicit agreements).

31.See also Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 451 (1957); In re "Agent Oranae" Product Liab. Litig., 635 F.2d 987, 989 n.4 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981) ("A cause of action which is founded on federal common law 'arises under' the laws of the United States within he meaning of § 1331(a)"); Republic of the Philippines v. Marcos, 806 F.2d 344, 353 (2d Cir. 1986); Nordlicht v. New York Tel. Co., 799 F.2d 859, 862 (2d Cir. 1986), cert. denied, 47g U.S. 1055 (1987); 13 C. Wright, A. Miller, & B. Cooper, Federal Practice andProcedure, § 3563 at 61-63 (2d ed. 1984).

32.In Kadic, the Second Circuit once again recognized the possibility of § 1331 jurisdiction, but declined to reach the issue. Slip op. at 28-30.

33.Martinez-Baca, No. 87-2266, slip op. at 4-5 (N.D. Cal. Apr. 11, 1989) (case brought by U.S. citizen, who could not invoke ATCA jurisdiction, sustained under § 1331); Forti, 672 F. Supp. at 1544; Abebe-Jiri v. Negewo, No. 90-2010 (N.D. Ga. Aug. 20, 1993).

34.That no independently given right of action is necessary to vindicate federal common law rights is inherent in Illinois v. Milwaukee, 406 U.S. at 103, and its progeny. As the Supreme Court noted in Illinois v. Milwaukee, "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." Id., quoting Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957). "[E]nforceability [of the right] is established by the existence of an individual right such a cause would seek to vindicate." Steven M. Schneebaum, The Enforceability of Customary Norms of Public International Law, 8 Brooklyn J. Int'1 L. 289, 305(1982).

35.See Xuncax v. Gramajo, 886 F. Supp. 162; Paul v. Avril, 901 F. Supp. 330 (final judgment); Todd v. Panjaitan, 1994 WL 827111 (D. Mass. 1994); Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D. Cal. Apr. 22, 1988).
The unpublished decisions in Todd and Martinez-Baca are reproduced in Ex. I.

36.Richard B. Lillich, Damages for Gross Violations of International Human Riqhts Awarded by U.S. Courts, 15 Hum. Rts. Q. 207, 210 (1993).

37.In Trajano v. Marcos, No. 86-0207 (D. Haw. May 19, 1991) (final judgment awarding damages), where Philippine law allowed punitive damages, the court applied that law. In all other cases, courts have applied a federal common law/international law measure of punitive damages, often without even referring to local law. The judgments in Quiros de Rapaport and Forti, for example, awarded punitive damages despite the lack of provisions for punitive damages under Argentine law. The judgment in Abebe-Jiri awarded punitive damages without reference to Ethiopian law. Siderman, the only case where punitive damages were not awarded, involved an action under the Foreign Sovereign Immunities Act against an internationally recognized foreign government. These judgments are summarized and reproduced in Ex. I.

38.The unpublished decisions in Forti and Todd are reproduced in Ex. I, as is a summary of all damage awards in prior Alien Tort Claims Act cases.

39.See Garcia-Amador, 2 The Changing Law of International Claims 593-596; Oppenheim, International Law 354-55 (Lauterpacht 8th ed. 1955) (citing Janes' Case, Annual Digest, 1925-26, Case No. 158, Decision of the Council of the League, Dec. 14, 1925, Off. J. 7 [1926]; I'm Alone Case (Canned v. U.S.), Jan. 5, 1935, 29 A.J. 331 [1935]).

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