

<http://www.etan.org/news/2000a/suit/memo-law.htm>

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS



HELEN TODD,

Plaintiff, Civil Case No. 92-12255 RCL

v.

SINTONG PANJAITAN,

Defendant.

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

BETH STEPHENS

MICHAEL RATNER

JOSE LUIS MORIN

JENNIFER GREEN

CENTER FOR CONSTITUTIONAL RIGHTS

666 Broadway, 7th floor

New York, NY 10012

212-614-6464

HARVEY KAPLAN

MAUREEN O'SULLIVAN

JEREMIAH FRIEDMAN

KAPLAN, O'SULLIVAN & FRIEDMAN

114 State St., Suite 300

Boston, MA 02109

617-523-3049

Attorneys for Plaintiff

February 14, 1994

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

PROCEDURAL POSTURE 1

INTRODUCTION 2

STATEMENT OF FACTS 6

A. Kamal Bamadhaj: Personal Background 6

B. East Timor: Indonesian Occupation and Repression 8

C. The Santa Cruz Massacre 12

D. The Death of Kamal Bamadhaj 15

E. Defendant Panjaitan's Responsibility for the Santa Cruz Massacre and the Death of Kamal Bamadhaj 16

F. Damages Sustained by Plaintiff Helen Todd and

the Estate of Kamal Bamadhaj 18

ARGUMENT 20

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF'S SUMMARY EXECUTION CLAIM UNDER THE ALIEN TORT CLAIMS ACT, THE TORTURE VICTIM PROTECTION ACT AND 28 U.S.C. § 1331,

AND HAS PENDANT JURISDICTION OVER PLAINTIFF'S MUNICIPAL TORT CLAIMS 20

A. The Alien Tort Claims Act 20

B. The Torture Victim Protection Act 22

C. 28 U.S.C. § 1331 27

D. Pendant Jurisdiction 30

II. PLAINTIFF IS ENTITLED TO COMPENSATORY AND PUNITIVE DAMAGES FOR SUMMARY EXECUTION AND FOR THE MUNICIPAL

TORTS COMMITTED BY DEFENDANT 30

A. Plaintiff is Entitled to Compensatory and Punitive Damages for Summary Execution, Measured by Accepted Principles of International Law and Federal Common Law 30

1. International Law and Federal Common Law Provide the Measure of Damages for Plaintiff's International Law Claims 31

2. Under International Law and Federal Common Law, Plaintiff is Entitled to Compensation for All Injuries Proximately Caused by Defendant's Acts 34

3. Plaintiff is Entitled to Punitive Damages Under International Law and Federal Common Law 37

B. Plaintiff is Entitled to Compensatory and Punitive Damages for Harm Caused by Defendant's Municipal Law Violations 40

1. Massachusetts Choice of Law Rules Determine What Law Applies to Plaintiff's Municipal Law Claims 41

2. The Law of Portugal, Which Governs a Claim Arising in East Timor, Provides for Compensatory and Quasi-Punitive Damages for Plaintiff's Claims 41

3. Massachusetts Law Would Provide for Compensatory and Punitive Damages for Plaintiff's Claims 42

III. THE FOREIGN SOVEREIGN IMMUNITY ACT DOES NOT IMMUNIZE DEFENDANT FROM LIABILITY 44

IV. ALL OTHER DEFENSES HAVE BEEN WAIVED, AND, IN ANY EVENT, ARE WITHOUT MERIT 48

A. The Act of State Doctrine Does Not Protect Defendant 48

B. There is No Statute of Limitations Bar to Deciding This Suit 51

C. This Case Raises No Issue of Forum Non Conveniens 51

CONCLUSION 53

PROCEDURAL POSTURE

On September 17, 1992, the summons and complaint in this case were served on defendant Panjaitan at his residence in Boston, Massachusetts. When defendant failed to respond in any manner to the lawsuit, plaintiff moved for an entry of default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. On February 24, 1993, this Court entered a default against defendant. Plaintiff filed a Motion for Default Judgment on March 26, 1993, and was allowed until February 10, 1994 to file her documentation in support thereof. Due to adverse weather conditions in the New York-New Jersey area, which immobilized plaintiff's attorney, plaintiff has had to request an additional (and final) extension until February 15, 1994.

INTRODUCTION

Plaintiff Helen Todd lost her only son, 20-year-old Kamal Bamadhaj, on November 12, 1991, when he and approximately 200 East Timorese were killed in a massacre committed by troops under the direction and control of Indonesian General Sintong Panjaitan, the defendant. Plaintiff asks this Court to award significant compensatory and punitive damages against defendant, a man who is personally responsible for her son's death as well as countless other human rights violations, and who has spoken proudly of the massacre in which her son was killed.

Plaintiff filed this action on her own behalf and as administratrix of her son's estate. However, plaintiff also filed this lawsuit as the symbolic representative of the hundreds of East Timorese families who, unlike plaintiff, live in East Timor and are therefore unable to take legal action without endangering their lives. As she says in her declaration,

I bring this case not only as Kamal's mother but on behalf of hundreds of East Timor mothers who are forced to grieve in silence for their dead children. Our

grief and anger is the same, but, unlike them, I can bring a case against a military officer without putting the rest of my family in danger. Whatever compensation is awarded by the court in this case will belong to the mothers of all the victims of the Dili massacre, and I will find a way to get it into their hands.

Decl. of Helen Todd at 23.

The allegations of the complaint, which must be taken as true on a Motion for Default Judgment, establish defendant's responsibility for the death of Kamal Bamadhaj. Military personnel acting under defendant's "direction and control" executed plaintiff's son as part of a massacre of East Timorese, committed pursuant to a program "designed, ordered, implemented and directed" by defendant. Compl. 1, 3, 6, 18.

In addition, the complaint and the multiple declarations filed along with this Memorandum demonstrate that this massacre was not an isolated incident. To the contrary, defendant Sintong Panjaitan bears personal responsibility for a systematic pattern of egregious human rights abuses in East Timor. Over the objections of the international community, the Indonesian military has employed a brutal campaign of repression to maintain its illegal occupation of East Timor. During much of his military career, defendant has played a key role in the design and implementation of this campaign.

In ruling on the Motion for Default Judgment, the court must determine the amount of compensatory and punitive damages to which plaintiff is entitled, and must confirm that it has subject matter jurisdiction and that defendant is not immune from suit. In addition to this Memorandum of Law, plaintiff has submitted the following documents to aid the court in its determination of these factual and legal issues:

1. The declaration of plaintiff Helen Todd, which describes the circumstances of her son's life and his death, and the loss she sustained when he was killed. Exhibit A [hereinafter Todd Decl.].
2. The declaration of Robert Muntz, who employed Kamal Bamadhaj as a translator in East Timor for several days before he was killed. Exhibit B [hereinafter Muntz Decl.].
3. The statistical analysis of Arthur Wright, Ph.D., an economist who estimates the economic value of Kamal Bamadhaj's lost earnings. Exhibit C [hereinafter Wright Statement].
4. The declarations of Liem Soei Liong, an expert on the Indonesian military and its occupation of East Timor (Exhibit D) [hereinafter Liong Decl.]; Geoffrey Robinson, an investigator with Amnesty International (Exhibit E) [hereinafter Robinson Decl.]; and Allan Nairn, a journalist who has studied East Timor and was present at the massacre in which Bamadhaj was killed (Exhibit F) [hereinafter Nairn Decl.], each of whom details different aspects of the events leading up to the

massacre, the human rights situation in East Timor, and defendant's actions.

5. The declaration of Roger Clark, professor of law, explaining the international legal status of East Timor and concluding that Portuguese or international law applies. Exhibit G [hereinafter Clark Decl.].
6. The declaration of Boaventura de Sousa Santos, Joao Pedroso and Jose Manuel Pureza, Portuguese law experts, explaining the Portuguese law applicable to plaintiff's claims. Exhibit H [hereinafter Port. Law Decl.].
7. Excerpts from the experts' affidavit submitted by international law professors in the case of Xuncax v. Gramajo, 91-11564WD (D.Mass. filed June 6, 1991), which confirms that summary execution constitutes a tort in violation of the law of nations. Exhibit I [hereinafter Law Profs. Aff.].
8. A summary and copies of judgments for compensatory and punitive damages entered in similar cases involving violations of internationally protected human rights. Exhibit J [hereinafter Judgments in Similar Cases].

Plaintiff asks the court to award damages on the scale of the awards in similar cases, which have ranged as high as \$60 million (Rapaport v. Suarez-Mason, No. 87-2266 (N.D.Cal. Apr. 11, 1989). See Ex. J, Judgments in Similar Cases.

Compensatory damages must make reparations to plaintiff and to the estate of Kamal Bamadhaj, reflecting his pain and suffering before he died, his mother's loss, and the loss of a lifetime of earnings. Punitive damages must reflect the egregiousness of defendant's conduct, the central role he played in these human rights abuses, and the international condemnation with which his serious human rights violations are viewed. Such a substantial award will send a strong message to defendant and his colleagues in Indonesia and around the world that such conduct is not tolerable.

-

STATEMENT OF FACTS

On November 12, 1991, Kamal Bamadhaj was murdered in East Timor along with approximately 200 East Timorese, when Indonesian soldiers under the direction and control of defendant, and acting under his orders, opened fire on a peaceful memorial procession. Cmplt. 13-18. The massacre and the execution of Bamadhaj were part of a "pattern and practice of systematic human rights violations designed, ordered, implemented and directed by the defendant." Id. at 18. With this lawsuit, his mother, plaintiff Helen Todd, seeks compensation for herself and her son's estate, and punitive damages which hold defendant accountable for the gross abuses for which he is responsible.

For the purposes of this motion, the allegations of the complaint must be accepted as true. In order to support plaintiff's claim to substantial compensatory and punitive damages, however, this Memorandum sets forth a more detailed account of the Kamal Bamadhaj's death, the events leading up to his murder and the role of

defendant Sintong Panjaitan in those events.

A. Kamal Bamadhaj: Personal Background

Kamal Ahmed Bamadhaj was born in Malaysia in 1970. Todd Decl. at 2. After the divorce of his parents, he was raised by his mother, plaintiff Helen Todd. Id. at 1. Educated first in Malaysia and then in New Zealand, he carried a New Zealand passport. Id. at 2. He spent the year 1989 travelling and working in Europe, Malaysia and Australia, then entered university in Australia in 1990, where he studied the Indonesian language and Asian history and politics. Id.

Mr. Bamadhaj was active in several organizations which supported pro-democracy efforts in areas under Indonesian control. Id. at 3. He spent two months in Indonesia and East Timor in late 1990, visiting student groups, studying the political situation and serving as a translator. Id. at 4.

The same interests drew him back to East Timor in October 1991. Id. at 5. He had just finished his second year of university study. Id. at 6. The Portuguese government and the United Nations announced that they would send a fact-finding delegation to East Timor under the auspices of the United Nations Secretary General. Id. at 5. There was widespread anticipation that the official visit might initiate significant change, and Mr. Bamadhaj wanted to offer his services as a translator, to observe and assist that process in any way he could and to follow-up contacts he had made with student groups the year before. Id. He arranged to translate for Robert Muntz, a representative of an Australian organization, Community Aid Abroad, during Muntz's visit to East Timor. Id.

Mr. Muntz met Mr. Bamadhaj at the airport in Dili, East Timor, on November 7, 1991. Muntz Decl. at 3. Bamadhaj had already been in East Timor for two to three weeks, travelling widely. Id. In the words of Mr. Muntz, Bamadhaj "was there as an individual, as a tourist," observing the local culture and making the acquaintance of Timorese of his own age. Id.

His interest was in getting to know the Timorese as individuals, in understanding the problems of the area from the perspective of those individuals, and in assisting their struggle for democracy by publicizing their situation internationally.

-

Id. at 5.

Muntz had come to East Timor to meet with the Catholic Church and other local non-governmental organizations about humanitarian aid projects. Id. at 1. He and Bamadhaj travelled together for five days, during which time Bamadhaj translated at a series of meetings with Timorese church representatives and Indonesian authorities. Id. at 4.

B. East Timor: Indonesian Occupation and Repression

East Timor was a colony of Portugal from the year 1702 until 1975. Cmplt. 8.

The Portuguese constitution defined East Timor as within the territorial limits of Portugal and subject to Portuguese law. Port. Law Decl. at 4-5. With the overthrow of the Portuguese dictatorship in 1974, Portugal renounced military efforts to maintain control of its overseas colonies, acknowledged the right of the East Timorese to self-determination, and made a commitment to facilitate the exercise of that right, pursuant to the mandate of the United Nations. Id. at 5-6.

The planned peaceful transition in East Timor was disrupted by its neighbor, Indonesia, which invaded on December 7, 1975, and has maintained an illegal occupation of East Timor since that date. Cmplt. 8. The United Nations rejects Indonesia's occupation, and continues to regard East Timor as a non-self-governing territory under the administration of Portugal. Id.; Clark Decl. at 4, 11. Portugal agrees that it remains the administrating power in East Timor under its own and international law. Id. at 11, 15; Port. Law Decl. at 6.

In order to maintain its occupation over East Timor, Indonesian military forces have resorted to a brutal campaign of repression, pursuant to which they have detained, tortured, executed and "disappeared" many tens of thousands of East Timorese. Cmplt. 9; Robinson Decl. 7-12; Nairn Decl. 17-26. Approximately one-third of the Timorese population has been killed, through massive executions and a disruption of village life which led to tens of thousands of deaths from disease and starvation. Cmplt. 10; Robinson Decl. 8; Nairn Decl. 17-18.

Torture and other ill-treatment occur "at every level of the military command structure." Robinson Decl. at 10. Amnesty International quotes the Bishop in charge of the Catholic Church in East Timor as saying that Indonesian troops torture political prisoners "just like two plus two is four." Id. at 7. Amnesty has concluded,

the government, and particularly the military command, has made it clear that basic human rights can and will be set aside in the name of national security, stability and order.... [U]nchecked by domestic legal or political mechanisms, the security forces have continued to commit violations with impunity.

-

Id. at 8. The human rights abuses in East Timor are the responsibility of the military leadership, not individual soldiers, and are part of a "clear and persistent pattern of human rights violations...practiced by the Indonesian authorities as a means for suppressing political dissent." Id. at 9. This repression has "the hallmarks of a systematic strategy for the silencing of real and suspected political opponents." Id.

The Indonesian army has systematically crushed virtually every Timorese institution, except the Catholic Church. Nairn Decl. at 19. Timorese political parties, peasant associations, student groups, civic organizations, and the media have been banned, and their leaders executed. Id. The goal, as described in an army manual, is to establish "control over all aspects of the life of the community." Id. at 20. This control is enforced by a program of systematic terror and violence, which was implemented by defendant Panjaitan during the years that

he was commander of the military region which included East Timor. Id. at 22.

The scheduled arrival of a joint Portuguese-United Nations fact-finding delegation in late 1991 was viewed as an event of extreme significance by both the East Timorese and the Indonesian military. Nairn Decl. at 27. The Timorese awaited the delegation with great hope, as an opportunity to tell the world of the repression they suffered under military rule. Id. They hoped the visit might lead to enforcement of the United Nations resolutions concerning their right to self-determination. Id.

The Indonesians military, on the other hand, was worried. In an internal memo, defendant Panjaitan's intelligence corps stated that growing Timorese outspokenness might require that repression be intensified. Id. at 28.

They were particularly upset that at a ceremony...some Timorese had unfurled "anti-Indonesia" banners, and shouted various pro-independence slogans. The memo said that such open dissent "is probably linked to our permissive attitude that makes them think that we are weak. Because they feel we aren't taking action against them they had the boldness to show their existence.... [I]f we allow this situation to continue it would be very harmful to us....

-
Id. This attitude is in keeping with the Indonesian policy of responding to peaceful protest with violent repression.

Months in advance of the arrival of the scheduled Portuguese-United Nations delegation, fresh troops arrived, "as if a second invasion were taking place." Liong Decl. at 14. A platoon of soldiers was stationed in every village or hamlet, and the military launched a heavy-handed intelligence operation. Id. at 14-15. In systematic neighborhood and village meetings, the Timorese were warned that if they demonstrated or spoke to the delegation they would be killed. Id. at 15; Nairn Decl. at 30. They were told that mass graves had already been dug for those who dared to speak out. Nairn Decl. at 30. Panjaitan's soldiers threatened to eliminate the families of speakers as well, saying that the families of those who spoke to the delegation would be killed "to the seventh generation." Id.

As the date of the Portuguese-U.N. visit neared, the terror increased: people were arrested, intimidated and tortured. Id. at 31; Liong Decl. at 15. Many people went into hiding, including one group in the Motael Church in Dili, the capital of East Timor. Nairn Decl. at 31.

The Portuguese-U.N. delegation was suddenly canceled on October 26, 1991. Cmplt. 12. As Kamal Bamadhaj wrote in his diary at the time, the cancellation was a blow to the hopes of the Timorese:

Hearts sank. People could not believe it. The disappointment here today is not only the deflating of many high expectations, but, more worrying still, the indefinite delay gives the Indonesian military the perfect opportunity to eliminate

all those Timorese who had exposed their identity while preparing for the visit.

Todd Decl. at 11. As Bamadhaj had predicted, the heightened international attention focused on East Timor ceased when the delegation was canceled, freeing the Indonesian military to take even stronger action. Nairn Decl. at 32. Two days later, the army stormed the Motael Church in the middle of the night, seizing the people who had sought sanctuary inside. Id. One man, Sebastiao Gomes, was shot at point blank range and bled to death on the steps of the church. Id. The attack on the church sent "shock waves" through East Timor, as the church had been the last refuge from Indonesian violence. Id. at 34.

C. The Santa Cruz Massacre

A mass for Sebastiao Gomes was scheduled for November 12, 1991, two weeks after his murder, to be followed by a funeral procession from the church to the Santa Cruz cemetery. Cmplt. 12-13. According to internal military reports, the Indonesian military knew in advance that the organizers planned to stage a protest on the way to the cemetery. Nairn at 36. "It was a 'public secret' that the Timorese resistance was preparing a demonstration. Even many people abroad were aware of the heated atmosphere." Lioeng Decl. at 13. Robert Muntz, Bamadhaj and several other foreigners in Dili decided to attend the mass and procession with cameras and tape recorders in the hope that their presence would deter the military from violence. Muntz Decl. at 6.

Several thousand people gathered at the church, with a palpable sense of tension in the air. Muntz Decl. at 8. Military troops were stationed all along the route of the march. The procession was peaceful, with chants of "Free East Timor." Amnesty International's investigation of the massacre confirmed that "there was absolutely no physical provocation." Robinson Decl. at 14.

As the procession arrived at the Santa Cruz cemetery, there were no soldiers in sight. Moments later, however, truckloads of soldiers with rifles appeared and sealed off the exit route, while another group of soldiers holding M-16 rifles in front of them marched up along the route the procession had taken. Eyewitness Allan Nairn describes what happened:

I, together with [another U.S. journalist] went and stood between the soldiers and the crowd. I thought that we could act as a shield for the Timorese, since the troops would see that we were obviously foreign reporters. But the soldiers did not stop. They never broke their marching stride. They just kept coming. They proceeded in discipline and relative quiet. The soldiers issued no warning, they did not attempt to make the Timorese disperse. There was no interaction between them and the crowd. The ranks of soldiers simply marched up to us--we were standing in the middle of the road--enveloped us and swept right past us. As they got a step or two beyond us (we were about 15 yards in front of the Timorese), the front rank raised their rifles to their shoulders all at once and opened fire into the stunned, retreating people. But the Timorese were hemmed in by the cemetery walls, by the narrowness of the road and their own numbers.

In an instant the street was covered with falling bodies and spurting blood. Each

rank of soldiers kept pouring in rifle fire. They were aiming and shooting people in the back. They vaulted fallen bodies to cut down those who were still standing. The firing was thorough and systematic.

Nairn Decl. at 41-42. After the initial burst of gunfire, the army systematically executed the wounded, over the course of hours. Id. at 46. Eyewitnesses reported that the executions continued at the military hospital:

Troops came in among the wounded Timorese and finished them off with iron bars, guns, and knives. Some were suffocated by shoving their heads into pails of blood and vomit.... These executions continued over the course of days and were part of a coordinated operation.

-

Id. at 47. Nairn himself was badly beaten by the soldiers, who fractured his skull with their rifle butts, seized cameras and tape recorders from him and his colleague and threatened to execute them. Id. at 43. They escaped only when they convinced the soldiers that they were from the United States, and slipped out of the country to report the massacre to the outside world. Id.

As a result of the presence of Nairn and his colleague and other foreigners, the Santa Cruz massacre was widely publicized. One expert, viewing the massacre in the context of years of gross human rights abuses in East Timor, notes, "only the presence of foreign journalists made the event at Santa Cruz cemetery unique." Liang Decl. at 5.

D. The Death of Kamal Bamadhaj

Kamal Bamadhaj left the hotel room he shared with Bob Muntz early on the morning of November 12, carrying Muntz's camera (Muntz Decl. at 7) and a tape recorder (Todd Decl. at 14). Muntz saw him later at the church, taking pictures, and saw him join the procession as it left the church heading towards the cemetery. Id. at 9. He was later seen at the cemetery, at one point near the front, and later in the middle of the crowd. Nairn Decl. at 44.

Bamadhaj was next seen shortly after the shooting at the cemetery, walking alone about half a kilometer from the site. Todd Decl. at 6. One report indicates that he may have already been wounded at that point, but he was able to walk. Id. His mother recounts the reports she received from eyewitnesses about what happened next:

Witnesses saw a military vehicle approach him; an argument ensued--apparently over his camera; shots rang out. Kamal fell and was left bleeding by the side of the road. The autopsy showed that he had been shot once in the arm and once at close range in the chest, by different calibre weapons.

-

Id. Anton Marti, a representative of the International Red Cross, found Bamadhaj

bleeding by the side of the road, waving his New Zealand passport, but without his camera. Id. at 18. Marti placed him in his Red Cross vehicle, and attempted to take him to a hospital. Id.; Muntz Decl. at 13. Despite the Red Cross markings on his vehicle and the fact that he was transporting a critically injured man, Marti was subjected to lengthy delays, first at a military roadblock and later at a police post. Todd Decl. at 18. After a long wait, Marti was allowed to proceed to the hospital. "The delay was fatal," says Helen Todd. "Kamal died of loss of blood." Id.

E. Defendant Panjaitan's Responsibility for the Santa Cruz Massacre and the Death of Kamal Bamadhaj

The Santa Cruz massacre was a premeditated attack, and part of a lengthy pattern of violent repression in East Timor. Lioing Decl. at 17-24. As Amnesty International concluded:

[T]he history of Indonesian repression in East Timor is extensive, dates back to the 1975 invasion, and is largely the responsibility of military forces. Such a history belies Indonesian government claims that the Santa Cruz massacre was an isolated incident, an unfortunate aberration in an otherwise acceptable pattern of behavior by government security forces, claims which Amnesty International has described as "far from the truth." Instead, as we have noted, the "massacre was only the most widely publicized case of political killings in East Timor."

Robinson Decl. at 16-17. Describing the massacre as "a planned military operation," and "a very disciplined operation," Amnesty International concluded that it reflected the policy of the Indonesian government and military. Id. at 17, 19. Other experts note that the military had dug large holes in advance of the massacre, which were later used for mass graves. Lioing Decl. at 19. In fact, the massacre was nothing more than what the army had previously threatened to do if the Timorese staged a peaceful protest: "Panjaitan's forces responded [to the peaceful protest] exactly as they had publicly warned they would: they opened fire and executed the Timorese en masse." Nairn Decl. at 35.

Defendant Panjaitan played a key role in the events leading up to the massacre and the massacre itself. A military commander with the rank of Major-General, Panjaitan was commander of the region which included East Timor, a post he had held since 1988. Lioing Decl. at 7. For almost 30 years, he had dedicated his career to the suppression of opposition to the military repression. Id. at 9. His record includes a period as head of the Red Berets, notorious in East Timor and Indonesia for their interrogation techniques, intimidation of the families of suspects, and use of the pretext of "provocation" as an excuse for crushing unrest. Id. at 11-12.

Panjaitan was responsible for organizing both the Indonesian military's preparation for the scheduled visit of the Portuguese delegation, and its response to the protests planned after the visit was canceled. Id. at 16, 19. His own statements after the massacre indicate that it was both a planned operation, and that he took full responsibility. For example, he was quoted by Amnesty International as defending the actions of his troops as "in accordance with the

standing procedure." Robinson Decl. at 22.

Panjaitan stated that the military officer immediately responsible for the operation had made no mistake: "There is no question of any violation. There's no question of any punishment.... It's quite possible that he will be promoted."

-

Id. Later, Panjaitan stated, "I told my troops, I back your actions. I'm prepared to take the responsibility." Liong Decl. at 22.

Panjaitan's command position, his history, and his own statements have led expert observers of the Indonesian military and its actions in East Timor to conclude that he was directly responsible for the policy of oppression and human rights abuses that included the massacre. Id. at 24; Nairn Decl. at 2.

Based upon his military position, his own statements... and my familiarity with both his prior military record and the Indonesian military structure, I conclude that there is no question that Sintong Panjaitan was responsible for the Santa Cruz massacre and, therefore, for the death of Kamal Bamadhaj.

Liong Decl. at 8. Panjaitan "oversaw and implemented a program of terror and systematic violence" in East Timor. Nairn Decl. at 2(a).

The killings on November 12 of the Timorese and Kamal Bamadhaj constitute especially egregious acts because they were the product of cool, official deliberation which has produced a longstanding policy of relentless torture and execution of those in Timor who dare to engage in private dissent or public speech. These killings were not one-time events or reactions to a situation, but were rather the fruit of an illegal occupation policy which defendant Panjaitan embraced and which he repeatedly and remorselessly carried out.

-

Id. at 2(g), 51.

F. Damages Sustained by Plaintiff Helen Todd and the
Estate of Kamal Bamadhaj

Plaintiff Helen Todd lost her 20-year-old son as a result of defendant's gross human rights violations. The loss, however, is not hers alone. By all accounts, Kamal Bamadhaj was an exceptional young man, committed to using his skills to better the world he lived in. Robert Muntz, one of the last people to see him alive, states,

[W]e are all diminished by his loss. Kamal was a very intelligent, idealistic, mature young man of twenty years. He was well-travelled, already possessed of the skills of language, and had the world at his feet. I have no doubt that, had he lived, he would have used his considerable talents in any number of important

social causes and would have made a substantial mark on society.

Muntz Decl. at 14.

In economic terms, the loss to Bamadhaj's estate can be calculated in terms of projected lifetime earnings. Using figures obtained from Australia, a U.S. economist has estimated that those earnings would be in the range of \$921,669 to \$1,134,911, based on two sets of assumptions as to how fast Bamadhaj would have progressed in his career. Wright Statement at pp. 1-3. In addition, a damages award should take into account Bamadhaj's pain and suffering before he died.

His mother's loss can never be fully compensated. As she herself notes,

No outcome in this lawsuit can adequately compensate for the loss of my son--or for the loss to him of the life he could have led. He was my only son, one of three children I raised as a single parent. When we [were] together, we shared a closeness which I treasured. When we were apart, I felt the pride and joy of knowing that he was out there in the world doing his chosen tasks, happily and effectively. I watched him grow into an intelligent and caring young man with much to offer the world in the field of human rights--perhaps as a scholar, perhaps as a diplomat, perhaps.... We will never know.

Todd Decl. at 21.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF'S SUMMARY EXECUTION CLAIM UNDER THE ALIEN TORT CLAIMS ACT, THE TORTURE VICTIM PROTECTION ACT AND 28 U.S.C. § 1331, AND HAS PENDANT JURISDICTION OVER PLAINTIFF'S MUNICIPAL TORT CLAIMS

A. The Alien Tort Claims Act

The Alien Tort Claims Act, 28 U.S.C. § 1330, 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.

(Emphasis added). The current 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 international legal norms. Every federal court that has considered claims similar to those raised by plaintiff has found that 28 U.S.C. § 1330 grants federal courts jurisdiction over such an action.

In Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), the first case in the modern line interpreting the Alien Tort Claims Act, the Second Circuit held that § 1330 affords victims of torture both a forum and a right to compensation under United States law. In a series of subsequent cases, federal courts have confirmed that the Alien Tort Claims Act grants jurisdiction to federal courts to consider the claims of aliens for torts committed in violation of fundamental norms of international law, including summary execution.

Torts committed in violation of the law of nations represent a narrow category of torts, where the prohibition is universal, obligatory and definable. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40, (N.D. Cal. 1987) [Forti I]. Summary execution is included within that category. Law Profs. Aff. at 20-24, Conclusion; Restatement (Third) of the Law of Foreign Relations § 404; Trajano, *supra*, 978 F.2d 493; In re Estate of Ferdinand E. Marcos, Human Rights Litigation, *supra*, MDL No. 840; Forti I, *supra*, 672 F. Supp. 1531; Quiros de Rapaport, *supra*, No. 87-2266.

Jurisdiction in these cases is based upon the concepts of both transitory torts and universal jurisdiction. Torts in violation of the law of nations are classic examples of transitory torts, under which the plaintiff's right of redress follows the defendant wherever he goes, even to foreign lands. Filártiga v. Peña-Irala, 630 F.2d at 885; Slater v. Mexican National Railroad Co., 103 U.S. 11 (1880). Additionally, international law has long recognized universal jurisdiction over certain matters, no matter where they occur. These offenses, including those alleged in the present case, "are so universally condemned that the perpetrators are the enemies of all people." Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

As the court in Filártiga noted, "for the purposes of civil liability, the torturer has become--like the pirate and the slave trader before him--hostis humani generis, an enemy of all mankind." 630 F.2d at 890. Likewise, defendant, who bears the responsibility for the massacre in which plaintiff's son was executed, is "an enemy of all mankind," subject to civil liability in this country.

B. The Torture Victim Protection Act

On March 12, 1992, President Bush signed into law the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 78 (1992) [hereinafter "TVPA"], which grants federal courts jurisdiction over civil suits for torture or summary execution, no matter where committed. Section 2(a) of the TVPA states:

An individual who, under actual or apparent authority, or under color of law, of any foreign nation... (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to that individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Extrajudicial killing (or summary execution) is defined by the TVPA, § 3(a), as follows:

a deliberated killing not authorized by a previous judgment pronounced by a

regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The murder of Kamal Bamadhaj falls squarely within this definition: an unarmed observer, carrying nothing more dangerous than a camera, he was murdered in cold blood by troops acting under defendant's direction and control.

Although the TVPA was enacted after this lawsuit was filed, standard principles of statutory interpretation favor applying it to this action. In general,

a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

-

Bradley v. School Board of City of Richmond, 416 U.S. 710, 711, 416 U.S. 696 (1974). Although the Supreme Court has made contradictory statements as to the standard to be applied when determining the retroactive impact of a newly enacted statute, its holdings can be reconciled. Indeed, the First Circuit has developed a consistent rule which addresses the concerns expressed in the different Supreme Court cases.

First, statutes which affect substantive rights and liabilities are presumed to be prospective only. Bennett v. New Jersey, 470 U.S. 632, 638, 470 U.S. 632 (1985) cited in Demars v. First Service Bank For Sav., 907 F.2d 1237, 1239 (1st Cir. 1990). However, if substantive rights are not affected, the statute is presumed to apply retroactively. Demars, supra, 907 F.2d at 1240. Finally, the presumption of retroactivity applies unless to do so would result in "manifest injustice." Id. This in turns requires a balancing of public and private interests. Id. The First Circuit has summarized these guidelines as follows:

We have recently suggested that the touchstone for deciding the question of retroactivity is whether retroactive application of a newly announced principle would alter substantive rules of conduct and disappoint private expectations.

-

C.E.K. Indus. Mechanical Contractors v. N.L.R.B., 921 F.2d 350, 357-58 n. 7 (1st Cir. 1990); Demars, supra, at 1240.

Applying this case law to the Torture Victim Protection Act, it is clear that the statute does not affect substantive rights, but merely clarifies pre-existing law. As noted in Demars, supra, at 1240 (citations omitted),

'[n]o conduct on the part of either party would have differed if the statute had been in effect at the time of the fatal incident' and thus no argument can be made that this provision is either one that 'interferes with antecedent rights' or one 'by which human action is regulated.'

Indeed, it is difficult to imagine a scenario under which defendant could argue that his behavior would have been different had he known that the plaintiff would have had not three but four legal bases for bringing suit against him in U.S. court. Any such argument defies reality. It also belies the heinousness and cold-bloodedness of the choices defendant made when he instituted the program of gross human rights violations which underlies this action. Defendant committed these abuses despite the fact that his conduct was proscribed by international law and the laws of virtually every country in the world. Clearly, the enactment of the TVPA would have had no effect on his conduct.

The legislative history of the TVPA supports the view that it was not intended to alter pre-existing substantive rights. The House Report states, "The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law," the Alien Tort Claims Act. H.Rep. No. 367, 102d Cong., 1st Sess. (1992); see also S.Rep. No. 249, 102d Cong., 1st Sess. (1992). The legislative history of the Act thus firmly places the TVPA within the framework of international, federal and state remedies which provide, to varying degrees, relief for the same set of torts.

In the absence of any effect on substantive rights, the TVPA is presumed to be retroactive, unless to do so would result in "manifest injustice." Any "disappointment of private expectations" must be balanced against "the public interest in enforcement of the rule." Here, defendant can claim no disappointment of private interest, given that his conduct was subject to suit in both state and federal courts in the United States even before the enactment of the TVPA. To the extent that the TVPA clarifies and strengthens plaintiff's federal cause of action, the result surely does not rise to the level of a "manifest injustice." Finally, the public has a strong interest in deterring and punishing gross human rights violations, and in implementing a uniform federal approach to international human rights suits in federal courts. This public interest outweighs any minimal impact on defendant.

C. 28 U.S.C. § 1331

This court also has jurisdiction pursuant to 28 U.S.C. § 1331, which provides federal subject matter jurisdiction in cases "arising under" the Constitution and laws of the United States. The complaint in this case charges a violation of fundamental norms of customary international law, which "arise under" U.S. law according to venerable principles of American jurisprudence. The Supreme Court has stated unequivocally that the federal courts' "arising under" jurisdiction established by § 1331 "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). This proposition has been readily accepted in United States courts. See also 13 B. Wright, Miller & Cooper, Federal Practice and Procedure § 3563 at 61-3 (2d ed. 1984).

The law of nations--customary international law--is part of federal common law. This principle was articulated by Chief Justice Marshall, who wrote that United States courts are "bound by the law of nations, which is part of the law of the land." The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). The famous prize case,

The Paquete Habana, 175 U.S. 677, 700 (1900), similarly held that United States courts were to apply the law of nations as federal law. More recently, the Supreme Court has directed federal courts to apply international norms as part of federal common law in a series of expropriation cases commencing with Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

As the Second Circuit held in Filártiga, international human rights standards also unquestionably form part of domestic common law:

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.

-

Filártiga, 630 F.2d at 886 (emphasis in original). Thus, as international law is part of federal common law and the "arising under" jurisdiction established by § 1331 supports claims founded on such common law, this court has jurisdiction under 28 U.S.C. § 1331. Furthermore, United States courts have long recognized a private remedy for violations of fundamental norms of international law. See The Paquete Habana, 175 U.S. 677, 700 (1900); La Amistad de Rues, 18 U.S. (5 Wheat.) 385 (1820) (prize case); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (expropriation). First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) (international law limits on manipulation of the corporate form); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (international law rights against illegal expropriation); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981) (international law right against illegal expropriation).

Several courts have recognized § 1331 jurisdiction over international human rights cases, including Martinez-Baca v. Suarez-Mason, 87-2057 (N.D.Cal. April 22, 1988), a case which could not be filed under § 1330 because the plaintiff was a U.S. citizen. In a factually parallel case, the court in Filártiga assumed jurisdiction pursuant to § 1330, but stated "our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331." Filártiga, supra, at 887 n.22. Most recently, the court in Abebe-Jiri explicitly relied on both § 1331 and § 1330 as bases for jurisdiction. Abebe-Jiri v. Negewo, 90-2010 (N.D.Ga. Aug. 20, 1993), appeal docketed, 93-9133 (11th Cir. Sept. 10, 1993), slip op. at p. 7 (for text of decision, see Ex. J, Judgments in Similar Cases). Regarding § 1331, the court held,

The claims of all of the plaintiffs "arise under" United States law, which includes customary international law as part of U.S. common law; thus subject matter jurisdiction is appropriate under 28 U.S.C. section 1331.

-

Id. at p. 7, 2.

D. Pendant Jurisdiction

This court has pendant jurisdiction over plaintiff's claims for wrongful death, assault and battery and intentional infliction of emotional distress. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Plaintiff's claims are transitory torts, governed by either the law applicable in East Timor or Massachusetts law. See discussion, infra.

II. PLAINTIFF IS ENTITLED TO COMPENSATORY AND PUNITIVE DAMAGES FOR SUMMARY EXECUTION AND FOR THE MUNICIPAL TORTS COMMITTED BY DEFENDANT

A. Plaintiff is Entitled to Compensatory and Punitive Damages for Summary Execution, Measured by Accepted Principles of International Law and Federal Common Law

The defendant has violated customary international law through the summary execution of Kamal Bamadhaj, plaintiff's son. The measure of damages under international law as well as federal common law is restoration of the status quo ante, if possible, and money damages to compensate for all injuries, direct and consequential, to the extent that the status quo cannot be restored. Plaintiff should be awarded damages to compensate for all the pecuniary and non-pecuniary injuries resulting from the defendant's violations of internationally secured human rights. International and federal common law also authorize imposition of punitive damages in order to punish and deter such serious violations of international law.

1. International Law and Federal Common Law Provide the Measure of Damages for Plaintiff's International Law Claims

The basic rules for determining damages in international tort cases were set forth in Filártiga v. Peña-Irala, in the decision on remand. 577 F. Supp. 860, 863 (E.D.N.Y. 1984). The court noted that the "tort" to which the statute refers means a wrong "in violation of the law of nations," not merely "a wrong actionable under the law of the appropriate sovereign state," and that, therefore, "it should determine the substantive principles to be applied by looking to international law," which became a part of the common law of the United States upon the adoption of the Constitution. Id. at 862-63.

Applying international choice of law principles, as incorporated into U.S. common law, the court looked first to Paraguayan damage rules to determine whether those rules would inhibit enforcement of international law, but concluded that Paraguayan law would not allow punitive damages. Id. at 863-4. Reasoning 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), the Filártiga court explicitly applied international law, invoking its common-law powers under § 1330:

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 Judgments in Similar Cases, Ex. J. Following the precedent established by the district court in Filártiga, federal district courts have consistently looked to international law, as incorporated into federal common law, to determine damages, including punitive damages, in cases where the law of the country where the abuse took place would not adequately vindicate the international interests at stake. In Martinez-Baca v. Suarez-Mason, 87-2057 (N.D.Cal., Apr. 22, 1988) (slip op.) the court clearly articulated its reasoning, 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 § 1350 case against an individual charged with gross human rights violations has awarded punitive and compensatory damages to the plaintiffs, whether or not allowed by the law of the host country. Where the local law allowed punitive damages, as in Trajano, the court applied that law. Where it did not, the court applied a federal common law/international law measure of damages.

In this case, the application of choice of law rules is complicated by the fact that East Timor has been under illegal military occupation for over 18 years. International law expressly prohibits the application of the law of an aggressor to the illegally occupied territory. Clark Decl. at 18. Thus, Indonesian law does not apply. If necessary to refer to a body of national law, the law of Portugal, the administering power under United Nations mandates, would govern.

Given that Portugal has not had actual control over the territory since the illegal Indonesian invasion in 1975, plaintiff asserts that the court should look directly to federal common law (and, therefore, international law), and the body of precedents applying it to § 1350, rather than first applying Portuguese law. However, plaintiff has attached a declaration detailing the applicable Portuguese law, in the event that the Court wishes to consult it. Ex. H, Port. Law Decl. As that declaration makes clear, Portuguese law provides for full compensatory damages for economic loss, projected loss of income and pain and suffering. Id. at 11-14. Further, although Portuguese law does not provide for punitive damages as understood in the United States, its definition of compensatory damages includes many of the concepts we consider "punitive," including the brutality of the defendant's conduct, the suffering of the victim, and the defendant's ability to pay. Id. at 12. Thus, under Portuguese law, this court could make an award of punitive damages. If, however, the Court were not convinced that the measure of such damages is adequate to vindicate the international law interests at stake in this case, it should turn to federal common law powers and apply an international law

measure of punitive damages.

2. Under International Law and Federal Common Law, Plaintiffs are Entitled to Compensation for All Injuries Proximately Caused by Defendant's Acts.

The federal common law of damages incorporates the basic international rule that entitles a victim to compensation for all injuries proximately 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 Rodriguez Case, IACourtHR, Judgment of July 21, 1989, 25, 11 HRLJ 127 (1989) (awarding the family of a disappeared person damages for loss of earnings and psychological injuries). The Inter-American Court relied on the leading case on the international law of damages, Case Concerning the Chorzow Factory (Germany v. Poland), 1928 P.C.I.J. (Ser. A), No. 17, at 47, in which the Permanent Court of International Justice held that compensatory damages include not only immediate and actual losses, but consequential damages as well:

[R]éparation 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.

-

Id.

When injuries to individuals are at issue, as in this case, international law allows damages to be awarded for a broad range of physical, emotional, and social harms:

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury.

M. Whiteman, Damages in International Law, 718-719 (1943).

Federal courts adjudicating claims under the Alien Tort Claims Act have awarded damages for the full range of injuries compensable under international law. See Judgments in Similar Cases, Ex J. In Forti v. Suarez-Mason, 87-2058, slip op. at 3 (N.D.Cal. Apr. 20, 1990), the court awarded compensatory damages for pain and suffering totalling \$4 million against an Argentine general for injuries suffered by two plaintiffs and their relatives during the Argentine "dirty war." In Filártiga, 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 Quiros de Rapaport v. Suarez-Mason, 87-2266, slip op. (N.D.Cal. Apr. 11, 1989) (\$30 million in compensatory damages awarded to four relatives of persons tortured and murdered for pain and suffering); Siderman v. Republic of Argentina, 82-1772, slip op. (C.D.Cal. Sept. 28, 1984), 965 F.2d 699 (9th Cir. 1992), cert. denied 113 S.Ct. 1812 (\$2.7 million awarded to compensate plaintiffs for their physical injuries, loss of earnings, medical expenses, moral damages, loss of consortium, as well as pain, suffering, and emotional distress); Trajano v. Marcos, No. 86-0207 (D.Haw., May 19, 1991), 978 F.2d 493 (9th Cir. 1992), cert. denied 61 U.S.L.W. 3832, 3834 (mother of victim awarded \$1.25 million compensatory damages for mental anguish because of murder of her son.)

The compensatory damages demanded in this case, \$5 million for summary execution, are certainly comparable to those in these prior cases. First, Kamal Bamadhaj's pain and suffering must be compensated. This young man attempted to escape after witnessing a brutal massacre. He was stopped by soldiers on the street, shot and left bleeding on the road. His apparent rescue by the International Red Cross was aborted by security forces, who twice maliciously stopped the emergency vehicle. Kamal Bamadhaj bled to death from his wounds.

Bamadhaj's estate must also be compensated for his lost earnings, an amount of approximately \$1 million, as estimated by economist Wright. Finally, his mother's loss is incalculable: the senseless murder of a son who was both child and friend to her, who she had every reason to expect would mature into a dedicated, compassionate man.

3. Plaintiff is Entitled to Punitive Damages under International Law and Federal Common Law.

Summary execution is universally condemned as a violation of fundamental human rights. Law Profs. Aff., Ex. I. The international community has few mechanisms of its own to punish such violations and therefore looks to domestic courts to reflect the force of the international prohibition in their judgments and damage awards. See, e.g., Declaration on the Protection of all Persons from Being Subjected to Torture, General Assembly Res. 3452, 30 U.N. G.A.O.R. Supp. (No. 34), 91 U.N.Doc. A/1034 (1975), arts. 7, 11.

Federal common law has followed Filártiga's reasoning that punitive damages are the only real mechanism available to uphold international sanctions against human rights abuses: "[T]he objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages." Filártiga, 577 F. Supp. at 863-864 (\$10 million in punitive damages). Federal courts entering judgments in subsequent international human rights cases have all followed Filártiga and awarded punitive damages. See Judgments in Similar Cases, Ex. J. See, e.g., Forti, 87-2058, slip op. (N.D.Cal., Apr. 25, 1990) (\$4 million in punitive damages); Quiros de Rapaport, 87-2266, slip op. (N.D.Cal., Apr. 11, 1989) (\$30 million in punitive damages); Martinez-Baca, 87-2057, slip op. (N.D.Cal. Apr. 22, 1988) (\$10 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 international human rights abuses.

Punitive damages are likewise proper in this case by analogy with similar actions under federal common law. See, e.g., Bass v. Wallenstein, 769 F.2d 1173, 1190 (7th Cir. 1985) (punitive damages for wrongful death in a civil rights action permitted as matter of federal common law); Sample v. Johnson, 771 F.2d 1335, 1347 n.12 (9th Cir. 1985), cert. denied, 475 U.S. 1019 (1986) (federal common law permits punitive damages in maritime action).

Another analogous body of law has grown up under 42 U.S.C. § 1983, which is in many ways 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 wilfully, or was the result of reckless indifference to the rights of others In that case, the jury are authorized, for the sake of a public 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 Ry. Co. v. Arms, 91 U.S. 489, 493 (1876).

The defendant in this case unquestionably had an "evil motive" in authorizing and implementing a program of repression and terror which included the massacre in which plaintiff's son was executed. As in Filártiga, 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.

-
Filártiga, 577 F. Supp. at 866 (citation omitted). The Filártiga 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 larger punitive damage award since the defendant was one of the architects and administrators of a campaign of human rights abuses with thousands of victims.

The nature and scope of the defendant's acts, his evil motive, and the need for

deterring such acts in the future all place plaintiff's prayer for at least \$10 million in punitive damages for summary execution squarely in line with the awards that federal courts regularly make in cases involving "far less reprehensible" conduct than that of this defendant. Filártiga, 577 F. Supp. at 866. A punitive award of at least \$10 million is thus both reasonable and appropriate.

B. Plaintiff is Entitled to Compensatory and Punitive Damages for Harm Caused by Defendant's Municipal Law Violations

In addition to her international law claims, plaintiff asserts, as alternative grounds for relief, the municipal law torts of wrongful death, assault and battery and intentional infliction of emotional distress. In determining the choice of law governing the award of damages in these claims, this court should apply Massachusetts choice of law principles, which require either the application of Massachusetts or East Timor substantive law on damages. Under either law, plaintiff is entitled to an award of compensatory and punitive damages.

1. Massachusetts Choice of Law Rules Determine What Law Applies to Plaintiff's Municipal Law Claims

Massachusetts choice of law rules apply to determine what laws govern plaintiff's state law claims. Massachusetts has turned away from the rigid, single-factor, lex loci analysis in favor of the more flexible "most significant relationship" analysis exemplified by the Restatement (Second) of Conflict of Laws (1971). Bi-Rite Enterprises, Inc. v. Bruce Miner Co., 757 F.2d 440 (1st Cir. 1985); Pevoski v. Pevoski, 371 Mass. 358 (Mass. 1976); Choate, Hall & Stewart v. SCA Servs., Inc., 378 Mass. 535 (Mass. 1979). Under this standard, it is likely that the law applicable in East Timor would apply, as the injuries and conduct causing them occurred in East Timor; as explained earlier, this would be Portuguese law.

2. The Law of Portugal, Which Governs a Claim Arising in East Timor, Provides for Compensatory and Quasi-Punitive Damages for Plaintiff's Claims

As discussed in detail in the Portuguese Law Declaration, Exhibit H, Portuguese law provides for a full range of compensatory damages pecuniary and non-pecuniary harm, including loss of future earnings and pain and suffering. Id. at 7, 11-14. An economist has estimated the value of Kamal Bamadhaj's lost earnings as in the range of \$921,669 to \$1,134,911, depending on how fast his career had advanced. Compensatory damages should include this amount, his pain and suffering before he died, and his mother's loss. Quasi-punitive damages would take into account the egregiousness of the defendant's conduct and the suffering of the victim.

3. Massachusetts Law Would Provide for Compensatory and Punitive Damages for Plaintiff's Claims

In the unlikely event that the Court decided to apply Massachusetts law to this case, under the Massachusetts Wrongful Death Act, plaintiff would be entitled to recover compensatory damages for injuries she suffered as a result of defendant's murder of her son. Mass. Gen. Laws ch. 229, § 2. The Act provides recovery for pecuniary and non-pecuniary losses resulting from wrongful death. Pecuniary damages include compensation for reasonably expected net income and for the value of the services, protection, care and assistance of the decedent. Plaintiff is also entitled to damages for non-pecuniary losses including loss of consortium and society, companionship, comfort, guidance, and counsel provided by the decedent. Finally, plaintiff may also recover for the "conscious suffering resulting" from decedent's wrongful death. Mass. Gen. Laws Ch. 229, § 6.

The Act also allows punitive damages where "the decedent's death was caused by the malicious, willful, wanton, or reckless conduct of the defendant." Mass. Gen. Laws Ch. 229, § 2. Defendant's design, control and supervision of program of human rights violations which including the massacre in which plaintiff's son was killed, was malicious, willful, wanton and reckless. Plaintiff is therefore also entitled to punitive damages.

Under Massachusetts case law, plaintiff is also entitled to recover compensatory damages for assault and battery and for intentional infliction of emotional distress. These damages include compensation for physical and mental suffering and loss of consortium and society. Coblyn v. Kennedy's, Inc., 359 Mass. 319 (1971); Foley v. Polaroid Corp., 400 Mass. 82 (Mass. 1987); Moore v. Eli Lilly and Co., 626 F. Supp. 365 (D. Mass. 1986); George v. Jordan Marsh Co., 359 Mass. 244 (1971); Agis v. Howard Johnson Co., 371 Mass. 140, 145 (1976). To recover for emotional distress, the defendant's conduct must have been "extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community." Agis, at 145. Defendant's conduct exceeds this threshold. The defendant intended to inflict emotional distress or knew or should have known that emotional distress was a likely consequence of his acts. Boyle v. Wenk, 378 Mass. 592 (1979) (court found intentional infliction of emotional distress resulted from defendant's harassment of plaintiff on the phone and in person).

It is difficult to find cases in Massachusetts that are truly comparable to the present case. However, a review of recent damages awards provides strong support for the plaintiff's claim. For example, in Sweeney v. Westvaco Co., 926 F.2d 29,(1st Cir. 1991), the wife of a victim who suffered an emotional breakdown received an award for \$1.5 million in compensatory damages for loss of consortium. Similarly, in Egan v. Holderman, 26 Mass. App. Ct. 942 (Ct. App. 1988), the plaintiff received an award of \$1 million in compensatory damages for injuries from a traffic accident, and his wife obtained an award of \$250,000 in compensatory damages for loss of consortium. Although the injuries suffered in these examples pale by comparison to the present case, they demonstrate that plaintiff's demand for compensation is reasonable under the severe circumstances of this case.

III. THE FOREIGN SOVEREIGN IMMUNITY ACT DOES NOT IMMUNIZE

DEFENDANT FROM LIABILITY

Defendant, who personally designed, ordered, and implemented a program of human rights abuses which resulted in the summary execution of plaintiff's son, is not entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.* (1988). No court has ever granted immunity from liability for acts as heinous as those alleged here. See, e.g., Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (torture by police officer); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D.Cal. 1987) (torture, summary execution by military general), on reconsid., 694 F. Supp. 707, 710 (N.D.Cal. 1988) (disappearance directed by general).

First, the plain language and the unambiguous legislative history of the FSIA demonstrate that it does not immunize individuals. Section 1603(a) of the FSIA carefully defines the beneficiaries of its protection to include a foreign state, its political subdivisions, "or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) of § 1603 then defines an "agency or instrumentality of a foreign state" as an "entity":

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title [defining corporate citizenship in U.S. jurisdictions], nor created under the laws of any third country. (Emphasis added).

The plain language of the FSIA requires that an "agency or instrumentality of a foreign state" must be both a separate legal person--artificially created and not natural--and an organ of the foreign state or a political subdivision thereof or be majority-owned by the state. "The terminology of these sections--'agency,' 'instrumentality,' 'entity,' 'organ'--makes it clear that the statute is not intended to apply to natural persons...." Republic of Philippines v. Marcos, 665 F. Supp. 793 (N.D. Cal. 1987) (foreign sovereign immunity does not apply to Philippine Solicitor General). Had Congress intended also to immunize officials and employees of foreign states, it would have used those terms explicitly, as it did elsewhere in the same statute, at 28 U.S.C. § 1605(a)(5) (waiving immunity of foreign sovereign for certain tortious acts or omissions by "any official or employee" of the State). In keeping with this view of the FSIA, the Restatement (Third) of the Law of Foreign Relations, §§ 451 *et seq.*, which incorporates changes instituted by the FSIA, has eliminated individuals from the list of parties entitled to sovereign immunity. Compare Restatement (Second) of the Law of Foreign Relations § 69 (pre-FSIA sovereign immunity covered heads of state).

The statute's plain meaning is confirmed by the unambiguous legislative history of § 1603(b)(1) and (2). Section 1603(b)(1) "is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name," and § 1603(b)(2)

"requires that the entity be either an organ of a foreign state...or that a majority of the entity's shares or other ownership interest be owned by a foreign state...." H.R. Rep. No. 1487, 94th Cong., 2d Sess. reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6614 (emphasis added). The legislative history continues in a manner that makes it unmistakable that the FSIA was not meant to cover individuals:

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company....

-

Id. Defendant Panjaitan is none of these.

Second, no court has granted immunity to individuals who have committed acts as heinous as those alleged here. Numerous courts have considered suits against foreign officials sued for torture or other egregious human rights violations that are contrary to the laws of their countries and to universally recognized norms of international law, and none of those courts has ever applied the FSIA to immunize those individuals. See, e.g., Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987). To the contrary, in the few cases which grant immunity to individuals under the FSIA, the immunized individual was acting both under the color of official authority and within the scope of his or her lawful authority as an official of a foreign state.

Filártiga and its progeny demonstrate that an act of torture or other gross human rights violations, carried out by the order or with the approval of an official, can never be within the scope of an official's discretionary authority. See, e.g., Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963) (serious financial crimes can never be considered as within lawful authority of official); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination is "clearly contrary to the precepts of humanity as recognized in both national and international law" and thus cannot be considered a part of an official's authority).

IV. ALL OTHER DEFENSES HAVE BEEN WAIVED, AND, IN ANY EVENT, ARE WITHOUT MERIT

The defenses of act of state, statute of limitations and forum non conveniens are nonjurisdictional and need not be addressed by the court on its own motion. Defendant has waived them by his failure to defend this action. However, defendant would not have prevailed on any of these issues even had they been properly raised.

A. The Act of State Doctrine Does Not Protect Defendant

The burden of raising and proving the applicability of the act of state doctrine rests upon the party seeking its protection. Defendant, having failed to meet that

burden, has waived the defense of act of state. Even if raised, however, the doctrine would not have protected defendant, given that (1) his violations of law could never be considered official public acts of a foreign sovereign; and (2) treaties and other "controlling legal principles" exist that universally condemn his actions and thus render the act of state doctrine inapplicable.

The act of state doctrine applies only when acts committed are official public acts, not "crimes committed by the Chief of State done in violation of his position and not in pursuance of it. [Such crimes] are as far from being an act of state as rape." Jimenez v. Aristeguieta, 311 F.2d 547, 558 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963) (financial crimes are not acts of state). See, e.g., Letelier v. Rep. of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination cannot be an act of state). As Judge Sofaer succinctly explained, "[t]he actions of an official acting outside the scope of his authority as an agent of the state are simply not acts of state." Sharon v. Time, 599 F. Supp. 538, 544 (S.D.N.Y. 1984) (Sofaer, J.).

No court has ever invoked the act of state doctrine in an international human rights case to shield a defendant who has committed official torture or other violations of fundamental human rights, regardless of that defendant's present or former government position. Filártiga, 630 F.2d at 889-890; Forti, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987), on reconsideration, 694 F. Supp. 707, 710 (N.D. Cal. 1988); Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (unpublished disposition).

In addition, the acts of which defendant stands accused are universally condemned by treaties, agreements and international legal norms. Compl. 5; Law Profs. Aff., Ex. I. As the Supreme Court explained in Banco Nacional de Cuba v. Sabbatino, 376 US 398, 428 (1964):

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

Thus, defendant could not have invoked the act of state doctrine.

B. There is No Statute of Limitations Bar to Deciding

This Suit

As noted above, defendant has waived any statute of limitations claim by his failure to plead or otherwise defend. However, even were this Court to consider this claim, it would find that plaintiff's claims are not time-barred: this lawsuit is based upon the November 1991 execution of plaintiff's son. The complaint was filed and served in September 1992, less than one year later. Under no possibly

applicable statute of limitations is the claim barred.

C. This Case Raises No Issue of Forum Non Conveniens

Defendant has waived any forum non conveniens claim by his default for failure to plead or otherwise defend. As the Supreme Court repeatedly has 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. Before a district court can dismiss a case on grounds of forum non conveniens, it must find that there exists an alternate forum in which the case could be tried. See Mercier v. Sheraton International, Inc., 935 F.2d 419, 423-24 (1st Cir. 1991).

The two preconditions for the existence of a satisfactory alternative forum are "(1) all parties can come within that forum's jurisdiction, and (2) the parties will not be deprived of all remedies or treated unfairly...." Id. at 424. However, where plaintiffs and others risk execution in another forum, that forum cannot, in the interests of justice, be considered adequate. See Rasoulzadeh v. Associated Press, 574 F. Supp. 854 (S.D.N.Y. 1983), aff'd without opinion, 767 F.2d 908 (2d Cir. 1985) (cited in Mercier, 935 F.2d at 424) (likelihood that plaintiff's return to Iran would result in execution of plaintiff rendered alternate Iranian forum inadequate for purposes of forum non conveniens). The second Mercier requirement for an adequate alternate forum--that the parties will not be deprived of all remedies or treated unfairly--also cannot be met in East Timor.

Moreover, the burden of proof rests on the defendant both to show that an adequate alternative forum exists and "to provide enough information to enable the District Court to balance the parties' interests." Id. at 258. Defendant has not done so. Thus, there is simply no issue here regarding dismissal for forum non conveniens.

CONCLUSION

In the last entry in his diary, just before the massacre in which he was killed, Kamal Bamadhaj predicted "another wave of genocide against the Timorese people," and wrote,

Whether total genocide occurs in East Timor or not depends not only on the remarkably powerful will of the East Timorese people, but also on the will of humanity, of us all.

Todd Decl. at 25. His mother, Helen Todd, views this lawsuit as "an important piece of humanity's reaction to that genocide--and as a piece of a monument to all

of those who fell that day in East Timor in search of democracy." *Id.* By initiating this litigation, Todd has employed a powerful tool on behalf of all humanity. As recognized by the Filártiga court, lawsuits such as these are "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." Filártiga, supra, 630 F.2d at 890.

For all of the above reasons, plaintiff's Motion for Default Judgment should be granted, and plaintiff should be awarded substantial compensatory and punitive damages commensurate with the harm she and the estate of her son have suffered and the egregiousness of defendant's behavior.

Respectfully submitted,

BETH STEPHENS

MICHAEL RATNER

JOSE LUIS MORIN

JENNIFER GREEN

CENTER FOR CONSTITUTIONAL RIGHTS

666 Broadway, 7th floor

New York, NY 10012

212-614-6464

HARVEY KAPLAN

MAUREEN O'SULLIVAN

JEREMIAH FRIEDMAN

KAPLAN, O'SULLIVAN & FRIEDMAN

114 State St., Suite 300

Boston, MA 02109

617-523-3049

Attorneys for Plaintiff

February 14, 1994

Plaintiff and her counsel wish to express their grateful appreciation to Jerry Spier and David Sullivan of Yale Law School for their valued assistance in the preparation of this Memorandum and the accompanying Exhibits.