

Exhibit F

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DECLARATION OF INTERNATIONAL LAW SCHOLARS

1. We make this declaration based on our knowledge and decades of experience studying, teaching, writing about, and practicing international human rights law. If called to testify about the issues addressed in this declaration, we could and would do so.

2. We attach as an Appendix to this Declaration summaries of our credentials, which provide evidence of our work, scholarship and expertise in the field of international law.

3. We have been asked to provide an opinion as to the content of certain customary international law standards and norms: (a) distinguishing non-international armed conflict from internal disturbances; (b) prohibiting extrajudicial killing; (c) prohibiting crimes against humanity; (d) protecting the right to life, liberty and security of person; (e) protecting the right of assembly and association; and (f) establishing secondary liability through aiding and abetting liability and command responsibility. We were also asked to provide an opinion on the requirements for exhaustion of domestic remedies under international law. We express no opinion as to whether exhaustion is required for claims under the Alien Tort Statute.

4. Customary international law is commonly defined as law that results from a general practice of states out of a sense of legal obligation, or *opinio juris*. Restatement (Third) of Foreign Relations Law of the United States § 102(2). As article 38 of the Statute of the International Court of Justice succinctly puts it, customary law is “a general practice accepted as law.”

5. A variety of sources may be consulted to determine whether a particular norm has risen to the level of customary international law. These include international conventions, international customs, treaties, and judicial decisions rendered in this and other countries. Malcolm N. Shaw, *International Law* 59 (1991) (citing Article 38(1) of the Statute of the International Court of Justice).

6. For the reasons stated below, it is our opinion that clearly defined and widely accepted norms of customary international law proscribe extrajudicial killings and crimes against humanity, and protect the right to life, liberty and security of person, and the right to assembly and association. These norms are as well-defined and as widely accepted as were the eighteenth century norms against piracy, affronts to ambassadors, and violations of safe passage. We therefore conclude that that violations of these norms are actionable in U.S. federal courts under

the Alien Tort Statute, 28 U.S.C. § 1350.

7. The bases for these opinions are set out below as follows: Section I addresses the distinction between non-international armed conflict and internal disturbances; Section II addresses the norm prohibiting extrajudicial killing; Section III addresses the norm prohibiting crimes against humanity; Section IV addresses the norm protecting the right to life, liberty and security of person; Section V addresses the norm protecting the right to assembly and association; Section VI addresses the norms allowing claims on the basis of secondary liability, including both aiding and abetting and command responsibility; and Section VII addresses the requirement of exhaustion of domestic remedies in international law.

I. CUSTOMARY INTERNATIONAL LAW DISTINGUISHES NON-INTERNATIONAL ARMED CONFLICT FROM INTERNAL DISTURBANCES.

8. Customary international law, as evidenced by the statutes and jurisprudence of international tribunals, defines the scope of a non-international or internal armed conflict and distinguishes such armed conflicts from internal disturbances and riots. Rules of international humanitarian law only apply when the standard for an armed conflict is met. When that standard is not met, human rights norms apply, including those that have been agreed to through treaties by relevant parties, as well as those that form part of customary international law.

9. In *Prosecutor v. Dusko Tadic*, No. IT-94-1-AR72 (Oct. 2, 1995) (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), the appeals chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.

Id. at para. 70.

10. In the context of the *Tadic* case, the appeals chamber ruled that there was an armed conflict because “There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups.” *Id.*

11. The ICTY has consistently used the definition laid out by the appeals chamber in *Tadic* to

determine the existence of an armed conflict. *See Prosecutor v. Kunarac, Kovac & Vukovic*, No. IT-96-23, para. 56 (June 12, 2002) (Appeals Chamber Judgment); *Prosecutor v. Jelusic*, No. IT-95-10-T, paras. 29, 30 (Dec. 14, 1999) (Trial Chamber Judgment); *Prosecutor v. Furundzija*, No. IT-95-17/1, para. 59 (Dec. 10, 1998) (Trial Chamber Judgment); *Prosecutor v. Delalic, Mucic, Delic, & Landzo*, No. IT-96-21-T, para. 185 (Nov. 16, 1998) (Trial Chamber Judgment).

12. The International Tribunal for Rwanda (ICTR) has employed a similar analysis when determining the existence of an armed conflict. *See Prosecutor v. Akayesu*, No. ICTR-96-4, para. 620 (Sept. 2, 1998) (Judgment) (stating that it is “necessary to evaluate both the intensity and organization of the parties to the conflict.”).

13. Article 8(2)(f) of the Rome Statute of the International Criminal Court (ICC Statute) likewise provides for jurisdiction over war crimes committed in “armed conflicts not of an international character,” which excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” ICC Statute, art. 8(2)(f), U.N. Doc. A/CONF. 183/9, July 18, 1998, as amended through Jan. 16, 2002, *entered into force* July 1, 2002.

14. Professor Dietrich Schindler has summarized the distinction between internal armed conflict and internal disturbances as turning on four conditions:

In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under responsible command and be capable of meeting humanitarian requirements. Accordingly, the conflict must show certain similarities to a war without fulfilling all conditions necessary for the recognition of belligerency.

Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* 163 (1979).

II. CLEARLY DEFINED AND WIDELY ACCEPTED CUSTOMARY INTERNATIONAL LAW NORMS PROHIBIT EXTRAJUDICIAL KILLINGS, INCLUDING THE ILLEGAL OR EXCESSIVE USE OF FORCE BY BOTH LAW ENFORCEMENT AND MILITARY FORCES.

15. Clearly defined and widely accepted customary law norms prohibit extrajudicial killing.

16. Various instruments of international human rights law and the decisions of their

corresponding adjudicatory bodies have clarified the specific content of the norms against extrajudicial killing. Jurists and commentators on international law have long condemned extrajudicial killing.

17. William Blackstone, writing in 1765, observed that life, as the “immediate donation of the Great Creator,” could not “legally be disposed of or destroyed by any individual . . . merely upon their own authority.” William Blackstone, 1 Commentaries on the Laws of England 133. States whose constitutions “vest[ed] in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject” were to be considered “in the highest degree tyrannical.” *Id.*

18. The clearly defined and widely accepted nature of the norm against extrajudicial killing is established by a wide panoply of international law sources, including commentary, treaties, authoritative interpretations, international courts, and regional courts. For example, the International Covenant on Civil and Political Rights (Civil and Political Covenant), Dec. 16, 1996, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, guarantees that one’s right to life “shall be protected by law” and that “[n]o one shall be arbitrarily deprived of his life.” *Id.*, art. 6(1). The prohibition on extrajudicial killing is fully obligatory, as it is listed among those norms that are non-derogable, even in exceptional circumstances. *Id.*, art. 4(2). The Covenant (which has been ratified by 160 countries, including the United States) is one of the useful reference points to determine whether a tort has been “committed in violation of the law of nations” under the ATS – or to use more modern terminology – customary international law. *See, e.g. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 n.66 (2006) (plurality op.) (referencing the Civil and Political Covenant as source for fundamental trial protections recognized by customary international law).

19. The Human Rights Committee, which was established to monitor compliance with the Civil and Political Covenant, has repeatedly found Article 6 violations in cases of extrajudicial execution. *See, e.g., Vicente et al. v. Colombia*, Comm. No. 612/1995, para. 8.3 (finding the state responsible for a violation in the case of forced disappearance and subsequent murder). The U.N. General Assembly has also consistently expressed concern regarding instances of extrajudicial executions. For examples, *see* David Weissbrodt, *Principles Against Execution*, 13 Hamline L. Rev. 579, 582 & n.15 (1990) (citing several resolutions).

20. In 1989, the U.N. Economic and Social Council adopted Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Principle 1 of

which declares that governments shall outlaw “all extra-legal, arbitrary and summary executions.”

21. The Special Rapporteur has consistently found violations of the prohibition on extrajudicial killings in cases in which individuals were killed by state agents with no judicial proceedings whatsoever. *See, e.g.*, Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, paras. 64-61, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992); Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, paras. 54-67, U.N. Doc. E/CN.4/1993/46 (Dec. 23, 1992); Report by the Special Rapporteur, Extrajudicial, Summary or Arbitrary Executions, para. 9, U.N. Doc. E/CN.4/2005/7 (2004).

22. Decisions of international bodies have consistently held that intentional killings by state actors in the absence of any judicial process violate international law. *See, e.g.*, *Vicente et al. v. Colombia*, Comm. No. 612/1995, para. 8.3 (Human Rights Committee); *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples’ Rights, Comm. No. 25/89, 47/90, 56/91, 100/93, para. 43 (1995); InterAmerican Court of Human Rights, *Case of Myrna Mack Chang*, Judgment of Nov. 25, 2003, Series C, No. 101; *Khashiyev and Akayeva v. Russia*, Nos. 57942/00 and 57945/00, 24 Feb. 2005, [2005], European Commission on Human Rights 132.

23. Article 4 of the African Charter on Human and Peoples’ Rights provides: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58. The African Commission has explicitly held that extrajudicial executions violate Article 4 of the African Charter. *See, e.g.*, *Free Legal Assistance Group and Others v. Zaire*, African Commission on Human and Peoples’ Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), para. 43.

24. Similarly, Article 4 of the American Convention on Human Rights guarantees that the right to life “shall be protected by law” and that “[n]o one shall be arbitrarily deprived of his life.” American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, *entered into force* July 18, 1978. The Inter-American Court on Human Rights has found that killings by state agents occurring outside the bounds of the judicial process violate the right to life. In *Myrna Mack Chang v. Guatemala*, the Court deemed an assassination conducted by state agents an “extra-legal execution” that violated the right to life. 2003 Inter-Am. Ct. H.R. (ser. C) No. 101,

paras. 138–58 (Nov. 25, 2003). In *Bamaca-Velasquez v. Guatemala*, the Court inferred from the victim’s disappearance and the state’s practice of extrajudicial executions that Article 4 was violated. 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, paras. 173–75 (Nov. 25, 2000). *See also Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, para. 157 (July 29, 1988) (calling a secret execution without trial a “flagrant violation of the right to life”).

25. The European Convention on Human Rights stipulates in Article 2 that the right to life “shall be protected by law” and provides: “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998, *respectively*. The European Court of Human Rights has found violations of the Article 2 “right to life” guarantee in cases of killings by state agents absent any judicial process. For example, in *Khashiyev v. Russia*, [2005] E.C.H.R. 132, the Court held that Russia was guilty of a right to life violation for the killing of civilians at or near their homes by Russian soldiers. *See id.* para. 147; *see also Estamirov and Others v. Russia*, [2006] E.C.H.R. 860, para. 114 (finding an Article 2 violation stemming from an attack by Russian soldiers of a family in its home).

26. In the context of an armed conflict, the intentional killing of civilians would also violate the laws of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has considered “willful killing” to be a grave breach of the Geneva Conventions; it has also considered the crime of “murder” as an element of crimes against humanity. *See* Statute for the International Criminal Tribunal for the Former Yugoslavia, arts. 2, 5, May 25, 1993, 32 I.L.M. 1192 (1993); *see also* Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1, 44 (2006) (noting that the ICTY has prosecuted “extrajudicial executions of prisoners” which have “long been proscribed by the laws of war”). In the *Srebrenica* case, the ICTY noted that “[m]urder has consistently been defined by the ICTY and the ICTR as the death of the victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death.” *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, para. 485 (Aug. 2, 2001). The Tribunal concluded that the summary executions

committed at Srebrenica fit within the definition of “murder.” *Id.* paras. 486–89. The Trial Chamber has treated “willful killing” and “murder” similarly. *See Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, paras. 421–23 (Nov. 16, 1998); *see also Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgment, para. 381 (Sept. 1, 2004) (observing that the elements of “murder” as an element of crimes against humanity and “willful killing” as a grave breach of the Geneva Conventions are the same). Included in the concept of willful killing is an analysis of the risk taken, taking into account the weapons used and the position of the accused in relation to the victim, with a proscription on excessively risking human life. *Delalic*, para. 436.¹ The ICTY Appeals Chamber has referred to its standard for “willful killing” and “murder” in relation to the broader international protections for the right to life. *See Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Judgment, para. 106 (Dec. 17, 2004) (“With respect to the charges of willful killing, murder, causing serious injury, and inhuman treatment, the Appeals Chamber considers that the inherent right to life and to be free from cruel, inhuman or degrading treatment or punishment is recognized in customary international law and is embodied in Articles 6 and 7 of the ICCPR, and Articles 2 and 3 of the ECHR.”).

27. The ICTR sets out the same elements for murder, which it calls the “unlawful, intentional killing of a human being.” *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 589 (Sept. 2, 1998). The elements are: (a) the victim is dead; (b) the death resulted from an unlawful act or omission of the accused or a subordinate; (c) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim’s death, and is reckless whether death ensues or not. *Id.*

28. Thus, “it is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law” except under exigent circumstances as might apply to police officials in line of duty in defense of themselves or of other innocent persons. Restatement (Third) of Foreign Relations Law of the United States §702, comment f. Section IV, *infra*, discusses the customary norm limiting the use of deadly force by law enforcement officials.

¹ This point is especially relevant in the context of right to life violations and excessive use of force. *See* Section IV, *infra*.

III. CLEARLY DEFINED AND WIDELY ACCEPTED CUSTOMARY INTERNATIONAL LAW NORMS PROHIBIT CRIMES AGAINST HUMANITY.

29. There are clearly defined and widely accepted customary law norms which prohibit crimes against humanity.

30. Various instruments of international human rights law and the decisions of their corresponding adjudicatory bodies have clarified the specific content of the norms against crimes against humanity. Jurists and commentators on international law have long condemned crimes against humanity.

31. Customary international law has condemned crimes against humanity for at least the last half century. Crimes against humanity are deemed to be part of *jus cogens* – those legal norms so fundamental that they are non-derogable. See Cherif Bassiouni, *Crimes Against Humanity*, in *Crimes of War: What the Public Should Know*, (Roy Gutman & David Rieff, eds., W.W. Norton 1999).

32. The term “crimes against humanity” originated in the 1907 Hague Convention preamble, which codified the customary law of armed conflict.

33. In 1945, the Allied Powers drafted the Nuremberg Charter for the International Military Tribunal, and enacted Control Council Law No. 10, which condemned crimes against humanity and set forth basic definitional requirements. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 (1945) (Nuremberg Charter); Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) (Control Council Law No. 10). These doctrines were reaffirmed in the Nuremberg Principles, drafted in 1950 by the International Law Commission at the request of the U.N. General Assembly. Report of the International Law Commission to the General Assembly, U.N. GAOR, 5th Sess., Supp. No. 12, at 1, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 364, 374-378.

34. Since World War II, other international instruments have condemned crimes against humanity. The United Nations issued repeated statements confirming the international community’s position on the subject. In 1946, General Assembly Resolution 3 specifically called for the punishment of those responsible for crimes against humanity, by reference to the Nuremberg Charter. G.A. Res. 3(I), U.N. Doc. A/OR/1-1/R (Feb. 13 1946), available at

<http://daccess-ods.un.org/TMP/4935496.html>. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity noted that “war crimes and crimes against humanity are among the gravest crimes in international law.” G.A. Res. 2391 (XXIII), preamble, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970.

35. Crimes against humanity are well-defined. The Nuremberg Tribunals established that crimes against humanity encompass “atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds.” Control Council Law No. 10, art. II(1)(c), *quoted in United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1191 (1949).

36. As the Tribunal noted, Control Council Law No. 10 is a “statement of international law which previously was at least partly uncodified.” *Flick*, 6 Trials at 1189. Time and again, the international community has defined crimes against humanity in virtually identical terms to those used in Control Council Law No. 10. *See, e.g.*, The Statute of the Iraqi Special Tribunal, (Dec. 10, 2003) available at www.cpa-iraq.org/human_rights/statute.htm; ICC Statute, art. 7, U.N. Doc. A/CONF/183/9 (July 17, 1998); Statute of the International Tribunal for Rwanda, U.N. SCOR 49th Sess., art. 3, U.N. Doc. S/RES/995 (Nov 8, 1994) [hereinafter the Statute of the ICTR]; Statute of the ICTY, *supra*, n.8, art. 7; Nuremberg Charter, *supra*, n.8, art.

37. The “civilian population” requirement is fulfilled by “either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident.” *Tadic*, Case No. IT-94-1-T, at 648. The notion of widespread abuses includes the cumulative effect of a series of inhumane acts. *Prosecutor v. Rutuganda*, Case No. ICTR-96-3-T, Judgment and Sentence, para.65 (Dec. 6 1999).

38. The ICTY has held that “a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility, and an individual need not commit numerous offences to be held liable.” *Tadic*, Case No. IT-94-1-T, at para. 649.

IV. CLEARLY DEFINED AND WIDELY ACCEPTED CUSTOMARY INTERNATIONAL LAW NORMS PROTECT THE RIGHT TO LIFE, LIBERTY AND SECURITY OF PERSON.

39. There are clearly defined and widely accepted customary law norms which protect the right to life liberty, and security of person and limit the use of force by law enforcement and military officials.

40. The rights to life, liberty and personal security are the most fundamental of all human rights that are protected under international law. They have their roots in natural law, first articulated in positive law in the English Magna Carta (1215) (“No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.”).

41. The right to life, liberty, and security is recognized in virtually every international instrument dealing with civil and political human rights. *See, e.g.*, Universal Declaration of Human Rights, art. 3 *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), *reprinted in* 43 Am. J. Int’l. L. Supp. 127 (1949) (guaranteeing “life, liberty and security of person”); Civil and Political Covenant, art. 6 (guaranteeing right to life), art. 9 (providing that liberty and security of person are treated concurrently with the prohibition of arbitrary arrest or detention); African Charter on Human and Peoples’ Rights, art. 4, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 (guaranteeing “respect for his life and integrity of his person” and prohibiting arbitrary deprivation of that right); American Convention on Human Rights, art. 4, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (guaranteeing “the right to have his life respected” and prohibiting the arbitrary deprivation of life); European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 2, 5, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 *which entered into force through* 1 November 1998 (guaranteeing the right to life, which shall be protected by law, and the right to liberty and security of person); American Declaration of the Rights and Duties of Man, art. I, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human

Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) and *reprinted in* 43 Am. J. Int'l. L. Supp. 127 (1949) (hereinafter "American Declaration")

42. The right to life is not concerned only with instances of intentional killing but also limits the use of force which may, as an unintended outcome, result in the deprivation of life. *McCann and Others v. United Kingdom*, European Court of Human Rights 17/1994/464/545 (1995), para. 148. As a result, the planning and control of a law enforcement operation must be done so as to "minimise, to the greatest extent possible, recourse to lethal force." para. 194

43. There is a clear international consensus that certain definable acts exceed international limits on the amount of force that can permissibly be used, in particular, against peaceful demonstrators. Such acts include the use of force that is not strictly necessary and the lethal use of firearms that is not strictly unavoidable in order to protect life. We are aware of no state that claims the right to use force in excess of those limits.

44. The *Restatement (Third) of Foreign Relations Law* affirms that the right to life is widely recognized to limit the scope of police officers' permissible use of force. As the Restatement notes, killings by police officers are prohibited by the customary right to life unless "necessary under exigent circumstances, for example . . . in defense of [the officer] or other innocent persons, or to prevent serious crime." § 702 comment f (1987).

45. Violations of the norms limiting the use of force are condemned in and defined by international agreements and other international norm-setting instruments. In particular, the prohibitions contained in the United Nations Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979) ("Code of Conduct"), and its Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990) ("Basic Principles"), reflect the universal consensus regarding the use of force by law enforcement officers. The Code of Conduct applies to "all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention," and provides that "[i]n countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services." Code of Conduct, art. 1(a)-(b).

46. The limits placed by international law on the permissible use of force are definable, and

preclude the use of force (particularly but not exclusively lethal force) against non-violent, unarmed protestors. Article 3 of the Code of Conduct states that “law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.” The requirements of strict or absolute necessity and proportionality are universally recognized principles of international law.

47. The commentary to Article 3 of the Code of Conduct reiterates the specific prohibition under international law on the use of firearms in all cases except those immediately threatening human life:

The use of firearms is an extreme measure. Every effort should be made to exclude the use of firearms. . . . [F]irearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of the others and less extreme measures are not sufficient to restrain or apprehend the offender.

Code of Conduct, art. 3 commentary.

48. The Basic Principles note that “law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights and reaffirmed in the International Covenant on Civil and Political Rights.” Basic Principles, Preamble.

49. Universally-recognized standards also specifically regulate the use of firearms by law enforcement officers. Principle 9 of the Basic Principles reflects a clear international consensus on this issue, and thus further defines the content of the customary norm stated in Article 3 of the Code of Conduct:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Basic Principles, Principle 9.

50. To further limit the use of firearms, Principle 10 of the Basic Principles mandates that: in the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so

would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

Basic Principles, Principle 10.

51. Customary international law recognizes that these principles limiting the use of force fully apply when law enforcement officers seek to suppress non-violent assemblies. This norm is expressed in Principle 13 of the Basic Principles, which states that when dispersing assemblies, force must be avoided or, if that is not possible, used only to the minimum extent necessary. Indeed, Principle 14 makes clear that even if the assembly is violent, firearms may be only be used when “less dangerous means are not practicable and only to the minimum extent necessary,” and such use must accord with Principle 9.

52. In sum, the use of unnecessary or disproportionate force, the use of firearms where not strictly necessary to protect life, and the planning of law enforcement operations without adequately ensuring that these first two requirements will be respected all violate clearly defined and widely accepted norms of international law protecting the right of life, liberty, and security of person.

V. CLEARLY DEFINED AND WIDELY ACCEPTED CUSTOMARY INTERNATIONAL LAW NORMS PROTECT THE RIGHT TO ASSEMBLY AND OF ASSOCIATION AND RESTRICT THE USE OF FORCE BY LAW ENFORCEMENT AND MILITARY OFFICIALS AGAINST NON-VIOLENT PROTESTERS.

53. The rights to peaceful assembly and expression free from violent dispersal are clearly defined and widely accepted norms of customary international law. Universal Declaration of Human Rights of 1948, art. 20; Civil and Political Covenant, arts. 19, 21; American Declaration of the Rights and Duties of Man, art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 10, 11; African [Banjul] Charter on Human and Peoples’ Rights, art. 11.

54. Assembly and expression are necessary to permit individuals to vindicate other basic international human rights, such as the right of a people not to “be deprived of its own means of subsistence.” *See* Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental

Freedoms, arts. 5, 12, G.A. Res.53/144, annex, 53 U.N. GAOR Supp., U.N. Doc. U.N. Doc. A/RES/53/144 (1999).² *See also* Civil and Political Covenant, art. 1(2); International Covenant on Economic, Social and Cultural Rights, art. 1(2) G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. Accordingly, the right to expression must be rigorously protected.

55. The killing or assaulting of non-violent protestors, even if their protest were to be illegal, necessarily has a chilling effect on the freedom of association and expression that would be very difficult to overstate. Similarly the killing or assaulting of non-violent protestors, even if their protest were to be illegal, violated the rights to life and security of person as described above in Section III.

56. The freedom of association is universally recognized to prohibit the shooting of peaceful protestors, even where their protest is illegal under domestic law. *See, e.g.* United Nations Security Council Resolution 134, U.N. Doc S/RES/134 (Apr. 1, 1960) (“Having considered. . . the situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa . . . *Deplores* that the recent disturbances in the Union of South Africa should have led to the loss of life of so many Africans . . . [and] *Deplores* the policies and actions of the Union of South Africa which have given rise to the present situation.”).

57. Principle 12 of the Basic Principles acknowledges that the limits on the use of force which protect even those persons engaged in non-violent but illegal protests specifically protect the freedom of association:

As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with [international law], Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

Basic Principles, Principle 12.

58. In sum, the violent dispersal of peaceful protestors, even where the protest violates local law, is a violation of customary international law.

² Article 5 provides: “For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) to meet or assemble peacefully.” Article 12 provides: “Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.”

VI. CLEARLY DEFINED AND WIDELY ACCEPTED CUSTOMARY INTERNATIONAL LAW NORMS RECOGNIZE CLAIMS MADE ON THE BASIS OF SECONDARY LIABILITY.

59. Customary international law provides for secondary liability, including liability for aiders and abettors to parties that violate international norms, and for commanders responsible for their subordinates' violations of international norms.

A. SECONDARY LIABILITY FOR AIDING AND ABETTING IS WELL-ESTABLISHED IN CUSTOMARY INTERNATIONAL LAW.

60. From the Nuremberg tribunals to the recent case law of the ICTY and ICTR and the statute of the International Criminal Court (ICC), the notion of individual responsibility for violations of international law and the various kinds of conduct that can give rise to such responsibility are well-established, and form part of customary international law. Several activities may give rise to individual responsibility under customary international law, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of a crime. Indeed, the focus of international criminal law has been on those individuals who assist the actual perpetrators in committing their crimes. *See* William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 Int'l Rev. Red Cross 439, 440 (2001) ("International penal repression, dating from its early manifestations at Nuremberg and Tokyo to the contemporary tribunals, has focused not so much on the 'principal' perpetrator – that is, the concentration camp torturer or front-line executioner – as on the leaders who are, technically speaking, 'mere' accomplices.").

61. Secondary liability is essential to the enforcement of international law because it ensures that individuals who facilitate the commission of a crime are held accountable.

Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or village, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

Prosecutor v. Tadic, Case No. IT-94-1-A, para. 191 (ICTY Appeals Chamber July 15, 1999).

62. At the end of World War II, the Allied Powers adopted Control Council Law No. 10, which authorized the prosecution of persons guilty of war crimes, crimes against peace, and

crimes against humanity. The law imposed liability on any person who was: (a) a principal; (b) an accessory to the commission of any crime or ordered or abetted the same; or (c) took a consenting part; or (d) was connected with plans or enterprises involving its commission; or (e) was a member of any organization or group connected with the commission of any such crime. Control Council Law No. 10, art. II(2).

63. Several decisions issued by the United States Military Tribunals established pursuant to Control Council Law No. 10 held individuals liable for aiding and abetting violations of international law. In *United States v. Krauch*, for example, the Military Tribunal indicated that personal criminal liability for war crimes is not limited exclusively to active participation. *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1081 (1952). Rather, liability could be established in several ways, including if a defendant abetted in illegal activities. *Id.* at 1137.

64. More recently, the Statutes of the ICTY and ICTR establish that a variety of conduct may give rise to individual responsibility, including planning, instigating, ordering, committing or otherwise aiding or abetting in the planning, preparation, or execution of a crime. *See* ICTY Statute, at art. 7(1); ICTR Statute, at art. 6(1).

65. Cases decided by the ICTY and ICTR have elaborated on the various forms of conduct that give rise to individual criminal liability, including aiding and abetting. In *Prosecutor v. Furundzija*, Case No. IT-95-17/1-PT (ICTY Dec. 10, 1998), for example, the Trial Chamber for the International Criminal Tribunal for the former Yugoslavia indicated that “not only the commission of rape or serious sexual assault, but also the planning, ordering or instigating of such acts, as well as aiding and abetting in the perpetration, are prohibited.” *Id.* at para. 187. *See also* *Prosecutor v. Tadic*, at para. 229 (To be liable as an aider and abettor, one must “carr[y] out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime . . . and this support [must have] a substantial effect upon the perpetration of the crime.”); *Prosecutor v. Galic*, Case No. IT-98-29 (ICTY Dec. 5, 2003) (“‘Aiding and Abetting’ means rendering a substantial contribution to the commission of a crime.”); *Prosecutor v. Krnojelac*, Case No. IT-97-25 (ICTY Sept. 17, 2003). After a comprehensive review of international law, the Trial Chamber indicated that “the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. . . . Moreover, it is not necessary that the aider and abettor should

know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.” *Id.* at para. 246.

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence.

Id. at para. 249. As the Trial Chamber emphasized, *quis per alium facit per se ipsum facere videtur* – he who acts through others is regarded as acting himself. *Id.* at para. 256.

66. In *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Sept. 2, 1998), the Trial Chamber for the ICTR held that an individual “can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.”³ *Id.* at para. 472. The Trial Chamber in *Akayesu* stated that, “Aiding means giving assistance to someone. . . . [I]t is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.” *Id.* at para. 484. The Trial Chamber emphasized that the accomplice need not even wish that the principal offense be committed. “[A]nyone who knowing of another’s criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.” *Id.* at para. 539.

67. The ICC Statute contains similar provisions that establish individual responsibility for various forms of participation, including aiding and abetting. Article 25(c), for example, provides that a person shall be criminally responsible if that person aids, abets, or otherwise assists in the commission or attempted commission of a crime within the Court’s jurisdiction. Like the case law of the international tribunals, Article 25 makes clear that aiding and abetting is a well-established form of individual liability. *See generally* The Rome Statute of the International Criminal Court: A Commentary 798-801 (Antonio Cassese, et al., eds., 2002); Commentary on the Rome Statute of the International Criminal Court 481-483 (Otto Triffter ed., 1999).

³ *See also Prosecutor v. Rutaganda*, Case No. ICTR-96-3-I (ICTR Dec. 6, 1999).

B. THE DOCTRINE OF COMMAND RESPONSIBILITY IS WELL-ESTABLISHED IN CUSTOMARY INTERNATIONAL LAW.

68. The doctrine of command responsibility is well-established in customary international law. See *The Prosecutor v. Kayishama*, 1995 ICTR, Case No. ICRR 95-1 (June 25, 1999) para. 209, p. 28 (“The principle of command responsibility is firmly established in international law.”) (citing *the Prosecutor v. Delalic*, ICTY, Case No. IT-96-21-T (Nov. 16, 1988), art. 6(3) and art. 28 of the Statute of the International Criminal Court); *The Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14-T, para. 322, p. 69 (stating that command responsibility became the international standard after World War II if the commander “should have had knowledge” that his subordinates were about to or had committed war crimes).

69. As the first international war crimes tribunal since the Nuremberg and Tokyo Trials in the aftermath of World War II, the U.N.-sponsored International Criminal Tribunal for the Former Yugoslavia (“ICTY”) is the foremost modern forum for command responsibility cases. The ICTY was established in 1993 by the United Nations Security Council to prosecute individuals charged with serious violations of international humanitarian law in the former Yugoslavia.

70. The ICTY Statute explicitly codifies a three-prong standard for command responsibility, requiring: i) a superior-subordinate relationship; ii) the superior “knew or had reason to know that the subordinate was about to commit [a crime] or had done so”; and iii) “the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” ICTY Statute, art. 7(3).

71. The ICTR Statute and the ICC Statute similarly codify a three-prong standard. The Statute of the International Criminal Tribunal for Rwanda states that:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute [genocide, crimes against humanity, and violations of Common Article Three] was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

ICTR Statute, art. 6(3).

72. Article 28 of the ICC Statute likewise defines the scope of liability for commanders and superiors:

(a) A military commander or person effectively acting as a military commander shall be

criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

73. In their case law, the ICTY and the ICTR have duly applied the three-prong test for command responsibility set out in their Statutes. (To date the ICC has yet to generate case law.) In *The Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T (Nov. 16, 1998), the ICTY's first major command responsibility case, the tribunal held the warden of a prison camp criminally responsible for the atrocities he allowed his subordinates to commit. Applying its Statute, the tribunal noted:

It is thus possible to identify the essential elements of command responsibility for failure to act as follows:

(i) the existence of a superior-subordinate relationship;

(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Id. at para. 346.

74. A commander need not have known of the crime at issue in order to be held liable under the command responsibility doctrine. According to *Delalic*, the knowledge prong is satisfied

when a commander “had in his possession information of a nature, which at the least, would put him on notice of the risk of such [crimes] by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.” *Delalic*, para. 383, p. 57-58. The absence of knowledge is not a defense if the commander “knew, or should have known, by use of reasonable diligence of the commission of atrocities by his subordinates.” *Id.* para. 389, p. 60 (quoting *United States v. Soemu Toyoda*, p. 5006, *The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East*, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 20 (Garland Publishing: New York & London, 1981)) (internal quotations omitted).

75. ICTY command responsibility cases since *Delalic* have applied the same three-prong command responsibility test, and have explicated it further. *See, e.g., The Prosecutor v. Aleksovski*, para. 69, p. 16 ; *The Prosecutor v. Tihomir Blaskic*, ICTY, Case No. IT-95-14-T, para. 294 (Mar. 3, 2000). For example, the *Alesovski* judgment points out that whether a commander took “appropriate steps” to prevent atrocities committed by subordinate troops is a factual question, dependent on the circumstances of each case. Therefore, the detailed answer must vary from case to case.

76. The *Blaskic* case illustrates that a commander may not avoid responsibility with evidence of measures that he knew would be ineffective, or that troops would not take seriously. *See Blaskic*, para. 487, p. 102 (stating that issuing “preventive” orders after an order to attack vitiated any preventive effect the order could have had and thus subordinates “clearly understood that certain types of illegal conduct were acceptable and would not lead to punishment”). A commander must have a reasonable expectation that his actions would prevent atrocities, and may not avoid command responsibility by taking facially preventive measures. *See id.* at para. 487, p. 102 and para. 561, at p. 165; *cf. Hirota*, *The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East*, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 20 (Garland Publishing: New York & London, 1981) (finding criminally negligent Japanese Foreign Minister Hirota’s reliance “on assurances which he knew were not being implemented while hundreds of murders, violations of women and other atrocities were being committed daily” in the Rape of Nanking).

77. Though the customary international law norm that a commander can be held responsible for the acts of his or her subordinates developed in the context of liability for violations of the laws of war and was originally limited in application to war crimes in the context of international armed conflicts, *see* Additional Protocol I, Articles 86 and 87, the principle has come to be applied with respect to substantive crimes other than violations of the laws of war.

78. The ICTY Statute requires that crimes against humanity be “committed in armed conflict,” but includes no such requirement for genocide. ICTY Statute, art. 5. The subsequent ICTR and ICC Statutes include no requirement that crimes against humanity be committed in armed conflict. ICTR Statute, art. 3; ICC Statute, art. 7. As noted above, all of the statutes provide that commanders may be held liable for the crimes of their subordinates, including genocide and crimes against humanity.

79. The ICTY trial chambers have concluded that the Article 7(3) principle of individual criminal responsibility of superiors for their failure to prevent or repress the crimes committed by subordinates formed part of customary international law at the time of the commission of the offenses charged in the indictment against the accused. *See Prosecutor v. Blaskic*, Case No IT-95-14-PT, Decision on Defence Motion to Strike Portions of the Amended Indictment Alleging “Failure to Punish” Liability, Apr. 4, 1997, paras. 6-11, 17; *Prosecutor v. Kordic and Cerkez*, Case No IT-95-14/2-PT, Decision on Joint Defence Motion to Dismiss for Lack of Jurisdiction Portions of the Amended Indictment Alleging “Failure to Punish Liability,” Mar. 2, 1999, paras. 9-16; *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39, PT, Decision on Motion Challenging Jurisdiction - With Reasons,” Sept. 22, 2000, para. 19-24; *see also Prosecutor v. Delalic et al.*, Judgment, Case No. IT-96-21-A, 20 Feb. 2001, paras. 195, 231, 235. These decisions, which confirm that command responsibility is a principle of customary international law, were not limited to violations of the laws of war.

80. The ICTR Statute, which includes no requirement that crimes against humanity be committed in armed conflict, contains a provision on superior responsibility that is applicable and has been applied to such crimes. The ICTR Statute, together with ICTR judgments in which the accused were convicted for genocide and crimes against humanity on the basis of the principle of superior responsibility confirm that under contemporary international criminal law this principle applies beyond the context of violations of the laws of war. *See Prosecutor v. Kambanda*, Judgment and Sentence, ICTR Case No. 97-23-S, Sept. 4, 1998; *Prosecutor v.*

Musema, Judgment and Sentence, Case No. ICTR-96-13-T, Jan. 27, 2000; *Prosecutor v. Omar Serushago*, Judgment, Case No. ICTR 98-39-S, 5 February 1999; *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, 21 May 1999.

81. Thus, it is not the case that a commander may only be held responsible for the acts of his or her subordinates in the context of war crimes or crimes committed during armed conflict. Indeed, through the statutes and jurisprudence of the ICTY and ICTR, the principle of command responsibility has been applied in relation to a wide range of international crimes, including war crimes, crimes against humanity and genocide. *See also* International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, comments to arts. 2, 6 (1996) available at http://untreaty.un.org/ilc/texts/7_4.htm (reviewing international jurisprudence and concluding that command responsibility extends to crimes against humanity, genocide and war crimes).

VII. UNDER INTERNATIONAL LAW, EXHAUSTION OF DOMESTIC REMEDIES IS EXCUSED WHEN AVAILABLE REMEDIES DO NOT PROVIDE AN EFFECTIVE MEANS OF REDRESS OR ARE FUTILE.

82. It is a well-recognized rule in international law that “that local remedies must be exhausted before international proceedings may be instituted.” Restatement (Third) of the Foreign Relations Law of the United States § 713 cmt. c (1986).

83. Under the rules governing exhaustion, a claimant is only required to have recourse to remedies which are capable of providing effective means of redress. *Nielsen v. Denmark*, Application 343/57 (1959) in 2 Yearbook of the European Convention on Human Rights 412 (1958-1959).

84. Among the instances in which recourse to a domestic forum may be rendered futile are when the local court has no jurisdiction over the issue and when the available remedies will not provide the relief sought by claimant. *See* Hittharanjan Amerasinghe, Local Remedies in International Law 325-346 (2nd ed., 2004). *See also* Restatement (Third) of the Foreign Relations Law of the United States § 713 reporter’s note 5 (1986).

85. These and other exceptions to the exhaustion rule are reflected in the decisions of numerous international tribunals and adjudicatory bodies. *See, e.g., Ambatielos Claim (Greece v. U.K.)*, 12 R.I.A.A. 91, 119-120 (1956); *Panevezys-Salduiskis Railway Case (Estonia v.*

Lithuania), P.C.I.J., ser. A/B, No. 76 at 18 (1939); *see also Finnish Ships Case*, 3 R.I.A.A. 1495, 1504 (1934); *Prince v. Jamaica*, U.N. Human Rights Committee Communication No. 269/1987 (Oct. 19, 1989) in Reports of the Human Rights Committee 242 (1992), U.N. Doc. A/47/40 (1994).

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I declare that under penalty of perjury that the foregoing is true and correct.

Signed:  Dated: June 17, 2008

Lithuania), P.C.I.J., ser. A/B, No. 76 at 18 (1939); see also *Finnish Ships Case*, 3 R.I.A.A. 1495, 1504 (1934); *Prince v. Jamaica*, U.N. Human Rights Committee Communication No. 269/1987 (Oct. 19, 1989) in Reports of the Human Rights Committee 242 (1992), U.N. Doc. A/47/40 (1994).

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Signed:  Dated: June 19, 2008

APPENDIX

Roger Clark, who holds an LL.M. and a J.S.D. from Columbia as well as graduating B.A., LL.B., LL.M., LL.D. from Victoria University in New Zealand, is a prolific scholar in international law and human rights and criminal law. A member of the United Nations Committee on Crime Prevention and Control between 1986 and 1990, he has authored or co-authored over a hundred articles and ten books. The most recent books are *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (2004), *INTERNATIONAL AND NATIONAL LAW IN RUSSIA AND EASTERN EUROPE: ESSAYS IN HONOR OF GEORGE GINSBURGS* (2001) and *THE CASE AGAINST THE BOMB* (1996). In 1995 and 1996 he represented the Government of Samoa in arguing the illegality of nuclear weapons before the International Court of Justice in The Hague. In the past few years he has represented Samoa in the negotiations at the United Nations to create a permanent international criminal court. Professor Clark teaches Criminal Law, International Law, Foreign Relations and National Security Law, and International Criminal Law.

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In 1996, Professor Weissbrodt was elected and in 2000 he was re-elected by the U.N. Commission on Human Rights to serve as a member of the U.N. Sub-Commission on the Promotion and Protection of Human Rights. In 2001-02, he became the first United States citizen since Eleanor Roosevelt to head a United Nations human rights body when he served as chairperson for the U.N. Sub-Commission on the Promotion and Protection of Human Rights. He was designated the U.N. Special Rapporteur on the rights of non-citizens from 2000-03. In July 2005, he was designated as one of twenty Regents Professors at the University of Minnesota and the first Regents Professor from the Law School.