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Clerk
District Court

MAY 11 2001

For The Northern Mariana Islands
By _____
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

JUYEL AHMED, et al., Plaintiffs, v. ROBERT GOLDBERG, in his personal capacity, UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, and DOES 1-25 Defendants.	)	Civil Action No. 00-0005 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT UNITED STATES' MOTION TO DISMISS SECOND AMENDED COMPLAINT AND DENYING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
RUI LIANG, et al., Plaintiffs, v. ROBERT GOLDBERG, in his personal capacity, UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, and DOES 1-25, Defendants.	)	Civil Case No. 99-0046

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Ahmed v. Goldberg, Civil Action No. 00-0005, came before the Court on December 7, 2000, for hearing on (1) Motion of Defendant United States of America, to Dismiss Second Amended Complaint for Injunctive, Declaratory, and Further Relief ("SAC"), and (2) Plaintiffs' Cross-Motion for Partial Summary Judgment Against United States.[1] Bruce Jorgensen appeared for plaintiffs. Gretchen Wolfinger and Cindy Ferrier of the United States Office of Immigration Litigation, and Assistant United States Attorney Gregory Baka appeared on behalf of the United States.

Upon consideration of the written and oral argument of counsel, the Court hereby GRANTS IN PART and DENIES IN PART defendant United States' Motion to Dismiss as follows: counts four and five (asylum and torture protection) are dismissed and plaintiffs are granted leave to amend consistent with this Order; counts nine (concealment), ten (emotional distress) and eleven (estoppel) are dismissed and plaintiffs are granted leave to amend; counts twelve (punitive damages) and thirteen (joint and several liability) are dismissed with prejudice.[2] The Court DENIES plaintiffs' Cross-Motion for Partial Summary Judgment.

DEFENDANT UNITED STATES' MOTION TO DISMISS`

Defendant United States moves to dismiss counts four, five, nine, ten, eleven, twelve and thirteen of the SAC on the following grounds: (1) the counts for asylum, torture protection and estoppel are not pled with sufficient particularity to provide defendants with fair notice of the

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[1]Defendant filed its motion to dismiss in Ahmed v. Goldberg prior to consolidation of the Ahmed case with Liang v. Goldberg, Civ. No. 99-0046.

[2]Defendant contends, and the Court agrees, that the other counts in the complaint are not directed against the United States. Plaintiffs have made no argument to the contrary.

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bases upon which plaintiffs rest their claims; (2) the SAC fails to state a claim upon which relief can be granted; and (3) the claims for concealment, emotional distress, punitive damages and joint and several liability are barred by sovereign immunity.

In ruling on a motion to dismiss, all allegations of material fact are to be construed as true and the court should not dismiss a plaintiff's claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997). "The Supreme Court has explained that it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test. In reviewing the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. at 249 (internal quotation marks and citations omitted). A Rule 12(b)(6) dismissal can be based on a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). Leave to amend may be granted where the court can "conceive of facts that would render plaintiff's claim viable" or "if it appears at all possible that the plaintiff can correct the defect" and the court can "discern from the record no reason why leave to amend should be denied." Id. at 701 (internal quotation marks omitted).

I. FAILURE TO PLEAD WITH SPECIFICITY

Defendant argues the SAC is not pled with sufficient specificity to give defendant notice of the legal bases for the claims. Defendant specifically cites count four seeking damages for failure to create a meaningful asylum and torture protection procedure applicable in the Commonwealth of the Northern Mariana Islands ("CNMI"), count five seeking equitable and

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injunctive relief on the same basis, and count eleven for estoppel. Defendant argues that a substantially similar complaint in Liang v. Goldberg was dismissed for lack of sufficient specificity, and therefore, this complaint should also be dismissed because it suffers from the same deficiencies.

In opposition to the motion, the plaintiffs filed a combined cross-motion for partial summary judgment and opposition to dismissal which fails to directly address defendant's lack of specificity argument.

Defendant moves to dismiss the SAC because it is not pled with sufficient specificity and because it fails to state a claim upon which relief can be granted. When a pleading is defective because it is vague and ambiguous such that a party cannot reasonably be required to frame a responsive pleading, the proper remedy is a motion for a more definite statement pursuant to Rule 12(e). *See* 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1376 (1990). But "[i]f the movant believes his opponent's pleading does not state a claim for relief, the proper course is a motion under Rule 12(b)(6) even if the pleading is vague or ambiguous." Id.

Because defendant has moved to dismiss the claims for failure to state a claim for relief, even with respect to the vague and generalized legal bases asserted in support of those claims, the Court will treat defendant's motion to dismiss for lack of specificity as a motion pursuant to Rule 12(b)(6) and will discuss the complaint's failure to cite specific bases of law in conjunction with defendant's other arguments that the counts do not state a claim for relief.

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II. FAILURE TO STATE A CLAIM FOR RELIEF

A. Asylum and Torture Protection Claims (Counts 4 and 5)

Plaintiffs allege they submitted asylum and torture protection applications to the Immigration and Naturalization Service ("INS") in Saipan and Honolulu and that the INS in Saipan refused to accept the applications. Plaintiffs also allege they submitted applications to the U.S. consulates in Manila and Bangkok.[3] Plaintiffs contend that the failure and/or unwillingness of the United States and CNMI to create meaningful policies and procedures to ensure an impartial determination of these applications violates international standards, customary international law, jus cogens norms, the 1967 Protocol Relating to the Status of Refugees ("Protocol"),[4] the United Nations Convention Against Torture and Other Forms of Cruel and Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"),[5] and rights guaranteed to plaintiffs by the U.S. and CNMI constitutions and laws. Plaintiffs seek damages for the aforementioned violations in count four of the SAC.

In count five, plaintiffs allege upon information and belief that defendant CNMI is attempting to deport one or more of them. Plaintiffs allege that any attempt to arrest, detain, or deport them absent a determination of their applications violates Article 31 (prohibiting the

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[3]Pursuant to the Court's Orders of February 5, 2001 and February 7, 2001, plaintiffs are directed to contact the consular offices on a monthly basis and report to the Court what action, if any, has been taken on their applications. To date, plaintiffs have reported that no action has been taken.

[4]Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. (Signed by United States on Nov. 1, 1968).

[5]United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. (Signed by United States on April 18, 1988).

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imposition of penalties) and Article 33 (prohibiting refoulement) of the 1951 Convention Relating to the Status of Refugees[6] ("1951 Convention"), as well as Article 3 (prohibiting refoulement) of the Torture Convention. Plaintiffs allege that all defendants are responsible for ensuring that the processing of asylum applicants within the CNMI conforms to these treaty obligations. Plaintiffs also allege the lack of such asylum/torture protection procedures deprives them of their right to due process. Plaintiffs request injunctive relief to restrain all defendants from subjecting them and others similarly situated to arrest, imprisonment, or refoulement,[7] to preserve the status quo pending acceptance and processing of the asylum/torture protection applications, and to require the U.S. and CNMI to implement a procedure for accepting and processing applications within the CNMI.

Defendant moves to dismiss the counts arguing that plaintiffs cannot state a claim upon which relief can be granted based on the relevant treaties, international law and federal law.

i) Claims under the 1967 Protocol and/or the implementing legislation.

Plaintiffs cite the 1967 Protocol, the Immigration and Nationality Act ("INA"), and INS asylum and refugee standards as the basis for their asylum claims. Defendant argues plaintiffs' reliance on the Protocol is misplaced because the Protocol is not self-executing and thus does not give rise to privately enforceable rights in court. Defendant also argues that the United States

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[6]Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. Articles 2 to 34 of the Convention are incorporated by the Protocol.

[7]Plaintiffs seek injunctive relief on behalf of themselves and others similarly situated. Because this is not a class action the Court cannot provide relief to such unnamed plaintiffs. Fed.R.Civ.P. 10(a) requires the names of all parties to be included in the caption of the complaint. There is no jurisdiction over unnamed parties because a case has not been commenced with respect them. *See* National Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989).

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fulfills its obligations under the Protocol through the asylum and withholding of deportation mechanisms in the INA, but that those mechanisms are not available to plaintiffs because the CNMI is not considered part of the United States for INA purposes.

Defendant further argues that the INA is not applicable in the CNMI under the terms of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States ("Covenant").[8] Defendant argues that the Covenant gave plenary authority over local immigration matters to the CNMI and concludes that until Congress expands the INA to the CNMI, the United States lacks authority to implement or enforce immigration procedures within the CNMI.

In opposition, plaintiffs contend the United States is bound by its treaties and international agreements and is obligated to uphold these foreign affairs obligations within the CNMI pursuant to § 102 and § 104 of the Covenant. Plaintiffs contend these international obligations bind the United States regardless of whether the INA is applicable in the CNMI. Plaintiffs contend the United States' recognition that it is bound by these international obligations is demonstrated by an INS official's attempt to interview plaintiffs and the INS interviews of the aliens intercepted at sea and detained on Tinian in April 1999. Plaintiffs also contend these INS interviews and INA criminal prosecutions in this Court belie the defendant's assertion that the INA is not applicable in the CNMI. Plaintiffs conclude that asylum obligations were arbitrarily delegated to the INS and that another United States entity with authority in the CNMI can and should assume those obligations.

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[8]Covenant, Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (1976); *reprinted at* 48 U.S.C. § 1681.

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The 1967 Protocol incorporates Articles 2 to 34 of the 1951 Convention and entered into force in the United States on November 1, 1968. Plaintiffs base their claims on Article 33 of the Convention which provides "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion," and Article 34 which provides "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees." The Protocol by its terms is applicable to the CNMI as part of the United States.[9]

The Protocol, however, is not self-executing. *See* United States v. Aguilar, 883 F.2d 662, 680 (9th Cir. 1989). Therefore, it is not directly enforceable by a private party in court. *See* People of Saipan v. United States Dept. of Interior, 502 F.2d 90, 100-101(9th Cir. 1974) (Trask, J., concurring). Congress must implement the terms of the treaty through domestic legislation and a private individual may then invoke the domestic law to secure any rights that law provides. *See* id. at 101.

The legislation implementing the Protocol is the INA. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 424, 107 S.Ct. 1207, 1209 (1987) (the 1980 Refugee Act amended the INA to fully implement the United States' obligations under the Protocol). The INA establishes the asylum and withholding of deportation (non-refoulement) procedures in the United States and requires an alien to be physically present in the United States or at its borders in order to claim asylum

[9]Article I, section 3 of the Protocol provides that the "Protocol shall be applied by the States Parties hereto without any geographical limitation."

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and withholding of deportation.[10] Under the INA, however, the CNMI is not considered to be part of the United States geographically.[11] The INA's geographical exclusion of the CNMI effectively supersedes the Protocol's provision that its terms are to be applied by the State Party without geographical limitation. *See generally* Aguilar, 883 F.2d at 679 ("Congress is not bound by international law [and] if it chooses to do so, it may legislate contrary to the limits posed by international law."). Consequently, the INA's asylum and withholding of deportation procedures are not available to plaintiffs because they cannot be considered "physically present in the United States" or at its borders.

The INA does, however, provide a mechanism for aliens who are not within the United States or at its borders to seek admission as refugees through application to United States consular offices.[12] *See* INA § 207, 8 U.S.C.A. § 1157. It appears that plaintiffs have availed

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[10]*See* 8 U.S.C.A. § 1158(a)(1) (1999) ("Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title."); *see also* Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 159-160, 113 S. Ct. 2549, 2553 (1993) ("The INA offers [asylum and withholding of deportation] protections only to aliens who reside in or have arrived at the border of the United States.").

[11]"The term 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." INA § 101(a)(38), 8 U.S.C.A. § 1101(a)(38) (1999). "The term 'State' includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States." Id. at § 101(a)(36), 8 U.S.C.A. § 1101(a)(36).

[12]Section 207 of the INA provides for an annual admission of refugees into the United States. *See* 8 U.S.C.A. § 1157 (1999). Application for admission as a refugee can be made by aliens outside the geographical territory of the United States by submission of I-590 forms to an INS office or United States consular office. *See* 8 C.F.R. §§ 207.1 and 207.2 (2000).

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themselves of this mechanism because they allege they are seeking refugee status, they allege they submitted applications to the United States consular offices in Manila and Bangkok, and they are outside the United States geographically for INA purposes. Because § 207 is available to applicants outside the United States, application of § 207 to plaintiffs' circumstances is not at odds with INA § 101(a)(38). Accordingly, plaintiffs appear to be entitled to whatever application review procedures are provided pursuant to § 207. It would seem to be an unintended and aberrant result if aliens worldwide could utilize this mechanism to receive consideration of their refugee status applications, except if the applicant is located in the CNMI.[13]

Further, the Court does not find that application of INA § 207 to plaintiffs' circumstances undermines the provisions of the Covenant. Pursuant to §§ 503(a) and 506 of the Covenant,[14] the applicability of the INA is limited in order to allow the CNMI to exercise authority over its

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[13]Such a result is incongruous with United States policy concerning refugee assistance. In enacting the 1980 Refugee Act, Congress "declare[d] that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for their resettlement or voluntary repatriation, aid for necessary transportation and processing, admissions to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible." 8 U.S.C.A. § 1521 note (1999).

[14]"The following laws of the United States . . . will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement: (a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States." Cov. § 503. Pursuant to § 506, the CNMI is "deemed to be a part of the United States under the [INA]" only for limited purposes pertaining to citizenship of children, naturalization of immediate relatives, and loss of nationality.

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own immigration.[15] In Tran v. CNMI, this Court recognized that such authority includes asylum and refugee status but that such authority could only confer upon an alien the right to reside in the CNMI for the rest of his or her life. *See* id., 780 F.Supp. 709, 713 (D.N.M.I. 1991); *see also* id. at 714 n.4 ("The granting U.S. citizenship to aliens remains in the province of the United States. Covenant § 506. Therefore, any refugee status or political asylum the CNMI could grant would give the recipient solely the right to reside in the CNMI for the remainder of his or her life.").

A determination of plaintiffs' refugee status and/or eligibility for asylum within the United States remains in the province of the United States and does not undermine the CNMI's control over its own immigration because plaintiffs eligible for refugee status in the United States would presumably be relocated from the CNMI, as happened with the aliens intercepted at sea and detained on Tinian,[16] and those who are determined ineligible for refugee status in the United States remain subject to the CNMI's immigration laws. Further, because aliens may seek refugee status pursuant to INA § 207 from anywhere in the world, application of § 207 to plaintiffs' circumstances would not precipitate an influx of legal and illegal immigration into the

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[15]*See* H.R. Rep. No. 94-364 at 5-19 (1975) ("Subsection 503(a) provides that until Congress acts to make the immigration and naturalization laws applicable, "the Northern Marianas will have local control over immigration."); *see also* Marianas Political Status Comm'n Sec. By Sec. Analysis of the Covenant ("MPSC Memorandum") § 506 (1975), *reprinted in Northern Mariana Islands: Hearing before the Senate Committee on Interior and Insular Affairs,* 94th Cong., 356-396 (1975) § 506 ("the laws of the Northern Marianas will set the conditions under which people will be able to immigrate to the Northern Marianas.").

[16]*See also* In re Li, 71 F.Supp.2d 1052, 1054 (D. Haw. 1999) (aliens interdicted at sea and taken to Midway Island were screened to identify those with a well-founded fear of persecution upon return to China; those identified were transferred to the United States for further consideration in immigration proceedings.).

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CNMI, which was an express concern of the Covenant negotiators. *See* S. Rep. No. 94-433, pp. 65-94 (1975) and Administration's Sec. by Sec. Analysis of the Covenant, *reprinted in To Approve 'The Covenant to Establish the Commonwealth of the Northern Mariana Islands' and for other Purposes: Hearings before the Subcommittee on Interior and Insular Affairs of the House Committee on Interior and Insular Affairs*, 94th Cong. 385-399 (1975) ("The reason [§ 503(a)] is included is to cope with the problems which unrestricted immigration may impose upon small island communities.").[17]

To interpret Covenant § 503(a) as a bar to plaintiffs' utilization of INA § 207 procedures would lead to the absurd result that the CNMI is the only place in the world from which an alien could not seek a determination of his/her refugee status by the United States. *See* United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001) (If a legislative purpose

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[17]Any unforseen consequences of the Court's determination that INA § 207 procedures may be available to CNMI-based aliens could be resolved through consultation between the United States and the CNMI pursuant to Covenant § 902. For example, unforseen consequences have arisen from agreements entered into between the United States and the Republic of the Marshall Islands, the Federated States of Micronesia ("FSM"), and the Republic of Palau. The United States entered into compacts of free association with each of these sovereign nations. Under the terms of each compact, the citizens of the Marshall Islands, the FSM, and Palau "may enter into, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States and its territories and possessions without regard to" certain provisions of the INA. *See* Compacts of Free Association, 48 U.S.C. § 1681 notes, Article IV, section 141(a) of each Compact. An unforseen consequence of the immigration freedoms afforded by section 141(a) has been an influx of people from the three Compact nations into the Territory of Guam, the state of Hawaii, and the CNMI. This unanticipated flow of people who are often under-educated and for who English is a second or third language has placed a strain on the medical, educational, and social services budgets of Hawaii, Guam, and the CNMI. However, in recognition of the effect the number of immigrants has had, the United States and the affected governments have negotiated "Compact impact" payments to help offset the financial burdens. Similarly, the Court's supposition that neither Congress nor the NMI negotiators foresaw the current problem when they were negotiating the Covenant in the 1970's leads the Court to conclude that both the United States and the CNMI will work together to resolve any problems which may arise as a result of the Court's decision today.

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is expressed in plain and unambiguous language, the duty of the courts is to give it effect according to its terms. Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole."). As explained above, the Court's determination that INA § 207 procedures may be available to plaintiffs gives effect to the legislative purpose of the INA, does not undermine Covenant § 503(a) grant of immigration authority to the CNMI, and avoids the absurd result that the CNMI is the only place in the world from which an alien could not seek a determination of his/her refugee status by the United States.

Moreover, interpretation of Covenant § 503(a) so as not to preclude application of INA § 207, avoids the consequence of placing the United States in violation of its international obligations with respect to plaintiffs. Congress is aware that the effect of CNMI-controlled immigration has placed the United States in violation of its international obligations,[18] and legislation is pending before the United States Senate to extend the INA in full to the CNMI. Even without full implementation of INA procedures within the CNMI, the United States has the

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[18]The U.S. Senate acknowledged the situation in its attempt to extend the INA in full to the CNMI in 1999 through Senate Bill 1052. *See* S. Rep. 106-204 (1999). The Senate Report accompanying the bill cited the U.S. Commission on Immigration Reform findings that "[t]he CNMI has no asylum policy or procedure placing the United States in violation of international obligations" and that asylum policy is a "Federal obligation." The Senate Report also contained the statement of Bo Cooper, INS General Counsel, noting that asylum and refugee problems were not envisioned when the Covenant was negotiated and that while the CNMI negotiators expressed fear that the island would be overwhelmed by large-scale immigration from nearby Asian nations if the INA was extended to the CNMI, the CNMI has instead "used the lack of such law for exactly the opposite purpose . . . [r]ather than limit immigration, the CNMI has engaged in the massive importation of low-paid temporary alien workers." Although Senate Bill 1052 was not enacted into law, a similar bill, S.B. 507, was introduced in the Senate on March 9, 2001.

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responsibility and authority to fulfill those international obligations, and can do so without undermining the Covenant through the INA § 207 mechanism invoked by plaintiffs.

Therefore, the Court finds plaintiffs have set forth sufficient facts to establish that they may be entitled to some process pursuant to INA § 207; nonetheless, the SAC is insufficient to state a claim for relief based on § 207. Accordingly, the asylum claims in counts four and five are dismissed and plaintiffs are granted leave to amend consistent with this Order.

ii) Claims under the Convention Against Torture and/or implementing legislation.

Plaintiffs base their claims for torture protection on the Convention Against Torture. Defendant argues that the Senate declared the Convention Against Torture was not self-executing when it gave its advice and consent to the treaty and that the Court should defer to the Senate's express announcement. Defendant also argues that the Foreign Affairs Reform and Restructuring Act ("FARR Act") which implements the Convention precludes the Court from reviewing plaintiffs' claims because under the Act, judicial review of Torture Convention claims is permitted only in the context of a final removal order under the INA and plaintiffs are not subject to such INA proceedings. Defendant further argues that the regulations implementing the Convention are part of the regulations implementing the INA and are therefore not applicable in the CNMI.

Plaintiffs contend the right to be free from torture is a jus cogens norm which may never be abrogated or derogated, and cite Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1016 (9th Cir. 2000), wherein the Ninth Circuit recognized the proscription against torture as a jus cogens norm when it considered a claim under the Torture Convention to prevent extradition. Plaintiffs note the Ninth Circuit construed both the FARR Act and the Torture Convention to impose a

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mandatory duty on the United States to ensure that an alien is not returned to a country where he may be tortured. Plaintiffs also contend the treaty is self-executing because even when there were no regulations or legislation implementing the Convention, the INS utilized an informal procedure by which torture protection claims could be processed.

Plaintiffs further contend their torture protection claims are cognizable in the CNMI because the United States' policy regarding involuntary return with respect to torture claims applies regardless of whether the person is physically present in the United States and regardless of whether the United States acts directly or through an agent. Lastly, plaintiffs argue that because the Department of Justice ("DOJ") linked torture protection procedures with the asylum process, torture protection within the CNMI should be delegated to another entity such as the Department of State or Department of Interior.

The Convention Against Torture entered into force in the United States in 1994 and is applicable within the CNMI. *See* Restatement of the Foreign Relations Law of the United States (*hereinafter* "Restatement") § 322(1) ("Unless a different intention appears, an international agreement binds a party in respect of its entire territory."). The treaty is subject to the declaration "[t]hat the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. S17486-01 (Oct. 27, 1990). Although the Senate has expressed its understanding that the treaty is not self-executing, that is a determination to be made by the courts. *See* Kolovrat v. Oregon, 366 U.S. 187, 194, 81 S.Ct. 922, 926 (1961) (courts interpret treaties for themselves but the meaning given them by the departments of governments charged with their negotiation and enforcement is given great weight).

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As yet, neither the Supreme Court nor the Ninth Circuit has determined whether the Torture Convention, or any provision therein, is self-executing. *See* Cornejo-Barreto, 218 F.3d at 1011 n.6 (court declined to reach the issue of whether Article 3 of the Torture Convention was self-executing because Congress had passed implementing legislation upon which it could base its ruling). Because it appears plaintiffs may pursue a remedy based on the legislation implementing Article 3 of the Torture Convention, the Court need not determine at this point whether Article 3 itself is self-executing and thus enforceable by plaintiffs in court.

Article 3 of the Torture Convention provides that "[n]o State Party shall expel, return ("refouler"), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Legislation implementing this provision was enacted by Congress in 1998 as part of the FARR Act, Pub. L. No. 105-277, §2242, 1999 U.S.C.C.A.N. 871. The FARR Act declared that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."[19] Id. at § 2242(a).

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[19]Plaintiffs assert the U.S. policy with regard to torture protection applies regardless of whether the claimant is physically present in the United States *or whether the United States acts directly or through an agent.* Plaintiffs cited to the language in § 2241(c) of FARR Act which relates to appropriations in connection with U.S. policy regarding refugee assistance and claims of political persecution, and not to the provision of the FARR Act implementing the Torture Convention. The U.S. policy statement regarding implementation of Article 3 of the Torture Convention is set forth in § 2242(a), and does not include the language concerning actions taken through an agent. *See* Cardoza-Fonesca, 480 U.S. at 432, 107 S.Ct. at 1213 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Even

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The FARR Act required the "heads of the appropriate agencies" to prescribe regulations within 120 days to implement the United States' Article 3 obligations. Id. at § 2242(b). *See also* Cornejo-Barreto, 218 F.3d at 1012 (the Secretary of State "has a statutory duty to carry out the dictates of Article 3"). The Department of State accordingly prescribed regulations concerning treaty obligations in the context of extradition, *see* id., and the DOJ/INS prescribed regulations in the context of involuntary return, *see* 8 C.F.R. § 208.18. The regulations promulgated by the DOJ/INS are part of the regulations implementing the INA and therefore effectively preclude CNMI-based aliens from access to the United States' torture protection procedures.

The DOJ's implementation of the Torture Convention does not entirely comport with the mandate of the FARR Act because the FARR Act does not exclude the CNMI from its purview or exclude CNMI-based aliens from seeking the Torture Convention's Article 3 protections. Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984) "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and [to] the principle of deference to administrative interpretations. . ." The DOJ's interpretation that the treaty is inapplicable to all U.S. territory, however, is contrary to the principle of statutory construction that an act of congress should never be construed to violate a treaty or the law of nations if any other possible

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if § 2241(c) related to implementation of the torture convention, the CNMI government would not be considered an agent of the United States under these circumstances. *See* MPSC Memorandum § 103 ("The fact that the people of the Northern Marianas will have the right of local self-government and will govern themselves under their own constitution means that the Northern Mariana Islands will not be an agency or instrumentality of the United States Government.").

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construction remains. *See* Haitian Centers Council, 509 U.S. at 178 n. 35, 113 S.Ct. at 2562 n. 35.

The FARR Act is silent as to whether Congress intended to preclude CNMI-based aliens from access to the United States' torture protection procedures. The provision of the FARR Act which expressly precludes certain classes of aliens from seeking torture protection in the United States, does not include aliens in the CNMI. *See* FARR Act § 2242(c). The FARR Act is not an amendment to the INA, and, in contrast to the INA, it contains no provision excluding the geographical territory of the CNMI. Regulations under the FARR Act were to be implemented "subject to any reservations, understanding, declarations, and provisos" contained in the Senate's resolution of ratification; there is no indication in that resolution that the CNMI was to be excluded from torture protection obligations. *See* Unanimous-Consent Agreement, 136 Cong. Rec. S17486-01, S17491 (Oct. 27, 1990). Further, the policy concerning involuntary return in the face of a torture claim applies "regardless of whether the person is physically present in the United States." FARR Act § 2242(a). *See also* Haitian Centers Council, 509 U.S. at 188, 113 S.Ct. at 2567 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested."). Thus, CNMI-based aliens fall within the scope of the United States' torture protection policy, if not the express terms of the Act.

There are inexplicit indications to suggest that Congress intended not to include the CNMI within the scope of the FARR Act. Congress appears to endorse implementation of the Torture Convention by utilizing the INA's existing procedures because the FARR Act makes several references to the INA and the FARR Act's judicial review provision provides for judicial

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review only as part of the INA deportation process. *See* FARR Act §2242(d).[20] These references to the INA and the limitation on judicial review, however, do not indicate that Congress intended to deny *all* torture protection procedures to aliens in the CNMI.[21] On the basis of this scant and ambiguous evidence, and because the FARR Act touches on the jus cogens norm prohibiting torture, the Court does not find exclusion of the CNMI from the United States' torture protection procedures a permissible construction of the FARR Act. *See generally* Restatement § 115 cmt a ("The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supercede the earlier agreement or other international obligation."); *see also* Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000) *cert. granted*, 121 S.Ct. 297 (Oct. 10, 2000) (ambiguous Congressional action should not be construed to abrogate a treaty).

Defendant also argues the judicial review provision of the FARR Act precludes the Court from considering plaintiffs' claims because the plaintiffs are not in deportation proceedings

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[20]The FARR Act provides that "nothing in this section shall be construed as providing any court with jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the [INA]." FARR Act § 2242(d).

[21]*See generally*, David Sloss, The Domestication of International Human Rights: Non Self-Executing Declarations and Human Righst Treaties, 24 Yale J. Int'l L. 129, 209-210 (1999) (In analyzing the non self-executing declaration to the Convention Against Torture, the author concluded that "the NSE declaration was not intended to preclude the government from granting relief under Article 3. Rather, the treaty makers intended for the Executive Branch, and not the courts, to decide the merits of individual claims under Article 3." Consistent with this analysis, even if the FARR Act precludes judicial review of the *merits* of plaintiffs' claims, plaintiffs are nonetheless entitled under the FARR Act to a determination of their claims by the executive branch.

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under the INA. Defendant's argument is of no moment because the FARR Act's limitation on judicial review is not applicable with respect to the claims plaintiffs are asserting. Plaintiffs are not seeking the type of review that is constrained by § 2242(d), but are seeking implementation of the administrative process which the FARR Act requires.

Therefore, the Court finds plaintiffs' claims are cognizable with respect to the Torture Convention's implementing legislation. However, plaintiffs have not alleged a statutory basis upon which they can challenge the DOJ's or other appropriate agency's failure to implement regulations applicable to the CNMI and have therefore failed to state a claim upon which relief can be granted. Accordingly, the torture protection claims in counts four and five are dismissed and plaintiffs are granted leave to amend consistent with this Order.

iii) Plaintiffs claims under customary international law/jus cogens norms.

Plaintiffs allege the lack of asylum and torture protection procedures violates customary international law and base their claims on the jus cogens norm prohibiting torture. Plaintiffs have not cited a specific principle of international law relating to asylum, but appear to allege that the Protocol reflects such international principles. (SAC ¶ 46).

Defendant argues that plaintiffs failed to identify the specific principles of customary international law on which they rely. Defendant also argues that plaintiffs cannot state a claim based on customary international law because customary international law is not applicable where there is a treaty or a controlling executive or legislative act or judicial decision. Defendant argues that the 1967 Protocol and the Convention Against Torture address plaintiffs' claims and thus displace any applicable international law principles. Defendant also argues that even if international law is applicable, it is not self-executing.

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Plaintiffs contend that customary international law is binding on the United States and that the United States has obligated itself to uphold these foreign affairs obligations relating to asylum and torture protection within the CNMI pursuant to § 102 and § 104 of the Covenant.

Customary international law is part of the federal common law and does not need to be implemented by Congress in order for the courts to apply it in appropriate cases. *See* The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 299 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ."). Congress, however, is not bound by the rules of international law and when it legislates domestically, it may legislate contrary to and thereby supercede pre-existing rules of international law.[22] Even where customary international law and domestic law are not in conflict, extensive legislation by Congress in a particular area may preempt application of international law principles.

Congress' extensive legislation in the area of asylum/refugee status has been construed to preempt the application of customary international law. *See* Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996) (Petitioner sought safehaven and nonreturn relying on customary international law rather than utilizing the INA's asylum and withholding of deportation procedures. The court

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[22]*See* In re Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1474 (9th Cir. 1994) (customary international law is part of federal common law unless there is a contradictory federal statute); *see also* Restatement § 115(1) (an act of Congress supercedes a pre-existing rule of international law as law of the United States if the purpose to supercede is clear or if the Act and the earlier rule of international law cannot be reconciled).

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held that "[b]ecause Congress has enacted an extensive legislative scheme for the admission of refugees, customary international law is inapplicable and cannot confer jurisdiction enabling either the IJ or the BIA to hear Galo's claim."). Through Covenant § 503 and INA §§ 101(a)(36) and (38), Congress has chosen not to fully implement that legislative scheme within the CNMI, and has instead ceded authority to the CNMI. Although the absence of the federal asylum and refugee laws may not comport with, and may result in a violation of international law principles, Congress is free to deviate from such principles. Accordingly, although defendant United States is bound by customary international law principles, plaintiffs may not state a claim for asylum against the United States based thereon.[23] *See* Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988) ("the law . . . remains clear: no enactment of Congress can be challenged on the ground that it violates customary international law").

As to plaintiffs' torture protection claims, it appears plaintiffs are basing their international law claims on the jus cogens norm prohibiting torture. Although Congress has not legislated extensively in the area of torture protection so as to preempt the application of international law, plaintiffs cannot resort to customary international law because there is a controlling act of Congress - the FARR Act, and a controlling treaty - the Convention Against Torture. Accordingly, plaintiffs may not rely on international law to challenge the United States torture protection laws.

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[23]Although Congress can act contrary to international law when it legislates domestically, the Court does not find that when Congress ceded immigration authority to the CNMI, Congress intended that the CNMI could legislate without regard to principles of international law. *See* Order Granting in Part and Den. in Part Def. CNMI's Mot. to Dismiss Second Am. Compl. and Den. Pls.' Mot. for Partial Summ. J., Sec. III.B, issued concurrently herewith.

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Although acts of Congress cannot be challenged as contrary to international law, Congress has expressly authorized court jurisdiction over tort claims by aliens based on violations of international law. Pursuant to the Alien Tort Claims Act ("ATCA"),[24] plaintiffs may maintain a tort action premised on a violation of international law. *See* In re Estate of Marcos, Human Rights Litigation, 25 F.3d at 1475 ("The [ATCA] creates a cause of action for violation of specific, universal and obligatory international human rights standards which confer fundamental rights upon all people vis-a-vis their own governments."). Plaintiffs have not, however, stated any cognizable tort claims against defendant based on international law because their claims for damages are based on the conflict between U.S. domestic law and customary international law principles.

Accordingly, plaintiffs' claims based on international law principles are dismissed. Plaintiffs are granted leave to amend in order to clarify any tort claims asserted pursuant to the ATCA.

iv) Rights Under U.S. Constitution and Laws.

The complaint alleges defendant violated rights guaranteed to plaintiffs by effect of the U.S. Constitution and laws. For the most part, plaintiffs have not identified the specific provisions of domestic law upon which they base their claims, however, it is clear that they are alleging due process violations and they specifically cite the Due Process clause in count five.

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[24]The ATCA provides "[t]he district courts shall have original jurisdiction in any action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C.A § 1350 (1993). Although plaintiffs have not specifically cited the ATCA in the count four claim for damages, it is alleged in ¶ 17 of the SAC and incorporated by reference. The ATCA, however, is not a waiver of sovereign immunity, and defendant therefore appears to be immune from such claims. *See* In re Estate of Marcos, Human Rights Litigation, 25 F.3d at 1473.

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Defendant presumes that plaintiffs' claimed violations of U.S. constitutional law are predicated on violations of international law because no specific provisions of U.S. law are identified. Defendant argues the constitutional claims therefore fail because plaintiffs have not stated a claim based on international law.

Plaintiffs allege they submitted asylum/refugee/torture protection applications to the INS and to United States consular offices and that they have been denied processing of their applications. Because it appears plaintiffs may be entitled to some process pursuant to INA § 207 as well as the FARR Act, plaintiffs are also entitled to assert due process claims based thereon. *See* Garcia-Mir v. Meese, 788 F.2d 1446, (11th Cir. 1986) ("The usual device signaling the existence of a nonconstitutionally-based liberty interest is a rule or regulation defining the obligations of the authority charged with exercising discretionary power, that places substantive limitations on official discretion such as particularized standards or criteria to guide decisionmakers.") (internal cites and punctuation omitted). Accordingly, defendant's motion to dismiss plaintiffs' due process claim is denied.

v) Conclusion re: Asylum and Torture Protection Claims.

For the foregoing reasons, the Court finds plaintiffs have alleged sufficient facts to show they may be able to state a claim upon which relief can be granted concerning asylum/refugee status and torture protection based on U.S. domestic and constitutional law. Plaintiffs cannot state a claim based on the Protocol and the Court declines to reach at this time the issue of whether Article 3 of the Torture Convention is self-executing. Plaintiffs may state a tort claim based on international law principles. Accordingly, counts four and five are dismissed and plaintiffs are granted leave to amend consistent with this Order.

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B. Concealment: Concealed Knowledge or Information (Count 9)

Plaintiffs allege all defendants intentionally or negligently concealed knowledge about the acceptance and processing of asylum/refugee and torture protection applications from CNMI-based aliens and also concealed information about the consequent unconstitutional and unlawful deprivations to which plaintiffs and others were subjected. Plaintiffs allege they were misled by defendants because they were unaware of the concealed information and had relied on defendants to comply with their duty to provide such information. Plaintiffs conclude they sustained injuries and damages as a result of the concealment.

Defendant argues plaintiffs have not identified a legal basis showing a duty to disclose, and further, that it is unclear what knowledge or information was allegedly concealed. Defendant also contends it has a duty of nondisclosure relating to asylum pursuant to 8 C.F.R. § 208.6 (confidentiality of asylum applications and identity of applicants). Defendant further contends the court lacks subject matter jurisdiction over the claim because defendant is immune from a claim for damages and plaintiffs have not identified any waiver of immunity.[25]

Plaintiffs oppose the motion simply by arguing it is a ground for relief to which they are entitled and that dismissal prior to discovery is premature.

Plaintiffs allege the existence of and concealment of asylum and torture protection *procedures* in the CNMI. Therefore, defendant's reliance on its duty to refrain from disclosing

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[25]Defendant's argument that the Court lacks subject matter jurisdiction is without merit. In Hill v. Blind Industries and Services of Maryland, the Ninth Circuit stated immunity is a "personal privilege" which can be waived and does not implicate a court's subject matter jurisdiction. 179 F.3d 754, 760 (9th Cir. 1999) *amended by* Hill v. Blind Indus. and Serv. of Md., 201 F.3d 1186 (9th Cir. 2000).

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information contained in asylum applications and the *identities* of applicants is not germane to plaintiffs' claims. Nonetheless, plaintiffs have failed to state a claim for concealment because they have not identified any legal basis requiring defendant to disclose such procedural information, the manner of their alleged reliance is unclear, and their allegation that they suffered injuries and damages is conclusory.[26] *See* McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988) ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim."). Further, plaintiffs have not identified any basis for waiver of sovereign immunity. *See* Quinby v. Internal Revenue Service, 1998 WL 776855, *1 (D. Or. July 23, 1998) (the burden is upon the plaintiff to demonstrate that the United States has consented to suit) (*citing* United States v. Sherwood, 312 U.S. 584, 590, 61 S.Ct. 767 (1941)).

Accordingly, the count for concealment is dismissed. Because plaintiffs may be able to correct the deficiencies, plaintiffs are granted leave to amend.

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[26]Plaintiffs have failed to allege facts that could support a claim under any of the various forms of misrepresentation/concealment set forth in the Restatement (Second) of Torts. For example, plaintiffs have failed to sufficiently state a claim based on § 536, "Information Required by Statute," which provides "[i]f a statute requires information to be furnished, filed, recorded or published for the protection of a particular class of persons, one who makes a fraudulent misrepresentation in so doing is subject to liability to the persons for pecuniary loss suffered through their justifiable reliance upon the misrepresentation in a transaction of the kind in which the statute is intended to protect them." *See also* id. § 551 re: Liability for Nondisclosure ("One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to disclose the matter in question."); *see also* id. § 557A re: Fraudulent Misrepresentations Causing Physical Harm ("One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person . . . who justifiably relies upon the misrepresentation, is subject to liability to the other.").

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C. Emotional Distress (Count 10)

All plaintiffs allege intentional and negligent infliction of severe emotional distress against all defendants and are seeking damages including punitive damages. Defendant argues the claim is barred by sovereign immunity. Defendant also contends that to the extent the claim is based on an alleged violation of international law, it fails for the reasons argued with respect to counts four and five. Again, plaintiffs oppose the motion simply by arguing it is a ground for relief to which they are entitled and that dismissal prior to discovery is premature.

It is not clear from the allegations what conduct is purported to have caused the emotional distress and thus the count is insufficient to state a claim for relief. Further, plaintiffs have not identified any basis for waiver of sovereign immunity by the United States. Accordingly, the count is dismissed. Because plaintiffs may be able to correct the deficiencies, plaintiffs are granted leave to amend.

D. Estoppel (Count 11)

Plaintiffs allege five incidents where an asylum process was allegedly made available to other CNMI-based aliens. Plaintiffs allege by effect of such occurrences, defendants have made promises, inducements and/or public representations to plaintiffs on which they have detrimentally relied and request that defendants be estopped from denying the substance and effect of such promises, inducements or representations.

Defendant argues that plaintiffs have failed to plead their claim with sufficient specificity and that plaintiffs have not alleged the elements required to state a claim for estoppel. Defendant argues that plaintiffs have not alleged affirmative misconduct by defendant which is necessary to state an estoppel claim against the government and that the incidents cited by plaintiffs do not

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demonstrate affirmative misconduct by defendant. Defendant also contends that plaintiffs may not rely on the incident involving the interdicted aliens on Tinian because the relief provided was not court ordered and plaintiffs are in disparate circumstances.

Plaintiffs argue that estoppel is a claim for relief to which they are entitled and that dismissal of the claim prior to discovery is premature.

"The doctrine of estoppel requires the presence of four elements: '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" In re Blankenship, 3 N. Mar. I. 209, 214 (1992). Plaintiffs have failed to state a claim for estoppel because it cannot be reasonably inferred from the allegations that defendant intended its conduct be acted upon and the allegations of detrimental reliance are vague and conclusory because the manner in which plaintiffs relied on defendant's conduct is not clear.

Further, the conduct alleged by plaintiffs is insufficient to support an estoppel claim against the government because it does not suggest the "affirmative misconduct" necessary to support a claim for estoppel against the government. *See* Office of Personnel Management v. Richmond, 496 U.S. 414, 421, 110 S. Ct. 2465, 2470 (1990); *see also* Socop-Gonzalez v. INS, 208 F.3d 838, 843 (9th Cir. 2000), *rehearing en banc granted*, 213 F.3d 449, 454 (Sept. 29, 2000) (INS officer's failure to inform petitioner of his legal rights is not affirmative misconduct nor is negligent provision of misinformation). Lastly, it is not clear what plaintiffs wish the Court to estop defendant from doing.

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Accordingly, plaintiffs have failed to state a claim of estoppel against defendant and the count is dismissed. Because plaintiffs may be able to correct the deficiencies, plaintiffs are granted leave to amend.

E. Punitive Damages (Count 12)

Plaintiffs set forth a request for punitive damages as a separate count. Defendant argues the count should be dismissed because plaintiffs are not entitled to relief on any of their substantive counts and an award of damages is barred by sovereign immunity. Plaintiffs oppose the motion by stating they are entitled to punitive damages.

A request for punitive damages is a request for relief that is more appropriately made in the substantive count and/or prayer for relief, which plaintiffs have done. Accordingly, the count is dismissed with prejudice.

F. Joint and Several Liability (Count 13)

Plaintiffs seek to hold the defendants jointly and severally liable. Defendant argues that plaintiffs have not identified the legal basis for their claim and that sovereign immunity prevents an award of damages against the defendant.

Joint and several liability is not a cause of action; rather, it is a request for relief that is more appropriately made in the substantive counts and/or in the prayer for relief, which plaintiffs have done. Accordingly, the count for joint and several liability is dismissed with prejudice.

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs contend the defendant's failure to implement a system for processing requests for asylum and torture protection constitutes a pattern and practice of wholly disregarding obligations imposed by international law and federal law. Plaintiffs contend partial summary

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judgment is appropriate because it cannot be disputed that the United States is bound by its international and statutory obligations respecting human rights. Plaintiffs request the Court to fashion an equitable remedy by way of the declaratory relief plaintiffs have sought.

Defendant opposes the cross-motion by restating its arguments from its motion to dismiss. Defendant also contends that a judicially-created remedy is inappropriate because the executive branch of the United States does not have unfettered ability to carry out its international obligations in the CNMI and resolution of the matter is likely to require negotiation between the CNMI and the United States.

Plaintiffs move for partial summary judgment on their asylum and torture protection claims in count five. However, the asylum and torture protection claims in count five have been dismissed with leave to amend for failure to state a claim upon which relief can be granted. Accordingly, plaintiffs' cross-motion is moot and therefore denied.

CONCLUSION

Defendant's motion to dismiss counts four and five for failure to state a claim for relief is granted and plaintiffs are granted leave to amend consistent with this Order. Defendant's motion to dismiss counts nine, ten and eleven for failure to state a claim for relief is granted and plaintiffs are granted leave to amend. Defendant's motion to dismiss counts twelve and thirteen for failure to state a claim for relief is granted and the counts are dismissed with prejudice. Plaintiffs cross-motion for partial summary judgment is denied.

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Plaintiffs shall have 20 days from the date of this order to amend their complaint in conformance with this order.

IT IS SO ORDERED.

Dated this 11th day of May, 2001.

Alex R. Munson
Judge

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