UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID BONIFACE, NISSAGE MARTYR and JUDERS YSEMÉ Plaintiffs, v. JEAN MOROSE VILIENA Defendant.	)	Civil Action No. 17-10477-ADB

SUPPLEMENTAL MEMORANDUM OF DEFENDANT JEAN MOROSE VILIENA IN SUPPORT OF MOTION RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS

TABLE OF CONTENTS

I. Introduction 1

II. The TVPA Does Not Provide a Cause of Action for Claims that Do Not Touch or Concern the United States. 1

III. Congress Lacks the Constitutional Authority to Enact Legislation that Exercises Jurisdiction Over Claims Between Foreign Individuals for Actions Outside the United States Which Do Not Touch or Concern the United States. 7

IV. Conclusion 13

TABLE OF AUTHORITIES

Page(s)

Cases

Adventure Communications, Inc. v. Kentucky Registry of Election Finance,
191 F.3d 429 (4th Cir.1999) 7

Am. Banana Co. v. United Fruit Co.,
213 U.S. 347 (1909).....10, 11

Boniface v. Viliena,
145 F.4th 198 (1st Cir. 2025) 1, 2, 5, 6, 7

Burton v. United States,
196 U.S. 283, 25 S.Ct. 243 (1905).....7

Chowdhury v. Worrldtel Bangladesh Holding, Ltd.
746 F.3d 42 (2d Cir. 2014).....2, 3, 4

Dennis v. United States,
341 U.S. 494, 71 S.Ct. 857 (1951).....6

Doe v. Drummond Co., Inc.,
782 F.3d 576 (11th Cir. 2015) 3

Fuld v. Pal. Liberation Org.,
606 U.S. 1, 145 S. Ct. 2090 (2025).....6

Hartford Fire Ins. Co. v. California,
509 U.S. 764, 113 S.Ct. 2891 (1993) (Scalia, J., dissenting).....7, 8, 10

Kiobel v. Royal Dutch Petroleum Co.,
569 U.S. 108, 133 S.Ct. 1659 (2013).....10

Lake v. Ohana Military Communities, LLC,
14 F.4th 993 (9th Cir. 2021) 7

Microsoft Corp. v. AT & T Corp.,
550 U.S. 437, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007).....10

Montralet v. Murray,
8 US (4 Cranch) 46 (1807).....9

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247, 130 S.Ct. 2869 (2010).....5

RJR Nabisco v. European Cmty.,
579 U.S. 325 346-347, 136 S.Ct. 2090 (2016) 6

Sosa v. Alvarez-Machain,
542 U.S. 692, 727-728,124 S.Ct. 2739 (2004) 6, 11, 12

Tel–Oren v. Libyan Arab Republic,
517 F.Supp. 542 (D.D.C.1981) 4

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 3, 4, 5, 6, 12

Torres v. Lynch,
578 U.S. 452, 136 S. Ct. 1619 (2016) 2

U.S. v. Cafiero,
342 F. Supp. 2d 49 (D. Mass. 2003) 10

Underhill v. Hernandez,
168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 8

United States Sec. & Exch. Comm'n v. Passos,
760 F.Supp.3d 95 (S.D.N.Y. 2024) 5, 6

United States v. Aluminum Co. of America,
148 F.2d 416 (2d Cir. 1945) 9, 10

United States v. Arjona,
120 U.S. 479, 7 S.Ct. 628 (1887) 12

United States v. Bellaizac-Hurtado,
700 F.3d 1245 (11th Cir. 2012) 12, 13

United States v. Benitez,
741 F.2d 1312 (11th Cir.1984) 12

United States v. Furlong,.
18 U.S. (5 Wheat.) 184 (1820) 13

United States v. Hasan,
747 F.Supp.2d 599 (E.D.Va.2010) 13

United States v. Hayes,
653 F. 2d 8 10

Statutes

28 U.S.C. § 1331 .....3, 7

28 U.S.C. § 1350 3

TVPA Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note) 1

TVPA Pub. L. No. 111-203, 124 Stat. 1376, 1862 (2010) 5, 6

TVPA § 2(a) 2

Other Authorities

The Alien Tort Statute and the Law of Nations, University of Chicago Law Review, Vol. 78, No. 2 (Spring 2011) 9

H.R. Rep. No. 102- 367 (1991) 2, 3

Michael T. Morley, Note, The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism, 112 Yale L. J. 109, 135-136 (2002) 9

The Defendant Jean Morose Viliena ("Defendant") submits this supplemental memorandum of law in support of his Motion for Reconsideration of the Order Denying the Motion to Dismiss [Docket No. 66].

I. Introduction

This matter comes before the Court on remand from the Court of Appeals, Boniface v. Viliena, 145 F.4th 198 (1st Cir. 2025) hereinafter "Boniface". The procedural history and underlying facts have been previously well reported by this Court and by the Court of Appeals in Boniface. The remaining two counts of the Complaint are Count I, alleging a claim for the extrajudicial killing of David Boniface, and Count 3, alleging a claim for the torture of Nissage Martyr and Juders Yseme. Both counts are premised upon the Torture Victim Protection Act [Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note) (the "TVPA")]. In framing the issues on remand, the Court of Appeals stated:

> We note that there are two distinct questions that the district court may have to consider on remand. First, as a matter of statutory interpretation, does the TVPA provide a cause of action for the facts here? Second, if the TVPA does provide such a cause of action, is that constitutional. In other words, did Congress have the power to authorize civil liability in this case, for acts committed by one foreign national upon another foreign national, in another country.

Boniface, 145 F.4th at 112. The Plaintiffs in their Complaint in this action alleged that the Defendant "[f]rom his base in Massachusetts…continued to participate in a conspiracy…" Complaint, ¶ 13 [Dkt. No. 1]. The Plaintiffs have been unable to establish those facts and adduced no evidence at trial to support them. In framing its analysis, the Court of Appeals noted that it has been established as the law of the case that the facts in this matter do not touch and concern the United States. Id. n. 7. The Defendant addresses each question below.

II. The TVPA Does Not Provide a Cause of Action for Claims that Do Not Touch or Concern the United States.

The concurring opinion in Boniface addresses this question most directly, noting that "there is a serious question whether the TVPA contains the necessary 'clear indication' to sustain the extraterritorial applications urged by the plaintiffs." Boniface at 123. In Chowdhury v. Worrldtel Bangladesh Holding, Ltd. 746 F.3d 42 (2d Cir. 2014), the Second Circuit found that extraterritorial application under the TVPA was appropriate because the statute was directed at acts by an individual carried out with "actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a). Id. at 51. Furthermore, the Second Circuit observed that the legislative history also supported that conclusion ("A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the Torture Victim Protection Act (TVPA) is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad."). Id. quoting H.R.Rep. No. 102–367, pt. 1, p. 4 (1991). While focusing on the substantive aspects of the TVPA and finding an extraterritorial intent, the court in Chowdhury did not engage in the analysis applied by the Supreme Court in Torres v. Lynch, 578 U.S. 452, 136 S. Ct. 1619 (2016). In Torres, in considering the application of a criminal statute, the Court noted that there was a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal law that supported the reading applied by the majority in that matter. In this case, the same form of analysis yields a different conclusion than reached by the Chowdhury court. In other words, while Congress may have intended that the actions to which the TVPA could be applied could be actions which occurred outside the United States, it does not necessarily follow that it also intended that those actions could be actions that did not touch or concern the United States. The legislative history indicates that while Congress was focused on acts that might be carried out by foreign actors or in foreign

jurisdictions, it decidedly did not intend that the TVPA would apply to acts which did not touch or concern the United States.

Congress enacted the TVPA in 1991 in response to the decision of the Court of Appeals for the District of Columbia Circuit in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). In Tel Oren the Court dismissed the claims of plaintiffs who had been the victims of an armed attack on a civilian bus in Israel carried out by foreign defendants. In his concurrence in Tel-Oren, Judge Bork noted that the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), provided only a jurisdictional grant and no relief for any particular substantive cause of action. 726 F.2d at 801. In response, Congress enacted the TVPA explaining that purpose of the statute is to provide "a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing." H.R. Rep. No. 102- 367, at 86 (1991). The Senate Report in turn states:

> The TVPA would provide [an explicit] grant [of a cause of action to victims of torture] and would also enhance the remedy already available under section 1350 in an important respect: while the **Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens** who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary execution do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact.

Sen. Rep. No. 102-249, at 3 (1991) [emphasis added].

The ATS provides a jurisdictional grant but no substantive cause of action. The TVPA remedied that issue by providing a substantive cause of action, but it did not do anything to enhance the limits of the jurisdictional grant afforded by the ATS. Courts, including the court in Chowdhury, have avoided this difficulty by reliance upon the general federal question jurisdiction conferred by 28 U.S.C. § 1331. See, Doe v. Drummond Co., Inc., 782 F.3d 576, 601 (11th Cir. 2015). At the same time, however, these courts have acknowledged that

Congress's intent in enacting the TVPA was, in part, to address the concerns articulated by Judge Bork's concurrence in Tel-Oren. See, Chowdhury at 51.

In Tel-Oren, Judge Bork noted that the parties and the courts treated the jurisdictional limits of the ATS and general federal question jurisdiction as identical. See, Tel-Oren, 726 F.2d at 800 (the parties agree that for purposes of the issues raised in this case "the jurisdictional requirements of sections 1331 and 1350 are the same" citing Tel–Oren v. Libyan Arab Republic, 517 F.Supp. 542 fn. 2 (D.D.C.1981)). The lower court footnote that Judge Bork cites makes the case even more explicit "[P]laintiffs themselves recognize that the jurisdictional bases of s 1331 and s 1350 are identical as to the role of the law of nations." Id. The opinion of the Court of Appeals in Tel Oren is itself suffused with discussion of the limits imposed by the Law of Nations. Judge Edwards begins the opinion of the Court by writing that he takes the position that the Law of Nations would not have afforded a means to impose liability on non-state actors. 726 F. 2d at 776. In responding to Judge Edwards opinion, Judge Bork in his concurrence similarly writes with frequent reference to the jurisdictional limits of the ATS. Observing in the first instance that any reading of the ATS which would carry with it a substantive grant of relief would be to ignore the reality that in the life of the nation at the time the ATS was enacted it would have been a "breathtaking folly" to purport to "regulate the conduct of other nations and individuals abroad." 726 F. 2d at 821. Responding further to Judge Edwards contention that the ATS did provide a substantive cause of action, Judge Bork observed that:

> A refusal by a United States court to hear a dispute between aliens is much less offensive to the states involved than would be an acceptance of jurisdiction and a decision on the merits. In the latter case, the state of the losing party would certainly be affronted, particularly where the United States' interests are not involved. The United States would be perceived, and justly so, not as a nation magnanimously refereeing international disputes but as an officious interloper and an international busybody.

Id.

With this context, and given the robust jurisdictional discussion in Tel-Oren, it would be difficult to contend that the jurisdictional limits of the substantive law embodied by the TVPA as proposed were not squarely in front of the Congress at the time of its enactment. Yet, as noted in the concurrence in Boniface, "The TVPA, enacted as a note to the ATS, appears to contain no explicit statement that it applies to entirely foreign conduct, such as on these facts." Boniface at 123. In discussing the limits of extraterritorial application of domestic laws in Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 130 S.Ct. 2869 (2010), the Supreme Court observed that the fact that the relevant securities law defined interstate commerce as trade or commerce "between any foreign country and any state" did not serve to overcome the presumption against the extraterritorial application of the law. 561 U.S. at 262-263, 130 S. Ct. at 2882. Congress responded to the ruling in Morrison by amending the securities and exchange act to add the following provision:

> (b) Extraterritorial Jurisdiction
>
> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Pub. L. No. 111-203, 124 Stat. 1376, 1862 (2010). See, United States Sec. & Exch. Comm'n v. Passos, 760 F.Supp.3d 95, 115 (S.D.N.Y. 2024) The Court in Passos, found that in amending the statute Congress had provided a clear indication of its intent to apply the statute in an extraterritorial manner, Id. at 117, although, notably, as reflected in the statutory language

quoted above, only to conduct that "has a foreseeable substantial effect within the United States." Pub. L. No. 111-203, 124 Stat. 1376, 1862, supra. The TVPA provides no equivalent declaration of intent.

The concurrence in Boniface repeats the concerns that applying the TVPA to actions between foreign actors that do not touch and concern the United States may have an adverse effect on international relations. Boniface at 124 citing RJR Nabisco v. European Cmty., 579 U.S. 325 346-347, 136 S.Ct. 2090, (2016); Sosa v. Alvarez-Machain, 542 U.S. 692, 727-728,124 S.Ct. 2739 (2004). These issues, as noted by Justice Thomas in Fuld v. Pal. Liberation Org., 606 U.S. 1, 145 S. Ct. 2090, (2025) involve "delicate judgments" properly left to "the prerogative of the political branches to make." 606 U.S. at 42, 145 S.Ct. at 2120. The legislative history provides no evidence that these were judgments made by Congress in enacting the TVPA, indeed the very case that Congress was responding to, Tel-Oren, in enacting the TVPA contains a fulsome discussion of these same issues and the jurisdictional limits of the ATS and the law of nations. Congress enacted the TVPA without any indication that it was choosing to abridge those limits. The presence of language indicating that the act was meant to apply to conduct on foreign soil does not at the same time mean that Congress intended to expand the jurisdictional limits beyond conduct that touched or concerned the United States "such as on these facts." Boniface at 123.

There is no plausible explanation for why Congress would have wanted, or intended, to enact legislation that did not touch or concern the United States and no court, nor litigant, has ever offered one. "It is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution." Dennis v. United States, 341 U.S. 494, 501, 71 S.Ct. 857, 863 (1951). The Court should not reach the issue of the constitutionality of

the statute "unless absolutely necessary to a decision of the case." Burton v. United States, 196 U.S. 283, 295, 25 S.Ct. 243, 245 (1905). A reasonable interpretation of the TVPA statute consonant with the Law of Nations and the prescription against the assumption of extraterritorial jurisdiction is available. Consistent with the concurrence in Boniface, the Court should choose it.

III. Congress Lacks the Constitutional Authority to Enact Legislation that Exercises Jurisdiction Over Claims Between Foreign Individuals for Actions Outside the United States Which Do Not Touch or Concern the United States.

The Court of Appeals in this matter concluded its analysis of the jurisdictional issues by stating that "[W]hether Congress had the power to apply the TVPA to conduct occurring abroad between foreign citizens is a critical question." Boniface at 112. In framing the question, the Court of Appeals has rejected the notion that federal question jurisdiction under Section 1331 is sufficient by itself to sustain the assertion of jurisdiction absent a more detailed inquiry into the constitutional foundation. The court referred to the issue of whether or not the TVPA as it may be construed to apply to actions between foreign individuals for acts taking place outside the United States was consistent with the Constitution as an issue of "legislative jurisdiction." Boniface at 112. The term "legislative jurisdiction" arises in varied situations, in some instances being equated with political jurisdiction over a certain areas or property, see Lake v. Ohana Military Communities, LLC, 14 F.4th 993 (9th Cir. 2021), but most frequently used to refer to the territorial limits of state jurisdiction. See, Adventure Communications, Inc. v. Kentucky Registry of Election Finance, 191 F.3d 429, 435 (4th Cir.1999) citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813, 113 S.Ct. 2891, (1993) (Scalia, J., dissenting). In his dissent in Hartford, Justice Scalia observed that:

> There is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as 'legislative jurisdiction.' This refers to the authority of a state to make its law applicable to persons or activities.

Hartford, 509 US at 812 (citations omitted).

In Hartford, interpreting the scope of the Sherman Act, the dissent observes that "this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." Id. The dissent notes that international law, or the law of nations, contains limitations on a nation's exercise of its jurisdiction to prescribe. See, Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897 ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.") Regardless of the labeling, the question before the Court is whether or not the application of the TVPA to actions between foreign individuals for acts taking place outside the United States that do not touch or concern the United States is consistent with the legislative limits of the Constitution. It is not.

The Law of Nations

To the extent the TVPA can be read to authorize jurisdiction over torts committed by foreign citizens on foreign soil that do not touch or concern the United States, its constitutional support must be found within those provisions which authorize Congress to "define and punish … Offenses against the Law of Nations." U.S. Const., art. I, section 8. The Law of Nations clause within the Constitution was one of the "class of powers lodged in the general government … which regulate the intercourse with foreign nations." The Federalist No. 42 (James Madison) at 264 (Clinton Rossiter ed., 1961). This clause was intended to regulate the conduct of

independent states towards each other. There is nothing within the clause or its historical understanding that would suggest its applicability to the wide-ranging exercise of the civil jurisdiction outside the United States with respect to conduct that does not touch or concern the United States. The Law of Nations clause codified the law of nations as it was known in 1787-1789, referring to the rights of independent sovereign states to punish offenses against other sovereign states pursuant to the then recognized rules of man invested by natural law and thought to be unchanging and immutable. There is nothing within the clause or its historical antecedents to suggest that it was meant to permit Congress to create forums for the exercise of civil jurisdiction governing events unrelated to the United States. See, Michael T. Morley, Note, The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism, 112 Yale L. J. 109, 135-136 (2002).

The authorization of federal jurisdiction over controversies between a "State, or the Citizens thereof, and foreign States, Citizen or Subjects" US Const. Art. III, § 2, cl. 1, did not encompass cases between two aliens. See Montralet v. Murray, 8 US (4 Cranch) 46 (1807). Claims between two foreign citizens that do not otherwise touch or concern the United States fall outside the limits of the Law of Nations and the limits of the Constitution. See The Alien Tort Statute and the Law of Nations, University of Chicago Law Review, Vol. 78, No. 2 (Spring 2011) at 529.

In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), a Sherman Act decision, the court cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' " Id. at 443. "United States law governs domestically but does not rule the world,"

Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115, 133 S.Ct. 1659, 1664 (2013) quoting Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007).

A rule that would authorize a nation to treat an actor "according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). Id. The First Circuit has, in the context of exercising jurisdiction to enforce criminal laws, been wary of the use of prescriptive jurisdiction abroad, endorsing the view that the courts should not "impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." United States v. Hayes, 653 F. 2d 8, 15 quoting United States v. Aluminum Co. of America, at 443. See also U.S. v. Cafiero, 342 F. Supp. 2d 49 (D. Mass. 2003)

In Hartford, Justice Scalia reviewed the Restatement factors that should be weighed in making the decision to exercise jurisdiction:

> Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) § 403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," id., § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," id., § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," id., § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," id., § 403(2)(g); and "the likelihood of conflict with regulation by another state," id., § 403(2)(h).

Hartford at 818-819.

A review of these factors in this matter indicates the exercise of jurisdiction would be inconsistent with the traditional notions of comity between nations. The incident complained of here took place in Haiti, between Haitians, and did not touch or concern the United States. The interests at issue here are the interests of Haiti and not the United States. The comity analysis is enhanced by projecting the response of the United States and its citizens in a scenario in which Haitian courts attempted to adjudicate disputes between a United States citizen and local police in the United States. The United States would undoubtedly find that such an action within Haiti would be "interference with the authority of another sovereign, contrary to the comity of nations." Am. Banana Co. v. United Fruit Co., at 356. This action is inconsistent with the traditional notions of comity between nations and, as such, inconsistent with the law of nations and the constitutional limits of the TVPA.

In Sosa v. Alvarez-Machain, supra. in the context of analyzing a claim under the ATS, the Supreme Court reviewed the constitutional limits of the law of nations. The court noted that offenses against the law of nations were "principally incident to whole states or nations." 522 U.S. at 714, quoting Blackstone, Commentaries on the Law of England 68 (1769) (hereinafter "Commentaries") In other words, the law of nations concerns itself not so much with the actions or rights of individual citizens as it does with the rights of sovereign nations to protect their interests. Blackstone, the court noted mentioned three specific offenses addressed by the criminal law of England at the time, violation of safe conducts, infringement of the rights of ambassadors, and piracy. Id. at 715. The Court noted that the history of the ATS was a history in which Congress meant to underwrite litigation of a narrow set of common law actions derived by the law of nations, id. at 720, and went on to note that "the possible collateral consequences of making international rules privately actionable argue for judicial caution." Id. at 727. The

Court also cited to Judge Bork's concurring opinion in Tel-Oren (expressing doubt that the ATS should be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. ") Sosa at 727.

In Sosa, the Court acknowledged the express mandate in the TVPA providing a basis for federal claims of torture and extrajudicial killing. Id. at 728. The Court did not, however, purport to imbue the TVPA with a scope that exceeds the Law of Nations. The Law of Nations as it existed at the time of enactment of the Constitution was a concept that served to protect the sovereignty and rights of individual nation states and to provide support for claims "incident to whole states or nations" Commentaries, 68. It was not a framework that licensed one sovereign state to adjudicate the rights of another country's citizens between each other.

The limits created by the Law of Nations are embedded in the Constitution and Congress does not have the authority to expand those limits. United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012). Whether a particular act is an offense against the law of nations "depends on the thing done, not on any declaration to that effect by Congress." Id. quoting United States v. Arjona, 120 U.S. 479, 488, 7 S.Ct. 628 (1887). While some courts have looked beyond the meanings ascribed to the law of nations at the time of enactment of the Constitution in favor of customary international law as it may be understood today, no court has sought to establish that a civil cause of action between two foreign citizens for conduct which does not touch or concern the United States merits the assertion of jurisdiction under the law of nations. In a concurrence in Bellaizac-Hurtado, Judge Barkett noted that "[C]ustomary international law recognizes five theories of jurisdiction: territorial, protective, national, passive personality, and universality." Id. at 1259 citing United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir.1984). The concurrence proceeds to observe that the first four theories permit nations to exercise

jurisdiction over offenses that implicate domestic interests "that is, offenses that occur within a nation's territory and those that occur outside the territory but have effects within it." Id. The causes of action in this matter do not fall within those categories. In assessing the application of the universality principle, the concurrence notes that "universal condemnation is by itself insufficient to place an offense within the scope of universal jurisdiction." Id. ("murder may be universally condemned but it is not subject to universal jurisdiction" citing United States v. Furlong,. 18 U.S. (5 Wheat.) 184, 197 (1820)). For the universality principle to apply the act must both fall within the norms of universally condemned behavior but also "within the specific 'subset of [universally condemned] behavior' that the international community has agreed warrants the assertion of universal jurisdiction." Id. quoting United States v. Hasan, 747 F.Supp.2d 599, 608 (E.D.Va.2010). There has been no suggestion in this case, nor could there be, that there is any universal acceptance of the notion that the international community has agreed that civil tort claims between citizens of one country should be adjudicated by the courts of another country.

IV. Conclusion

In responding to the questions presented by the Court of Appeals on remand, this Court in recognizing the Tel Oren based genesis of the TVPA should acknowledge that the intent of Congress was to provide civil recourse for matters that touched and concerned the United States but that it did not purport to, nor evince any clear indication that it also intended to, extend the jurisdictional reach of such claims beyond those well observed limits. To the extent Congress did have such an intent and the TVPA can be construed to reach matters that do not touch or concern the United States, it falls outside the Constitutional limits of what Congress can legislate and the Court should decline to enforce it for those reasons.

Wherefore, for the foregoing reasons, the Defendant Jean Morose Viliena prays that the Court enter judgment in his favor dismissing the remaining claims against him in this action and that the Court grant such other and further relief as is just.

Jean Morose Viliena,

By his attorney,

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