**IN THE UNITED STATES DISTRICT COURT**
**IN THE EASTERN DISTRICT OF PENNSYLVANIA**

JANE W, in her individual capacity, and in her capacity as the personal representative of the estates of her relatives, James W, Julie W and Jen W;

JOHN X, in his individual capacity, and in his capacity as the personal representative of the estates of his relatives, Jane X, Julie X, James X and Joseph X;

JOHN Y, in his individual capacity;

AND JOHN Z, in his individual capacity,

Plaintiffs,

v.

MOSES W. THOMAS,

Defendant.

Case No. 2:18-CV-00569-PBT

ORAL ARGUMENT REQUESTED

**Plaintiffs' Memorandum of Law in Opposition**
**to Defendant's Motion to Dismiss**

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**CASES**

**STATUTES**

**OTHER AUTHORITIES**

## INTRODUCTION

Plaintiffs Jane W, John X, John Y, and John Z, collectively ("**Plaintiffs**") submit this memorandum of law in opposition to Defendant Moses Thomas's ("**Defendant**") motion to dismiss their Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the statute of limitations bars Plaintiffs' claims and that Plaintiffs failed to exhaust local remedies. Defendant's motion should be denied because: (1) Plaintiffs are entitled to equitable tolling, which brings them within the statute of limitations; (2) Defendant has not met his burden of showing that Plaintiffs failed to exhaust local remedies; and (3) the defenses of equitable tolling and exhaustion of local remedies generally require consideration of evidence beyond the pleadings, and accordingly neither is capable of resolution on a Rule 12(b)(6) motion where there has been no factual discovery.

Plaintiffs' memorandum of law also will address this Court's jurisdiction over Plaintiffs' claims for cruel, inhuman or degrading treatment or punishment, war crimes, and crimes against humanity under the Alien Tort Statute, 28 U.S.C. § 1350 ("**ATS**") following the decision of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).[1] While the Supreme Court in *Kiobel* placed some limitations on the extraterritorial reach of the ATS, it left open ATS claims involving extraterritorial conduct that sufficiently "touch and concern the territory of the United States." *Id.* at 124–25. Because Plaintiffs' ATS claims profoundly touch and concern the United States, this Court has jurisdiction over those claims.

---

[1] Defendant has not raised the issue, but because this Court must be satisfied of its own jurisdiction, Plaintiffs consider it necessary to address it. After receiving Defendant's motion to dismiss, counsel for Plaintiffs informed defense counsel on April 30, 2018 that Plaintiffs intended to brief ATS jurisdiction in their response to Defendant's motion to dismiss and that Defendant would have an opportunity to respond in his reply. Because this is Plaintiffs' first opportunity to brief this issue, Plaintiffs respectfully request the option of a sur-reply on the issue of *Kiobel* alone, if necessary.

Accordingly, Defendant's motion should be denied in its entirety.

## RELEVANT FACTS

Defendant is a Liberian national and citizen who entered the United States in 2000. He currently resides and is domiciled in Sharon Hill, Pennsylvania. Compl. ¶ 8.

In 1990, during the administration of President Samuel Doe, Defendant was commander of the Special Anti-Terrorist Unit ("**SATU**"), a highly trained, elite Liberian special forces unit that committed multiple, indiscriminate killings of civilians as it suppressed rebellions beginning in the mid-1980s. Compl. ¶¶ 16–17.

On July 29, 1990, during the First Liberian Civil War, Defendant directed soldiers under his command to enter St. Peter's Lutheran Church, a shelter for civilians fleeing the violence of the ongoing civil war, and to kill all civilians inside. Defendant, as head of SATU, commanded a massacre of approximately 600 unarmed, sleeping men, women, and children taking refuge in St. Peter's Lutheran Church in Monrovia, Liberia (the "**Lutheran Church Massacre**" or the "**Massacre**"). Plaintiffs, who survived by hiding under piles of dead bodies, each witnessed the slaughter of hundreds of civilians, including, for some, their own family members. Compl. ¶¶ 27–35.

The Lutheran Church Massacre was part of a violent conflict that directly impacted U.S. interests. Compl. ¶ 52. The United States supported the Liberian government at the start of the civil wars and remained deeply involved throughout the conflict, due to its longstanding ties to the country and foreign policy interests. Compl. ¶¶ 53–56. The Lutheran Church itself was under the formal stewardship of the Evangelical Lutheran Church of America, which made it a target as disagreements arose between the United States and the Liberian government. Compl. ¶¶ 52–55. On the day of the Massacre, government soldiers broke into the Lutheran Bishop's

Compound, threatened a U.S. missionary, murdered her adopted daughter, and took possession of the daughter's body. Compl. ¶ 52. The following day, Massacre survivors fled to the compound of the United States Agency for International Development ("**USAID**"). *Id.* Soldiers pursued them there, invading the compound to arrest and execute survivors, and later returned to the compound to arrest and imprison a U.S. citizen who had provided first aid. *Id*.

In 2000, Defendant fled to the United States, where he applied for lawful immigration status under a program established for victims of the very violence in Liberia that he perpetrated. Compl. ¶ 49. Armed conflict in Liberia ended in 2003. In 2005, a Truth and Reconciliation Commission ("**TRC**") was established with a mandate to investigate human rights abuses during the wars, including the Lutheran Church Massacre, and recommend prosecution. The Liberian Supreme Court, however, determined in 2011 that the TRC's recommendations were "optional," and to date there have been no prosecutions for wartime atrocities. Compl. ¶¶ 27–35. Impunity persists in Liberia, where former war criminals still hold political office and witnesses who come forward to testify against perpetrators—even perpetrators residing outside of Liberia—are threatened with violence. Compl. ¶¶ 45–46. In light of Plaintiffs' inability to obtain any remedy in Liberia, they filed the Complaint in this action on February 12, 2018, alleging claims against Defendant under the ATS and the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note) ("**TVPA**").

## STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), a court is "required to accept as true all of the allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Thus, a motion to dismiss should only be granted

"if it appears to a certainty that no relief could be granted under any set of facts which could be proved." *D.P. Enter. Inc. v. Bucks Cty. Cmty. Coll.*, 725 F.2d 943, 944 (3d Cir. 1984). On a motion to dismiss for failure to bring claims within the statute of limitations, all facts as pleaded are taken as true, and "[i]f the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014).

## ARGUMENT

### I. Plaintiffs' Claims are Not Time-Barred.

Defendant's motion to dismiss Plaintiffs' claims as untimely should be denied—and the statute of limitations should be equitably tolled—because a confluence of extraordinary circumstances impeded Plaintiffs' ability to bring this action within the otherwise applicable ten-year statute of limitations. Those circumstances, some of which extend through the present, include the threat of violent reprisals in Liberia against victims who bring claims for wrongs that occurred in the context of Liberia's long-running civil wars, Defendant's absence from the United States through 2000 and concealment of his identity, and Plaintiffs' inability to identify or locate Defendant. Because Plaintiffs have pleaded facts sufficient to justify equitable tolling, Defendant's motion should be denied.

#### A. Courts Regularly Toll the Statute of Limitations in ATS and TVPA Cases.

The TVPA requires claims to be brought ten years from when the cause of action arose, 28 U.S.C. § 1350, note, sec. 2(c), but Congress has directed courts to "consider[] all equitable tolling principles in calculating this period with a view towards giving justice to plaintiff's rights." S. Rep. No. 102-249, at 10 (1991). While the ATS does not contain an express limitations period, courts have consistently applied the same ten-year statute of limitations period

and equitable tolling principles to ATS and TVPA claims. *See, e.g.*, *Chavez v. Carranza*, 559 F.3d 486, 493 (6th Cir. 2009) (applying the TVPA's ten-year statute of limitations and tolling provisions to the ATS and TVPA); *Arce v. Garcia*, 434 F.3d 1254, 1261–62 (11th Cir. 2006) (same); *Hilao v. Estate of Marcos,* 103 F.3d 767, 773 (9th Cir. 1996) (same).

Equitable tolling is available "when the principle of equity would make the rigid application of a limitation period unfair." *McAleese v. Brennan*, 483 F.3d 206, 219 (3d Cir. 2007) (internal citation omitted). Equitable tolling is appropriate in TVPA and ATS cases "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Arce*, 434 F.3d at 1261; *see also McAleese*, 483 F.3d at 219 (requiring plaintiffs to show that "some extraordinary circumstances stood in [their] way" and that they "diligently pursued [their] rights"). Serious risk of violent reprisal, the existence of armed conflict, and a general culture of impunity for serious human rights abuses have been found to constitute "extraordinary circumstances" justifying equitable tolling. *See, e.g.*, *Chavez*, 559 F.3d at 493 (tolling for grounds including fear of reprisal and the country's overall inability to administer justice); *Jean v. Dorelien*, 431 F.3d 776, 779 (11th Cir. 2005) (tolling for civil war and the continued existence of a repressive regime); *Yousuf v. Samantar*, No. 1:04CV1360, 2012 WL 3730617, at *4 (E.D. Va. Aug. 28, 2012) (tolling for "plaintiff's lack of access to a judicial remedy in his native country due to extreme unrest and legitimate fear of retaliation").

Because "equitable tolling generally requires consideration of evidence beyond the pleadings, such tolling is not generally amenable to resolution on a Rule 12(b)(6) motion." *In re Cmty. Bank of N. Virginia*, 622 F. 3d 275, 301–02 (3d Cir. 2010), *as amended* (Oct. 20, 2010); *see also Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 (3d Cir. 1994) (pleading grounds for equitable tolling was "all that was required of" the plaintiff to survive a

motion to dismiss on statute of limitations grounds). The particularly fact-intensive nature of the tolling inquiry under the TVPA and ATS, which requires careful consideration of both a plaintiff's individual situation and the broader contexts of current and historic political events and country conditions in her home country, sets a particularly high bar for any ATS and TVPA defendant to justify dismissal on statute of limitations grounds based on the pleadings alone.

### B. Extraordinary Circumstances Toll the Statute of Limitations for Plaintiffs' Claims Until Filing of the Complaint.

Congress has specifically noted, and courts have recognized, that plaintiffs in ATS and TVPA cases face unique obstacles in bringing their claims. *See, e.g.*, H. Rep. No. 102-367(I), at *3 (noting that "[t]he general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact"); *Jean*, 431 F.3d at 780 ("Congress acknowledged that plaintiffs face unique impediments . . . in bringing human rights litigation."). Accordingly, courts have permitted tolling of TVPA and ATS claims in a broad variety of circumstances. Plaintiffs in this case have pleaded facts sufficient to establish extraordinary circumstances that continue to the present day and entitle them to tolling up until the Complaint was filed.

***First***, from the time of the Massacre through the present day, witnesses and victims who have spoken out against civil war-era human rights abusers—including perpetrators living outside Liberia—have faced and continue to face threats of violence. Compl. ¶ 46. Courts have found tolling justified where ATS and TVPA plaintiffs live in a country where the regime is hostile to their claims, or other in-country circumstances create fear of reprisal. *See Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148 (E.D. Cal. 2004) (tolling ATS and TVPA claims against former Salvadoran death squad members until the complaint was filed, well beyond signing of

Peace Accords dissolving death squads and elections ending the military dictatorship, because plaintiffs continued to fear reprisals by former death squad members); *see also Warfaa v. Ali*, 33 F. Supp. 3d 653, 664–65 (E.D. Va. 2014) (tolling ATS and TVPA claims where sectarian violence and political upheaval continued after the fall of the repressive regime). The circumstances justifying tolling in the instant case are similar to those in *Saravia* and *Warfaa*. Plaintiffs here have pleaded that, in Liberia, perpetrators of wartime abuses continue to hold important political offices and use their positions of power to thwart accountability efforts perceived as threats to their authority. Compl. ¶¶ 45–46. The TRC's recommendations on enacting legislation necessary to hold perpetrators of wartime atrocities accountable have yet to be implemented. Compl. ¶¶ 43–44. Liberian witnesses who testify against perpetrators of human rights abuses are threatened with violence. Compl. ¶ 46. Indeed, Plaintiffs are seeking to proceed under pseudonyms because they fear violent reprisal for participating in this lawsuit. *See* Dkt. ##15–16. Those elected to the Liberian government following the civil wars have done little to advance accountability or to reduce the danger posed to Plaintiffs. Plaintiffs' continued fear of violent reprisal warrants equitable tolling of their TVPA and ATS claims up until the filing of the Complaint.

***Second***, as residents of post-conflict Liberia, it was impossible for Plaintiffs to independently locate or identify Defendant. As a consequence, the practical challenges that Plaintiffs faced constitute extraordinary circumstances that entitle Plaintiffs to equitable tolling to the filing date. *See Yousuf*, 2012 WL 3730617, at *5 ("In addition to the turmoil within Somali[a], defendant's absence—and plaintiffs' lack of knowledge about his whereabouts in the years following his departure from Somalia—prevented the commencement of [plaintiffs' ATS and TVPA claims]."). After the Massacre, many survivors and witnesses to the attack, including

several Plaintiffs, fled Monrovia, the capital, to rural Liberia, where they remain today. Compl. ¶¶ 36–38, 41. The civil wars, which ended in 2003, resulted in the decimation of the country's already-limited transportation and communications infrastructure. Compl. ¶ 48. Struggles to rebuild were hampered by successive setbacks, including the Ebola pandemic from 2014 to 2016. Compl. ¶¶ 47, 49. To this day, Plaintiffs have limited access to the world outside of their local communities in Liberia, let alone the means or ability to independently conduct the international investigation necessary to locate Defendant, whose name was until recently not known to any of them except John Y. Compl. ¶ 49.

Difficulties in identifying Defendant after he fled to the United States were further compounded by the fact that Defendant misrepresented his actions in Liberia's First Civil War, falsely stating that he was a victim of wartime atrocities in Liberia and concealing his position as a senior military officer and his role in the Massacre. Compl. ¶ 50. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155–56 (11th Cir. 2005) (tolling statute of limitations for period in which there was active concealment of relevant facts); *see also* S. Rep. No. 102-249, at 11 (noting that TVPA claims "should . . . be tolled where the defendant has concealed his or her whereabouts").

### C. Additional Circumstances Alleged in the Complaint Toll the Limitations Period to 2011, and from 2014 to 2016.

Plaintiffs have also pleaded facts sufficient to establish overlapping extraordinary circumstances that, together, toll the statute of limitations period to 2011, and again from 2014 to 2016: Defendant's absence from the United States (1990–2000), the Liberian civil wars (1990–2006), the TRC's investigation of violations of international law that Liberians hoped would

result in legal avenues of accountability for wartime atrocities (2006–2011), and the Ebola pandemic (2014–2016).

***First***, Defendant was outside of the United States until 2000. ATS and TVPA claims are tolled where timely filing is unavailable due to a defendant's absence from the United States, and where the jurisdiction where the defendant was present offered no adequate comparable remedy. *See, e.g.*, *Arce*, 434 F.3d at 1264 (tolling TVPA claims against Salvadorian military officers until they became U.S. residents); *Jean*, 431 F.3d at 779–80 (tolling TVPA and ATS claims against Haitian military officer "at least until [the defendant] entered the United States"); *Warfaa*, 33 F. Supp. 3d at 665 (tolling TVPA and ATS claims while defendant was in Somalia); *see also* S. Rep. No. 102-249, at 10 (listing a defendant's absence from the United States as a ground for equitable tolling). Prior to Defendant's arrival in the United States in 2000, he was in Liberia, which was ensnared in ongoing civil wars until 2003 and lacked a functioning judiciary, and could not provide an adequate comparable remedy. *See* Compl. ¶¶ 41–48.

***Second***, back-to-back civil wars in Liberia lasted through 2003, and no functioning government was installed until 2006. Compl. ¶¶ 14–15. *See Chavez*, 559 F.3d at 492–94 (tolling claims through first national elections rather than the earlier signing of the Peace Accord); *Jean*, 431 F.3d at 779 (identifying consensus among "every court that has considered the question" that civil war and the continued existence of a repressive regime constitute "extraordinary circumstances" for purposes of tolling the TVPA's limitations period). Even after the first elected government took office in 2006, Liberia continued to struggle with post-conflict reconstruction and lacked institutions that could investigate or resolve claims from the civil wars. Compl. ¶ 48.

***Third***, following the Second Civil War, the TRC was established to investigate gross human rights violations committed during Liberia's two civil wars, identify those responsible for serious abuses, and develop recommendations for how the government of Liberia could create the institutional capacity to prosecute perpetrators of these crimes. Compl. ¶¶ 42–43. Plaintiffs believed that the TRC would successfully carry out its mandate and that the government would accept its recommendations, thereby making it unnecessary and imprudent for victims to independently investigate their own claims. Compl. ¶ 43.

The TRC concluded its work in 2009. Among its recommendations was a draft statute to establish a war crimes court to investigate and prosecute civil war-era human rights violations such as the Massacre. Litigation to compel action on the TRC recommendations ensued, and, in 2011, the Supreme Court of Liberia held that the TRC's recommendations were non-binding. Compl. ¶ 44. Since then, the Liberian government has yet to take steps to implement laws necessary to provide legal accountability or reparations to victims of the civil wars. *Id.* Prior to 2011, Plaintiffs had reason to believe that the TRC would investigate the Massacre and provide a remedy. Accordingly, circumstances in Liberia warrant tolling the limitations period until at least 2011. *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 291 (S.D.N.Y. 2009) (tolling the limitation period during the TRC process because "[a] reasonable plaintiff may have assumed that defendants would participate in the TRC process, in which case plaintiffs would have had no need to conduct an independent investigation into defendants' conduct").

***Fourth***, the Ebola pandemic in Liberia further prevented Plaintiffs from investigating their claims and accessing legal counsel to pursue the instant action. The pandemic, which officially lasted from March 30, 2014 to June 9, 2016, made travel in and around the country, and communication within and outside of Liberia, difficult and oftentimes dangerous. Compl.

¶ 47. Several Plaintiffs and many witnesses to the Massacre reside in rural Liberia, which was under travel restriction during the pandemic. Claim development was effectively brought to a standstill. These extraordinary circumstances warrant additional equitable tolling from March 2014 through June 2016.

Given the numerous and overlapping extraordinary circumstances Plaintiffs faced, they are entitled to equitable tolling up until the time they filed the Complaint.

Moreover, as noted above, because equitable tolling requires consideration of evidence beyond the pleadings, it "is not generally amenable to resolution on a Rule 12(b)(6) motion." *In re Cmty. Bank of N. Virginia*, 622 F. 3d at 301–02. At the very least, Plaintiffs have pleaded facts sufficient to show they have grounds for equitable tolling, which is "all that [is] required" to preclude dismissal at this time. *Oshiver*, 38 F.3d at 1384. Defendant's Rule 12(b)(6) motion to dismiss Plaintiffs' ATS and TVPA claims for failure to comply with the statute of limitations should therefore be denied.

## II. The Court Should Deny Defendant's Motion to Dismiss Plaintiffs' TVPA Claims for Failure to Exhaust Local Remedies.

Citing the TVPA's requirement that plaintiffs must "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred," Defendant moves to dismiss the TVPA claims on the theory that Plaintiffs failed to set out in the Complaint the remedies they sought in Liberia. Mot. at 7 (citing 28 U.S.C. § 1350, note). This argument fails for two reasons. ***First***, failure to exhaust local remedies is an affirmative defense that Defendant bears the burden of establishing, and Defendant cannot meet that burden on a motion to dismiss, where he has not even alleged, let alone shown, that adequate remedies are available in Liberia.

***Second***, while not required to do so, Plaintiffs have pleaded facts in the Complaint showing that no adequate remedies are available in Liberia, which a court must accept as true at this stage.

### A. Defendant Fails to Meet His Burden to Show that Local Remedies Are Available.

"[T]he exhaustion requirement pursuant to the TVPA is an affirmative defense, requiring the defendant to bear the burden of proof." *Jean*, 431 F.3d at 781; *accord Hilao*, 103 F.3d at 778 n.5. "Because it is an affirmative defense, exhaustion of local remedies need not be pled in a complaint under the TVPA." *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 190 F. Supp. 3d 1100, 1114 (S.D. Fla. 2016); *see also Flight Sys., Inc. v. Elec. Data Sys. Corp.*, 112 F.3d 124, 127 (3d Cir. 1997) ("On a Rule 12(b)(6) motion, an affirmative defense . . . is appropriately considered only if it presents an insuperable barrier to recovery by the plaintiff.").

Instead, a defendant raising this defense must "show[] remedies abroad which have not been exhausted," after which the burden "shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable unduly prolonged, inadequate, or obviously futile," although the "ultimate burden of proof and persuasion . . . [remains] with the defendant." S. Rep. No. 102-249, at 9–10; *see also id.* (stating that "in most instances the initiation of litigation under [the TVPA] will be virtually prima facie evidence that the claimant has exhausted his or her remedies" and courts should "approach cases . . . with this assumption"). Any doubts about exhaustion under this analysis are to "be resolved in favor of the plaintiffs." *Enahoro v. Abubakar*, 408 F.3d 877, 891–92 (7th Cir. 2005).

Defendant plainly has failed to meet the burden of raising an affirmative defense. Apart from a conclusory statement that Plaintiffs have failed to allege exhaustion, Defendant has not

alleged that any adequate remedies are available and obtainable in Liberia, let alone identified the remedies as required.

### B. The Complaint Includes Detailed Allegations That Liberian Remedies are Unobtainable, Ineffective, Inadequate and Obviously Futile.

Plaintiffs, on the other hand, have pleaded facts to show that remedies in Liberia are "unobtainable, ineffective, inadequate or obviously futile." *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (citing S. Rep. No. 102-249, at 10). Although Plaintiffs have no burden to show exhaustion, they have alleged at least three sets of facts, any one of which satisfies the exhaustion requirement.

***First***, where, as here, a government has resisted holding human rights violators accountable, local redress is deemed futile for purposes of the TVPA. *See, e.g.*, *Saravia*, 348 F. Supp. 2d at 1152–53 (holding that no exhaustion of TVPA claims was required where "there has never been a successful criminal prosecution against the [perpetrators] . . . and the opportunity to do so has been effectively abrogated" by the local government). No perpetrator of wartime atrocities has been prosecuted in Liberia to date, despite widespread violations of human rights during the civil wars. Compl. ¶ 44. To the contrary, the Liberian government has actively resisted demands to hold perpetrators accountable, rejecting recommendations from the TRC to create an Extraordinary Chamber within the Courts of Liberia to prosecute war crimes and making no other efforts to promote accountability. Compl. ¶¶ 43–44. Liberia's failure to prosecute *any* war crimes, despite well-documented abuses in two civil wars spanning decades, demonstrates that Plaintiffs have little hope of a local remedy, let alone an adequate one.

***Second***, local remedies are futile where Plaintiffs are subject to an ongoing risk of retaliation in their home country for seeking redress for human rights abuses. *See In re Chiquita*

*Brands*, 190 F. Supp. 3d at 1114 n.16; *Jean*, 431 F.3d at 782–83. As discussed in Part I.B, *supra*, Plaintiffs face serious risks of retaliation for attempting to bring claims. Compl. ¶¶ 43–44, 46.

***Third***, exhaustion of local remedies is futile where there is no adequately functioning judiciary. *See, e.g.*, *Enahoro*, 408 F.3d at 891–92 (finding exhaustion futile where "the Nigerian judiciary was under-funded, corrupt, subject to political influence and generally unable or unwilling to compensate victims of past human rights abuses"); *Ahmed v. Magan*, , No. 2:10-CV-342, 2011 WL 13160129, at *4 (S.D. Ohio Nov. 7, 2011) (finding exhaustion futile where, among other factors, there was a "lack of trained judges" and other "problems in the administration of justice" in Somalia); *Mushikiwabo v. Barayagwiza*, 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996) (finding that plaintiffs "fulfilled the exhaustion requirement of the TVPA by demonstrating that the Rwandan justice system is virtually inoperative").

Liberia existed in a state of intense and widespread armed conflict until 2003, and there was no elected government in place until 2006. Compl. ¶¶ 15, 41. Liberia's civil wars decimated its civil institutions and resulted in "a judiciary without capacity to investigate or resolve individual claims arising from the civil wars." Compl. ¶ 48. Indeed, in a 2011 ATS case, the Seventh Circuit expressly found that the plaintiffs had satisfied the exhaustion requirement because the Liberian courts were unable to provide a remedy. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011) ("A U.S. court might . . . give the courts of the nation in which the violation had occurred a chance to remedy it, provided that the nation seemed willing and able to do that. Liberia is not able.").

Defendant's Rule 12(b)(6) motion to dismiss Plaintiffs' TVPA claims for failure to exhaust local remedies should therefore be denied.

## III. This Court Has Jurisdiction Over the Plaintiffs' ATS Claims.

### A. *Kiobel* Establishes That Courts Have Jurisdiction Over ATS Claims that Touch and Concern the United States.

While Defendant has not objected to the Court's jurisdiction over Plaintiffs' ATS claims, Plaintiffs nonetheless take this opportunity to address the ATS's jurisdictional requirements in light of the lower courts' inconsistent interpretation of *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), which governs jurisdiction under the ATS for claims involving extraterritorial conduct. This issue does not implicate Plaintiffs' TVPA claims, for which there is statutory extraterritorial jurisdiction. *See* 28 U.S.C. § 1350, note.

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. That provision confers jurisdiction to recognize under federal common law a cause of action for violations of certain international legal norms that are sufficiently specific, universal and obligatory. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). In *Kiobel*, the Supreme Court held that there is a presumption against jurisdiction over ATS claims involving only extraterritorial conduct and limited ATS claims to those that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" of U.S. statutes. 569 U.S. at 124–25. *See also, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521, 528 (4th Cir. 2014) (finding that extraterritorial conduct "touch[ed] and concern[ed]" the United States where the plaintiffs' claims had substantial connections to U.S. individuals and interests). Plaintiffs' claims readily satisfy the "touch and concern" test.

### B. This Court Has Jurisdiction Because the Plaintiffs' Claims Touch and Concern the Territory of the United States.

Plaintiffs' claims "touch and concern" the territory of the United States as required under *Kiobel* both because Defendant is a longtime U.S. resident and because Plaintiffs' claims have substantial connections to the United States that further anchor jurisdiction under the ATS.

#### 1. Defendant's Longtime U.S. Residence and Attempt to Obtain Safe Harbor in the United States Are Sufficient to Displace the Presumption Against Extraterritoriality.

Claims against a defendant residing in the United States touch and concern U.S. territory. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the presence of the defendant within the United States was sufficient to exercise jurisdiction over ATS claims for torture abroad); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994) (exercising jurisdiction over ATS claims involving extraterritorial conduct where the defendant had been residing in the United States for two months). This is particularly the case where, as here, a defendant is using the United States as a safe harbor from accountability for egregious violations of international law. For example, the court in *Filartiga*, the first modern ATS case, allowed claims against a Paraguayan citizen for torture committed in Paraguay to proceed where the defendant had sought safe harbor in the United States on a visitor's visa. 630 F.2d 876. Similarly, in *Marcos*, the Ninth Circuit found it had jurisdiction over ATS claims against a Philippine national whose alleged misconduct took place in the Philippines, but who later fled to the United States and sought safe harbor here. 25 F.3d at 1475. The Supreme Court has not questioned that ATS claims where the United States is effectively serving as a "safe harbor" to torturers or war criminals, as in *Filartiga*, can still be subject to jurisdiction in U.S. courts. *See Sosa*, 542 U.S. at 731–32, 748; *see also Kiobel*, 560 U.S. at 135 (Breyer, J., concurring) (noting

that *Sosa* "referred to [*Filartaga* and *Marcos*] with approval, suggesting that the ATS allowed a claim for relief" where a perpetrator sought safe harbor in the United States); *Jesner v. Arab Bank*, 138 S. Ct. 1398, 1428 (2018) (Sotomayor, Ginsburg, Breyer, and Kagan, JJ., dissenting) ("The *Sosa* Court acknowledged the decisions made in *Filartiga* and similar cases; and it held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations.").

The *Kiobel* majority, which addressed only ATS jurisdiction based on corporate—not individual—presence, did not alter the ability of U.S. courts to assert jurisdiction for ATS claims implicating the United States as a "safe harbor" for violators of international law. In holding that "mere corporate presence" in the United States does not displace the presumption against extraterritoriality, the *Kiobel* majority limited its holding to facts unique to the case, including that "[c]orporations are often present in many countries." *Id.* at 125.[2] That reasoning, of course, is inapplicable to individual defendants, who can only be present in a single jurisdiction at a time.

Only Justice Breyer's four-judge concurrence considered individual defendants, and it emphasized the importance of ATS jurisdiction in upholding "this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms." *Id.* at 133–36 (citing *Sosa*'s approval of *Filartiga* and *Marcos* to show "that the ATS allowed a claim for relief" based on a defendant's U.S. residence). Justice Kennedy's separate concurrence emphasized the limited nature of the majority's opinion. *Id.* at 125 (noting that *Kiobel* was

[2] In *Kiobel*, the two defendant corporations' shares were traded on the New York Stock Exchange and their "only presence in the United States consist[ed] of an office in New York City (actually owned by a separate but affiliated company) that help[ed] to explain their business to potential investors." 569 U.S. at 139 (Breyer, J., concurring).

written narrowly to "leave open a number of significant questions" and, for future cases involving "human rights abuses committed abroad," the particular "reasoning and holding" of *Kiobel* may not apply).[3] Taken together, these two concurrences—reflecting the opinions of five Justices—make clear that *Kiobel* does not displace jurisdiction over ATS claims against individual defendants who reside in the United States. Further, *Jesner*, the most recent Supreme Court opinion considering ATS claims, held that ATS jurisdiction does not extend to suits against foreign corporations and did not address claims against individual human rights violators (including those seeking safe harbor in the United States). Notably, the majority repeatedly cited *Sosa* and *Filartiga* with approval. *See generally Jesner*, 138 S. Ct. 1386. Furthermore, the four-Justice dissent noted the continued importance of the ATS in "preventing our nation from serving as a safe harbor for today's pirates." 138 S. Ct. at 1428 (Sotomayor, Ginsburg, Breyer, and Kagan, JJ., dissenting).

Following *Kiobel*, courts have continued to recognize the profound U.S. interest in preventing perpetrators of war crimes from finding safe harbor here. *See, e.g.*, *Al Shimari*, 758 F.3d at 530 (drawing an analogy between ATS and TVPA claims and noting that "the TVPA's broad prohibition against torture reflects Congress's recognition of a 'distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind'") (citing *Kiobel*, 569 U.S. at 127–28 (Breyer, J., concurring)). At least one post-*Kiobel* court has explicitly held that a defendant's U.S. residence displaces the presumption against extraterritoriality for ATS claims. *See Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013), *report and*

[3] At oral argument, Justice Kennedy specified that *Filartiga* is a "binding and important precedent." Tr. of Oral Argument at 13:21– 23, *Kiobel* (No. 10-1491) (Feb. 28, 2012).

*recommendation adopted*, No. 2:10-CV-00342, 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013) (holding that "the presumption . . . against extraterritoriality has been overcome in this case" because the defendant was "a permanent resident of the United States").

Defendant has continuously resided in the United States for approximately 18 years under an immigration policy designed to assist individuals fleeing the very wartime abuses he perpetrated. Compl. ¶ 51. Defendant remained in the United States while the Liberian TRC investigated gross human rights violations committed during the civil wars and their perpetrators. Compl. ¶42. The TRC made recommendations for the creation of a war crimes court to investigate and prosecute wartime atrocities, such as the Massacre. Compl. ¶ 44. These recommendations are still pending. Nevertheless, Defendant's continued residence in the United States ensures that he is only subject to the reach and jurisdiction of U.S. courts. Moreover, Defendant's longstanding U.S. residence and abuse of a U.S. immigration benefit to obtain safe harbor make his connection to the United States even stronger than the connections of the defendants in *Filartiga* and *Marcos*, and similar to those in *Ahmed*, where the court found that the defendant's longtime residency touched and concerned the United States so as to displace the post-*Kiobel* presumption against extraterritoriality.

2. The Defendant's U.S. Residence Combined with the Claims' Significant Additional Connections to the United States Displace the Presumption Against Extraterritoriality.

Defendant's U.S. residence alone is sufficient to confer jurisdiction over Plaintiffs' ATS claims. That Plaintiffs' ATS claims touch and concern the United States is bolstered by significant additional connections with the United States. The violence that gave rise to Plaintiffs' claims also harmed U.S. citizens, entities, and interests, and occurred as part of an armed conflict in which the United States had a substantial interest.

Claims touch and concern the United States where the alleged wrongdoing targets and affects the United States or its citizens, entities, and interests, even if the conduct in question was largely or exclusively committed outside of the United States. *You v. Japan*, No. C 15-03257 WHA, 2015 WL 6689398, at *1 (N.D. Cal. Nov. 3, 2015) (finding ATS jurisdiction under the *Kiobel* test where "[t]he alleged atrocities that give rise to plaintiffs' claims were part and parcel of the Japanese war effort," which included a direct attack against the United States); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (holding an attack on a U.S. Embassy in Kenya sufficed to satisfy *Kiobel*'s touch and concern test in part because it was "directed at the United States government, with the intention of harming this country and its citizens").[4]

[4] Some federal courts have erroneously applied a "focus" test to ATS claims. *See, e.g.*, *Balintulo v. Ford Motor Co*., 796 F.3d 160, 166 (2d Cir. 2015), *cert. denied sub nom. Ntsebeza v. Ford Motor Co*., 136 S. Ct. 2485 (2016); *Adhikari v. Kellogg Brown & Root, Inc.,* 845 F.3d 184, 197 (5th Cir. 2017), cert. denied, 138 S. Ct. 134 (2017). But that test derives from a case concerning the extraterritorial application of federal securities law, *Morrison v. Nat'l Austl. Bank Ltd.,* 561 U.S. 247 (2010), in which the court looked to where the "focus" of the tort occurred—that is, where the conduct that Congress sought to regulate took place. A more recent Supreme Court case, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016), which concerned the extraterritorial application of RICO and in dicta mentioned the "focus" test together with the ATS, did not displace the Supreme Court's reasoned explanation of the ATS analysis from *Kiobel*. *See Salim v. Mitchell*, 268 F. Supp. 3d 1132, 1151 (E.D. Wash. 2017) ("This court finds *RJR Nabisco* has not displaced *Kiobel* when the issue is extraterritorial application of the ATS.").

Here, the wrongdoing surrounding the Lutheran Church Massacre directly involved and impacted the United States. The Liberian government soldiers who broke into the Lutheran Bishop's Compound the day of the Massacre threatened a U.S. missionary with serious bodily harm, murdered her adopted daughter, and took possession of the daughter's body. Compl. ¶ 52. The day after the Massacre, soldiers pursued survivors of the massacre to the compound of a U.S. government agency—USAID—and invaded it to arrest hundreds of survivors for execution at a nearby beach. Compl. ¶ 52. Ten days later, the soldiers again entered the USAID compound to arrest and imprison a U.S. citizen who had provided first aid to the survivors fleeing the massacre, and killed another U.S. missionary in Monrovia within weeks. *Id.* The Lutheran Church itself was closely affiliated with a U.S. institution, the Evangelical Lutheran Church of America, which provided extensive operational and administrative support to the Lutheran Church in Liberia ("**LCL**"), which managed the refuge at St. Peter's Lutheran Church. The attack on the Bishop's Compound and the Lutheran Church Massacre both occurred after Doe's military forces began targeting the LCL and its bishop for their efforts, in conjunction with the United States, to broker peace. Compl. ¶¶ 52–55. As these facts show, the Massacre was one part of a campaign of violence directly attacking U.S. affiliated sites, a U.S. government agency, and U.S. citizens.

Moreover, the Lutheran Church Massacre took place in the broader context of an armed conflict in which the United States played an integral role. The U.S. stationed a military presence off the coast in preparation for a possible armed intervention and evacuation mission, was the only country to maintain an open embassy for the duration of the conflict, and ultimately played a pivotal role in brokering peace. Compl. ¶¶ 52–56. Following the conflict, the United States hosted TRC hearings with victims and perpetrators, and permitted significant numbers of

Liberians fleeing their war-torn country to resettle temporarily in the United States. Compl. ¶ 56. The international crimes committed by Defendant took place in the context of an armed conflict with substantial U.S. connections.

Accordingly, multiple factors militate in favor of finding that this case sufficiently touches and concerns the United States so as to displace *Kiobel*'s presumption against extraterritoriality, from Defendant's long-term U.S. residency, safe harbor, and continued abuse of a U.S. immigration benefit, to the U.S. interests impacted by the Massacre and related events and the United States' role in the Liberian civil war.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).