UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS EASTERN DIVISION

DAVID BONIFACE,

NISSAGE MARTYR (DECEASED), and

JUDERS YSEME;

Plaintiffs,

v.

JEAN MOROSE VILIENA (a.k.a. JEAN MOROSE VILLIENA),

Defendant.

Civil Action No. 1:17-cv-10477-ADB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Defendant Jean Morose Viliena ("Defendant") is a legal permanent resident of the United States who currently resides in Massachusetts. Between 2007 and 2009, as Mayor of the Haitian town of Les Irois, Defendant led his associates in a campaign of torture, killing, and persecution of perceived political opponents, which targeted Plaintiffs David Boniface, Nissage Martyr (Deceased)[1] and Juders Ysemé ("Plaintiffs"). Since 2007, Plaintiffs have diligently pursued all available avenues for accountability. They first sought justice through the criminal justice system in Haiti only to see Defendant flee to the United States to avoid prosecution and, in concert with his co-conspirators, engage in physical violence and coercion to obstruct Plaintiffs' efforts. It ultimately became clear to Plaintiffs that any efforts to hold Defendant to account in Haiti would be futile; as a result, on March 22, 2017, they filed this action against him for torture, extrajudicial killing, and attempted extra-judicial killing under the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note) ("TVPA"), for crimes against humanity under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and for arson under the laws of the Republic of Haiti pursuant to 28 U.S.C. § 1367. (Dkt 1).

Defendant moves to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In his motion, Defendant minimizes the wrongs he inflicted upon Plaintiffs by mischaracterizing this suit as an attention-grabbing exercise, claiming "[t]here is little more to be gained or accomplished" by continuing this action. Not so. Plaintiffs seek justice they have been unable to obtain in Haiti for the role Defendant played in the abuses that left them maimed, disfigured, psychologically devastated, and unable to sustain their livelihoods.

[1] On March 24, 2017, one day after Defendant was served with the Summons and Complaint in this matter, plaintiff Nissage Martyr died suddenly under suspicious circumstances. Plaintiffs' motion to substitute Nissandère Martyr, Nissage's son, as plaintiff in place of Nissage Martyr is currently pending before the Court. *See* Dkt. 29, 30, 40 and 43.

Defendant identifies no valid legal bases to dismiss the Complaint. First, the Court has subject matter jurisdiction over Plaintiffs' ATS and TVPA claims. Defendant's arguments to the contrary subvert well-established jurisprudence on the scope and applicability of the presumption against extraterritoriality announced in *Kiobel v. Royal Dutch Petroleum Co*., 133 S.Ct. 1659 (2013). Second, Defendant fails to satisfy his burden of proof to show that that Plaintiffs failed to exhaust local remedies, an affirmative defense under the TVPA. Indeed, the Complaint amply sets forth detailed allegations demonstrating that Haitian remedies are unobtainable, ineffective, inadequate and obviously futile for Plaintiffs here. Third, the Complaint contains sufficient and plausible allegations to satisfy Rule 12(b)(6) that Defendant was acting under color of law and is liable for extrajudicial killing, attempted extrajudicial killing and torture under the TVPA. Fourth, supplemental jurisdiction over Plaintiffs' Haitian law claim is proper pursuant to 28 U.S.C. § 1367. Finally, the Court should deny Defendant's unfounded request to abstain from hearing Plaintiffs' justiciable claims. Defendant's motion should be denied in its entirety.

RELEVANT FACTS

Defendant served as Mayor of Les Irois from December 2006 to February 2010, during which time he personally led an armed group in a series of attacks on his critics and perceived political opponents, including Plaintiffs. Dkt. 1, Complaint ("Compl.") ¶ 11-12, 24-28.

On July 27, 2007, Plaintiff David Boniface, a grade school teacher and human rights advocate, spoke at a judicial proceeding to protect the human rights of a neighbor assaulted by Defendant. In reprisal, Defendant led an armed group to David Boniface's home that evening, where Defendant's associates shot and killed David Boniface's younger brother, Eclesiaste Boniface, and then smashed his skull with a large rock before a crowd of bystanders. Compl. ¶ 29-39.

On April 8, 2008, Defendant mobilized and armed his associates to forcibly shut down a community radio station that he perceived as a political threat. During the attack on the radio station, Defendant and his associates pistol-whipped and brutally beat Plaintiff Nissage Martyr, out of whose home the radio station operated, and Plaintiff Juders Ysemé. When Nissage Martyr and Juders Ysemé tried to escape, Defendant ordered one of his associates to shoot and kill them. The shotgun blast struck Nissage Martyr in the leg and Juders Ysemé in the face. Both were left for dead and permanently maimed. Compl. ¶ 40-51.

In January 2009, Defendant fled to the United States after Haitian authorities finally launched a criminal investigation into the killing of Eclesiaste Boniface and the attack on the radio station. Defendant continued to serve as Mayor of Les Irois from Massachusetts and to orchestrate the repression of perceived political opponents in Haiti. Compl. ¶ 52. In October 2009, Defendant coordinated the mass arson of 36 homes that left 300 individuals, including Plaintiffs, homeless. Compl. ¶ 53-58. Defendant, acting in concert with his co-conspirators, continues to thwart Plaintiffs' diligent efforts to seek justice in Haiti through violence and political pressure. Compl. ¶ 59-64.

STANDARD OF REVIEW

In considering a motion under Rule 12(b)(1), where the defendant attacks the Court's jurisdiction based solely on allegations in the complaint, "the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." *Aversa v. U.S.*, 99 F.3d 1200, 1210 (1st Cir. 1996) (citations omitted).

Similarly, in considering a motion to dismiss under Rule 12(b)(6), the Court "accept[s] as true all well-pleaded facts, analyz[es] those facts in the light most hospitable to the plaintiff's theory, and draw[s] all reasonable inferences for the plaintiff." *U.S. ex rel. Hutcheson v.*

Blackstone Med., Inc., 647 F.3d 377, 383 (1st Cir. 2011). *Twombly* and *Iqbal* require Plaintiffs to plead sufficient facts, which, if taken as true, "nudge[] their claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). "Plausible" does not mean "probable." A complaint withstands a Rule 12(b)(6) motion "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556.

ARGUMENT

I. Defendant's 12(b)(1) Motion Should Be Denied Because The Court Has Subject-Matter Jurisdiction Over Plaintiffs' ATS and TVPA Claims.

The Court should deny Defendant's Rule 12(b)(1) motion to dismiss Plaintiffs' ATS and TVPA claims as they are not barred by the presumption against extraterritoriality. Defendant wrongly construes this as a "foreign-cubed" case with no purported nexus to the United States. To the contrary, the Complaint alleges Defendant is a U.S. lawful permanent resident who was responsible for serious human rights violations while serving as a public official in Haiti, who engaged in substantial tortious conduct from his current home base of Massachusetts, and who is using his residency in the United States to evade Plaintiffs' attempts to seek justice in Haiti.

A. Plaintiffs' ATS Claims Sufficiently Touch and Concern the United States to Displace the *Kiobel* Presumption.

The ATS gives federal courts "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 (2012). Under the ATS, courts may recognize certain violations of international law as federal common law. *Kiobel*, 133 S.Ct. at 1663.[2] In *Kiobel*, the Supreme

[2] When determining what constitutes a violation of international law, courts should recognize only those claims based on norms of international law that are "specific, universal, and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

Court endorsed a presumption against recognizing ATS claims arising *exclusively* from extraterritorial conduct. *See id*. at 1669. The Court emphasized, however, that this presumption could be displaced where claims "touch and concern" the United States "with sufficient force." *Id.*

Accordingly, courts applying *Kiobel* have exercised ATS jurisdiction in cases where the primary harm occurred abroad, so long as the claim sufficiently touches and concerns the United States. The only post-*Kiobel* decision in this Circuit to evaluate a 12(b)(1) challenge to an ATS claim makes clear that domestic conduct that contributes to violations of international law abroad can displace the *Kiobel* presumption. In *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013), which was not cited by Defendant, this Court denied defendant's motion to dismiss an ATS claim for the crime against humanity of persecution of the LGBTI community in Uganda. Notably, this Court found that, while all of the alleged injuries took place in Uganda, the *Kiobel* presumption was rebutted because defendant, a U.S. citizen and resident, was alleged to have provided practical assistance from the United States to the campaign of persecution abroad. *Id.* at 323 ("*Kiobel* makes clear that its restrictions on extraterritorial application of American law do not apply where a defendant and his or her conduct are based in this country.");[3] *see also Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014) (jurisdiction under the ATS was proper where U.S.-based corporation engaged in relevant conduct in the U.S. that resulted in the commission of crimes against humanity abroad) (vacated and remanded on other grounds); *Salim v. Mitchell*, 268 F. Supp. 3d 1132, 1150 (E.D. Wash.

[3] The ATS claim in *Lively* was ultimately dismissed at summary judgment after a full evidentiary record showed that defendant's U.S.-based conduct was limited to "sporadic emails" from the U.S. offering only advice, guidance and rhetorical support for the campaign of persecution, which was insufficient to displace the *Kiobel* presumption. *Sexual Minorities Uganda v. Lively*, 254 F. Supp. 3d 262, 271 (D. Mass. 2017) (reaffirming that plaintiff's allegations of U.S.-based conduct nevertheless "fully supported" the court's denial of defendant's threshold motion to dismiss). Unlike Defendant here, Mr. Lively did not hold office, did not direct violence and had no authority over his associates in Uganda.

2017) (jurisdiction under the ATS was proper where U.S. resident citizens engaged in U.S. conduct that aided and abetted torture carried out abroad).

Here, as in *Lively*, *Al Shimari*, and *Mitchell*, Plaintiffs' ATS claims of persecution as a crime against humanity touch and concern the United States with sufficient force because Defendant's domestic conduct substantially contributed to the persecution of Plaintiffs abroad. *See* Compl. ¶¶ 63, 74. Defendant's persecution of Plaintiffs was a continuing offense, committed over years, as part of a cross-border conspiracy. Compl. ¶¶ 72-74. Defendant continued to govern as Mayor of Les Irois from his home in Massachusetts. Compl. ¶¶ 13, 64. He orchestrated an ongoing campaign of persecution from the United States by directing acts of violence, exercising control over local perpetrators and providing logistical support, planning, and coordination. Compl. ¶¶ 1-3, 13-14, 52-64, 68-71, 74-77, 107-124. The violence included the brutal beating of Clorene Francois by Defendant's co-conspirators after she provided eyewitness testimony against Defendant regarding the killing of Eclesiaste Boniface and the mass arson in October 2009. Compl. ¶ 52-58, 62-64, 109-112. Moreover, Defendant's flight to Massachusetts furthered the conspiracy to persecute Plaintiffs as it hindered the apprehension, trial, and punishment of him and his co-conspirators. Compl. ¶¶ 60-61, 63, 74.

Since at least January 2009, Defendant has resided in Massachusetts as a permanent resident of the United States. Compl. ¶ 9. Thus, his (1) residency, (2) physical presence, (3) participation in the conspiracy on U.S. soil, and (4) exploitation of the U.S. as a safe haven from prosecution in Haiti are all factors that touch and concern the U.S. with far greater significance than the "mere corporate presence" of the defendant in *Kiobel*. 133 S.Ct. at 1669; *see Ahmed v. Magan*, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013) (*Kiobel* presumption displaced because defendant was a resident of the United States, which has an interest in not becoming a

haven for persons who commit serious crimes actionable under the ATS); *see also Kiobel*, 133 S.Ct. at 1671 (Breyer, J., concurring).

B. The Court Has Jurisdiction Over Plaintiffs' TVPA Claims.

Defendant posits, despite clear Congressional intent and jurisprudence to the contrary, that the Court's exercise of jurisdiction over TVPA claims is impermissible under the federal question statute, 28 U.S.C. § 1331, and that *Kiobel*'s presumption against extraterritoriality applies to the TVPA. Both arguments lack merit.

First, this Court has long held that 28 U.S.C. § 1331 confers jurisdiction over TVPA claims. *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) ("The case thus 'arises under' the laws of the United States for purposes of federal question jurisdiction under 28 U.S.C. § 1331. . . . This Court therefore has subject matter jurisdiction to hear plaintiff['s] TVPA claims."); *accord Doe v. Drummond Co.*, 782 F.3d 576, 601 (11th Cir. 2015).

Second, the *Kiobel* presumption against extraterritoriality does not apply to claims brought under the TVPA. In *Kiobel*, the Supreme Court found that the language of the ATS did not statutorily establish extraterritorial reach. 133 S.Ct. at 1669. Not so for the TVPA, where the text and history provide "clear indication of an extraterritorial application." *Drummond Co.*, 782 F.3d at 602 (quoting *Morrison v. Nat'l Austl. Bank Ltd*., 561 U.S. 247, 255 (2010)); *accord Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 51 (2d Cir. 2014). The TVPA explicitly involves foreign authority and foreign territory: it applies to violations committed "under actual or apparent authority, or color of law, of any *foreign* nation," and considers "adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350, note § (a)-(b) (emphasis added). Indeed, the legislative history

states specifically that the statute has extraterritorial effect.[4]

Nor is there any question that Congress had the Constitutional power to give the TVPA extraterritorial reach. *See, e.g.*, U.S. Const., art. I, section 8 (authorizing Congress to "define and punish Offenses against the Laws of Nations"); S. Rep. No. 102-249, at 3-4 (1991) ("Congress clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad."). Since the TVPA's enactment, courts have properly exercised jurisdiction over TVPA claims where plaintiff's injuries occurred abroad without stumbling on the Constitutional barrier Defendant now attempts to conjure.[5] *See, e.g.*, *Gramajo*, 886 F. Supp. at 199; *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming TVPA judgment concerning torture in El Salvador) (cited with approval in *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (affirming dismissal not because TVPA claims arose abroad, but because the defendant was not an "individual")); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995).

In sum, this Court clearly has jurisdiction over Plaintiffs' ATS and TVPA claims and should deny Defendant's Rule 12(b)(1) motion in its entirety.

II. The Court Should Deny Defendant's Motion to Dismiss Plaintiffs' TVPA Claims For Failure To Exhaust Local Remedies Given Plaintiffs' Detailed Allegations That Local Remedies Are Unobtainable, Ineffective, Inadequate And Obviously Futile.

Defendant moves to dismiss the TVPA claims because Plaintiffs purportedly have adequate remedies in Haiti that they have not yet exhausted. However, the TVPA's exhaustion requirement is an affirmative defense as to which Defendant bears the burden of proof—a "substantial" burden. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005). "The legislative

[4] *See, e.g.*, S. Rep. No. 102–249, at 3-4 (1991) (describing the TVPA as "providing a civil cause of action in U.S. courts for torture committed abroad"); *id.* at 5 ("[W]hile the [ATS] provides a remedy to aliens only, the TVPA ... extend[s] a civil remedy also to U.S. citizens who may have been tortured abroad.").

[5] The only support that Defendant is able to muster for his jurisdictional argument under the TVPA are two non-binding district court opinions with minimal discussion of the Act, both decided on the heels of *Kiobel* without the benefit of the jurisprudence that has since calibrated the scope of that decision.

history to the TVPA indicates that the exhaustion requirement of § 2(b) was not intended to create a prohibitively stringent condition precedent to recovery under the statute." *Gramajo*, 886 F. Supp. at 178. The TVPA's exhaustion requirement is satisfied "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile." *Id.* (quoting S. Rep. No. 249, 102d Cong., 1st Sess. 10 (1991)).

A. It Is Premature And Improper To Address Defendant's Exhaustion Affirmative Defense At The Pleadings Stage.

Failure to exhaust local remedies is an affirmative defense under the TVPA, not a jurisdictional bar contestable under Rule 12(b)(1), nor a pleading defect contestable under Rule 12(b)(6). *See In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 190 F. Supp. 3d 1100, 1114 (S.D. Fla. 2016) ("Because it is an affirmative defense, exhaustion of local remedies need not be pled in a complaint under the TVPA."). As such, exhaustion "is an affirmative defense to a plaintiff's claim for relief, not something the plaintiff must anticipate and negate in her pleading." *Perry v. Merit Sys. Prot. Bd.*, 137 S.Ct. 1975, 1987 n.9 (2017) (concerning other affirmative defenses). When considering an affirmative defense under Rule 12(b)(6), "review of the complaint, together with any other documents appropriately considered under Fed.R.Civ.P. 12(b)(6), must 'leave no doubt' that the plaintiff's action is barred by the asserted defense." *Blackstone Realty LLC v. F.D.I.C.*, 244 F.3d 193, 197 (1st Cir. 2001) (citations omitted). Given the fact-intensive nature of the exhaustion inquiry under the TVPA, the Court should address Defendant's affirmative defense on the basis of a complete evidentiary record, not at the pleadings stage. *See Jara v. Nunez*, 2015 WL 8659954, at *2 (M.D. Fla. Dec. 14, 2015) (finding that the truth of exhaustion allegations is necessarily left for resolution at summary judgment).

B. The Complaint Includes Detailed Allegations That Haitian Remedies Are Unobtainable, Ineffective, Inadequate And Obviously Futile.

Even if the Court does address Defendant's affirmative defense at the pleadings stage, the Complaint alleges at least three sets of facts relevant to exhaustion, any one of which renders Plaintiffs' remedies in Haiti "unobtainable, ineffective, inadequate and obviously futile," (*see Gramajo*, 886 F. Supp. at 178), and requires denial of Defendant's motion.

1. Defendant and his co-conspirators have a long-standing history of retributive violence.

Where, as here, Plaintiffs are subject to an ongoing risk of retaliation in their home country for seeking redress for human rights abuses, such redress is deemed futile for purposes of the TVPA. *See In re Chiquita Brands*, 190 F. Supp. 3d at 1114 (holding that allegations of a history of retributive violence in Colombia were sufficient to "suggest the existence of disputed issues of fact on the adequacy and availability of Colombian remedies which are not properly considered here, at the motion to dismiss stage"); *Dorelien*, 431 F.3d at 783 (district court erred in not considering plaintiff's allegation of retaliatory violence in Haiti).

The Complaint details Defendant's personal history of retributive violence designed to thwart judicial proceedings. Defendant's campaign of persecution against Plaintiffs started immediately after a judicial proceeding when Plaintiff David Boniface sought to protect the human rights of a neighbor assaulted by Defendant. In retaliation, Defendant threatened him with violence and then, later that same day, led the extrajudicial killing of his younger brother, Eclesiaste Boniface. Compl. ¶ 29-39. In a separate incident, Clorene Francois, a neighbor of the Boniface family, was brutally beaten by Defendant's co-conspirators after she was summoned to provide in-court, eyewitness testimony about the killing of Eclesiaste Boniface. Compl. ¶ 63. These actions operated against a backdrop of violence against those, like Plaintiffs, who seek

redress for human rights abuses.[6]

2. Defendant can and has used his power and political connections to thwart justice in Haiti.

In *Dorelien*, the Eleventh Circuit held that political conditions in Haiti precluded a finding that adequate and available remedies existed there despite a legally binding judgment from a Haitian court. 431 F.3d at 783. *Dorelien* noted plaintiff's allegations that defendant had returned to a position of power, demonstrating the inadequacy of the Haitian judgment, and that the political structure in Haiti was such that plaintiff could not file her claims in Haiti and be successful. *Id*; s*ee also Jara*, 2015 WL 8659954, at *2 (denying motion to dismiss on exhaustion grounds where plaintiffs alleged politicization of judiciary).

The Complaint details Defendant's relationship with KOREGA, the powerful political machine that controls politics throughout the southwest region of Haiti, where Les Irois is located, through a system of patronage, strong-arm tactics, threats, and armed violence. Compl. ¶ 12-13, 20-23, 25-28. In September 2008, a Haitian investigating judge ordered Defendant's arrest. However, he was provisionally released in December 2008 as a result of political pressure, whereupon he fled to the United States. Compl. ¶ 60-61. Defendant nevertheless continued to serve as Mayor of Les Irois from his new home in Massachusetts and, in August 2012, was irregularly appointed by former Haitian President Michel Martelly as "Interim Executive Agent" for Les Irois, despite the expiration of Defendant's elected term of office, his continued residence in Massachusetts and the open criminal indictment against him in Haiti. Compl. ¶ 14, 62. Defendant has been able to return to Haiti without fear of prosecution given his political connections (Compl. ¶ 12-14, 20-23, 25-27, 28, 62-64), and the general state of the

[6] *See, e.g.*, Compl. ¶ 22 ("Armed groups aligned with political parties routinely kidnap, torture, and kill political opponents, journalists, and human rights advocates, while meting out vigilante justice, collecting bribes, and ensuring loyalty in the face of collapsed law enforcement institutions.").

Haitian justice system.[7] Indeed, Defendant has repeatedly warned and threatened Plaintiffs that they could never hold him accountable in Haiti given his power and influence.[8]

3. Despite Plaintiffs' diligent efforts, Defendant fled justice and the proceedings against him in Haiti have not progressed.

In *Gramajo*, this Court held that the plaintiff exhausted the remedies available to her in Guatemala for purposes of the TVPA where she returned to participate in the local criminal proceedings, but they nevertheless made no progress for several years. 886 F. Supp. at 178. Similarly, here, Plaintiffs have pursued all available avenues for justice within Haiti, to no avail. Since 2007, they have lodged at least eight reports or complaints regarding the acts set forth in the Complaint with Haitian law enforcement and judicial authorities, the U.N. Mission in Haiti, and the Inter-American Commission on Human Rights. Despite these efforts over the last decade, Defendant has managed to avoid any adjudication of his personal responsibility for these crimes, even as some of his less influential co-conspirators have been convicted. Compl. ¶¶ 59-64. In 2009, following the opening of a criminal investigation against Defendant and his associates, he fled to Massachusetts to blunt any momentum for prosecution. Compl. ¶ 3, 60-61. In 2010, Defendant was indicted in Haiti as a "fugitive" for his involvement in the crimes alleged in the Complaint. Though the indictment indicated he was to be tried *in absentia*, no such trial has been held. Compl. ¶ 62. To date, Haitian law enforcement and judicial authorities have been unable or unwilling to act because of Defendant's political influence and the very real threat of retaliation by Defendant and his supporters. Compl. ¶ 64.

[7] Compl. ¶ 21 ("Haiti's justice system is highly dysfunctional, with rampant corruption, politicization, and a lack of training and resources.").

[8] Compl. ¶ 64 ("Since Viliena's appointment as Interim Executive Agent in August 2012, he has flouted his impunity, warning Plaintiffs that his power and political connections place him above the law in Haiti and that it would be futile—and dangerous—for them to seek justice.").

4. Even if the Court considers evidence extrinsic to the Complaint, such documents merely bolster Plaintiffs' claims.

Defendant identifies no allegations in the Complaint that support his affirmative defense. Instead, Defendant relies exclusively on extrinsic evidence, namely a purported extract from the magistrate court of Les Cayes, dated July 7, 2017 ("Les Cayes Extract"),[9] and the Declaration of Mario Joseph dated June 21, 2017.[10] Defendant's reliance on these materials is unavailing.

As a threshold matter, these documents, particularly the Les Cayes Extract, should not be considered by the Court because exhaustion is not a jurisdictional issue. "On a motion to dismiss, a court ordinarily may only consider facts alleged in the complaint and exhibits attached thereto." *Freeman v. Town of Hudson*, 714 F.3d 29, 35 (1st Cir. 2013) (rejecting request to consider extrinsic evidence of excerpts of depositions, transcripts of 911 calls and police incident reports on a motion to dismiss); *see also In re Chiquita Brands*, 190 F. Supp. 3d at 1114 (finding that plaintiff's alleged failure to exhaust local remedies "is not properly resolved by reference to extrinsic evidence at the motion to dismiss stage."). Extrinsic evidence may only be considered under certain "narrow exceptions," none of which are met here. *See Freeman*, 714 F.3d at 35 (limiting the "official public records exception" to documents subject to judicial notice under Federal Rule of Evidence 201). The Les Cayes Extract is an unauthenticated and self-serving extract of a foreign document, and Defendant has made no attempt to show this document warrants consideration as extrinsic evidence.

More importantly, even if considered, neither document supports Defendant's affirmative defense. The Les Cayes Extract speaks volumes. For the first time since his 2010 indictment, Defendant presented himself for trial in Haiti—during a publicly advertised nation-wide strike of

[9] Dkt. 47-1, which was submitted as an exhibit to Defendant's Motion to Dismiss (Dkt. 47).

[10] Dkt. 20-1, which was submitted as an exhibit to Plaintiffs' Supplemental Brief Regarding Plaintiffs' Standing and Substitution of Plaintiff for the Late Nissage Martyr (Dkt. 20).

court personnel, ensuring there would be no risk of trial on that date. *See* Dkt. 47-1. Seven years after his indictment, Defendant made a risk-free appearance during the strike—four months after the filing of this case, and just in time to lay the groundwork for an exhaustion defense. And yet Defendant's change-of-heart as to Haitian jurisdiction did not outlast the strike; he apparently returned to the United States before the Haitian proceedings could resume. *See id.*

Even if credited, a defendant's professed willingness to be subject to local remedies is not a sufficient ground to support dismissal under the TVPA. *See In re Chiquita Brands*, 190 F. Supp. 3d at 1113-14 (denying motion to dismiss based on exhaustion despite defendants' declarations proffering their amenability to suit in Colombia). The Les Cayes Extract also leaves unaddressed Plaintiffs' allegations regarding the risks of retaliatory violence and Defendant's ability to thwart a successful suit through political pressure.

Similarly, the Declaration of Mario Joseph, Plaintiffs' Haitian attorney, simply establishes that, as a matter of Haitian law, Plaintiffs have standing to seek damages from Defendant, which they pursued as part of the stalled criminal case against Defendant and his co-conspirators. The Declaration also bolsters Plaintiffs' allegations that Haitian remedies are unobtainable, ineffective, inadequate and obviously futile,[11] as does the 2016 U.S. State Department Haiti Human Rights Report that is attached to the Declaration.[12]

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[11] Dkt. 20-1, Joseph Declaration, ¶ 13 ("However, although my clients have obtained a civil judgment against Mr. Viliena's co-defendants, they have been unable to finalize their civil action against Mr. Viliena in Haiti due to his flight from the country and because of the political influence exercised on the Court by Mr. Viliena's supporters and sponsors in the political movement KOREGA. The latter have, in fact, blocked legal actions against Mr. Viliena in Haiti. Political interference in the courts is unfortunately one of the symptoms of Haiti's deficient rule of law, about which the US Department of State has attested a number of times in its reports on human rights in Haiti.").

[12] *See e.g.*, Dkt. 20-4, Haiti 2016 State Department Human Rights Report, at 9 ("[S]enior officials in the executive and legislative branches exerted significant influence on the judicial branch and law enforcement. . . . Judges assigned to politically sensitive cases complained about interference from the executive branch."); at 10 ("[A]uthorities often failed to question witnesses, complete investigations, compile complete case files, or conduct autopsies."); at 12 ("Courts could award damages for human

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

III. Defendant's Rule 12(b)(6) Motion Should Be Denied Because Plaintiffs Sufficiently Plead That Defendant Is Liable for Extrajudicial Killing, Attempted Extrajudicial Killing and Torture Under the TVPA.

The factual allegations in the Complaint more than adequately plead that Defendant is liable under the TVPA for extrajudicial killing, attempted extrajudicial killing and torture, and are sufficient to defeat Defendant's Rule 12(b)(6) motion.

A. The Complaint Properly Pleads that Defendant Was Acting Under Color of Law of a Foreign Nation.

The TVPA provides jurisdiction to federal courts to hear claims brought against individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. 1350 note, § (a).

As this Court has recognized, color of law is established when a foreign official had the ability to order the abuse or the release of a victim. *See Gramajo*, 886 F. Supp. at 178 n.15. Defendant had such authority. Plaintiffs allege that, on July 27, 2007, then-Mayor Defendant instructed his subordinates to release David Boniface because they would "take care of him later." Compl. ¶ 33. That night Defendant led his men in the killing of David's brother. Compl. ¶ 36. During the raid on the radio station in April 2008, Defendant ordered the shooting of Martyr and Yseme. Compl. ¶ 48. These indicia of control amply demonstrate that, as in *Gramajo*, Defendant acted under color of law.

Similarly, in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1249-50 (11th Cir. 2005), the court held that the TVPA color-of-law requirement had been met because the mayor of the town was one of the armed aggressors who participated in the attacks against

rights abuse claims brought in civil forums, but seeking such remedies was difficult and rarely successful.").

plaintiffs at a radio station. *See also Doe v. Qi*, 349 F. Supp. 2d 1258, 1314 (N.D. Cal. 2004) (finding that acts were committed under color of authority because the torture was conducted by national police and security forces); *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1240 (S.D. Fla. 2012) (finding that torture conducted by government officials, prison guards, and state security investigators sufficiently constituted state action under the TVPA). Here, Plaintiffs allege that Defendant was Mayor of Les Irois when he participated in the crimes against Plaintiffs detailed in the Complaint. Compl. ¶ 11, 29-51, 81, 88, 102.

In fact, Plaintiffs' color of law allegations are significantly stronger than those in *Aldana* given that: (1) Defendant conspired with other members of his mayoral staff to perpetrate the attacks and impound the radio equipment (Compl. ¶ 28, 35, 43, 46), (2) the attacks were part of a pattern of persecution carried out throughout Defendant's term as Mayor against those who threatened his power (Compl. ¶ 27-28), (3) the murder of Eclesiaste Boniface was in retribution for Plaintiff David Boniface accusing Defendant of official misconduct (Compl. ¶ 2), and (4) the attack against the radio station was designed to silence political opposition (Compl. ¶ 72).

B. The Complaint Properly Pleads that Defendant Is Liable for Extrajudicial Killing and Attempted Extrajudicial Killing Under the TVPA.

Defendant contends that Plaintiffs' First Claim For Relief under the TVPA (extrajudicial killing of Eclesiaste Boniface) should be dismissed because Plaintiffs failed to properly plead command responsibility as a theory of liability. Yet Defendant overlooks the theories of liability that *were* pleaded in the Complaint. Both direct and secondary forms of liability are appropriate under the TVPA. *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1709 (2012). In addition to direct liability, Plaintiffs properly plead three forms of secondary liability: (1) ordering, inciting, or soliciting; (2) conspiracy; and (3) aiding and abetting. Compl. ¶ 66-77. Courts have

consistently recognized these forms of liability as appropriate under the TVPA.[13] Defendant does not contest any of these secondary theories of liability, effectively conceding that they are properly pled in the Complaint. Instead, Defendant erroneously posits that Plaintiffs "must establish" that Defendant is liable for Eclesiaste Boniface's murder under command responsibility[14]—a theory of liability Plaintiffs do not plead. Neither common sense nor existing jurisprudence supports Defendant's position. *See e.g., Drummond Co.*, 782 F.3d at 607-10 (recognizing command responsibility *and* aiding and abetting as distinct and viable theories of secondary liability under the TVPA).

Defendant seeks dismissal of Plaintiffs' Second Claim For Relief under the TVPA (attempted extrajudicial killing of Plaintiffs Nissage Martyr and Juders Ysemé) on the ground that the claim is not cognizable under the TVPA. While the TVPA does not explicitly account for "attempts," courts have nonetheless recognized claims of attempted extrajudicial killing as actionable under the TVPA. *See Doe v. Constant*, 354 F. App'x 543, 546 (2d Cir. 2009) (affirming entry of judgment *inter alia* for attempted extrajudicial killing under the TVPA); *Yousuf v. Samantar*, 2012 WL 3730617, at *2 (E.D. Va. Aug. 28, 2012) (awarding damages *inter alia* for attempted extrajudicial killing under the TVPA). Liability for injuries caused by the Defendant's attempted extrajudicial killing is all the more appropriate here, since Defendant ordered his associates to "shoot and kill" Nissage Martyr (Compl. ¶ 48) and his co-conspirators completed the elements of an extrajudicial killing—but did not achieve the intended result. That Plaintiffs were only disfigured cannot absolve Defendant of liability.

[13] *See, e.g., Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-60 (11th Cir. 2005) (upholding a jury verdict premised on indirect liability claims under the ATS and TVPA, including aiding and abetting and conspiracy); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (finding that the TVPA "reaches those who ordered, abetted, or assisted in the wrongful act"); *see also Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 53 (2d Cir. 2014) (recognizing that the TVPA is presumed to incorporate common-law theories of liability not specified in the statute).

[14] *See* Dkt. 47, 12-13 (citing *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015)).

C. The Complaint Properly Pleads that Defendant Is Liable for Torture Under the TVPA.

Defendant contests that the harms alleged by Plaintiffs Nissage Martyr and Juders Ysemé rise to the level of severity of pain or suffering required for a claim of torture under the TVPA. The TVPA defines torture as any act (1) "directed against an individual in the offender's custody or physical control[;]" (2) that inflicts "severe pain or suffering[,] ... whether physical or mental[;]" (3) for the purpose of obtaining information, intimidation, punishment or discrimination. 28 U.S.C. § 1350 note § 3(b)(1). A single incident is sufficient to constitute torture. *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 (N.D. Ga. 2002) (defendant hitting and kicking plaintiff in the stomach with his military boots and causing severe pain constituted torture under the TVPA). Prolonged mental harm can be caused by the intentional infliction or threatened infliction of severe physical pain or suffering, the threat of imminent death, or the threat that another individual will imminently be subjected to death or severe physical pain or suffering. 28 U.S.C. § 1350 note § 3(b)(2).

Plaintiffs Nissage Martyr and Juders Ysemé both suffered severe physical pain and suffering from the torture inflicted by Defendant and his armed associates during their attack on the community radio station. Defendant and his associates forcibly entered Nissage Martyr's house, where they grabbed him before repeatedly pistol-whipping and beating him with their fists causing him to collapse in pain. Compl. ¶ 45-46, 48. Seeing him try to escape, Defendant ordered his associates to shoot Nissage Martyr with a 12-gauge shotgun, hitting him in the leg. Compl. ¶ 48. Nissage Martyr was then left for dead. Compl. ¶ 48. As a result of his injuries, Nissage Martyr spent several months at multiple hospitals and doctors were forced to amputate his injured leg above the knee. Compl. ¶ 50. During the attack, Juders Ysemé was also restrained by Defendant's associates and beaten on his head and the sides of his body. Compl. ¶ 47. When

he tried to escape along with Nissage Martyr, Juders Ysemé was hit in the face by the 12-gauge shotgun blast and also left for dead. Compl. ¶ 47. Juders Ysemé required months of intensive medical treatment for his wounds, including two surgeries to extract shotgun pellets from his face. Compl. ¶ 51. He is permanently blind in one eye. Compl. ¶ 51.

Plaintiffs Nissage Martyr and Juders Ysemé also suffered prolonged mental harm as a result of the attack. Nissage Martyr was at least twice threatened with imminent death, first when Defendant placed a gun to his ear, and then again when he was shot, severely wounded and left for dead. Compl. ¶ 45, 48. Juders Ysemé was also placed in fear of imminent death when he was shot in the face. Compl. ¶ 48. These allegations, which must be taken as true at the motion to dismiss stage, more than plausibly establish a cognizable claim. Indeed, in *Carranza*, the court granted plaintiff's motion for summary judgment on the TVPA torture claim on analogous facts. *Chavez v. Carranza*, 413 F. Supp. 2d 891, 902 (W.D. Tenn. 2005), *aff'd*, 559 F.3d 486 (6th Cir. 2009). There, armed men forcibly entered plaintiff's house, stepped on him, pointed a gun at his back, and shot his father, leading him to believe that the men would kill him next. *Id.* at 902 (finding the TVPA's mental pain or suffering element established).

V. This Court Has Supplemental Jurisdiction Over Plaintiffs' Haitian Law Claims.

This Court has supplemental jurisdiction over Plaintiffs' claims based on the laws of the Republic of Haiti pursuant to 28 U.S.C. § 1367 given that it also has jurisdiction over Plaintiffs' ATS and TVPA claims, which "form part of the same case or controversy." 28 U.S.C. § 1367(a).

Plaintiffs' Haitian claims for arson rests on the same set of facts, implicate the same perpetrators and witnesses, and involve the same evidence as their claims under the ATS and TVPA. *See Palmer v. Hosp. Auth. of Randolph Cnty.*, 22 F.3d 1559, 1566 (11th Cir. 1994) (section 1367(a) is satisfied if "each claim [federal and pendant] involves the same facts, occurrences, witnesses, and evidence."). Indeed, federal courts regularly exercise supplemental

jurisdiction over claims involving foreign law. *See, e.g.*, *Rundquist v. Vapiano* SE, 798 F. Supp. 2d 102, 130, 132 (D.D.C. 2011) (exercising jurisdiction over pendant copyright claims under the laws of fifteen foreign countries). The Court therefore has jurisdiction to hear Plaintiffs' claims pursuant to 28 U.S.C. § 1367(a).

VI. Defendant Provides No Reason for the Court to Abstain.

This Court should exercise its jurisdiction over Plaintiffs' claims, all of which are justiciable. Defendant utterly fails to explain what "exceptional circumstances exist that justify the surrender of that jurisdiction." *Ace Arts, LLC v. Sony/ATV Music Pub., LLC*, 56 F. Supp. 3d 436, 445 (S.D.N.Y. 2014). Since 2009, Haiti has proven an entirely unsuitable forum in which to hold Defendant accountable for his acts of violence against Plaintiffs. Defendant, acting in concert with his co-conspirators, continues to impede the proceedings in Haiti through violence and political pressure. *See id.* (denying request for abstention where foreign suit, though filed first, had not made significantly more progress than the parallel U.S. suit).

CONCLUSION

For the above reasons, Defendant has failed to demonstrate that the Court lacks subject matter jurisdiction or that Plaintiffs' causes of action are inadequately pleaded in any respect. Plaintiffs respectfully request that Defendant's motion to dismiss be denied in its entirety.

Dated: April 13, 2018

/s/ *Bonnie Lau*
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CERTIFICATE OF SERVICE

I certify that on April 13, 2018, I caused to be filed electronically a true copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will notify the parties of record via electronic notification.

/s/ Bonnie Lau