UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

DAVID BONIFACE,

NISSANDERE MARTYR, and

JUDERS YSEME,

Plaintiffs,

v.

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

Defendant.

Case No. 1:17-cv-10477-ADB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

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Plaintiffs David Boniface, Nissandere Martyr, and Juders Yseme ("Plaintiffs") hereby oppose Defendant's Motion for Reconsideration and Certification of Order Denying Motion to Dismiss ("Motion for Reconsideration" or "Def. Mot."). Dkt 60.

INTRODUCTION

Defendant Jean Morose Viliena ("Defendant") is a legal permanent resident of the United States currently residing 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 Plaintiff David Boniface, Nissage Martyr (deceased)[1] and Plaintiff Juders Ysemé. 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.

On August 31, 2018, this Court issued its Memorandum and Order on Defendant's Motion to Dismiss (the "Court Order"), dismissing the ATS claim, but otherwise finding that Plaintiffs had properly stated claims under the TVPA and Haitian law and allowing those remaining counts to proceed. Dkt 56. Defendant now moves the Court to reconsider its holding

[1] On March 24, 2017, one day after Defendant was served with the Summons and Complaint in this matter, Nissage Martyr died suddenly under unusual circumstances. Plaintiffs' motion to substitute Nissandère Martyr, Nissage's son, as plaintiff in place of Nissage Martyr was granted by the Court on August 31, 2018. *See* Dkt 29, 30, 40, 43 and 56.

that it has jurisdiction over Plaintiffs' TVPA claims pursuant to federal question jurisdiction, 28 U.S.C. § 1331, or, in the alternative, to certify the question for interlocutory appeal.

Defendant has now twice briefed the issue but remains unable to provide any legal support for his position that the Court lacks subject matter jurisdiction over Plaintiffs' TVPA claims. Defendant's Motion for Reconsideration of this issue should be denied in its entirety – again. First, for over two decades, courts in this Circuit have held that subject matter jurisdiction over TVPA claims exists pursuant to 28 U.S.C. § 1331. Second, while Defendant reprises his argument that the law of nations does not permit the TVPA's extraterritorial application, courts have recognized that the statute's text and history give clear indication of its extraterritorial application and consistently allowed claims for torture and extrajudicial killings abroad to be heard in domestic federal courts. Third, Defendant's current attempt to recast his law of nations argument as one of international comity is equally unavailing. Defendant fundamentally misconstrues the notion of international comity, while disregarding the universal prohibitions against torture and extrajudicial killings under international law, along with their significance to United States interests. Defendant identifies no manifest error of law or clearly unjust circumstance that would justify the Court reconsidering its exercise of jurisdiction over Plaintiffs' TVPA claims here.

Moreover, Defendant's motion to certify the same question for interlocutory appeal fails because Defendant is unable to show any controlling question of law, substantial difference of opinion, or exceptional circumstance that would warrant certification of an interlocutory appeal. Defendant's Motion for Reconsideration should be denied in its entirety.

STANDARD OF REVIEW

A district court has "inherent power to reconsider its interlocutory orders." *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 61 n.2 (1st Cir. 2008). However, exercising this power of

reconsideration is appropriate only in limited circumstances, namely if "the original decision was based on a manifest error of law or was clearly unjust." *United States v. Allen*, 573 F.3d 42, 53 (1st Cir. 2009).

Alternatively, "[d]istrict courts may certify an otherwise non-appealable order for interlocutory review by the Court of Appeals if the order 1) involves a controlling question of law, 2) as to which there are grounds for a substantial difference of opinion, and 3) an immediate appeal would materially advance the ultimate termination of the litigation." *Amphastar Pharm., Inc. v. Momenta Pharm., Inc.*, 313 F. Supp. 3d 366, 368-69 (D. Mass. 2018); 28 U.S.C. § 1292(b). An interlocutory appeal should be used sparingly and only in exceptional circumstances "where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority." *U.S. ex rel. LaValley v. First Nat. Bank of Boston*, No. CIV. A. 86-236-WF, 1990 WL 112285, at *3 (D. Mass. July 30, 1990). For this reason, the First Circuit rarely grants interlocutory appeals from a denial of a motion to dismiss, particularly one based on a jurisdictional challenge. *Caraballo-Seda v. Municipality Of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005); *United States v. Sorren*, 605 F.2d 1211, 1214 (1st Cir. 1979).

ARGUMENT

I. THE COURT HAS JURISDICTION OVER PLAINTIFFS' TVPA CLAIMS PURSUANT TO 28 U.S.C. § 1331.

For more than two decades, courts in this Circuit have consistently held that federal question jurisdiction as set out in 28 U.S.C. § 1331 ("section 1331") confers jurisdiction over TVPA claims. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995). Despite having now twice briefed the issue, Defendant is still unable to cite a single case supporting his assertion that section 1331 does not confer federal subject matter jurisdiction over Plaintiffs' claims arising under the TVPA. *See* Dkt 56, p. 15, fn 2 ("Defendant has not made any argument as to

why section 1331 is insufficient, however, nor has Defendant cited cases explaining why the Court would not have jurisdiction under section 1331.").

The text of section 1331 is straightforward: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The TVPA is plainly a law of the United States. Congress enacted the TVPA in order to provide a private right of action to aliens and U.S. citizens for torture and extrajudicial killing committed abroad. *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.").

The TVPA's extensive legislative history, documented in the Senate and House Reports, demonstrates Congress's intent to provide victims of torture and extrajudicial killing committed abroad with a means of civil redress in U.S. courts. *See e.g.*, 137 Cong. Rec. H11244 (1991) (The TVPA "puts torturers on notice that they will find no safe haven in the United States. Torturers may be sued under the bill if they seek the protection of our shores."). Moreover, the legislative history also makes clear that the statute was meant to implement the United States' international treaty obligations under the Convention against Torture, which requires state parties to provide all victims of torture with "redress and […] an enforceable right to fair and adequate compensation." *See, e.g.*, S. Rep. No. 102-249, at 3 (1991) (stating that the TVPA's purpose is to "carry out the intent of the [Convention against Torture ...]. This legislation will do precisely that – by making sure that torturers and death squads will no longer have a safe haven in the United States."); H.R. Rep. No. 102-367 at 3 (1991) (stating that the TVPA satisfied the treaty obligation under this Convention "to provide means of civil redress to victims of torture").

Through the TVPA, Congress domesticated the United States' international obligations under the Convention against Torture and created a federal cause of action premised on a federal statute.

Consequently, federal courts, including this one, have exercised jurisdiction over TVPA claims pursuant to federal question jurisdiction as set out in section 1331. *Gramajo*, 886 F. Supp. at 178 ("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."); Dkt 56, p. 15 ("Thus, in this case, the Court may exercise jurisdiction over Plaintiffs' TVPA claims through section 1331."); *see also Doe v. Drummond Co.*, 782 F.3d 576, 601 (11th Cir. 2015) ("Our jurisdiction to consider Plaintiffs' TVPA claims is grounded ... in 28 U.S.C. § 1331, the general federal question jurisdiction statute."); *Haim v. Neeman*, No. 12-cv-351 (JLL), 2012 WL 12905235, at *3 (D.N.J. Aug. 29, 2012) (same); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1118 n.2 (E.D. Cal. 2004) (same); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (same).

There is nothing in Defendant's recitation of the TVPA's legislative history to suggest a contrary interpretation. His recounting of the TVPA's legislative history is, at best, incomplete, and, at times, misleading. For example, he mischaracterizes Judge Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), as standing for the proposition that the TVPA was passed in order to correct a jurisdictional defect in the ATS and, as a result, jurisdiction over claims arising under the TVPA are necessarily tied to jurisdiction over claims arising under the ATS. Def. Mot. at 3-5. However, Judge Bork's concurrence simply reiterates that Congress intended to expand the scope of remedy in U.S. courts already provided by the ATS to aliens for torture and extrajudicial killing by extending "a clear and specific remedy" via a statutory private right of action to U.S. citizens and aliens alike for torture and extrajudicial killing committed outside of the United States.

Indeed, courts have routinely treated their jurisdiction over TVPA claims as unrelated to their jurisdiction over ATS claims. *See, e.g.*, *Warfaa v. Ali*, 33 F. Supp. 3d 653 (E.D. Va. 2014) (dismissing a plaintiff's claim under the ATS but allowing a distinct TVPA claim to proceed), *judgment aff'd*, 811 F.3d 653 (4th Cir. 2016) (holding the defendant was not entitled to foreign official immunity from the plaintiff's claims under the TVPA); *Drummond Co.*, 782 F.3d at 601 ("Plaintiffs are entitled to bring separate TVPA claims based on the same underlying events as any claims simultaneously brought under the ATS; the TVPA provides an independent action for claims of extrajudicial killing and torture."). Defendant cites no support for his contention that this Court should disregard long-standing and unambiguous jurisprudence that 28 U.S.C. § 1331 confers federal subject matter jurisdiction over TVPA claims.

II. THE TVPA IS AN EXPLICITLY EXTRATERRITORIAL STATUTE AND ITS APPLICATION TO CONDUCT ABROAD IS CONSISTENTLY UPHELD BY COURTS.

Defendant asserts – without reference to any authority – that the TVPA constitutes "an unconstitutional exercise of legislative authority," and that the Supreme Court's concerns about extraterritoriality, as expressed in *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), should apply equally to claims brought pursuant to the TVPA. Def. Mot. at 2.

As a threshold matter, *Kiobel* has no application to the instant case. The Supreme Court's concern about the extraterritorial reach of the ATS arose in a context where the Court could find no clear indication that Congress intended the ATS to have extraterritorial effect. *See Kiobel*, 569 U.S. at 118 ("nothing in the text of the [ATS] suggests that Congress intended causes of action recognized under it to have extraterritorial reach."). By contrast, the text and legislative history of the TVPA give "clear indication of an extraterritorial application." *Drummond Co.*, 782 F.3d at 602 (*quoting Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)). Defendant himself acknowledges as much. *See* Def. Mot. at 8. Indeed, the TVPA explicitly involves foreign authority, foreign territory, and foreign conduct: 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). The TVPA's legislative history also states specifically that the statute has extraterritorial application.[2] As a result, "jurisdiction over TVPA actions under § 1331 is not constrained by the presumption against extraterritoriality[.]"*Drummond Co.*, 782 F.3d at 602; *see also* Restatement (Fourth) of Foreign Relations Law § 404 (2018) ("The presumption against extraterritoriality is not a limit on Congress's power to legislate.") (*citing Morrison*, 561 U.S. at 255).

Defendant attempts to overcome the explicitly extraterritorial nature of the TVPA by half-heartedly reprising the argument – already rejected by this Court – that Congress did not have the authority to enact the TVPA because the law of nations does not permit one sovereign to exercise jurisdiction over the affairs of another sovereign. The "law of nations," however, is not what determines Congress's constitutional authority to legislate. *See* Dkt 56, p. 15-16 ("Other courts have rejected this argument, and Defendant cites no legal authority that directly supports this proposition.") (*citing Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 50-51 (2d Cir. 2014) (finding "no support in *Kiobel* or any other authority for the proposition that the territorial constraints on common-law causes of action under the ATS apply to the statutory cause of action created by the TVPA").

Congress has the constitutional power to give the TVPA extraterritorial reach. The Constitution explicitly authorizes Congress to "define and punish Offenses against the Law of Nations." U.S. Const., art. I, section 8. "The Offenses Clause allows Congress to prescribe punishment for conduct that the United States has an international legal obligation to prevent." Restatement (Fourth) of Foreign Relations Law § 403 (2018) (*citing United States v. Arjona*, 120

[2] *See supra* p. 5.

U.S. 479, 488 (1887)). As detailed *infra*,[3] few international norms are more firmly established than the prohibitions against torture and extrajudicial killings. Indeed, the TVPA was enacted to implement the United States own international obligations under the Convention against Torture.[4] Congress properly considered the enactment of the TVPA as clearly within its constitutional authority. *See* 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. Under article III of the Constitution, the Federal judiciary has the power to adjudicate cases 'arising under' the 'law of the United States.")

And, contrary to Defendant's position, courts have repeatedly found the TVPA to have extraterritorial effect. *See, e.g., Drummond Co.*, 782 F.3d at 601-02 (holding that the TVPA applies extraterritorially); *see also Warfaa,* 33 F. Supp. 3d 653 (E.D. Va. 2014), *aff'd*, 811 F.3d 653 (4th Cir. 2016) ("The language of the TVPA, which creates civil liability for extrajudicial killing and torture carried out by an individual with 'actual or apparent authority, or color of law, of any foreign nation,' naturally contemplates conduct occurring in the territory of a foreign sovereign."). Since the TVPA's enactment, courts have consistently exercised jurisdiction over TVPA claims where plaintiff's injuries occurred entirely abroad without stumbling on the constitutional barrier Defendant now attempts to conjure. *See, e.g., Gramajo*, 886 F. Supp. at 199 (entering judgment pursuant to the TVPA for torture and extrajudicial killing in Guatemala); *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming TVPA judgment for 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")); *Jara v. Nunez*, 878 F.3d 1268 (11th Cir. 2018) (noting trial judgment pursuant to the TVPA for torture and extrajudicial killing in Chile); *see also Kiobel,* 569 U.S. at 125

[3] *See infra* p. 11.
[4] *See supra* p. 5.

(Kennedy, J., concurring) ("Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act ….") (emphasis added).

Defendant also seems to suggest that principles of international comity serve as a bar to Congress's constitutional authority to legislate with respect to extraterritorial conduct. This argument equally misses the mark.

First, Defendant fundamentally distorts the notion of international comity. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). International comity is a prudential abstention doctrine, and the choice to apply it is fundamentally discretionary. *See United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997) ("Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation."). Defendant seeks to recast the notion of international comity as a limit on Congress's constitutional prerogative to enact laws, such as the TVPA, with extraterritorial application. Defendant offers no controlling authority for his position,[5] which, in fact, runs counter to established jurisprudence. "Because the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, it has no application where Congress has

[5] Defendant draws on Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), to argue that the exercise of jurisdiction over extraterritorial conduct pursuant to the TVPA would offend notions of international comity. Def. Mot. at 6-9. In *Hartford Fire*, the Supreme Court upheld the extraterritorial application of the Sherman Act even after considering the principle of international comity. *See, e.g., Nippon Paper Indus. Co.*, 109 F.3d at 8 (noting that "the *Hartford Fire* Court gave short shrift" to the defendant's international comity argument). In addition, the issue in Defendant's other cited cases was whether Congress intended the underlying statutes, 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 844(a), to apply extraterritorially. *See U.S. v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981) ("Thus, we must determine from the legislative history and the nature of the offense whether one can infer a Congressional intent that the provision apply to ships on the high seas.") (emphasis added); *U.S. v. Cafiero*, 242 F. Supp. 2d 49, 53 (D. Mass. 2003) (same). These cases are inapposite given that the TVPA is explicitly extraterritorial in reach. *See* Section II *supra.*

indicated otherwise." *In re Maxwell Commc'n Corp. plc by Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996); *see also McBee v. Delica Co.*, 417 F.3d 107, 120 (1st Cir. 2005) ("We reject the notion that a comity analysis is part of subject matter jurisdiction. Comity considerations, [...], are properly treated as questions of whether a court should, in its discretion, decline to exercise subject matter jurisdiction that it already possesses.").

Second, Defendant seeks to depict the exercise of jurisdiction over torture and extrajudicial killings committed abroad as exceptional and contrary to the comity of nations. Just the opposite is true. Few international norms are more firmly established than the prohibitions against torture and extrajudicial killings. These prohibitions are recognized in every major human rights instrument, including treaties ratified by the United States. *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, art. 6-7, 999 U.N.T.S. 171 (entered into force March 23, 1976);[6] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), art. 2, 1465 U.N.T.S. 85 (entered into force June 26, 1987).[7] Domestically, states have enacted widespread legislation providing for extraterritorial jurisdiction over acts of torture and extrajudicial killing.[8] In turn, national courts

[6] As of November 1, 2018, there are 172 States Parties to the International Covenant on Civil and Political Rights. The U.S. signed the International Covenant on October 5, 1977 and ratified it on June 8, 1992.

[7] As of November 1, 2018, there are 165 States Parties to the Convention against Torture. Notably, article 14 of the Convention against Torture states, "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." *See also* Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusion and Recommendations of the Committee against Torture: Canada*, ¶ 5(f), Doc. CAT/C/CR/34/CAN (July 7, 2005) (stating that states have an obligation to provide civil redress and compensation to victims of torture); *and General Comment No.3, op.cit.*, ¶¶ 5, 20, 22 (Dec. 13, 2012) (stating that article 14 requires States Parties to provide a procedure permitting victims and their families to obtain reparations from those responsible for torture regardless of where it was committed). The U.S. signed the Convention against Torture on April 18, 1988 and ratified it on October 21, 1994.

[8] *See, e.g., Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012 Update,* Amnesty International (IOR 53/019/2012), October 2012 (finding that not less than 147 out of 193 United Nations Member States had domestic provisions for the exercise of universal jurisdiction over one or more crimes under international law, namely torture, genocide, crimes against humanity and war crimes).

have relied on these statutes to adjudicate suits and provide civil remedies to victims for torture and extrajudicial killing committed extraterritorially.[9]

Third, Defendant disregards the significant United States interest in cases brought pursuant to the TVPA. At minimum, to initiate a TVPA suit, a court must exercise personal jurisdiction over the defendant, which necessarily implicates a United States interest. Here, Defendant is a lawful permanent resident of the United States who fled Haiti and used the United States as a safe haven from prosecution. Dkt 1 ¶¶ 9, 60-61, 63, 74. Having exhausted all available remedies in Haiti or determined they were futile, Plaintiffs brought suit against Defendant in Massachusetts, where he currently resides. Dkt 1 ¶¶ 9, 59-64. The TVPA was designed to provide victims of torture and extrajudicial killings a means of civil redress against human rights abusers found in the United States. *See, e.g.,* S. Rep. No. 102-249, at 3 (1991). Federal courts have recognized the significant domestic interest implicated in addressing torture and extrajudicial killing. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105-06 (2d Cir. 2000) (The TVPA "expresses a policy favoring receptivity by our courts to such suits [...] The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is 'our business.'").[10] Defendant fails to cite a single case where a court has dismissed TVPA claims on the grounds of comity.

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[9] *See, e.g., Ashraf Ahmed El-Hojouj v. Harb Amer Derbal et al.*, LJN BV9748, Rechtbank's-Gravenhage, 400882 / HA ZA 11-2252 (March 21, 2012) (awarding $1 million euros as restitution in civil suit in Dutch court for torture of a Palestinian national, committed by Libyan officials in Libya); *Kovac v. Karadžic*, Tribunal de Grande Instance de Paris, Judgment of March 14, 2011, No. 05/10617 (awarding $200,000 euros to Bosnian plaintiffs in a civil suit, for injuries inflicted by Bosnian Serb leaders in the Bosnian civil war); *Ely Ould Dah Case*, Gard Assizes Court (France), No. 70/05 (Arrêt de condamnation) / No. 71/05 (Arrêt statuant sur les intérêts civils) (July 1, 2005), (awarding damages to Mauritanian civil parties of a criminal complaint initiated in French courts against a Mauritanian national, for torture committed in Mauritania), *aff'd Dah v. France*, Decision on Admissibility, Eur. Ct. H.R., No. 13113/03 (Mar. 17, 2009).

[10] *See also* Periodic Report of the United States of America to the United Nations Committee against Torture (Third, Fourth and Fifth Reports), August 12, 2013, paras. 2-3 ("The absolute prohibition of torture is of fundamental importance to the United States. [...] As a nation that played a leading role in the effort to bring this treaty into force, the United States will remain a leader in the effort to end torture around the world and to address the needs of torture victims.")

Finally, this Court has already expressly rejected Defendant's argument that it should abstain from the present case as an exercise of comity, highlighting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Dkt 56, p. 27 (*quoting Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Defendant offers no additional arguments regarding the instant suit that would counsel the Court to abstain on comity grounds.

In sum, Defendant fails, once again, to present any argument or controlling authority, let alone demonstrate any manifest error of law, to support his position that the Court is unable to exercise jurisdiction over Plaintiffs' TVPA claims, or that Congress acted beyond the scope of its constitutional authority in enacting the TVPA. The Motion for Reconsideration should be denied.

III. INTERLOCUTORY APPEAL IS NOT WARRANTED.

In the alternative, Defendant moves the Court for certification of an interlocutory appeal of the Court's Order denying his motion to dismiss the TVPA claims on jurisdictional grounds. Defendant fails to establish any of the criteria for certification, or show that there are any exceptional circumstances that would warrant certification of an interlocutory appeal. *Amphastar Pharm., Inc.*, 313 F. Supp. 3d at 368-69; 28 U.S.C. § 1292(b); *First Nat. Bank of Boston*, No. CIV. A. 86-236-WF, 1990 WL 112285, at *3 (D. Mass. July 30, 1990) (An interlocutory appeal should be granted only in exceptional circumstances "where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.").

Certification of an interlocutory appeal is inappropriate here because Defendant fails to establish that 1) there is a controlling question of law 2) that is subject to a "substantial difference of opinion." *Amphastar Pharm., Inc.*, 313 F. Supp. 3d at 368-69. A controlling question of law typically involves a question of statutory or regulatory interpretation, and not how the court applied the existing law to the facts. *Johansen v. Liberty Mutual Grp., Inc.*, 15-cv-

12920, 2017 WL 937712, at *1 (D. Mass. March 7, 2017). And, "to determine if a substantial ground for difference of opinion exists, the court must examine to what extent the controlling law is unclear." *Couch v. Telescope Inc*., 611 F.3d 629, 633 (9th Cir. 2010).

First, Defendant does not argue, nor does he identify, any conflicting statutory interpretation pertaining to the TVPA. In his Motion to Dismiss, Defendant initially challenged whether Plaintiffs exhausted their remedies in Haiti under the TVPA, but this Court found that Defendant did not meet his burden. Dkt 56, p. 20. Defendant does not raise this issue in his Motion for Reconsideration, nor would it have been appropriate for an interlocutory appeal since exhaustion of remedies involves the application of law to the facts as pleaded in the complaint, and not an issue of statutory interpretation. *Johansen*, 2017 WL 937712, at *1.

Instead, Defendant's Motion raises a jurisdictional challenge, arguing generally that federal question jurisdiction under section 1331 somehow violates the comity of nations and relying on wholly irrelevant case law. These arguments fail as explained *supra*. *Mamani v. Berzain*, 309 F. Supp. 3d 1274, 1293-94 (S.D. Fla. 2018), which Defendant cites in support of certification, did not address, nor did the parties raise, any issues pertaining to the court's jurisdiction over TVPA claims. Rather, the court certified an interlocutory appeal on an issue concerning the application of the TVPA: "whether Plaintiffs' TVPA claim is precluded where they have already recovered payments from the Bolivian government, but have received no recovery from the specific defendants they seek to hold liable." *Mamani v. Berzain*, No. 07-22459, 2014 WL 12689038, at *2 (S.D. Fla. Aug. 18, 2014). In other words, the question in *Mamani* was not whether the court had jurisdiction to hear claims arising under the TVPA, but whether a claim under the TVPA was available based on the facts of the case and interpretation of the statute. The court's reasoning in *Mamani* has no bearing on whether section 1331 jurisdiction exists with respect to claims arising under to the TVPA.

Second, the Court Order noted that Defendant presented no authority for the argument that "the law of nations does not permit one sovereign to exercise territorial jurisdiction over the affairs of another sovereign," Dkt 56, p. 15, and as detailed *supra*, Defendant still presents no authority in the present Motion. At the same time, Defendant acknowledges that numerous cases in multiple jurisdictions have decided that section 1331 confers federal question jurisdiction over TVPA claims. Dkt 56, p. 15. Defendant's disagreement with this Court's Order does not mean that there is a substantial difference of opinion, especially because every court that has addressed this issue has ruled in favor of jurisdiction, and Defendant has not cited any contrary case law to support his position. *Id. (citing In re Flor,* 79 F.3d 281, 284 (2d Cir. 1996) ("[T]he mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.")) Defendant has therefore failed to satisfy any of the requirements for certification of an interlocutory appeal.

Nor is there an exceptional circumstance here that would justify an interlocutory appeal. Indeed, the First Circuit generally does not grant interlocutory appeals from a denial of a motion to dismiss, particularly one based on a jurisdictional challenge. *Caraballo-Seda*, 395 F.3d at 9; *Sorren*, 605 F.2d at 1214. In *Sorren,* for example, the First Circuit stated that "an interlocutory denial of a motion to dismiss a civil case for lack of jurisdiction ... 'is perhaps unique in its incapacity permanently to affect the rights of the moving party' ... [and] courts have not found that the 'inconvenience' to a party of awaiting review of a jurisdictional question justifies permitting immediate review." *Id.* (citation omitted). Accordingly, the First Circuit held that the criminal defendant was not entitled to an interlocutory appeal based on a jurisdictional challenge because the criminal defendant could still vindicate his rights during post-judgment appeal. *Id.*; *see also N. Laminate Sales, Inc. v. Davis,* 403 F.3d 14, 23 (1st Cir. 2005) ("the denial of a motion to dismiss a complaint for a lack of jurisdiction over the defendant's person . . . is not a

final adjudication and generally is not appealable" on an interlocutory basis."). The First Circuit disfavors interlocutory appeals given its policy against piecemeal litigation. *Caraballo-Seda*, 395 F.3d at 9.[11]

The same scenario is presented here. Defendant challenges the Court's jurisdiction over Plaintiffs' TVPA claims under section 1331. Because the interlocutory appeal presents a jurisdictional challenge only, Defendant's substantive rights are not affected. Instead, the interlocutory appeal merely creates the potential to further delay proceedings that have already been pending for over twenty months, yet remain at the dispositive motion stage.[12]

CONCLUSION

Defendant submits no basis for the Court to reconsider its exercise of jurisdiction over Plaintiffs' TVPA claims, nor does he establish any exceptional circumstance that would warrant certification of an interlocutory appeal. Defendant's Motion should be denied in its entirety.

Dated: November 21, 2018

Respectfully submitted,

DAVID BONIFACE, NISSANDERE MARTYR, AND JUDERS YSEME

By their attorneys,

/s/ Bonnie Lau

CENTER FOR JUSTICE & ACCOUNTABILITY
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[11] Indeed, this Court has noted that because subject matter jurisdiction may be raised at any time, "Defendant may renew his motion for dismissal on this basis with a fully-developed argument if he believes that section 1331 is not sufficient to confer jurisdiction over the TVPA claims." Dkt 56, p. 15, fn. 2.

[12] Plaintiffs filed the instant suit on March 22, 2017. And for over a decade, Plaintiffs have diligently pursued all available avenues for accountability, first in Haiti and now in the United States. Throughout, they have done so in the face of ongoing threats and intimidation. Nissage Martyr, one of the original plaintiffs in this suit, died under unusual circumstances one day after Defendant was served with the Summons and Complaint. *See supra* fn. 1.

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CERTIFICATE OF SERVICE

I certify that on November 21, 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

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