No. __-_____

United States Court of Appeals for the First Circuit

DAVID BONIFACE, NISSAGE MARTYR, AND JUDER YSEMÉ,
Plaintiffs-Respondents,

v.

JEAN MOROSE VILIENA,
Defendant-Petitioner.

On Appeal from the United States District Court
for the District of Massachusetts

(No. 17-cv-10477-ADB)

PETITION OF JEAN MOROSE VILIENA FOR PERMISSION TO APPEAL PURSUANT TO 12 U.S.C. § 1292(b)

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Petitioner Defendant Jean Morose Viliena ("Viliena") seeks leave to file an interlocutory appeal from an Order of the District Court, originally dated August 31, 2018, denying in part Viliena's Motion to Dismiss [Docket No. 56, attached as **Exhibit 1**] (the "MTD Order"), which was the subject of Viliena's Motion for Reconsideration [Docket No. 66], and the District Court's subsequent Order, dated September 30, 2019, denying reconsideration and certifying its Order for interlocutory appeal [Docket No. 84, attached as **Exhibit 2**] (the "Reconsideration Order"). This petition is timely filed within 10 days of entry of that certification.

I. INTRODUCTION

The District Court has certified for appeal the question of whether it can exercise federal question jurisdiction under 28 U.S.C. § 1331 over claims asserted under the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note) in an action by three Haitian citizens against a defendant Haitian citizen to recover civil damages for torts allegedly committed in Haiti in the period 2007-2010. The District Court previously dismissed Count IV of the Complaint, which asserted a cause of action under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), on the basis that Plaintiffs failed to allege with sufficient particularity that the claims touch and concern the territory of the United States, the standard articulated in Kiobel v. Royal Dutch Petroleum Co., 569 U.S.

108 (2013). As such, there is no jurisdiction for the claims asserted in this matter under the ATS.

Viliena also asserted, in the Motion to Dismiss and the Motion for Reconsideration, that Congress cannot legislatively confer jurisdiction, under the TVPA, over claims between aliens that do not touch and concern the territory of the United States. This inquiry can be framed either as a question as to the constitutional bounds of the TVPA or the substantive meaning and interpretation of the statute itself. In either instance, the exercise of jurisdiction over domestic crimes within another country between persons who are not United States citizens falls outside the limits of the authority vested in Congress by the Constitution and is either not encompassed by the statute itself or is an unconstitutional exercise of legislative authority.

Viliena is represented by counsel appointed on a *pro bono* basis by the District Court for the limited purpose of litigating the issues relating to the Motion to Dismiss. [Docket No. 34.] The District Court, in its Reconsideration Order certifying this interlocutory appeal, has recognized that the appeal concerns a controlling question of law that may materially advance the litigation in the District Court. If there is no jurisdiction under the TVPA, there is no jurisdiction in the District Court and this matter will terminate. Reconsideration Order, Exhibit 2, at p. 16.

While the Eleventh and Fourth Circuits have ruled that there are no territorial limits on federal question jurisdiction if Congress evinces an intent to exercise jurisdiction internationally, and some district courts, bound by the dictates of precedent or finding those decisions persuasive, have concurred, other district courts have found jurisdiction lacking. Courts that have found jurisdiction have done so by means of a "syllogism," in the word of the District Court, that has not gone beyond the tautological reasoning that: (i) the TVPA is a federal statute and (ii) Section 1331 provides for jurisdiction over matters concerning federal statutes.

While, like any syllogism, the argument is possessed of an attractive simplicity, the logic employed portends a dynamic in which there are no limits on the ability of Congress to confer jurisdiction over any subject (*e.g.*, Italian traffic laws). To accept this reasoning—that where Congress enacts a law and states an intent to govern the affairs of foreign citizens acting within a foreign jurisdiction, it may do so and thereby confer jurisdiction in U.S. courts—is to render meaningless the limitations inherent in the Law of Nations, as embodied in the Constitution, that a matter must touch and concern the United States. This is an extraordinary jurisdictional reach that merits reasoned and final judicial review. It is an important issue that neither the First Circuit, nor the majority of other circuits, have addressed. This Court's review will bring a measure of finality to the instant litigation and

provide clarity on a subject with important constitutional and international implications.

II. QUESTION ON APPEAL

Whether federal question jurisdiction under 28 U.S.C. § 1331 can be asserted over claims asserted under the Torture Victim Protection Act and between aliens that do not touch and concern the territory of the United States.

III. BACKGROUND

A. Procedural

The Complaint in this matter was filed on March 22, 2017. [Docket No. 1.] After appointment of counsel, the Viliena filed a Motion to Dismiss. [Docket No. 46.] The District Court issued its Order on the Motion to Dismiss on August 31, 2018. [Docket No. 56.] After oral argument on the Motion to Dismiss, at the invitation of the District Court, Viliena filed a Motion for Reconsideration and Request for Certification. [Docket No. 66.] By Order dated September 30, 2019, the District Court denied reconsideration and certified its Order for interlocutory appeal. [Docket No. 84.]

B. Factual

This is a so-called "foreign cubed" proceeding: i) foreign plaintiffs, 2) foreign defendant, and 3) acts that took place in a foreign jurisdiction. The Complaint, accepted as true, confirms this summary characterization.

1. *Facts Alleged in the Complaint*

July 2007

The Plaintiffs assert that, on July 27, 2007, Viliena, at that time allegedly a leader in a Haitian political party, and also the mayor of Les Irois, Haiti, "personally supervised" as "associates" dragged Eclesiaste Boniface ("E. Boniface") from his home in Les Irois into a crowd of bystanders, where one associate fired a gun, killing Mr. Boniface. [Docket No. 1, Complaint, at ¶36.]

April 2008

Plaintiffs allege that, on April 8, 2008, Viliena and his staff physically assaulted Nissage Martyr ("Martyr") at a radio station in Les Irois, hitting him in the chest and sides with his fists and with a gun. Id. at ¶46. When Martyr ran way, Plaintiffs claim that Viliena ordered an associate to shoot Martyr, as well as Juders Ysemé ("Ysemé"), who had witnessed the assault on Martyr. Id. at ¶¶47-48. Martyr was hit by a bullet in the leg, causing him to have it amputated above the knee; Ysemé was struck in the face, which resulted in him being blind in one eye. Id. at ¶¶48, 50.

January 2009

Plaintiffs allege that Viliena, while in Haiti and while "acting in concert" with a militia and his mayoral staff, set fire to 36 homes in the town of Les Irois on the night of October 29, 2009. Id.

Haitian Judicial Proceedings

The Plaintiffs submitted an affidavit to the Court, from Mario Joseph, an attorney, which claims that:

- "The rights of my clients Mr. David Boniface, Mr. Nissage Martyr and Mr. Juders Ysemé, to file a civil complaint against Defendant Viliena for their injuries have been recognized in Haitian Legal Proceedings;"
- under Haitian law a cause of action exists for the injuries alleged in the Complaint;
- the Plaintiffs have recovered a monetary judgment against the "associates' identified in the Complaint for those injuries; and
- the Plaintiffs continue to prosecute their claims against Mr. Viliena in the Haitian court.

[Docket No. 20, Supplemental Brief Regarding Standing, Exhibit A, Declaration of Mario Joseph, Attorney, ¶¶ 4-10, p. 2.]

2. *Causes of Action Alleged in the Complaint*

Count I asserts a claim for extrajudicial killing, relative to July 27, 2007 death of E. Boniface, in violation of the TVPA.

Count II asserts a claim for attempted extrajudicial killing, relative to the April 8, 2008 injuries sustained by Martyr and Ysemé, in violation of the TVPA.

Count III asserts a claim for torture, relative to the April 8, 2008 injuries sustained by Martyr and Ysemé, in violation of the TVPA.

Count IV asserts a claim for crime against humanity, a tort "committed in violation of the laws of nations or a treaty of the United States," under the ATS.

Count V asserts a claim, under Haitian law (Articles 1 and 3 of the Haitian Code of Criminal Examination and Article 356 of the Haitian Penal Code), in connection with the arson of the 36 homes on October 29, 2009.

IV. RELIEF SOUGHT

If the petition is granted, Viliena will ask the Court to reverse the District Court order denying the motion to dismiss and to enter an order dismissing the underlying action by holding that the TVPA is limited jurisdictionally by the bounds of the traditional scope of the Law of Nations as incorporated in the Constitution and that the Court lacks subject matter jurisdiction under the TVPA over claims that do not touch and concern the territory of the United States.

V. REASONS WHY THE PETITION SHOULD BE GRANTED

Interlocutory appeals under 28 U.S.C. § 1292(b) may be granted with respect to matters that involve "(1) a controlling question of law, (2) as to which there is substantial ground for difference of opinion and (3) for which an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Carballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005) (quotations omitted).

A. Controlling Question of Law

"[A] question of law is 'controlling' if reversal of the district court's order would terminate the action." Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2d Cir. 1990). Here, if there is no jurisdiction under the TVPA, there is no jurisdiction, at all, in this matter. A finding by this Court that jurisdiction does not exist in a proceeding between foreign nationals, concerning issues that do not touch or concern the United States, will be the end of the litigation.

B. There are Substantial Grounds for a Difference of Opinion

1. *The Origins and Legislative History of the TVPA*

The TVPA has its origins in the ATS and its modern usage in the federal courts. The ATS, enacted in 1789, states in full: "[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." The ATS is a jurisdictional statute enacted to make all actionable tort claims predicated on the Law of Nations, as defined by Article I, Section 8, Clause 10 of the United States Constitution, cognizable in federal courts. At the time of enactment of the ATS, there was no federal question jurisdiction.

The ATS was invoked twice in the late 18th century, but then only once more over the next 167 years. See Moxon v. The Fanny, 17 F. Cas. 942 (D.C. Pa. 1793); Bolchos v. Darrel, 3 F. Cas. 810 (D.C. S.C. 1795); O'Reilly de Camara v. Brooke, 209 U.S. 45 (1908); Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 51–52 (2d Cir. 1960) (per curiam). The ATS gained new life in the courts in 1980. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), a Paraguayan family, resident in the United States, sought to use the ATS to sue a former Paraguayan police inspector-general, also resident in the United States, for torturing and killing a member of their family in Paraguay. Reversing the decision of the lower court, the Second Circuit held that the ATS provided a legitimate source of subject matter jurisdiction for the claim. Following Filartiga, in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), the DC Circuit affirmed the dismissal of a case brought by the survivors of an armed attack on a civilian bus in Israel alleging that the attack had been carried out by the foreign defendants. Although affirming the lower court dismissal, the three members of the panel each wrote separately to do so and took markedly different views of Filartiga and its progeny. Judge Bork in his concurring opinion notably took the position that the jurisdictional grant afforded by the ATS did not create a cause of action and observed that "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal." 726 F.2d at 801.

Congress responded to the concerns articulated in Tel-Oren by passing the TVPA in 1991. See H.R. Rep. No. 102-367, at 86 (1991) (explaining that purpose of the statute is to provide "a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing"). It explicitly did so to address Judge Bork's view that the ATS did not provide a right of action to torture victims. The House Report on the TVPA states:

> Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. Rep No. 102-367, at 86 (1991). The Senate Report contains similar language:

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

Sen. Rep. No. 102-249, at 3 (1991) (emphasis added). The legislative history of the TVPA indicates that it was meant to further define specific violations of the Law of Nations as articulated by Judge Bork and to apply the rights arising under the ATS to United States citizens.

The Plaintiffs in this case have asserted, and the District Court has ruled, that federal question jurisdiction, 28 U.S.C. § 1331, provides the Court with sufficient jurisdiction over an action between aliens for acts committed in a foreign country that do not touch and concern the United States. That ruling elides the required analysis of whether the assertion of jurisdiction over those claims falls within the bounds of the Constitution itself. In Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), the Second Circuit observed that some courts had determined that Section 1331 provided an independent basis for claims alleging violations of international law, but observed that "whether or not that is so is an issue of some uncertainty that need not be decided in this case." Id. at 246. The courts that resolved this uncertainty have done so with a *res ipsa* form of analysis—§ 1331 provides jurisdiction over questions involving federal statutes; the TVPA is a federal statute—that has not addressed the question of whether the legislative assertion of extraterritorial jurisdiction over disputes that exceed the limits of the Law of Nations also fall outside the limits of the Constitution.

2. *The Law of Nations*

The Law of Nations clause within the Constitution was one of the "class of powers lodged in the general government … which regulate the intercourse with foreign nations," The Federalist No. 42 (James Madison) at 264 (Clinton Rossiter ed., 1961), and was intended to regulate the conduct of independent states towards

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

The authorization of federal jurisdiction over controversies between a "State, or the Citizens thereof, and foreign States, Citizen or Subjects," U.S. Const. Art. III, § 2, cl. 1, did not encompass cases between two aliens. See Montralet v. Murray, 8 U.S. (4 Cranch) 46 (1807). Claims between two foreign citizens that do not otherwise touch or concern the United States fall outside the limits of the Law of Nations and the limits of the Constitution. See Bellia & Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445, 529 (2011).

3. *Federal Question Jurisdiction and the Limits of Prescriptive Jurisdiction*

The limits of the Court's jurisdictional power are logically most often contested in the framework of a motion to dismiss for lack of subject matter jurisdiction. In his dissent in Hartford Fire Ins. Co. v. California, 509 U.S. 764, 800-821 (1993), Justice Scalia observed that this construct misses the point. Quoting Lauritzen v. Larsen, 345 U.S. 571 (1953), he observed that:

> As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

Hartford, 509 U.S. at 812. The dissent accepts the presumption that federal question jurisdiction can be universally employed in this manner. In his analysis, however, Justice Scalia notes that answering this question, while it changes the problem set from one about jurisdiction (Rule 12(b)(1)) to one about the substantive scope of the legislation (Rule 12(b)(6)), still leaves the Court with two questions to answer:

1) does the statute have extraterritorial reach, known as "legislative jurisdiction," Id. at 814; and

2) if the presumption against the extraterritorial scope of the statute is overcome, is the statute being construed in a manner that would be violative of the law of nations, because of the well-established presumption that "an act of congress ought never to be construed to

violate the law of nations if any other possible construction remains." Id. at 815.

In Hartford, interpreting the scope of the Sherman Act, the dissent observes that "this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." Id. The dissent notes that international law, or the law of nations, contains limitations on a nation's exercise of its jurisdiction to prescribe. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

In Kiobel v. Royal Dutch Petroleum Co., the court addressed the first question posited in the Hartford dissent, employing a presumption against the extraterritorial reach of any statute, the Court concluded that a "presumption against extraterritoriality applies to claims under the Alien Tort Statute, and that nothing in the statute rebuts the presumption." 569 U.S. 108, 124 (2013). The legislative history of the TVPA evinces an interest in providing a remedy in the form of a civil action for torture that may be committed abroad, and several courts have noted its intent to extend beyond the territory of the United States. See Chowdhury v. Worrldtel

Bangladesh Holding, Ltd. 746 F.3d 42, 51 (2d Cir. 2014); MTD Order, Exhibit 1, at pp. 15-16.

The remaining issue though is, assuming an intent to apply the statute extraterritorially, would the exercise of jurisdiction over conduct occurring wholly within a foreign country, between foreign citizens, and that does not "touch and concern" the United States offend the traditional notions of comity imbedded within international law. In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), a Sherman Act decision, the court cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'" Id. at 443. "United States law governs domestically but does not rule the world," Kiobel, 569 U.S. at 115, quoting Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454 (2007).

The comity at issue here is the comity of nations, "the respect sovereign nations afford each other by limiting the reach of their laws." Hartford, 509 U.S. at 817, citing J. Story, Commentaries on Conflict of Laws § 38 (1834). Justice Holmes early on observed that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). A rule that would authorize a nation to treat an actor "according to its own

notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." Id. The First Circuit has, in the context of exercising jurisdiction to enforce criminal laws, been wary of the use of prescriptive jurisdiction abroad, endorsing the view that the courts should not "impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." United States v. Hayes, 653 F. 2d 8, 15 (1st Cir. 1981), quoting United States v. Aluminum Co. of America, 148 F. 2d. 416, 443 (2d Cir. 1945); see also U.S. v. Cafiero, 242 F. Supp. 2d 49, 53-54 (D. Mass. 2003).

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

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

> regulating the activity," id., § 403(2)(g); and "the likelihood of conflict with regulation by another state," id., § 403(2)(h).

Hartford, 509 U.S. at 818-819.

A review of these factors in this matter demonstrates that the exercise of prescriptive jurisdiction would be inconsistent with the traditional notions of comity between nations. The incident complained of here took place in Haiti, between Haitians, and did not touch and concern the United States. The interests at issue here are the interests of Haiti and not the United States. The Plaintiffs allege that Viliena was acting in his capacity as mayor of a town in Haiti when he allegedly engaged in tortious conduct that harmed other Haitians.

The comity analysis is enhanced by projecting the response of the United States and its citizens in a scenario in which Haitian courts attempted to adjudicate disputes between a United States citizen and local police in the United States. The United States would undoubtedly find that such an action within Haiti would be "interference with the authority of another sovereign, contrary to the comity of nations." Am. Banana Co. v. United Fruit Co., 231 U.S. at 356. This civil action is no different. It is an action inconsistent with the traditional notions of comity between nations and, as such, inconsistent with the law of nations and the statutory intent and limits of the TVPA.

C. An Immediate Appeal Will Advance the Termination of the Litigation

A grant of this petition will advance the litigation and permit the issues raised by the Motion to Dismiss to be fully reviewed. Absent such a grant these issues will likely avoid review. See Reconsideration Order, Exhibit 2, at pp. 17-18.

VI. CONCLUSION

Wherefore, for the foregoing reasons, the Petitioner Jean Morose Viliena prays that the Court grant this petition for permission to appeal.

Jean Morose Viliena

By his attorneys,

/s/ Peter J. Haley

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Counsel for Defendant-Petitioner

Dated: October 10, 2019

CERTIFICATE OF COMPLIANCE

1. The foregoing Petition for Permission to Appeal complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as determined by the word-count function (4,223 words) of Microsoft Word 2016, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f); and

2. This Petition for Permission to Appeal complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: October 10, 2019

/s/ Peter J. Haley
Peter J. Haley

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2019, I caused the foregoing petition to be electronically filed with the Clerk of the Court via the Court's CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. Service was likewise accomplished by electronic mail for the following counsel for Plaintiffs-Respondents:

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EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER ON MOTION TO DISMISS AND MOTION TO SUBSTITUTE PARTY

BURROUGHS, D.J.

Plaintiffs David Boniface, Nissage Martyr, and Juders Ysemé, residents of Les Irois, Haiti, allege that Defendant, as the mayor of Les Irois and the leader of a political party opposed to the party that Plaintiffs support, committed human rights abuses in violation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 (codified at note). Now before the Court are Defendant's motion to dismiss [ECF No. 46] and Plaintiffs' motion to substitute Nissandère Martyr as plaintiff in place of Nissage Martyr [ECF No. 29]. For the reasons set forth below, the motion to dismiss is granted in part and denied in part, and the motion to substitute is granted.

I. BACKGROUND

The following facts are drawn from the complaint, the allegations of which are taken as true for purposes of evaluating the motion to dismiss. Ruivo v. Wells Fargo Bank, 766 F.3d 87, 90 (1st Cir. 2014).

Defendant Jean Morose Viliena is a citizen of Haiti and a lawful permanent resident of the United States. He currently resides in or around Malden, Massachusetts, and is or was employed as a school bus driver in Massachusetts. The Plaintiffs, David Boniface, Nissage Martyr, and Juders Ysemé, are citizens of Haiti who reside (or resided) in the town of Les Irois, Haiti. Boniface and Martyr are supporters of a political party in Les Irois, the Struggling People's Party, which opposes the party with which Defendant is affiliated, the Haitian Democratic and Reform Movement ("MODEREH").

On February 29, 2004, former Haitian President Jean-Bertrand Aristide was overthrown in a violent coup d'état. The 2004 coup left a power vacuum in Haiti, and in its aftermath, a large array of political parties—at least 70 nationwide—competed for popular support. Since the 2004 coup, government institutions have remained weak and unable to reestablish the rule of law. Plaintiffs assert that the Haitian National Police is chronically undertrained and underfunded, and suffers from corruption and brutality, and that Haiti's justice system is dysfunctional, with widespread corruption, politicization, and a lack of training and resources.

Plaintiffs represent that, in the absence of stable security forces and judicial accountability, political parties and rival government officials have used informal armed groups to gain and exercise power. They assert that armed groups aligned with political parties regularly engage in violence against political opponents, journalists, and human rights advocates.

In December 2006, Defendant ran for mayor of Les Irois as a candidate for the MODEREH party. Defendant's main rival in the election was a candidate from the Struggling People's Party. Defendant won the election, and he held the office of Mayor until approximately February 2010. Plaintiffs assert that, as a candidate and as Mayor, Defendant was backed by a powerful political machine known as KOREGA, which exerts control over politics in the

southwestern region of Haiti, including Les Irois, through a system of patronage, threats, and violence. Plaintiffs assert that KOREGA engaged in voter fraud, intimidation, and violence to ensure that Defendant was elected mayor. Once Defendant was elected Mayor, Plaintiffs contend that he became the head of the Les Irois branch of KOREGA and exercised control over the KOREGA militia's operations in Les Irois, using violence to accomplish his political ends. Plaintiffs assert that the KOREGA militia operated as an extension of Mayor Viliena's office in Les Irois. At all relevant times, Defendant personally supervised his mayoral staff and security detail.

Defendant fled to the Boston area in or around January 2009 following the opening of a criminal investigation into his human rights abuses and those of his associates. Plaintiffs assert that, throughout 2009, Defendant continued to serve as mayor of Les Irois and exercise control over the KOREGA militia from Massachusetts. They further assert that Defendant continued to work closely with his associates in Les Irois to coordinate and implement the continued repression of perceived political opponents, and that Defendant made trips to Haiti in support of this goal.

On or around August 27, 2012, Defendant was appointed by former Haitian President Michel Martelly to serve as the "Interim Executive Agent" for Les Irois. Through this position, he continued to exercise the functions of Mayor of Les Irois from Massachusetts. Plaintiffs believe that his term as Interim Executive Agent expired in or around October 2015. He no longer holds public office in Haiti.

A. Death of Eclesiaste Boniface, July 27, 2007

On the morning of July 27, 2007, Defendant was accompanying a sanitation crew through the streets of Les Irois when he got into a dispute with a resident, Ostanie Mersier, about

the disposal of garbage. After Defendant hit Mersier on the head with his gun, she left to file an incident report with the local Justice of the Peace, Judge Saint Bell, and Defendant followed her to demand her arrest.

As a trial monitor for a local human rights organization, Plaintiff Boniface came to observe the proceedings before Judge Bell. Boniface also spoke on Mersier's behalf and accused Defendant of abusing his authority by assaulting Mersier. As Boniface was leaving, he encountered Defendant, along with members of the KOREGA militia, members of the mayoral staff, and two of Judge Bell's cousins. They surrounded Boniface and threatened him with violence, but a group of bystanders intervened and escorted Boniface to Plaintiff Martyr's home. Defendant and his associates followed Boniface and continued to threaten and attempt to hit Boniface until Defendant instructed his associates to let him go, because they would "take care of him later."

That evening, Defendant and an associate from the KOREGA militia appeared near Boniface's home. They ordered the residents in the area to remain behind closed doors and announced that later that night, the paramilitaries would appear and show no mercy. Later that evening, Defendant led a group of approximately twelve men from the KOREGA militia, armed with firearms, machetes, clubs, and picks, to Boniface's home. The group included members of the mayoral staff and Judge Bell's cousins. At that time, David Boniface was not at home, but was attending church. His younger brother, 23-year-old Eclesiaste Boniface, answered the door, and Defendant personally supervised as his associates dragged Eclesiaste into a crowd of about thirty bystanders. Eclesiaste pleaded with the crowd, saying that he was uninvolved and had no problems with anyone. Despite his pleas, Defendant's associates lunged at Eclesiaste with a machete, and then one of them fired his gun, killing Eclesiaste. Neighbors ran to David

Boniface's church to warn him that Eclesiaste had been killed and that Defendant and the KOREGA militia were now looking for him. The church pastor sheltered Boniface overnight.

B. Assault on Martyr and Ysemé, April 8, 2008

In or around March 2008, a committee of local journalists and activists founded a community radio station in Les Irois called New Vision Radio, which was to be the first local radio station in the town. Radio serves as a primary news source in Haiti due to high rates of illiteracy. The radio station was financed and operated with support from two Struggling People's Party politicians. It rented a room from Plaintiff Martyr and operated out of his home. Throughout March and early April 2008, station volunteers ran test broadcasts to determine the reach of the signal. Plaintiff Ysemé, who was in high school at the time, enjoyed spending time at the station before and after class, though he was not employed by the station.

Defendant was opposed to the radio station, and on the day the station launched, in late March of 2008, Defendant called in to the station and declared his intent to shut the station down. On or about March 27, 2008, a group of government officials visited Les Irois to mediate the dispute between Defendant and supporters of the radio station. The delegation included the prosecutor from a neighboring city, as well as Haitian National Police and officers from the United Nations Stabilization Mission in Haiti. After the meeting, the officials instructed Defendant not to shut the radio station down, and he agreed.

On or about April 8, 2008, Defendant met a group of approximately 30 KOREGA militia members near Martyr's residence. Defendant distributed firearms to the militia members, some of whom also carried machetes, picks, and sledge hammers. Defendant's associates began firing in the air as they walked toward Martyr's house. Martyr and Ysemé were sitting on the front

porch. Hearing the gunshots, Ysemé ran through the house to the backyard. Martyr started to get up from the porch to go inside, seeking to protect his wife and daughters who were inside.

Defendant grabbed Martyr and dragged him down the hallway. Defendant pointed his handgun at Martyr's ear and told him to leave the house. Martyr refused to leave because his family remained in the house. Defendant shouted that Martyr wanted to stay so that he could report the attack. Defendant then swept Martyr's feet out from under him, forcing him to the floor. He started beating Martyr on his sides and chest, pistol-whipping Martyr with his gun and striking him with his fists. Several members of the KOREGA militia and the mayor's staff joined in the assault, Defendant struck Martyr hard in the chest, causing Martyr to collapse face forward. The militia members left Martyr on the floor and carried the broadcasting equipment out the door, at the direction of Defendant.

Meanwhile, a member of the KOREGA militia spotted Plaintiff Ysemé in the backyard. He accused Ysemé of wanting to report the attack, grabbed him, and dragged him into the house. One member of the militia restrained Ysemé as others beat him on his head and the sides of his body. Defendant, who was striking Martyr, turned to Ysemé and said that he "wanted him." While Martyr was lying on the floor in pain, he saw that the front door was open, and he ran to the doorway to escape. Ysemé, who had managed to slip free, followed him and ran toward the door. Some of Defendant's associates tackled Martyr as he tried to run. Ysemé ran past him, onto the street. Martyr broke free again and followed Ysemé onto the street. Seeing them trying to escape, Defendant ordered one of his associates, Villeme Duclona, to shoot and kill Martyr and Ysemé. Duclona opened fire with his shotgun, hitting Martyr in the leg and Ysemé in the face. Defendant and the KOREGA militia members then seized the rest of the radio equipment and fled the scene. They left Martyr and Ysemé for dead.

Martyr and Ysemé survived the attack, but both were left with severe, permanent injuries. Martyr spent several months in the hospital as a result of his wounds, and his injured leg was amputated above the knee. Ysemé also required months of intensive medical treatment, including two surgeries to extract shotgun pellets from his face. He is permanently blind in one eye and still has pieces of shotgun pellets in his scalp and arms. He continues to suffer from dizziness and migraine headaches as a result of his injuries.

C. Arson of 36 Homes, October 29, 2009

In or around January 2009, Defendant fled to the United States after Haitian authorities launched a criminal investigation into the killing of Eclesiaste Boniface and the attack on the radio station. Plaintiffs assert that he continued to hold the office of mayor and exercised control over the KOREGA militia from Massachusetts.

In or around October 2009, Hautefort Bajon, Defendant's Chief of Staff, fell ill. On October 27, 2009, KOREGA supporters, led by Defendant, who was then in Haiti, marched through the streets of Les Irois, threatening to kill people and burn down houses if Bajon died. Defendant publicly declared that the Struggling People's Party had placed a voodoo curse on Bajon. The next day, October 28, 2009, Defendant and members of the KOREGA militia, again marched through the streets. Bajon died on October 29. Shortly thereafter, Defendant went into the town market with several KOREGA associates and started to strike perceived supporters of the Struggling People's Party, accusing them of causing Bajon's death.

On the night of October 29, members of the KOREGA militia and mayoral staff, acting in concert with Defendant, set fire to 36 homes, all belonging to Struggling People's Party supporters, to avenge the death of Bajon. The homes of Martyr, Ysemé, and the Boniface family were burned and rendered uninhabitable.

D. Pursuit of Remedies in Haiti

Plaintiffs Boniface, Martyr, and Ysemé assert that they have pursued all avenues for justice in Haiti to no avail. Since 2007, although they have lodged at least eight reports or complaints with Haitian law enforcement and judicial authorities, the U.N. Mission in Haiti, and the Inter-American Commission on Human Rights, Defendant still has not been held accountable. In response to Plaintiffs' complaints, the Haitian judiciary initially pursued a criminal investigation. In September 2008, a Haitian judge ordered Defendant's arrest, but he was provisionally released in December 2008, allegedly as a result of political pressure. Defendant and other members of the KOREGA militia then fled or went into hiding.

In 2010, Defendant and 19 members of the KOREGA militia were indicted in Haiti for their involvement in the acts discussed in the Complaint. The indictment stated that the defendants would be tried in absentia, however, Defendant was never tried. Plaintiffs assert that Defendant has been able to return to Haiti without fear of prosecution.

II. MOTION TO DISMISS

A. Standard of Review

When evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) at the pleading stage, granting such a motion "is appropriate only when the facts alleged in the complaint, taken as true, do not justify the exercise of subject matter jurisdiction." Muniz-Rivera v. United States, 326 F.3d 8, 11 (1st Cir. 2003). "When a district court considers a Rule 12(b)(1) motion, it must credit the plaintiff's well-pled factual allegations and draw all reasonable inferences in the plaintiff's favor." Merlonghi v. United States, 620 F.3d 50, 54 (1st Cir. 2010). "In addition, the court may consider whatever evidence has been submitted, such as the depositions and exhibits submitted in this case." Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996). "While the

court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion," and attaching exhibits to a Rule 12(b)(1) motion does not convert it to a motion for summary judgment. Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002), as corrected (May 8, 2002).

To withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must allege a claim for relief that is "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Assessing the plausibility of a claim is a two-step process:

> First, the court must sift through the averments in the complaint, separating conclusory legal allegations (which may be disregarded) from allegations of fact (which must be credited). Second, the court must consider whether the winnowed residue of factual allegations gives rise to a plausible claim to relief.

Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 53 (1st Cir. 2013) (citation omitted). Along with all well-pleaded facts, the Court must draw all logical inferences from a complaint in favor of the plaintiff. Frappier v. Countrywide Home Loans, Inc., 750 F.3d 91, 96 (1st Cir. 2014). "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." Rodriguez-Reyes, 711 F.3d at 53 (quoting SEC v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010) (en banc)).

"When a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter," because "if the court lacks subject matter jurisdiction, assessment of the merits becomes a matter of purely academic interest." Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149–50 (1st Cir. 2002).

B. Jurisdiction Under the ATS

Defendant first argues that the Court lacks jurisdiction under the ATS to adjudicate Counts I–IV, because all of the relevant conduct occurred in Haiti, not the United States. As an

initial matter, the Court notes that Counts I, II, and III assert claims under the TVPA, not the ATS, so Defendant's argument concerning the ATS pertains only to Count IV.

The ATS provides that the "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. The statute has been read to allow federal courts to "recognize private claims under federal common law" for a "modest number of international law violations." Sosa v. Alvarez-Machain, 542 U.S. 692, 724, 732 (2004). Five years ago, the Supreme Court addressed the question of whether a claim brought pursuant to the ATS "may reach conduct occurring in the territory of a foreign sovereign." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013). Applying the "canon of statutory interpretation known as the presumption against extraterritorial application," which provides that "when a statute gives no clear indication of an extraterritorial application, it has none, and reflects the presumption that United States law governs domestically but does not rule the world," the court determined that the principles underlying the canon "constrain courts considering causes of action that may be brought under the ATS." Id. at 115–16 (internal quotation marks and citations omitted). In Kiobel, "all of the relevant conduct took place outside the United States," and thus the plaintiffs' claims were barred. Id. at 124. The court recognized however, that claims could be actionable under the ATS where they "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." Id. at 124–25. The court has not provided further guidance on the application of the "touch and concern" standard, although it noted that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." Id. at 125.[1]

[1] The court has since determined that "foreign corporations may not be defendants in suits brought under the ATS." Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

In the years since Kiobel was decided, courts have grappled with the meaning of the "touch and concern" standard, although the First Circuit has not yet had the opportunity to weigh in. While the inquiry is naturally fact-dependent, a few general principles have emerged. First, a court must evaluate a plaintiff's "specific claim to determine what contacts with or connections to the United States are relevant." Doe v. Drummond Co., 782 F.3d 576, 597 (11th Cir. 2015). Where some relevant conduct occurs domestically, "the sufficiency question—whether the claims [touch and concern the United States] with 'sufficient force' or to the 'degree necessary' to warrant displacement—will only be answered in the affirmative if *enough* relevant conduct occurred within the United States." Id. This inquiry may "extend to the place of decision-making." Id.; see also Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (claims touched and concerned U.S. with sufficient force where defendant corporation was based in U.S. hired employees who perpetrated torture, received payments based on contracts issued by U.S. government in U.S., encouraged misconduct, and attempted to cover up conduct when discovered); Mujica v. AirScan Inc., 771 F.3d 580, 592 (9th Cir. 2014) (explaining that allegations that decisions furthering the conspiracy occurred in the United States were relevant to the jurisdictional inquiry, although they were too conclusory to be sufficient); Nestle v. Nestle, S.A., No. CV 05-5133-SVW-MRW, 2017 WL 6059134, at *5 (C.D. Cal. Mar. 2, 2017) (explaining that presumption against extraterritoriality has been displaced "when the tortious conduct itself was planned in the United States"). In contrast, where the activity that occurred in the United States did not directly involve decision-making about the specific conduct alleged to be tortious, several courts have determined that the allegations were insufficient to satisfy the "touch and concern" standard. See, e.g., Drummond, 782 F.3d at 599 ("mere consent" by company president in United States to murder committed abroad "is not enough"); William v.

AES Corp., 28 F. Supp. 3d 553, 568 (E.D. Va. 2014) (rejecting argument that activities of United States corporation that "profits from and is actively involved in the decision-making of its foreign subsidiaries" were sufficient to touch and concern United States).

The facts of Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304 (D. Mass. 2013) ("Lively I") and Sexual Minorities Uganda v. Lively, 254 F. Supp. 3d 262 (D. Mass. 2017) ("Lively II"), appeal docketed, No. 17-1593 (1st Cir. June 14, 2017) may be the most analogous to the present case. In Lively I, decided at the motion to dismiss stage, the defendant, who lived in the United States, was accused of working with others to devise and execute a "program of persecution" aimed at individuals in Uganda based on their sexual orientation and gender identity. Lively I, 960 F. Supp. 2d at 311. The court determined that the plaintiffs had sufficiently plead a cause of action under the ATS, because the complaint alleged that "the tortious acts committed by [the defendant] took place to a substantial degree within the United States, over many years, with only infrequent actual visits to Uganda." Id. at 321. The complaint described how, after the defendant returned from Uganda, "he continued to assist, manage, and advise associates in Uganda on methods to deprive the Ugandan LGBTI community of its basic rights" from the United States. Id. at 323. The complaint described the defendant's specific activities in the United States, including publishing books describing a plan of action to repress LGBTI individuals and reviewing and advising on legislation proposed in the Ugandan Parliament. Id. at 312–14. After discovery was complete in the case, however, the court granted the defendant's motion for summary judgment, concluding that the court had no jurisdiction under the ATS to hear the plaintiff's claims. Lively II, 254 F. Supp. 3d at 270. Discovery had revealed that the only activity the defendant had engaged in within the United States was to send "sporadic emails" from the United States "offering encouragement, guidance, and advice to a

cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country," and the court determined that these emails did not "rise to the level of 'force' sufficient to displace the presumption against extraterritorial application." Id. at 268, 270.

In this case, Defendant correctly points out that two of the three major incidents alleged in the complaint—the 2007 death of Eclesiaste Boniface and the 2008 assault of Martyr and Ysemé—occurred before Defendant allegedly fled to the United States. Thus, these incidents do not shed any light on whether the allegedly tortious conduct "touch[es] and concern[s]" the United States. Plaintiffs respond that although Defendant fled to the United States in January 2009, he continued to hold office as the mayor of Les Irois, including at the time of the October 2009 arson. The Complaint reveals, however, that Defendant was physically present in Haiti on the day of the arson, October 29, 2009, as well as the two days prior, although it contains no allegations concerning Defendant's location at the time the arson occurred. Compl. ¶¶ 53–57. The Complaint does not specifically allege that Defendant planned or orchestrated the arson while he was in the United States. It does, however, include general statements to the effect that Defendant "continued to exercise control over the KOREGA militia in Les Irois from his base in Massachusetts," and that "he coordinated his return to Les Irois and the campaign of persecution against Plaintiffs and other Struggling People's Party supporters," id. ¶ 74, but contains no detail about specific actions Defendant allegedly undertook while he was living in the United States. Plaintiffs also point to another allegation in the Complaint that "[i]n a separate incident, Clorene Francois, a neighbor of the Boniface family, was brutally beaten by members of the KOREGA militia after she was summoned to provide in-court, eyewitness testimony about the killing of Eclesiaste Boniface," id. ¶ 63. The Complaint, however, does not provide the date of this incident, although it is included in a paragraph that begins with the assertion that Defendant

continues to persecute his political opponents from Massachusetts.

Accordingly, setting aside the major incidents alleged in the Complaint, none of which sufficiently "touch and concern" the United States to alone allow the Complaint to withstand a motion to dismiss, the only remaining allegations indicating that the claims "touch and concern" the United States are that, after he fled to the United States in 2009, Defendant continued to hold office as the mayor of Les Irois, continued to exercise control over the KOREGA militia, and that from the United States, he coordinated his return to Les Irois and the campaign of persecution against his enemies. The Court concludes that these allegations are more similar to Lively II, in which the facts indicated that the defendant's involvement from the United States was limited, than Lively I, which alleged specific actions that the defendant took from the United States that could give rise to a claim under the ATS. Under the Kiobel standard, the "*claims* [must] touch and concern the territory of the United States," and do so with sufficient force to displace the presumption against extraterritorial application. Kiobel, 569 U.S. at 124–25 (emphasis added). Here, the incidents that give rise to the claims alleged in the Complaint all occurred while the Defendant was in Haiti. If the Plaintiffs could point to specific activities that Defendant engaged in while in the United States that violated international law, the analysis would be different. As it stands, however, the Complaint does not demonstrate that the Plaintiffs' ATS claims have a sufficient connection to the United States, and thus the claims are barred. As such, Count IV is dismissed.

C. Jurisdiction Over TVPA Claims

Defendant argues that the Court also lacks jurisdiction over the claims brought pursuant to the TVPA. First, Defendant asserts that "[w]ithout subject matter jurisdiction under the ATS, the Court also lacks jurisdiction over plaintiffs' TVPA claim[s]." Chen Gang v. Zhao Zhizhen,

No. 3:04CV1146 RNC, 2013 WL 5313411, at *4 (D. Conn. Sept. 20, 2013). Defendant is correct that the TVPA creates a cause of action, but unlike the ATS, it does not provide for federal jurisdiction. Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995). Federal jurisdiction over TVPA claims is conferred by both the ATS and general federal question jurisdiction pursuant to 28 U.S.C. § 1331, id., but many courts have determined that section 1331 is sufficient in and of itself to establish federal jurisdiction over TVPA claims. See Drummond, 782 F.3d at 601 ("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) (court has jurisdiction over TVPA claims pursuant to section 1331); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1118 n.2 (E.D. Cal. 2004) (same); Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995) (same).[2] Thus, in this case, the Court may exercise jurisdiction over Plaintiffs' TVPA claims through section 1331.

Next, Defendant argues that the Supreme Court's concerns about extraterritorial jurisdiction as expressed in Kiobel should apply equally to claims brought pursuant to the TVPA. Defendant recognizes that, in enacting the TVPA, Congress relied on its power under Article I, Section 8 of the U.S. Constitution to "define and punish . . . Offenses against the Law of Nations," but he asserts that the law of nations does not permit one sovereign to exercise territorial jurisdiction over the affairs of another sovereign. Other courts have rejected this

[2] Other courts have suggested that the question of "[w]hether subject matter jurisdiction for a claim asserted under the TVPA must be conferred on this Court through the [ATS] or can be based solely on 28 U.S.C. § 1331" is a "thorny issue" that has not been resolved. Arndt v. UBS AG, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004). 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. As subject matter jurisdiction is an issue that can be raised at any time, see McBee v. Delica Co., 417 F.3d 107, 127 (1st Cir. 2005), 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.

argument, and Defendant cites no legal authority that directly supports this proposition. See Drummond, 782 F.3d at 601–02 (holding that "the TVPA applies extraterritorially," and explaining that "the Act itself gives clear indication of an extraterritorial application"); Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 50–51 (2d Cir. 2014) (explaining that the court "find[s] 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," and after conducting separate analysis of the TVPA, "conclud[ing] that the TVPA, unlike the ATS, has extraterritorial application"). Thus, Defendant has not demonstrated that the Court lacks jurisdiction over Plaintiffs' TVPA claims.[3]

D. Whether Plaintiffs Have Stated a Claim Under the TVPA

Defendant also argues that Plaintiffs failed to state a claim under the TVPA because they have not demonstrated that they exhausted their available remedies in Haiti, and they have not alleged that Defendant engaged in torture or an extrajudicial killing or that he was acting on behalf of a foreign nation.

1. Exhaustion

The Court must decline to hear a claim brought pursuant to the TVPA "if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 (codified at note). The TVPA exhaustion requirement "is an affirmative defense, requiring the defendant to bear the burden of proof," a burden which is "substantial." Jean v. Dorelien, 431 F.3d 776, 781 (11th Cir. 2005).[4] This requirement is

[3] Defendant also argues that, because the Court lacks jurisdiction over the ATS and TVPA claims, it cannot exercise supplemental jurisdiction over the claim for a violation of Haitian law in Count V of the Complaint. This argument is unavailing, however, because the Court has determined that it does have jurisdiction over the TVPA claims.

[4] Under the rules of civil procedure, an affirmative defense "may be raised in a motion to dismiss an action for failure to state a claim," however, "for dismissal to be allowed on the basis of an

informed by general principles of international law, which provide that:

> the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.

Jean, 431 F.3d at 782 (quoting Senate Report to the TVPA, S.Rep. No. 102–249, at 9–10 (1991)). "Under both the TVPA and public international law, it is the respondent or defendant's burden to demonstrate that plaintiffs had adequate legal remedies which they did not pursue in the country where the alleged abuses occurred." Enahoro v. Abubakar, 408 F.3d 877, 891 (7th Cir. 2005). "Then, *if* the defendant 'makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'" Id. (quoting S.Rep. No. 102–249, at 10). The defendant "must prove the existence of specific domestic remedies that should have been utilized." Id. at 892 (internal quotation marks and citation omitted). In most instances, initiation of litigation under the TVPA "will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred." Jean, 431 F.3d at 781–82 (quoting S.Rep. No. 102–249, at 9–10). Further, "to the extent that there is any doubt on this issue, both Congress and international tribunals have mandated that such doubts be resolved in favor of the plaintiffs." Enahoro, 408 F.3d at 892.

Defendant points to an affidavit by Mario Joseph, a Haitian attorney who represents

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affirmative defense, the facts establishing the defense must be clear on the face of the plaintiff's pleadings," and the complaint (along with any other documents that may be properly reviewed on a Rule 12(b)(6) motion) 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) (internal quotation marks and citations omitted).

Plaintiffs in their civil and criminal proceedings against Defendant in Haiti. [ECF No. 20-1]. The affidavit, which was filed by Plaintiffs, was attached to a supplemental brief that the Court ordered Plaintiffs to submit to address issues concerning Plaintiffs' standing and the substitution of another individual for deceased plaintiff Nissage Martyr. [ECF No. 20]. Its purpose was to demonstrate that Plaintiffs have standing to bring this lawsuit and that they are entitled to substitute another individual for Plaintiff Martyr. It states that "the rights of my clients, Mr. David Boniface, Mr. Nissage Martyr and Mr. Juders Yseme, to file a civil complaint against Defendant Viliena for their injuries, have been recognized in Haitian legal proceedings." [ECF No. 20-1]. It further asserts that Plaintiffs were awarded money damages in a suit against five of Defendant's associates, and that proceedings against Defendant are ongoing. Id.

When evaluating a 12(b)(6), motion, the Court "may properly consider only facts and documents that are part of or incorporated into the complaint; if matters outside the pleadings are considered, the motion must be decided under the more stringent standards applicable to a Rule 56 motion for summary judgment." Trans-Spec Truck Serv., Inc. v. Caterpillar Inc., 524 F.3d 315, 321 (1st Cir. 2008). The First Circuit has made an exception to this rule "for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; [and] for documents sufficiently referred to in the complaint." Miss. Pub. Emps.' Ret. Sys. v. Bos. Sci. Corp., 523 F.3d 75, 86 (1st Cir. 2008) (internal quotation marks and citation omitted). Here, the only potentially applicable exception would be for a document accepted as authentic by all parties, however, that exception only applies when the "complaint's factual allegations are expressly linked to—and admittedly dependent upon" that document. Trans-Spec Truck, 524 F.3d at 321; see also Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001) (complaint must "rel[y] upon" document at

issue, which then "merges into the pleadings"). The Joseph affidavit is not referenced at all in the Complaint, and was filed months after the Complaint in response to a request from the Court. The Complaint in no way relies on the affidavit, nor are the facts alleged in the Complaint linked to, or dependent on, the contents of the affidavit. Thus, it is not apparent that the Court may consider the affidavit at the motion to dismiss stage.

In general, courts have declined to consider extrinsic evidence when a defendant argues, in a motion to dismiss a claim under the TVPA, that the plaintiff has not exhausted available remedies. 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, a Plaintiff's alleged failure to exhaust local remedies would not deprive the court of subject matter jurisdiction, and the matter is not properly resolved by reference to extrinsic evidence at the motion to dismiss stage."); Jara v. Nunez, No. 6:13-cv-1426-ORL-37GJK, 2015 WL 8659954, at *2 (M.D. Fla. Dec. 14, 2015) (concluding that assessment of "[t]he truth" of defendant's exhaustion of remedies defense "is better left for resolution at the summary judgment stage"); Doe v. Drummond Co., No. 7:09-cv-01041-RDP, 2009 WL 9056091, at *17 (N.D. Ala. Nov. 9, 2009) ("[W]hether Defendants are entitled to the affirmative defense on exhaustion of remedies is not appropriate for decision on a motion to dismiss."); see also Abiola v. Abubakar, No. 02-cv-6093, 2005 WL 3050607, at *3 (N.D. Ill. Nov. 8, 2005) (concluding that evidence submitted concerning exhaustion of TVPA claims created genuine issue of material fact which could only be resolved by a hearing, not on motion for summary judgment). Accordingly, the Court concludes that it is not able to consider the Joseph affidavit in evaluating the present motion to dismiss.

Furthermore, even if the Court could consider the Joseph affidavit, it would likely not be

sufficient for Defendant to satisfy his "substantial" burden of demonstrating that Plaintiffs had failed to exhaust their available remedies in Haiti. The Complaint contains detailed allegations concerning the purported dysfunction of the Haitian justice system, including descriptions of events in which individuals were targeted with threats, violence, and death for reporting a crime or participating in court proceedings. The Complaint also asserts that Defendant exerted his political influence in Haiti to avoid accountability for his actions before fleeing to Massachusetts to escape prosecution. Courts have routinely found that threats of violent retaliation and allegations that a country's judicial system is corrupt or ineffective are sufficient to show that a plaintiff lacks effective domestic legal remedies. See Enahoro, 408 F.3d at 892 (where plaintiffs indicated that "they or their relatives were targeted by the Nigerian government as political enemies," and also that "the Nigerian judiciary was under-funded, corrupt, subject to political influence and generally unable or unwilling to compensate victims of past human rights abuses," there was "obviously nothing to be gained by filing complaints in the Nigerian courts," and thus defendant failed to meet his burden to prove that plaintiff had viable legal remedies in Nigeria); In re Chiquita Brands, 190 F. Supp. 3d at 1115 (where the plaintiffs alleged facts suggesting exhausting remedies in Colombia "would be futile because of the ongoing risk of violent retaliation against civilians, judicial officers and human rights defenders seeking redress for human rights abuses," defendants were not entitled to dismissal based on lack of exhaustion); Doe v. Drummond Co., 2009 WL 9056091, at *17 (allegation in complaint that seeking redress in Colombia would be futile due to risk of retaliation sufficient to satisfy plaintiffs' burden at motion to dismiss stage). Accordingly, Defendant has not satisfied his burden to prove that Plaintiffs failed to exhaust "adequate and available remedies" in Haiti. See 28 U.S.C. § 1350.

2. Extrajudicial Killing

Defendant contends that Plaintiffs have not demonstrated that he can be held liable for the killing of Eclesiaste Boniface, or for the attacks on Martyr and Ysemé, under a secondary theory of liability. In particular, Defendant asserts that Plaintiffs have not pleaded sufficient facts to show that Defendant can be held liable under the command and control doctrine. Plaintiffs respond that they do not allege that Defendant is liable under the command and control doctrine, but rather, they plead direct liability as well as three other secondary forms of liability: (1) ordering, inciting, or soliciting; (2) conspiracy; and (3) aiding and abetting.

Plaintiffs are correct that "the TVPA contemplates liability against officers who do not personally execute the [alleged] torture or extrajudicial killing." Mohamad v. Palestinian Auth., 566 U.S. 449, 458 (2012). "Congress is understood to legislate against a background of common-law adjudicatory principles," id. at 457, and "since domestic law sets the standards for the TVPA, secondary or indirect theories of liability recognized by U.S. law are available for claims brought under the TVPA." Drummond, 782 F.3d at 607; see also Chowdhury, 746 F.3d at 53 (holding that an individual can be liable for torture "even if his agent administers the torture"); Aziz v. Alcolac, Inc., 658 F.3d 388, 396 (4th Cir. 2011) (acknowledging, prior to Mohamad, that "[v]irtually every court to address the issue" has recognized "secondary liability for violations of international law since the founding of the Republic" (quoting Doe v. Exxon Mobil Corp., 654 F.3d 11, 19 (D.C. Cir. 2011), vacated on other grounds, 527 F. App'x 7 (D.C. Cir. 2013))). Some courts have recognized that a claim for indirect liability under an aiding and abetting theory is cognizable under the TVPA. See Drummond, 782 F.3d at 608. But see Mastafa v. Chevron Corp., 759 F. Supp. 2d 297, 300 (S.D.N.Y. 2010), aff'd, 770 F.3d 170 (2d Cir. 2014) (interpreting language of TVPA to not permit aiding and abetting liability).

At this stage, Defendant has not asserted that he cannot be held liable either directly, or under the secondary theories of liability that Plaintiffs have advanced, and instead chose to address only the command and control doctrine, which is not relied on by Plaintiffs. Accordingly, the question of whether Plaintiffs can bring a TVPA claim based on their alternative theories of liability (ordering, inciting, or soliciting, conspiracy, and aiding and abetting) is not before the Court at this time.

Defendant also asserts that the TVPA does not contemplate liability for an "attempted" extrajudicial killing. This argument is based entirely on the text of the statute, and Defendant cites no cases to support this reading. The Court is not aware of any cases that have analyzed whether a claim for attempted extrajudicial killing is tenable under the TVPA, however, several courts have permitted such claims to proceed. See Doe v. Constant, 354 F. App'x 543, 547 (2d Cir. 2009) (affirming entry of judgment, inter alia, for attempted extrajudicial killing under the TVPA); Warfaa v. Ali, 33 F. Supp. 3d 653, 666 (E.D. Va. 2014), aff'd, 811 F.3d 653 (4th Cir. 2016) (denying motion to dismiss claims under TVPA for, inter alia, attempted extrajudicial killing); Yousuf v. Samantar, No. 1:04-cv-1360 LMB/JFA, 2012 WL 3730617, at *16 (E.D. Va. Aug. 28, 2012) (entering default judgment on claims including attempted extrajudicial killing under the TVPA). Further, the Court is not aware of any cases determining that a claim for attempted extrajudicial killing is not actionable under the TVPA. Therefore, Defendant has not demonstrated that Plaintiffs' TVPA claim for attempted extrajudicial killing should be dismissed.

3. Torture

Defendant contends that the conduct described in the complaint is not egregious enough to satisfy the definition of torture established by the TVPA. Plaintiffs assert that the acts perpetrated against Martyr and Ysemé during the 2008 incident at Martyr's home constitute

torture.

The TVPA definition of torture, as relevant here, is:

> (1) the term 'torture' means any act, directed against an individual . . . by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual . . .
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering; . . .
> > (C) the threat of imminent death; or
> > (D) the threat that another individual will imminently be subjected to death, [or] severe physical pain or suffering . . . .

28 U.S.C. § 1350 (codified at note).

The requirement that the acts in question reach a certain level of severity "is crucial to ensuring that the conduct proscribed by . . . the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92 (D.C. Cir. 2002). "The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim." Id. at 93. "The more intense, lasting, or heinous the agony, the more likely it is to be torture." Id. "This understanding thus makes clear that torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault." Id.

"Not *all* police brutality, not *every* instance of excessive force used against prisoners, is torture . . . ." Id. Courts have determined that mere allegations that individuals were subject to "kicking, clubbing, and beatings," without detail allowing the court to evaluate the severity of the conduct, such as the "frequency, duration, the parts of the body at which [the assaults] were aimed, and the weapons used to carry them out," are not sufficient to demonstrate that the conduct "evinced the degree of cruelty necessary to reach a level of torture." Id. at 93–94. When

something more is alleged, however, such as the threat of imminent death, courts have found that such conduct rises to the level of torture under the TVPA. See Warfaa v. Ali, 33 F. Supp. 3d 653, 657, 666 (E.D. Va. 2014), aff'd, 811 F.3d 653 (4th Cir. 2016) (plaintiff sufficiently alleged torture satisfying TVPA standard where he experienced severe beatings over the course of three months, then was shot five times and left for dead).

In this case, the acts that Plaintiffs have alleged relating to the 2008 assault of Martyr and Ysemé are sufficient to satisfy the TVPA definition of torture. Plaintiffs have described with specificity the physical attacks that they claim occurred during the incident, including that Defendant and his associates pistol-whipped Martyr, that multiple individuals beat him on his sides and chest and threw him on the floor, and that one individual restrained Ysemé while three others beat him on his head and the sides of his body. Furthermore, Plaintiffs describe how Defendant and his associates threatened Martyr and Ysemé with imminent death, first by pointing a handgun directly at Martyr's ear, and then by shooting at Martyr and Ysemé. Moreover, Plaintiffs allege that a KOREGA militia member, carrying out Defendant's orders, shot Martyr and Ysemé, injuring them sufficiently that they were left for dead. Both Martyr and Ysemé endured lengthy recoveries from the gunshot wounds, and both suffered permanent physical disfigurement. Taken together, the combination of severe beatings by multiple individuals at once, threats of imminent death, and gunshot wounds causing painful, permanent injuries are sufficient to allege torture under the TVPA. See Jaramillo v. Naranjo, No. 10-21951-CIV, 2014 WL 4898210, at *14 (S.D. Fla. Sept. 30, 2014) (determining that plaintiff sufficiently plead the elements of torture where she witnessed a relative be shot three times and bleed to death, and she was threatened with imminent death by having a gun pointed at her); Jara v. Nunez, No. 6:13-cv-1426-ORL37GJK, 2014 WL 12623015, at *3 (M.D. Fla. June 30, 2014)

(definition of torture satisfied where the defendant's subordinates "brutally beat" the plaintiff, and then the defendant played "Russian Roulette" with the plaintiff and eventually shot him in the head); Chavez v. Carranza, 413 F. Supp. 2d 891, 901 (W.D. Tenn. 2005) (plaintiff sufficiently plead torture where his "attackers forced him to the ground, stepped on him, and pointed a rifle at his back," then shot his father, causing the plaintiff to believe he would be shot next). Thus, Defendant is not entitled to dismissal on this basis.

4. Whether Defendant Acted on Behalf of a Foreign Nation

To establish liability under the TVPA, Plaintiffs must demonstrate that Defendant acted "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 (codified at note). "[F]or purposes of the TVPA, an individual acts under color of law . . . when he acts together with state officials or with significant state aid." Chowdhury, 746 F.3d at 52–53 (internal quotation marks and citations omitted). At least one court has determined that a mayor is a state actor. See Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1249 (11th Cir. 2005).

Here, Defendant argues that the acts attributed to Defendant in the Complaint relate more to his advocacy for a Haitian political party than to acts taken as mayor of Les Irois. He asserts that the Complaint does not allege that Defendant was acting as part of his mayoral responsibilities when he carried out the attacks at issue, and therefore he contends that Plaintiffs have not demonstrated that he was acting "under color of law" at the time of the incidents. This attempt to recast the Complaint in the light most favorable to Defendant is unavailing. The Complaint makes clear that, during each of the three incidents that are the focus of the Complaint, Defendant brought along members of his mayoral staff and instructed them to engage in violent acts. In addition, each of the incidents were related to Defendant's duties as mayor.

The July 2007 incident was apparently sparked by an altercation that occurred while Defendant was accompanying a sanitation crew. The April 2008 incident occurred after Defendant had been instructed by other government officials not to shut down the radio station, presumably in his capacity as mayor. Further, Defendant apparently desired to put an end to the radio station because he believed it threatened his political power. Finally, the October 2009 arson was prompted by the death of Defendant's chief of staff, and again, Defendant expressly targeted his political opponents. Therefore, the Complaint has sufficiently alleged that, during the incidents in question, Defendant was acting in his official capacity as mayor, and used the resources available to him through that office, to target individuals he believed to be a threat to his ability to remain in office and exert power. This is sufficient to allege that Defendant acted under the "color of law."

E. Abstention

Finally, Defendant makes a one-sentence argument that the Court "should abstain from this matter as an exercise of comity," without elucidating why he believes abstention is appropriate. Defendant cites Ace Arts, LLC v. Sony/ATV Music Pub., LLC, 56 F. Supp. 3d 436 (S.D.N.Y. 2014) in support of this proposition. Ace Arts explains that "'[g]enerally, concurrent jurisdiction in United States courts and the courts of a foreign sovereign does not result in conflict,' and such '[p]arallel proceedings in the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata the other.'" Ace Arts, 56 F. Supp. 3d 436, 444 (quoting Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006)). "In exceptional circumstances, however, a district court may exercise its inherent power to dismiss or stay an action based on the pendency of a related proceeding in a foreign jurisdiction." Id. (internal

quotation marks and citation omitted). "[T]he mere existence of parallel foreign proceedings does not negate" the district courts' "'virtually unflagging obligation . . . to exercise the jurisdiction given them,'" however. Id. at 445 (quoting Royal & Sun Alliance, 466 F.3d at 92). "Accordingly, a district court should not abstain in deference to a previously filed foreign proceeding under 'circumstances that routinely exist in connection with parallel litigation,' but should rather reserve abstention for situations in which 'additional circumstances . . . outweigh the district court's general obligation to exercise its jurisdiction.'" Id. (quoting Royal & Sun Alliance, 466 F.3d at 95).

Here, Defendant has not explained what "exceptional circumstances" are present that warrant abstention in this particular case, nor is the Court aware of any. It appears that there may be some parallel litigation in Haiti that has occurred or is ongoing, see supra. As Ace Arts makes clear, however, the mere existence of parallel litigation is not enough to make abstention necessary. Here, given that Defendant has not provided any reason as to why the Court should abstain, and considering the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976), the Court cannot conclude that abstention is warranted.

III. MOTION TO SUBSTITUTE PARTY

Plaintiff Nissage Martyr died on March 24, 2017, two days after this lawsuit was filed. Plaintiffs move to substitute Nissandère Martyr, the son of Nissage Martyr, as Plaintiff pursuant to Federal Rule of Civil Procedure 25. Under Rule 25, "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party." Fed. R. Civ. P. 25(a)(1). Defendant opposes the motion.

"The language of Fed. R. Civ. P. 25(a)(1) is permissive." In re Baycol Prod. Litig., 616

F.3d 778, 783 (8th Cir. 2010). "The decision whether to substitute parties lies within the discretion of the trial judge and he [or she] may refuse to substitute parties in an action even if one of the parties so moves." Id. (internal quotation marks and citation omitted). The Advisory Committee on the 1963 amendments to Rule 25 noted, however, that it "intended that motions to substitute be freely granted." Id.; see Fed. R. Civ. P. 25, advisory committee to 1963 amendment ("A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ('the court may order') it may be denied by the court in the exercise of a sound discretion if made long after the death . . . and circumstances have arisen rendering it unfair to allow substitution.").

A. Timeliness of Motion

Defendant first argues that Plaintiffs' motion to substitute is not timely. Under Rule 25, if the motion to substitute "is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." Fed. R. Civ. P. 25(a)(1). The statement noting death "must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4." Id. at 25(a)(3).

Defendant notes that Plaintiffs filed a Notice of Death of Nissage Martyr in this case on May 16, 2017 [ECF No. 18], and he contends that Nissandère Martyr must have known of the death by March 31, 2017, when he requested an autopsy. He asserts that, because the motion to substitute was not made within 90 days, it must be dismissed. Plaintiffs contend that the 90-day limitations period is only triggered once a notice of death identifies the representative or successor who may be substituted as a party, and the notice is properly served on the representative or successor pursuant to Fed. R. Civ. P. 4 and 5.

While courts have interpreted this aspect of Rule 25 in various ways, "six circuits have

held that the limitations period in Fed. R. Civ. P. 25(a)(1) does not begin until the decedent's representative or successor is properly served with the statement noting death." In re C.R. Stone Concrete Contractors, Inc., 462 B.R. 6, 19 (Bankr. D. Mass. 2011). The Stone court noted that one concern animating this reading of Rule 25 is that, when a plaintiff dies, it may take some time to identify and notify the rightful successor or an appropriate representative. Id. at 18. Often, a party will need to notify the court of the death to obtain extensions of deadlines or other necessary relief. Id. If such a notification triggers the clock to file a motion to substitute, however, the plaintiff could run out of time to file the motion to substitute before identifying a successor. Id. Given these circumstances, reading Rule 25 to provide that the 90-day period is only triggered when the successor is served is appropriate. Moreover, the text of the rule itself is clear: "only *service* of a statement noting death starts the limitations period under the rule." Id. at 19. But see Unicorn Tales, Inc. v. Banerjee, 138 F.3d 467, 470 (2d Cir. 1998) (holding that Rule 25 does not require the statement of death to identify the successor, and explaining that the proper remedy is to seek an extension of time until the successor can be identified). A magistrate judge in this district reached the same conclusion as Stone. See Americus Mortg. Corp. v. Mark, No. 12-cv-10158-GAO, 2013 WL 3106018, at *5 (D. Mass. June 17, 2013) (explaining that, "in addition to the requirement that a suggestion of death be filed according to Rules 4 and 5, Fed R. Civ. P., the suggestion of death must identify and serve the representative or successor who may be substituted as a party," and holding that an oral statement made in court that a party had died, without naming a representative or successor, did not trigger the 90-day period).

Here, it is apparently undisputed that Nissandère Martyr was never served with the notice of death in a manner that satisfies Rule 4, and thus the Court concludes that the 90-day period to file a motion to substitute had not yet commenced when the motion to substitute was filed.

B. Whether Nissandère Martyr Is Nissage Martyr's Successor

Defendant also argues that Plaintiffs have failed to demonstrate that Nissandère Martyr is the legal successor or representative of Nissage Martyr. "[T]he proper parties for substitution are the 'successors or representatives of the deceased party,'" Americus, 2013 WL 3106018, at *13 (quoting Rende v. Kay, 415 F.2d 983, 985 (D.C. Cir. 1969), and "[t]he burden is on the moving party to demonstrate that the claims asserted survived the death of the plaintiff." Brenner v. Williams-Sonoma, Inc., No. 13-cv-10931-MLW, 2016 WL 7785456, at *3 (D. Mass. Jan. 27, 2016) (citing Stone, 462 B.R. at 20), report and recommendation adopted, No. 13-cv-10931-MLW, 2016 WL 5661987 (D. Mass. Sept. 28, 2016), appeal dismissed, 867 F.3d 294 (1st Cir. 2017). "[A] person may be a 'successor' under Rule 25(a)(1) if [he or] she is (1) the primary beneficiary of an already distributed estate; (2) named in a will as the executor of the decedent's estate, even if the will is not probated; or (3) the primary beneficiary of an unprobated intestate estate which need not be probated." In re Baycol Prod. Litig., 616 F.3d at 784–85 (citations omitted).

At the time that the briefs on this motion were filed, Plaintiffs had submitted the declaration of Mario Joseph in support of the motion to substitute. The Joseph declaration explains Haitian law concerning the survival of a decedent's legal claims, and then goes on to state that

> By operation of Haitian law, upon Mr. Nissage Martyr's death, his adult son Mr. Nissandère Martyr became his heir and successor-in-interest, with the right to assume his father's pending claims against Defendant Viliena and the right to file new criminal and civil claims for wrongful death as a partie civile.

[ECF No. 20-1 ¶ 16]. Defendant took issue with this declaration, asserting that it was not sufficient to satisfy Plaintiffs' burden of proof on this issue. Regardless of the merits of this argument, after the issue was briefed, Plaintiffs filed a supplemental document which is

apparently an order of the Massachusetts Probate and Family Court appointing Nissandère Martyr as the personal representative of Nissage Martyr for purposes of Mass. Gen. Laws ch. 190B, the Massachusetts Uniform Probate Code. [ECF No. 48-1]. Accordingly, the Court concludes that this order, in combination with the Joseph Declaration, is sufficient to demonstrate that Nissandère Martyr is the legal successor or representative of Nissage Martyr. Therefore, Plaintiffs have satisfied their burden to prove that the motion to substitute should be granted.

IV. CONCLUSION

Accordingly, Defendant's motion to dismiss [ECF No. 46] is GRANTED as to Count IV, and otherwise DENIED. Plaintiffs' motion to substitute [ECF No. 29] is GRANTED, and Nissandère Martyr is hereby substituted as plaintiff in place of Nissage Martyr.

SO ORDERED.

August 31, 2018

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID BONIFACE, NISSANDÈRE MARTYR, AND JUDERS YSEMÉ,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 17-cv-10477-ADB
JEAN MOROSE VILIENA,	*	
Defendant.	*	

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, CERTIFICATION OF AN INTERLOCUTORY APPEAL

BURROUGHS, D.J.

David Boniface, Nissandère Martyr,[1] and Juders Ysemé (together, "Plaintiffs"), residents of Les Irois, Haiti, allege that Jean Morose Viliena ("Defendant"), the former mayor of Les Irois, committed human rights abuses in violation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 (codified at note). [ECF No. 1 ("Complaint" or "Compl.")]. On August 31, 2018, the Court granted in part and denied in part Defendant's motion to dismiss. [ECF No. 56]. Now before the Court is Defendant's motion for reconsideration of the Court's motion to dismiss order, or, in the alternative, a motion for certification of an interlocutory appeal. [ECF Nos. 59, 66]. For the reasons set forth below, Defendant's motion for reconsideration [ECF No. 66] is

[1] On August 31, 2018, the Court allowed Plaintiffs to substitute Nissandère Martyr as a party following the death of his father, Nissage Martyr, who had been a named plaintiff in this action. See [ECF No. 56].

DENIED, and Defendant's motion for the alternative relief of certification of an interlocutory appeal [ECF No. 59] is GRANTED.

I. BACKGROUND

A. August 31, 2018 Motion to Dismiss Order

The Court presumes familiarity with the underlying facts alleged in the Complaint that were summarized in the Court's memorandum and order granting in part and denying in part Defendant's motion to dismiss ("Motion to Dismiss Order"). See Boniface v. Viliena, 338 F. Supp. 3d 50, 56 (D. Mass. 2018). Below, the Court summarizes the portions of the Motion to Dismiss Order that are relevant to Defendant's request for reconsideration.

The Motion to Dismiss Order began by addressing Defendant's argument that the Court lacked jurisdiction over Counts I–IV under the ATS because the relevant conduct occurred in Haiti. Id. at 60. The ATS states that "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. After clarifying that Defendant's argument applied only to Count IV because Counts I–III asserted claims under the TVPA, the Court concluded that it lacked jurisdiction over Count IV under the ATS. See id. at 60–63.

The Court began its analysis of the ATS claim with Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013), which "addressed the question of whether a claim brought pursuant to the ATS 'may reach conduct occurring in the territory of a foreign sovereign.'" Boniface, 338 F. Supp. 3d at 60 (quoting Kiobel, 569 U.S. at 115). In Kiobel, the Supreme Court observed that the "presumption against extraterritorial application"—which is a canon of statutory interpretation that provides that "when a statute gives no clear indication of an extraterritorial application, it has none"—"constrain[s] courts considering causes of action that may be brought

under the ATS." Kiobel, 569 U.S. at 115–16 (internal quotation marks and citations omitted). Applying this construction, the Supreme Court in Kiobel held that the plaintiffs' claims were barred by the ATS because "all of the relevant conduct took place outside the United States." Id. at 124. In so holding, however, the Supreme Court also recognized that claims could be actionable under the ATS so long as they "touch[ed] and concern[ed] the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." Id. at 124–25.

The Court then turned to Kiobel's progeny to flesh out the boundaries of the "touch and concern" standard while noting that the inquiry is "naturally fact-dependent." Boniface, 338 F. Supp. 3d at 61–62. Next, the Court summarized analogous cases from this district. See id. at 61–62 (first citing Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304 (D. Mass. 2013) and then citing Sexual Minorities Uganda v. Lively, 254 F. Supp. 3d 262 (D. Mass. 2017) ("Lively II"), aff'd in part, appeal dismissed in part, 899 F.3d 24 (1st Cir. 2018)). Finally, the Court examined the Complaint and found that the three major incidents alleged in the Complaint occurred before Defendant fled to the United States and therefore did not "touch and concern" the United States sufficiently to confer jurisdiction under the ATS. Id. at 62. Removing these allegations,

> the only remaining allegations indicating that the claims "touch and concern" the United States are that, after he fled to the United States in 2009, Defendant continued to hold office as the mayor of Les Irois, continued to exercise control over the KOREGA militia, and that from the United States, he coordinated his return to Les Irois and the campaign of persecution against his enemies.

Id. at 63. Analogizing to Lively II, the Court concluded that these facts indicate that Defendant's involvement from the United Stated was "limited" and held that "the Complaint does not demonstrate that the Plaintiffs' ATS claims have a sufficient connection to the United States."

Id. The Court dismissed Count IV and proceeded to assess whether it had jurisdiction over Counts I–III under the TVPA.

The Court recognized that "the TVPA creates a cause of action, but unlike the ATS, it does not provide for federal jurisdiction." Id. (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995)). The Court summarized that federal jurisdiction over TVPA claims "is conferred by both the ATS and general federal question jurisdiction pursuant to 28 U.S.C. § 1331, but many courts have determined that section 1331 is sufficient in and of itself to establish federal jurisdiction over TVPA claims." Id. (first citing Doe v. Drummond Co., 782 F.3d 576, 601 (11th Cir. 2015), then citing Haim v. Neeman, No. 12-cv-00351, 2012 WL 12905235, at *3 (D.N.J. Aug. 29, 2012), then citing Doe v. Saravia, 348 F. Supp. 2d 1112, 1118 n.2 (E.D. Cal. 2004), and then citing Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995)). The Court appended a footnote to the end of this sentence that read:

> Other courts have suggested that the question of "[w]hether subject matter jurisdiction for a claim asserted under the TVPA must be conferred on this Court through the [ATS] or can be based solely on 28 U.S.C. § 1331" is a "thorny issue" that has not been resolved. 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. As subject matter jurisdiction is an issue that can 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.

Id. at 63 n.2 (citations omitted). The Court concluded that it could exercise jurisdiction over the TVPA claims through section 1331. Id. at 63–64.

After concluding that it possessed jurisdiction over the TVPA claims, the Court rejected Defendant's argument that the concerns about extraterritorial jurisdiction expressed by the Supreme Court in Kiobel "should apply equally to claims brought pursuant to the TVPA." Id. at 64. The Court observed that "[o]ther courts have rejected this argument, and Defendant cites no

legal authority that directly supports this proposition." Id. (first citing Drummond, 782 F.3d at 601–02 and then citing Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 50–51 (2d Cir. 2014)).

B. Procedural History

On September 25, 2018, following entry of the Motion to Dismiss Order, Defendant filed a motion for certification of interlocutory appeal. [ECF No. 59]. On September 26, 2018, the Court issued an electronic order advising the parties that it deemed Defendant's filing to be a motion for reconsideration or, in the alternative, a motion for certification of an interlocutory appeal, and permitted Defendant to file a supporting memorandum. [ECF No. 60]. On November 2, 2018, Defendant filed a motion for reconsideration and supporting memorandum. [ECF Nos. 66–67]. On November 21, 2018, Plaintiffs opposed reconsideration and certification of an interlocutory appeal. [ECF No. 70].

II. MOTION FOR RECONSIDERATION

A. Legal Standard

"A federal district court has the discretion to reconsider interlocutory orders and revise or amend them at any time prior to final judgment." Davis v. Lehane, 89 F. Supp. 2d 142, 147 (D. Mass. 2000); see Fed. R. Civ. P. 54(b); see Fernandez-Vargas v. Pfizer, 522 F.3d 55, 61 n.2 ("[A] district court has the inherent power to reconsider its interlocutory orders, and we encourage it to do so where error is apparent."); see also Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40, 42 (1st Cir. 1994) ("Interlocutory orders . . . remain open to trial court reconsideration . . . ."). The Supreme Court, however, has cautioned that "courts should be loathe to [reconsider orders] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" Christianson v. Colt Indus. Operating Corp.,

486 U.S. 800, 817 (1988) (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)). With these principles in mind, "a court should grant a motion for reconsideration of an interlocutory order only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." Davis, 89 F. Supp. 2d at 147; see Tomon v. Entergy Nuclear Operations, Inc., No. 05-cv-12539-MLW, 2011 WL 3812708, at *1 (D. Mass. Aug. 25, 2011) ("[M]otions for reconsideration are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust.") (citing United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009)).

B. Analysis

Defendant frames the subject of its motion for reconsideration as follows: "whether the Court can exercise jurisdiction under the TVPA based solely on federal question jurisdiction, 28 U.S.C. § 1331, in instances where the claims at issue concern only parties who are aliens and do not touch and concern the territory of the United States." [ECF No. 67 at 2]; see also [ECF No. 70 at 6–7 (framing issue raised by Defendant's motion as whether Court has jurisdiction over Plaintiffs' TVPA claims pursuant to 28 U.S.C. § 1331)]. The Court understands the motion to raise two related issues: first, whether a court may exercise subject matter jurisdiction over TVPA claims based on 28 U.S.C. § 1331, and second, whether the exercise of jurisdiction over TVPA claims pursuant to § 1331 is unconstitutional in some circumstances. To prevail on his motion for reconsideration, Defendant must demonstrate that the Motion to Dismiss Order

contained a clear error of law or resulted in a manifest injustice as to either of these two issues.[2] See Fernandez-Vargas, 522 F.3d at 61 n.2; Davis, 89 F. Supp. 2d at 147. Because Defendant is unable to meet this burden, the motion for reconsideration is denied. Although this case presents a legal question that has not been addressed by the First Circuit or the Supreme Court, the lack of controlling authority is not sufficient to warrant the extraordinary remedy of reconsideration where the underlying order is consistent with persuasive authority from other circuits.

1. Jurisdiction Over TVPA Claims Pursuant to 28 U.S.C. § 1331

Since the TVPA was enacted in 1995, courts have exercised subject matter jurisdiction over TVPA claims based on federal question jurisdiction, 28 U.S.C. § 1331. See, e.g., Warfaa v. Ali, 811 F.3d 653, 657 (4th Cir. 2016) (affirming district court holding that dismissed ATS claims and allowed TVPA claims to proceed and noting that "the TVPA . . . provides a jurisdictional basis separate from the ATS"); Drummond, 782 F.3d at 601 ("Our jurisdiction to consider Plaintiffs' TVPA claims is grounded, instead, in 28 U.S.C. § 1331, the general federal question jurisdiction statute."); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1269 (11th Cir. 2009) ("The district court determined there was no subject matter jurisdiction for the ATS claims, and because ATS jurisdiction was lacking, . . . concluded the TVPA claims also failed . . . . We conclude the district court erred . . . because jurisdiction over the TVPA claims is conferred by 28 U.S.C. § 1331 in this case." (citations omitted)), abrogated on other grounds by Mohamad v. Palestinian Auth., 566 U.S. 449 (2012); Garcia v. Chapman, 911 F. Supp. 2d 1222, 1239 & n.12 (S.D. Fla. 2012) (allowing ATS claim to proceed and noting that "jurisdiction [over the TVPA claim] is conferred by 28 U.S.C. § 1331," which the defendant conceded at a hearing);

[2] Defendant does not argue that there has been an "intervening change in the law" or that he has discovered "new evidence not previously available." See Davis v. Lehane, 89 F. Supp. 2d 142, 147 (D. Mass. 2000).

Jaramillo v. Naranjo, No. 10-cv-21951, 2012 WL 12915426, at *2–3 (S.D. Fla. June 26, 2012) (allowing TVPA claim to proceed regardless of outcome of ATS claim upon finding that "the weight of authority, specifically within the Eleventh Circuit, support[ed] TVPA jurisdiction under § 1331"); see also Arce v. Garcia, 434 F.3d 1254, 1257 n.8 (11th Cir. 2006) ("The omission of a jurisdictional basis for the first count [alleging a claim under the TVPA] is not fatal, however, for we assume jurisdiction under § 1331 when it appears that a complaint's allegations state a cause of action under federal law."); Hua Chen v. Honghui Shi, No. 09-cv-08920, 2013 WL 3963735, at *7 n.4 (S.D.N.Y. 2013) (dismissing TVPA claim for lack of personal jurisdiction but noting that "[t]he Court might still have subject matter jurisdiction over claims cognizable under the TVPA" in the absence of a viable ATS claim).

As Defendant observes, some courts that have approached the issue of whether section 1331 is sufficient for jurisdiction have adopted the following syllogism: The TVPA is a law of the United States. Section 1331 establishes federal subject matter jurisdiction over the laws of the United States. Therefore, federal courts have subject matter jurisdiction over claims brought under the TVPA. See [ECF No. 67 at 5 (citing Drummond Co., 782 F.3d at 601)]; see also Xuncax v. Gramajo, 886 F. Supp. 162, 177 (D. Mass. 1995) ("[F]ederal statutory law clearly creates the cause of action upon which [plaintiff's] lawsuit is founded. The case thus 'arises under' the laws of the United States for purposes of federal question jurisdiction under 28 U.S.C. § 1331."). Defendant decries the "tautological certainty" of this approach and finds it lacking in legal analysis. [ECF No. 67 at 5].

Defendant's assessment aside, only a minority of courts have rejected the notion that section 1331 alone may confer jurisdiction over TVPA claims. See, e.g., Chen Gang v. Zhao Zhizhen, No. 3:04-cv-01146, 2013 WL 5313411, at *4 (D. Conn. Sept. 20, 2013) ("Without

subject matter jurisdiction under the ATS, the Court also lacks jurisdiction over plaintiffs' TVPA claim."). A few other courts have declined to express a view on the issue where doing so is unnecessary to the adjudication of the case. See Singh v. G.K., No. 1:15-cv-05372, 2016 WL 3181149, at *6 (S.D.N.Y. June 2, 2016) (stating that after the Second Circuit "noted without resolving a split of authority on the issue of whether a claim under the TVPA could be brought solely under the jurisdiction conferred by § 1331," "district courts have generally attempted to avoid this 'thorny issue'" (citing Arndt v. UBS AG, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004)).

Accordingly, secure in its assessment that it was not a clear error of law to adopt the majority approach and to exercise jurisdiction over the TVPA claims through § 1331, the Court proceeds to consider the second, related issue of whether the Constitution limits the exercise of such jurisdiction in situations where the TVPA claims "concern only parties who are aliens and do not touch and concern the territory of the United States."[3] See [ECF No. 67 at 2].

2. Statutory and Constitutional Limits of the Extraterritorial Application of the TVPA

Defendant presents two arguments in support of its position that "the exercise of jurisdiction over domestic crimes within another country between persons who are not United States citizens falls outside the limits of the authority vested in Congress by the Constitution:" first, that the exercise of jurisdiction in these situations falls outside the scope of the statutory language of the TVPA, and second, that the exercise of jurisdiction in these situations is unconstitutional as violative of the law of nations. See [ECF No. 67 at 2, 9]. The Court rejects Defendant's statutory construction argument, as it did in the Motion to Dismiss Order, and

[3] The Court observes that subject matter jurisdiction pursuant to 28 U.S.C. § 1331 is not limitless because the scope of claims a court may adjudicate is constrained by the court's ability to exercise personal jurisdiction over a defendant.

declines to reconsider its exercise of jurisdiction over Plaintiffs' TVPA claims based on Defendant's reasoned, but unsupported, constitutional law argument.

i. Statutory Construction

Defendant asserted in his original motion that "the jurisdictional limits of the ATS remain, as well, the appropriate limit of jurisdiction under the TVPA," which the Court understands as arguing for an extension of the Kiobel holding to the TVPA. See [ECF No. 59 ¶ 5]. In his supplemental memorandum, however, Defendant concedes that the TVPA's legislative history indicates an intention to provide a remedy for torture committed abroad, and he notes that several courts, including this Court, have identified "[the TVPA's] intent to extend beyond the territory of the United States." See [ECF No. 67 at 8 (first citing Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F.3d 42, 51 (2d Cir. 2014) and then citing Boniface, 338 F. Supp. 3d at 64 (rejecting argument that "the Supreme Court's concerns about extraterritorial jurisdiction as expressed in Kiobel should apply equally to claims brought pursuant to the TVPA"))]; see also [ECF No. 70 at 11–12 (stating that the TVPA's legislative history supports its extraterritorial application)]. Accordingly, the Court affirms its conclusion that Congress intended the TVPA to have an extraterritorial application, see Boniface, 338 F. Supp. 3d at 64, and proceeds to consider whether its exercise of jurisdiction over the TVPA claims in this case was unconstitutional and merits reconsideration.

ii. Constitutional Analysis

Defendant presents two arguments in support of his position that application of the TVPA to situations where a non-U.S. citizen was tortured by a non-U.S. citizen outside the United States is unconstitutional. First, Defendant argues that the Law of Nations clause in the Constitution, which authorizes Congress to "define and punish . . . offenses against the law of nations," cannot be relied on as a source of Congress' power to extend the TVPA in this fashion.

[ECF No. 67 at 6 ("There is nothing within the clause or its historical antecedents to suggest that it was meant to permit Congress to create forums for the exercise of civil jurisdiction governing events unrelated to the United States.")]; see U.S. Const., art. 1, § 8. Plaintiffs argue that the Law of Nations clause permits Congress "to prescribe punishments for conduct that the United States has an international obligation to prevent," such as torture and extrajudicial killings, and directs the Court to the TVPA Senate Report, the Motion to Dismiss Order, and case law. See [ECF No. 70 at 12–13 (quoting U.S. Const., art. I, § 8)]; see also S. Rep. No. 102-249 (1991), 1991 WL 258662 (adding that, in addition to the Offenses Clause, the "arising under" clause of Article III also "allows Congress to confer jurisdiction on U.S. Courts to recognize claims brought by a foreign plaintiff against a foreign defendant"). The Court understands Defendant's argument on this point to be another attempt at arguing for an extension of Kiobel's holding to the TVPA, which the Court has already rejected. See supra Section II.B.2.i; see also Boniface, 338 F. Supp. 3d at 64 (summarizing Defendant's argument that "the law of nations does not permit one sovereign to exercise territorial jurisdiction over the affairs of another sovereign" and concluding that "[o]ther courts have rejected this argument, and Defendant cites no legal authority that directly supports his proposition").

Second, Defendant contends that comity between nations, or "the respect sovereign nations afford each other by limiting the reach of their laws," makes application of the TVPA to this case unconstitutional. [ECF No. 67 at 8 (quoting Hartford Fire Ins. Co., 509 U.S. at 817), 10]. Defendant relies on Justice Scalia's dissent in Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993), which interpreted the scope of the Sherman Act and addressed the constitutionality of its extraterritorial application. See [ECF No. 67 at 6–7]. In Hartford Fire, Justice Scalia accepted the presumption that federal question jurisdiction applied to a case

brought under the Sherman Act and observed that doing so "changes the problem set from one about jurisdiction . . . to one about the substantive scope of the legislation." [Id. at 7]. This shift led Justice Scalia to two questions: does the statute have extraterritorial reach and "if . . . the presumption against the extraterritorial scope of the statute is overcome, is the statute being construed to violate the law of nations . . . ." [Id. (quoting Hartford Fire Ins. Co., 509 U.S. at 814–15)].

The former question concerning extraterritorial reach has been resolved, see supra Section II.B.2.i, which leaves the question of whether the TVPA is being construed to violate the law of nations. On this point, Justice Scalia noted that "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." [ECF No. 67 at 7 (quoting Hartford Fire Ins. Co., 509 U.S. at 815)]. Justice Scalia also utilizes the Restatement (Third) of Foreign Relations Law, which instructs that even if a nation may have some "basis" for jurisdiction to prescribe law, it should refrain from exercising that jurisdiction with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) of Foreign Relations Law, § 403(1) (Am. Law Inst. 1987). The Restatement suggests a series of factors to consider when determining whether the exercise of jurisdiction is reasonable.[4] [ECF No. 67 at 9 (quoting Hartford, 509 U.S. at 818–

[4] These factors include

> "the extent to which the activity takes place within the territory [of the regulating state]," id., § 403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the . . . activity to be regulated," id., § 403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," id., § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," id.,

19)]. Here, Defendant argues that the exercise of jurisdiction would be unreasonable, based on reference to these factors, and "would be inconsistent with the traditional notions of comity between nations." [Id. at 9–10].

Defendant does not cite to any case in which a court has accepted this argument or dismissed a TVPA claim on comity grounds.[5] See [ECF No. 70 at 16]. In fact, courts have permitted TVPA claims to proceed in cases where neither the defendant nor victim was a U.S. citizen at the time of the alleged torture and in which the torture took place outside of the United States. See, e.g., Jara v. Nunez, No. 6:13-cv-01426, 2015 WL 12852354, at *4–6 (M.D. Fla. Apr. 14, 2015); Warfaa, 33 F. Supp. 3d at 656–57, 659, 666; Jaramillo, 2012 WL 12915246, at *3–4. For example, in Warfaa v. Ali, 33 F. Supp. 3d 653 (E.D. Va. July 9, 2014), a Somalian native and citizen who had been tortured in Somalia and left for dead brought claims under the ATS and TVPA. 33 F. Supp. 3d at 656–57. The defendant was also a Somalian native and citizen, but was residing in the United States at the time of the case. Id. at 656. The Court dismissed the victim's ATS claim because the conduct occurred in Somalia but allowed the TVPA claims to proceed pursuant to federal question jurisdiction as they "are not subject to the same analysis."[6] Id. at 659, 666. Similarly, in Jaramillo v. Naranjo, No. 10-cv-21951 (S.D. Fla.

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§ 403(2)(g); and "the likelihood of conflict with regulation by another state," id., § 403(2)(h).

[ECF No. 67 at 9].

[5] Apart from the Motion to Dismiss Order, Defendant cites to one TVPA case throughout its constitutionality argument. See [ECF No. 67 at 6–10]. That case is Chowdhhury v. Worrldtel Bangladesh Holding, Ltd., 746 F.3d 42 (2d Cir. 2014), which held that "unlike the ATS, [the TVPA] has extraterritorial application." 746 F.3d at 51.

[6] The court in Warfaa v. Ali, 33 F. Supp. 3d 653 (E.D. Va. July 9, 2014), does not expressly assert jurisdiction pursuant to 28 U.S.C. § 1331, but it is implied based on its analysis of other jurisdictional issues such as the application of the political question doctrine, act of state doctrine, and official acts immunity. See 33 F. Supp. 3d at 659–63.

June 26, 2012), beneficiaries of the estates of Columbian citizens who had been killed by paramilitary forces in Columbia brought claims under the ATS and TVPA. See Compl. ¶¶ 1–2, 9–16, 51–100, Jaramillo v. Naranjo, No. 10-cv-21951 (S.D. Fla. June 14, 2010), ECF No. 1. The court stayed the action pending the Supreme Court's ruling in Kiobel. Jaramillo, 2012 WL 12915246, at *1. On a motion for reconsideration, the court vacated the stay as to the TVPA claims and explained that "as the Court now understands it, the Torture Victim Protection Act presents a separate claim and a separate basis for subject matter jurisdiction." Id. at *2.[7] Finally, in Jara v. Nunez, No. 6:13-cv-01426, 2015 WL 12852354 (M.D. Fla. Apr. 14, 2015), the court dismissed ATS claims but allowed TVPA claims brought by surviving family members against a former member of the Chilean military for extrajudicial killing and torture that occurred in Chile. See 2015 WL 12852354, at *4–6; Am. Compl. ¶¶ 1, 11, 13–16, No. 6:13-cv-01426 (M.D. Fla. Feb. 19, 2014) (describing torture and killing in Chile, alleging that defendant moved permanently to the United States after the killing, and alleging that plaintiffs and surviving family members of the deceased were all not U.S. citizens). In the absence of case law supporting Defendant's position, the Court is not persuaded that its exercise of jurisdiction in this matter was unconstitutional or a clear error of law that should be reconsidered.

III. MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

A. Legal Standard

In the alternative to reconsideration, Defendant asks the Court to certify an interlocutory appeal of the Motion to Dismiss Order to allow the First Circuit to weigh in on the question of the limits of jurisdiction under the TVPA. See [ECF Nos. 59, 66]. A district judge may certify

[7] The ATS claims were later dismissed for lack of jurisdiction because all of the events alleged occurred in Columbia. See Order at 16–17, 30, Jaramillo v. Naranjo, No. 10-cv-21951 (S.D. Fla. Sept. 30, 2014), ECF No. 101. The court also dismissed some of the TVPA claims pursuant to Federal Rule of Civil Procedure 12(b)(6). See id. at 17–30.

an interlocutory appeal in a written order when issuing an otherwise not-appealable civil order if she is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The First Circuit has "repeatedly emphasized that 'interlocutory certification under 28 U.S.C. § 1292(b) should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.'" Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005) (quoting Palandjian v. Pahlavi, 782 F.2d 313, 314 (1st Cir. 1986)).

"As a general rule, [the First Circuit does] not grant interlocutory appeals from a denial of a motion to dismiss." Id. (citing McGillicuddy v. Clements, 746 F.2d 76, 76 n.1 (1st Cir. 1984)). "This reflects [the First Circuit's] policy preference against piecemeal litigation as well as prudential concerns about mootness, ripeness, and lengthy appellate proceedings." Id. (citation omitted). In addition, the First Circuit has recognized that "the 'fact that appreciable trial time may be saved is not determinative,' and neither is the fact that the case has 'tremendous implications' . . . ." Id. (citations omitted) (first quoting Palandjian, 782 F.2d at 314 and then quoting Slade v. Shearson, Hammill & Co., 517 F.2d 398, 400 (2d Cir. 1974)).

B. Analysis

Defendant argues that certification of an interlocutory appeal is merited here because the question of the limits of jurisdiction under the TVPA is a controlling question of law, there are "ample grounds" for Defendant's position that jurisdiction is lacking, and allowing the appeal "may materially advance the ultimate termination of the litigation." See [ECF No. 59 ¶¶ 9–12; ECF No. 67 at 10–11]. Plaintiffs respond that certification of an interlocutory appeal is

inappropriate because Defendant has not established a controlling question of law, which "typically involves a question of statutory or regulatory interpretation," and has not demonstrated a substantial difference of opinion "because every court that has addressed this issue has ruled in favor of jurisdiction," [ECF No. 70 at 17–19]. Plaintiffs also assert that this case does not present exceptional circumstances that would justify an interlocutory appeal. [Id. at 19–20].

The proposed interlocutory appeal of the Motion to Dismiss Order clearly concerns a controlling question of law: whether "the Court may exercise jurisdiction over Plaintiffs' TVPA claims through section 1331." See Boniface, 338 F. Supp. 3d at 63–64. "[A] question of law is controlling if reversal of the district court's order would terminate the action." Johansen v. Liberty Mut. Grp., Inc., No. 15-cv-12920-ADB, 2017 WL 937712, at *1 (D. Mass. Mar. 9, 2017) (quoting Philip Morris Inc. v. Harshbarger, 957 F. Supp. 327, 330 (D. Mass. 1997)). "A controlling question of law usually involves a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than an application of law to the facts." Id. (quoting S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-cv-13069-PBS, 2016 WL 3064054, at *2 (D. Mass. May 31, 2016)). Here, the issue of the scope of permissible jurisdiction under the TVPA is a question of law that controls the case because, as Defendant asserts, "[i]f there is no jurisdiction under the TVPA, there is no jurisdiction." [ECF No. 67 at 10]. For the same reason, the Court concludes that an interlocutory appeal may materially advance the litigation. See [ECF No. 59 ¶ 12].

There is also substantial ground for difference of opinion on the issue. Although "many courts have determined that section 1331 is sufficient in and of itself to establish federal jurisdiction over TVPA claims," Boniface, 338 F. Supp. 3d at 63, other courts have resisted adopting this position, see Singh v. G.K., 2016 WL 3181149, at *6; Chen Gang, 2013 WL

5313411, at *4, and the First Circuit has not provided guidance to district courts on this issue. As noted in the Motion to Dismiss Order, this Court considered the issue unsettled enough to invite Defendant to re-present argument on the issue in response to the Order. See Boniface, 338 F. Supp. 3d at 63 n.2. Although the Court does not ultimately find that its Motion to Dismiss Order merits reconsideration, it nonetheless concludes that there is disagreement within the judiciary concerning how to approach personal jurisdiction under the TVPA.

Finally, the Court believes that this case presents an exceptional circumstance justifying a break from the First Circuit's general practice of disfavoring interlocutory appeals from a denial of a motion to dismiss. See Caraballo-Seda, 395 F.3d at 9 (citing McGillicuddy, 746 F.2d at 76 n.1). The Court recognizes that the controlling legal question in this case is a jurisdictional matter that could be addressed in the normal course on a post-judgment appeal. Cf. U.S. v. Sorren, 605 F.2d 1211, 1213–14 (1st Cir. 1979) ("[D]ecisions denying appeals from other jurisdictional challenges suggest that the individual litigant's interest in the limitations on the courts' jurisdiction is adequately served by postjudgment appeal."). Defendant's circumstances, however, suggest that he will be unable to proceed in this normal course or seek relief through a post-judgment appeal.

As the Court understands the situation, this interlocutory appeal may be Defendant's final opportunity to challenge the claims against him with legal representation. Defendant's counsel confirms in their motion papers, "absent an interlocutory appeal, the Defendant will most likely return to his pro se status and this issue, and its potential chance for appellate review, stand a good chance of being lost." [ECF No. 59 ¶ 12]. Indeed, if an interlocutory appeal is denied, the Court is not optimistic that additional pro bono counsel could be retained given the tremendous difficulty the Court faced in identifying pro bono counsel at the outset of this litigation due to the

nature of the claims asserted and the anticipated cost of conducting discovery in Haiti. Should Defendant return to *pro se* status following the denial of an interlocutory appeal, the Court does not have confidence that he would be able to represent himself effectively through the appellate process. Because there may not be another opportunity for Defendant to argue on appeal the merits of his legal arguments favoring dismissal of the claims against him, which contain serious allegations of extrajudicial killing and torture, the Court believes that this case presents an exceptional scenario appropriate for interlocutory review. Accordingly, Defendant's motion for the alternative relief of certification of an interlocutory appeal is granted.

IV. CONCLUSION

Accordingly, Defendant's motion for reconsideration [ECF No. 66] is DENIED, and Defendant's motion for the alternative relief of certification of an interlocutory appeal [ECF No. 59] is GRANTED.

SO ORDERED.

September 30, 2019

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE