UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DEFENDANT JEAN MOROSE VILIENA'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS

The Defendant Jean Morose Viliena ("Defendant") submits this memorandum of law in support of the Motion of Defendant Jean Morse Viliena To Dismiss The Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted.

I. Introduction

This is an action by three Haitian citizens[1] against a defendant Haitian citizen to recover civil damages for torts allegedly committed in Haiti in the period 2007-2010. The cause of action has been, and is being, litigated in the Haitian courts. There is no nexus with the United States, other than the present residence of the defendant Jean Morse Viliena. This is a so-called "Foreign Cubed" proceeding, i) foreign plaintiffs, 2) foreign defendants, and 3) acts that took place in a foreign jurisdiction. The Court lacks subject matter jurisdiction. The Complaint fails

[1] The Plaintiff Nissage Martyr has passed away since the commencement of this action and there has been no timely substitution. The Defendant specifically reserves those arguments made in his Opposition to Substitute [Docket No. 40] and incorporates the same by reference.

to establish a claim for relief under the applicable statute. Even finding jurisdiction, the Court should exercise the power of abstention with respect to this matter.

It is difficult to discern the purpose of this proceeding and its continued prosecution in this Court. The plaintiffs and their advocates have successfully called attention to themselves and Mr. Viliena. Mr. Viliena has lost his job as a bus driver. There is little more to be gained or accomplished. The Court should decline the invitation to weigh in on the efficacy of Haitian civil relief or to substitute its own judgment on the administration of justice in Haiti in place of the men and women in Haiti charged with that responsibility by their own fellow citizens. The first 27 paragraphs of the complaint in this case detail with some vividness the unhappiness of the Plaintiffs with the political parties in Haiti and their conduct of civil society in that country. A set of circumstances not limited to Haiti. Those statements may or may not be true, but regardless of their accuracy, they do not form the basis for the United States to exercise extraterritorial jurisdiction to resolve those matters.

II. Matters Established by the Complaint.

A. 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. Complaint, at ¶36.

April, 2008

Plaintiffs allege that on April 8, 2008, Defendant and his staff physically assaulted 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 Defendant ordered an associate to shoot Martyr, as well as 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 the Defendant 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 have submitted an affidavit to the Court, [Docket No. 20, Supplemental Brief Regarding Standing, Exhibit A, Declaration of Mario Joseph, Attorney, (hereinafter "Joseph") in which in paragraphs 4 through 10 under the heading "**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**," Joseph, p. 2, Mr. Joseph details the fact that under Haitian law a cause of action exists for the injuries alleged in the Complaint, Joseph, ¶ 5, that the Plaintiffs have recovered a monetary judgment against the "associates' identified in the Complaint for those injuries, Joseph, ¶¶ 9, 10 and that the Plaintiffs continue to prosecute their claims against Mr. Viliena in the Haitian court. Joseph, ¶ 8.

In 2010, Defendant was indicted in Haiti for his alleged involvement in the killing of E Boniface, the assault and injuries to Martyr and Ysemé, and the "ransacking of the radio station." Id. at ¶62. After a judgment against Defendant, and then a subsequent appeal, the matter was remanded to a magistrate court in Les Cayes, Haiti, where a bench trial was scheduled to proceed

on July 14, 2017. *See* Notice and Order (with translation), attached hereto at Tab A.[2] Defendant appeared for trial on this date, but the matter was continued. Id. The Defendant continues to participate in and respond to the proceedings in the Haitian court.

B. Causes of Action Alleged in the Complaint

Four months prior to appearing for the bench trial in Haiti, Plaintiffs filed the instant action, asserting five separate claims for relief.

Count I asserts a claim for extrajudicial killing, relative to July 27, 2007 death of E. Boniface, in violation of the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note).

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 Alien Tort Statute, 28 U.S.C. § 1350.

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.

Plaintiffs allege that this Court has jurisdiction for Counts I, II, and III under 29 U.S.C. § 1331 (federal question). And they claim that the Court has jurisdiction as to Count IV under the

[2] The Court may take judicial notice of this document, as it is a public record of the Haitian court, executed under seal. *See* Fed. R. Evid. Rule 201; Freeman v. Town of Hudson, 714 F.3d 29, 36 (1st Cir. 2013) (on Rule 12(b) motion, court may consider "'official public records; documents central to plaintiffs' claim; and documents sufficiently referred to in the complaint'"); Giragosian v. Ryan, 547 F.3d 59, 65-66 (1st Cir. 2008) (court can consider documents relied on in complaint, public records, and other documents subject to judicial notice).

Alien Tort Statute, 28 U.S.C. § 1350, and as to Count V, under 28 U.S.C. 1367 (supplemental jurisdiction).

III. Applicable Standard

Fed. R. Civ. 12(b)(1)

When deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) "[a]t the pleading stage," dismissal "is appropriate 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). As with a Fed. R. Civ. P. 12(b)(6) motion, the Court "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). Unlike a Rule 12(b)(6) motion, however, the Court may look beyond the pleadings to determine jurisdiction without converting the motion into a summary judgment motion. Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002).

Fed. R. Civ. Rule 12(b)(6)

A court will grant a motion to dismiss pursuant to Rule 12(b)(6) if the complaint fails to plead sufficient facts that "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The Court must "assume the truth of 'the raw facts' set forth in the complaint." In re Ariad Pharm., Inc. Sec. Litig., 842 F.3d 744, 750 (1st Cir. 2016) (quoting In re Bos. Sci. Corp. Sec. Litig., 686 F.3d 21, 27 (1st Cir. 2012)). The Court, however, need not consider "naked assertion[s] devoid of further factual enhancement." San Gerónimo Caribe Project, Inc. v. Acevedo-Vilá, 687 F.3d 465, 471 (1st Cir. 2012) (quoting Twombly, 550 U.S. at 557). Similarly, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662 (2009)) (internal quotation mark omitted).

Fed. R. Civ. 12(b)(1) before 12(b)(6)

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." Déniz v. Municipality of Guaynabo, 285 F.3d 142, 149-50 (1st Cir. 2002) (citing *Ne. Erectors Ass'n of the BTEA v. Sec'y of Labor, Occupational Safety & Health Admin.*, 62 F.3d 37 (1st Cir. 1995).

IV. Argument

A. The Court Lacks Jurisdiction

1. There Is No Jurisdiction Under the Alien Tort Statute, 28 U.S.C. § 1350, Because All Plaintiffs' Claims Occurred In Haiti (Counts I-IV)

Passed as part of the Judiciary Act of 1789, the Alien Tort Statute 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 (C.A.2 1960) (per curiam). The statute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action. In Sosa v. Alvarez–Machain, 542 U.S. 692 (2004), the Supreme Court held that the statute was "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." Id. at 724. In Kiobel v. Royal Dutch Petroleum Co., the Supreme 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 Supreme Court reasoned that nothing about the historical context, or the language of the Alien

Tort Statute, "suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign." Id. Thus, because "all the relevant conduct took place outside the United States," the matter was appropriately dismissed for lack of jurisdiction. Id. As explained in Jara v. Nunez,

> The Court in *Kiobel* held that a claim must "touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application" before a district court may exercise jurisdiction under the Alien Tort Statute. 569 U.S. at 124–25, 133 S.Ct. 1659. And in *Doe*, *Baloco*, and *Cardona v. Chiquita Brands International, Inc.*, 760 F.3d 1185 (11th Cir. 2014), we explained that *Kiobel* foreclosed jurisdiction over claims based on the foreign torts of American corporations and citizens. These precedents control this appeal in the light of the Jaras' failure to allege any relevant conduct on American soil.

878 F.3d 1268, 1273–1274 (11th Cir. 2018); Doe v. Drummond Co., 782 F.3d 576, 592–93 (11th Cir. 2015) ("In weighing the pertinent facts, the site of the conduct alleged is relevant and carries significant weight …. our jurisdictional inquiry requires us to consider the domestic or extraterritorial location where the defendant is alleged to engage in conduct that directly or secondarily results in violations of international law within the meaning of the ATS*");* Balintulo v. Daimler AG, 727 F.3d 174, 191 (2d Cir. 2011) ("[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under Kiobel."). Here, all the relevant conduct alleged by the Plaintiffs took place outside of the United States.[3] Plaintiffs' claims must be dismissed for lack of jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350.

[3] Plaintiffs have attempted to elude this operation of law through conclusory statements asserting as to Mr. Viliena "on information and belief, he continued to exercise control" over a militia operating in Les Irois from Massachusetts. See Complaint at ¶74. This conclusory and general allegation is insufficient to overcome the presumption that this Court lacks jurisdiction. See Doe v. Drummond Co., 782 F.3d 576, 598 (11th Cir. 2015) ("general allegations involving U.S. defendants' domestic decision-making with regard to supporting and funding terrorist organizations [a]re insufficient to warrant displacement and permit jurisdiction*");* see also Arndt v. UBS AG, 342 F. Supp. 2d 132, 136–137 (E.D.N.Y. 2004) ("On a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the burden of establishing jurisdiction, by a preponderance of the evidence, rests with the party asserting that it exists.").

2. There Is No Jurisdiction Under 28 U.S.C. § 1331 (Count I-IV)

The Alien Tort Statute, 28 USC § 1350, applies only to claims asserted by aliens and not United States citizens, Rasul v. Bush, 542 U.S. 466, 484-85 (2004), in contrast, the Torture Victim Protection Act, was enacted by Congress to

> 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.

S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). See, Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005).The Senate Report on the TVPA states that the statute was intended to 'establish an unambiguous basis for a cause of action that has been successfully maintained under [the Alien Tort Statute,] ... which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.'" Flores v. S. Peru Copper Corp., 343 F.3d 140, 152–153 (2d Cir. 2003). Here, just as the Plaintiffs cannot maintain an action under the Alien Tort Statute, they are likewise unable to maintain a cause of action under the TVPA by way of the Court's federal question jurisdiction under 28. U.S.C. § 1331. In Chen Gang v. Zhao Zhizhen, the court held that "without subject matter jurisdiction under the ATS, the Court also lacks jurisdiction over plaintiffs' TVPA claim." 2013 WL 5313411, at *3–4 (D. Conn. Sept. 20, 2013) (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) ("Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute."); see also Murillo v. Bain, 2013 WL 1718915, at *3 (S.D. Tex. Apr. 19, 2013) ("This case has nothing to do with the United States. The parents of a deceased Honduran are suing a Honduran politician, complaining about the Honduran army's behavior at a Honduran airport. American laws like the Alien Tort Statute and Torture Victim Protection Act are presumed not apply beyond the borders of the United

States."). As in Chen Gang and Murillo, the Court lacks jurisdiction under 28 U.S.C. § 1331, because the conduct alleged occurred in Haiti, between Haitian citizens and does not "touch and concern" the United States. (But see discussion, infra.) This is not a case "arising under" the "laws of the United States." U.S. Const. art. III, § 2, cl. 1.

The application of the bar on the exercise of extraterritorial jurisdiction as it relates to the TVPA has been neither consistent, nor unanimous. Many courts have applied 28 USC § 1331 to find jurisdiction under the TVPA finding support in the legislative history and elsewhere for the proposition that Congress intended to "provide a civil cause of action in U.S. Courts for torture committed abroad." Chowdhury v. Worrldtel Bangladesh Holding, Ltd. 746 F.3d 42, 51 (2d Cir. 2014) (citation omitted); Doe v. Drummond Co., Inc., 782 F.3d 576 (11th Cir. 2015) ("we hold now that the TVPA applies extraterritorially" Id. at 601.)

While the Supreme Court in Kiobel contrasted the TVPA with the Alien Tort Statute, it did not address the extraterritorial applicability of the TVPA other than by observing a more pronounced congressional intent in contrast to the Alien Tort Statute, nor has it addressed that issue subsequently. The presumption against extraterritoriality reflects the acknowledgment that "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, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007). In finding extraterritorial jurisdiction appropriate, courts have focused on the intent of Congress to provide for that jurisdiction in the language of the TVPA itself though. In doing so, however, they have ignored the inherent constitutional limits on the judiciary itself. In enacting the TVPA, Congress recognized that

> Under article III of the Constitution, the Federal judiciary has the power to adjudicate cases "arising under" the "law of the United States." The Supreme Court has held that the law of the United States includes international law.... Congress' ability to enact this

> legislation also drives from article I, section 8 of the Constitution, which authorizes Congress "to define and punish ... Offenses against the Laws of Nations."

S. Rep. No. 102-249, at 5(1991). There is no support for the argument, however, that the law of nations recognizes the exercise of territorial jurisdiction by one sovereign over the affairs of another. The law of nations sanction universal civil jurisdiction as prescribed by the TVPA. See, Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897 ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.") This is the very thing the Plaintiffs ask here. We do not like our results as determined by the laws of Haiti, give us something else.

When, as here, the TVPA is applied to actions between foreign citizens taking place on foreign soil, the Supreme Court's concerns regarding the exercise of extraterritorial jurisdiction as established in Kiobel with regard to the Alien Tort Statute carry equal weight with respect to the TVPA. To ignore those concerns is both imprudent and unconstitutional. If there is any constitutional boundary as it relates to the exercise of judicial power, that boundary must be the limits of international law, to argue otherwise is to aver that Congress is free to make laws providing for the adjudication of foreign disputes between foreign citizens. Something no country has ever endorsed.

3. **The Plaintiffs have Otherwise Failed to State a Claim Consistent with the Statutory Requirements of the TVPA.**

To establish liability under the TVPA, a plaintiff must establish that a Defendant is:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation –
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (2006). The Act further provides that

> A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

Id. , § 2(b), see Enahoro v. Abubakar, 408 F.3d 877, 886 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006).

A. **No Exhaustion of Available Remedies**

As acknowledged by the Plaintiffs in their own pleadings they have an available remedy in Haiti and they are pursuing it. The specific purpose of the exhaustion provision was to ensure that the costs of entertaining a TVPA claim are imposed only when victims "are unable to obtain redress in the country where [the] torture took place." 134 Cong. Rec. 28,613-28,614 (1988) (Rep. Fascell). The Plaintiffs have no such inability. See Corrie v. Caterpillar, Inc., 403 F.Supp.2d 1019, 1025–26 (W.D.Wash.2005) (holding that TVPA plaintiffs had to exhaust available remedies in Israel: "A foreign remedy is adequate even if not identical to remedies available in the United States. Courts usually find a foreign remedy adequate unless it is 'no remedy at all.' ") (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)). Congress was clear in establishing the TVPA that "the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred," as this "ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred." H.R. Rep. No. 102-367, at 4--5 (1991). Claims must be brought under the TVPA "as a last resort," after attempts to obtain local

remedies have failed. S. Rep. No. 103-249, at 9 (1991); 134 Cong. Rec. 28611, 28614 (1988) (statement of Rep. Broomfield) (stating that, "as a last recourse to justice, [the TVPA] would then allow a person to turn to the Federal courts for help"); see generally Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1710 (2012) (noting that "[C]ongress appeared well aware of the limited nature of the cause of action it established in the [TVPA]").

The Plaintiffs have through the affidavit of their Haitian counsel in this action made clear that they have an adequate remedy and as such have not stated a cause of action under the TVPA sufficient to either establish jurisdiction or state a claim for relief. See Joseph, p. 2, ("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,")

B. **Failure to Allege Factual Basis for TVPA Claim.**

In order to be actionable under the TVPA, the Plaintiffs must allege facts that the Defendant engaged in torture or an extrajudicial killing. Torture Victim Protection Act, §§ 2(a)(1), 2(a)(2), note following 28 U.S.C. § 1350 (2006).

i. **Extrajudicial Killing**

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. Complaint, at ¶36. The Plaintiffs do not allege that the Defendant killed Mr. Boniface and, accordingly, to make him liable for the acts of third parties they must establish that Viliena had liability under the

command and control doctrine. See, Doe v. Drummond, 782 F.3d 576 (11th Cir. 2015). To establish that liability, the necessary elements to support such liability are:

> (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.

Id. at 609 citing Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1289 (11th Cir.2002) Ford, 289 F.3d at 1288; accord Chavez v. Carranza, 559 F.3d 486, 499 (6th Cir.2009). The Complaint does not identify the alleged actors, nor does it allege any other facts necessary to establish such liability. Viliena did not kill Mr. Boniface and there are no factual allegations in the Complaint to suggest that he knew or should have known that others would act to do so or that they were acting under his command and control.

The plain language of the TVPA does not contemplate an "attempted" extrajudicial killing. See, Moskal v. United States, 498 U.S. 103, 108 (1990) (in determining the meaning of a statutory provision, courts "look first to its language, giving the words used their ordinary meaning"). The word "attempted" is not used in the statute. This is bolstered by the fact that the statute states that a person who does the killing will be liable to that individual's "legal representative" or other individual capable of bringing an action for "wrongful death." Count II must be dismissed because the plain language of the TVPA does not permit the claim.

ii. **Torture**

The TVPA defines torture as

> (1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, 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 for such purposes as

> obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (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;
>
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Torture Victim Protection Act, § 3(b).

The definition makes clear that "torture" that is actionable is meant to be something more than the battery alleged in the Complaint. Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38 (D.D.C. 2000) (imprisonment); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (teeth pulling); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (D.D.C. 1998) (isolation and blindfolding, beatings, and threats of imminent death over the course of long periods of confinements).

Courts have held that the Plaintiff must allege sufficiently "severe" or "extremely" cruel acts to bring a claim for torture. See Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92–93 (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. The more intense, lasting, or heinous the agony, the more likely it is to be torture… [I]n order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically

intended to inflict excruciating and agonizing physical or mental pain or suffering."). "Torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault. Rather, torture is a label that is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying or hanging in positions that cause extreme pain." Simpson v. Socialist People's Libyan Arab Jamahiriya, 326 F.3d 230, 235 (D.C. Cir. 2003) (internal citations and quotation marks omitted). As Plaintiffs have failed to allege facts which amount to torture, as that term is used in the TVPA, Count III must be dismissed. The acts alleged in the Complaint do not rise to the level of "torture" as defined by the Act and the relevant case law.

C. The Complaint Does Not Sufficiently Allege that Viliena was Acting on Behalf of a Foreign Nation

A TVPA action may be brought by non-citizens against "an individual who, under actual or apparent authority, or color of law, **of any foreign nation**—subjects an individual to torture" or "subjects an individual to extrajudicial killing." (emphasis added) Torture Victim Protection Act, § 2(a). An individual acts under color of law when actions are made together with state officials or with significant state aid. See Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir.2007). In interpreting the state action courts rely upon "the principles of agency law and to jurisprudence under 42 U.S.C. § 1983." Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1247 (11th Cir.2005) A political party is not generally a state actor for purposes of section 1983. Libertarian Party of Ohio v. Husted, 831 F.3d 382 (6th Cir. 2016). In this instance, although the Complaint alleges that Viliena was the mayor of Les Irois, the acts attributed to him in the Complaint relate more directly to his advocacy for a Haitian political

party. The Complaint does not allege that Viliena was acting as part of his mayoral responsibilities or otherwise on behalf of the nation.

In sum, the Complaint fails to allege the facts necessary to establish a claim for relief under the TVPA, thereby meriting both the dismissal of the Complaint in accordance with Rule 12(b)(6) and the determination that the Plaintiffs have failed to establish subject matter jurisdiction and, accordingly, meriting dismissal in accordance with Rule 12(b)(1).

4. **Because There Is No Jurisdiction Under 28 U.S.C §§ 1350 or 1331, There Is No Supplemental Jurisdiction (Count V)**

Plaintiffs claim that this Court has supplemental jurisdiction—under 28 U.S.C. § 1367—as to Count V, for an alleged violation of 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. But where there is no jurisdiction for Plaintiffs' other claims, there can be no supplemental jurisdiction. See, Doe I v. Cisco Sys., Inc., 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014) ("As all of Plaintiffs' federal law claims are being dismissed, the Court declines to exercise supplemental jurisdiction over the remaining state law claims, including the claim arising under the UCL."); see also Chen Gang, 2013 WL 5313411, at *3–4 ("In the absence of any federal claims, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claims for intentional and negligent infliction of emotional distress."). For this reason, Count V must be dismissed for lack of jurisdiction.

5. **Abstention**

In absence of a basis to dismiss the Complaint, the Court should abstain from this matter as an exercise of comity. See Ace Arts, LLC v. Sony/ATV Music Pub., LLC, 56 F. Supp. 3d 436 (S.D.N.Y. 2014);

V. **Conclusion**

Wherefore, for the foregoing reasons, the Defendant Jean Morose Viliena prays that the Court dismiss all Counts asserted in the Plaintiffs' Complaint and that the Court grant such other and further relief as is just.

Jean Morose Viliena,

By his attorney,

/s/ Peter J. Haley

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Dated: March 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on this date.

Date: March 23, 2018 */s/ Peter J. Haley*