THE CENTER FOR JUSTICE & ACCOUNTABILITY
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July 20, 2010

Via First Class Mail
The Honorable William K. Suter, Clerk
The Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

Re: *Constant v. Doe*, 09-11327

Dear Mr. Suter:

Enclosed for filing please find the original and ten copies of Respondents' Motion to Seal the Petition for Certiorari and to Substitute a Redacted Version in the Public Record. Also enclosed please find Respondents' Waiver of filing an Opposition to the Petition for Certiorari.

Please do not hesitate to contact me if you have any questions.

Thank you for your attention to this matter.

Sincerely yours,

Andrea C. Evans
Counsel of Record

Cc: Jennifer Green, Esq.
Maria LaHood, Esq.

870 Market Street, Suite 688 San Francisco, CA 94102 tel 415 544 0444 fax 415 544 0456 info@cja.org cja.org

WAIVER

Supreme Court of the United States

No. 09-11327

Emmanuel Constant, aka Toto Constant (Petitioner) v. Jane Doe 1, et al. (Respondents)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☒ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain name change since bar admission):

Signature Andrea Evans

Date: 7/20/2010

(Type or print) Name ANDREA C. EVANS

☐ Mr. ☐ Ms. ☒ Mrs. ☐ Miss

Firm The Center for Justice & Accountability

Address 870 Market Street, Suite 682

City & State San Francisco, CA Zip 94102

Phone 415-544-0444, x 313

SEND A COPY OF THIS FORM TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

Cc: Emmanuel "Toto" Constant
#08A5836
Coxsackie Correctional Facility
P.O. Box #999
Coxsackie, NY 12051

Obtain status of case on the docket. By phone at 202-479-3034 or via the internet at http://www.supremecourtus.gov. Have the Supreme Court docket number available.

No. 09-11327

IN THE
SUPREME COURT OF THE UNITED STATES

EMMANUEL "TOTO" CONSTANT, *Petitioner*

v.

JANE DOE I, JANE DOE II, AND JANE DOE III, *Respondents*

RESPONDENTS' MOTION TO FILE PETITION FOR CERTIORARI UNDER SEAL AND TO SUBSTITUTE REDACTED VERSION IN THE PUBLIC RECORD

ANDREA C. EVANS
Counsel of Record
NATASHA FAIN
THE CENTER FOR JUSTICE & ACCOUNTABILITY
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415-544-0444

JENNIFER GREEN
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95 J Mondale Hall
229-19th Avenue South
Minneapolis, MN 55455

Respondents, Jane Doe I, Jane Doe II, and Jane Doe III, through undersigned counsel hereby respectfully move the Court to file the Petition for Certiorari that was filed by Petitioner Emmanuel "Toto" Constant under seal and to substitute a redacted version of the Petition in the public record. In support of this Motion, Respondents state:

(1) In 2004, Respondents filed a complaint against Petitioner in the Southern District of New York. In connection with filing the complaint, Respondents requested and were granted leave to proceed with their claims under pseudonym. *See* December 22, 2004 Order sealing case (attached hereto as Exhibit A).

(2) Throughout the proceedings, Respondents participated under pseudonym. The District Court Judge, the Honorable Sidney Stein, entered numerous orders permitting Respondents to continue their participation in the case under pseudonym. *See* August 28, 2006 Order (permitting Respondents to proceed pseudonymously and to testify behind a curtain at damages hearing) and July 31, 2008 Order (ordering redaction of documents Petitioner submitted to the Court) (Attached hereto are Exhibits B and C respectively).

(3) Notwithstanding these Orders, Petitioner has speculated as to the identity of one of the Jane Does in his Petition for Certiorari. Specifically, the second full paragraph on page 7 and the last full paragraph on page 40 includes information that might enable someone to ascertain the identity of a Jane Doe.

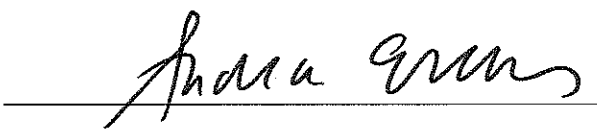
(4) The security concerns that prompted Respondents to proceed under pseudonym at the district court level continue to this day.

(5) To protect the safety and well being of Respondents, Respondents request redaction of only two paragraphs of the entire 41 page Petition for Certiorari, specifically, the second full paragraph on page 7 and the last full paragraph on page 40 (redacted version attached hereto as Ex. D)

(6) It is well-settled that "specific, on-the-record findings that sealing is necessary to preserve higher values" can overcome the common law presumptive right of access to judicial documents if the sealing order is narrowly tailored to achieve that aim. *Lugosch v. Pyramid, Co.*, 435 F.3d 110, 124 (2d Cir. 2006). Moreover, courts have held that concerns for physical safety, particularly in instances in which people's lives have been threatened, are sufficient to overcome the openness presumption. *See In re Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992) (citing *Ip v. Henderson*, 710 F. Supp. 915, 918 (S.D.N.Y. 1989)). Here, Respondents have demonstrated time and again that it is in the interests of justice that they be permitted to proceed under pseudonym.

WHEREFORE, Respondents respectfully request that the Court seal the Petition for Certiorari in this case and substitute the attached redacted version in the public record.

Respectfully submitted,



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Dated: July 20, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2010, I caused a copy of this Motion to File Petition for Certiorari Under Seal and to Substitute Redacted Version thereof on to be served, via first class mail, on:

Emmanuel "Toto" Constant
08A5836
COXSACKIE CORRECTIONAL FACILITY
P.O. BOX # 999
COXSACKIE, NY 12051-0999

Andrea C. Evans
Counsel for Respondents

JUDGE STEIN

ORIGINAL

#11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JANE DOE I, JANE DOE II AND JANE DOE III,	)	04 CV 10108
Plaintiffs,	)	Civil Action No. _____
v.	)	**[PROPOSED] ORDER GRANTING PLAINTIFFS' *EX PARTE* MOTION FOR LEAVE TO FILE COMPLAINT AS PSEUDONYMOUS PLAINTIFFS**
EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,	)	
Defendant.	)	

Upon the motion of Plaintiffs for an order permitting the filing of the Complaint using pseudonyms, and upon review of the declaration of counsel in support thereof, it is hereby

ORDERED that Plaintiffs' *Ex Parte* Motion for Leave to File Complaint as Pseudonymous Plaintiffs be GRANTED. Plaintiffs are permitted to proceed with pseudonyms until such time as the Court orders the names to be disclosed.

UNITED STATES DISTRICT JUDGE

Dated: December 22, 2004

MICROFILM
JAN 26 2005
9:00 AM

Ex. A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOES I, JANE DOES II AND JANE DOE III,

Plaintiffs,

-against-

EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,

Defendant.

ORDER
04 Civ. 10108 (SHS)

SIDNEY H. STEIN, U.S. District Judge.

For the reasons set forth at a telephone conference today, with counsel for all plaintiffs present and defendant, having defaulted, not present, it is hereby ordered that:

Plaintiffs Jane Doe I and Jane Doe II's Motion for Partial Closed Court Testimony and the Continued Use of Pseudonyms is granted in part and denied in part. Specifically, plaintiffs Jane Doe I and Jane Doe II are permitted to proceed pseudonymously, and shall testify behind a curtain at the hearing on damages to commence on August 29, 2006. However, plaintiffs Jane Doe I and Jane Doe II may not testify in closed court or in chambers.

Plaintiff Jane Doe III's Motion for Continued Use of a Pseudonym and for the Substitution of Written Declarations for In-Person or Deposition Testimony and to File Supporting Memorandum Under Seal is granted in its entirety.

Dated: New York, New York
August 28, 2006

SO ORDERED:

Sidney H. Stein, U.S.D.J.

Ex. B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE I, JANE DOE II, and JANE DOE III,

Plaintiffs,

-against-

EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,

Defendant.

04-Civ-10108 (SHS)

ORDER

SIDNEY H. STEIN, U.S. District Judge.

In accordance with this Court's prior orders permitting the sealing of information regarding plaintiffs' identities and plaintiffs' requests in letters to the Court dated January 14, 2008 and April 4, 2008 that certain filings in this action be redacted to protect plaintiffs' anonymity,

IT IS HEREBY ORDERED that:

1. Plaintiffs are to publicly file no later than August 15, 2008 redacted versions of the following documents omitting references to the relevant litigation in the United States District Court for the Eastern District of New York:

   a. Defendant's Reply Memorandum in Support of Defendant's Rule 60(b)(4) Motion filed Jan. 7, 2008 [Docket # 77];

   b. Letter to the Court from Jennifer M. Green dated Jan. 14, 2008;

   c. Defendant's submission dated Feb. 6, 2008, including Defendant's Amended Memorandum in Support of Defendant's Rule 60(b)(4) Motion, Defendant's Motion to Hold the Decision on Defendant's 60(b)(4) Motion in Abeyance

Ex. C

09-11327

IN THE

SUPREME COURT OF THE UNITED STATES

EMMANUEL CONSTANT - PETITIONER

VS.

JANE DOE I, JANE DOE II, JANE DOE III - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EMMANUEL CONSTANT, Pro Se Petitioner
08A5836
COXSACKIE CORRECTIONAL FACILITY
PO BOX 999
COXSACKIE, N.Y. 12051-0999

May 21, 2010

REDACTED

Ex. D

QUESTIONS PRESENTED

The Alien Tort Statute, 28 U.S.C. § 1350 provides as follow: "The District Court 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".

1. Whether an exhaustion of remedies requirement an universal and binding norm of Customary International Law, creates jurisdictional limitations under the Alien Tort Statute.

2. Whether the subject matter of the Alien Tort Statute, in suits against private actors, must be defined by reference to norms embodied in International Law and in strict conformity with legal and jurisdictional pleading standards set forth by this Court.

3. Whether counsel gross negligence, leaving an Incarcerated defendant, unrepresented, constitutes extraordinary circumstances under Federal Rule of Civil procedure 60 [b] [6].

4. Whether entry of judgment, not entered in compliance with Federal Rule of Civil Procedure § 55 violates due process and renders the judgment void.

5. Whether failure to comply with the statutory time limitations provided by the Torture Victim Protection Act (note), is a condition precedent which defeats claimsunder this statute.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner: Emmanuel Constant is a Haitian National, currently incarcerated in a New York State on charges unrelated to the case at bar.

Respondents: Jane Doe I. Jane Doe II, and Jane Doe III are Haitian National, resident of the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

For cases from Federal Court

The opinion of the United States Court of Appeal appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was December 1st, 2009.

A timely petition for rehearing was denied by the United States Court of Appeals on February 23, 2010, and a copy of the order denying appears at Appendix C

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 [1]

CONSTITUTIONAL AND STATURORY PROVISIONS INVOLVED.

1. Article I, § 10 of The Constitution which provides:

> The Congress shall have power to define and punish policies on Felonies committed on the high seas and Offenses against the Law of Nations.
> An Act to establish the judicial Courts of the United States. Ch. 20, 1 stat. 73 (1789)

2. Aliens Tort Statute 28 U.S.C. § 1350

> "The District Court 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."

3. Torture Victim Protection Act

> "An individual who under actual or apparent authority, or Color of Law, of a foreign nation, objects an individual to torture or to extra judicial killing....shall be liable for damages."
> Codified at 28 U.S.C. § 1350 (note)(1992)

RULES INVOLVED.

The pertinent provisions of Federal Rules of Civil Procedure 60(b), 55 and 8 are set forth in the present case.

STATEMENT OF FACTS

This case presents various questions of law that require clarification by this Court as to the scope of the Alien Tort Statute 28 U.S.C. §1350, (ATS) and The Torture Victim Protection Act also codified at 28 U.S.C. § 1350 (note) (TVPA).

The statutes call for a construction by federal courts as to meaning and application of the "in violation" of the Law of Nations requirement at a jurisdictional threshold. The ATS provides:

"The District Court 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 must be interpretated to incorporate the full body of the Law of Nations referred also as Customary International Law, (CIL), and the subject matter jurisdiction of this statute should be defined by reference to the limits set forth by the norms embodied in the CIL. The statute and this court specify several threshold ingredients akin to 28 U.S.C. § 1350. See Sosa V. Alvarez-Machain 542 U.S. 692 (2004)

Petitioner, Emmanuel Constant, a private actor seeks the review of a final determination before the Court of Appeals for the Second Circuit. The court below affirmed the trial Court's denial of Petitioner's F.R.C.P. 60(b) motion for relief from a void judgment. The U.S. District Court for the

Southern District of New York entered a default judgment against Petitioner, and later awarded respondents an amount of $19 million in compensatory and punitive damages. The action involved claims brought by the Center for Constitutional Rights, a human rights advocacy group, on behalf of three Jane Doe aliens from the Republic of Haiti; against Petitioner, also a Haitian National, in his personal capacity.

The complaint alleges various human rights violations including, torture, attempted extra judicial killing and crime against humanity, committed by unidentified masked men, assumed to be members of Petitioner's former political party, The Front For The Advancement and Progress of Haiti (F.R.A.P.H) (an Unincorporate Association).

Petitioner's failure to answer the complaint was neither deliberate nor willful, yet the court rejected the meritorious defenses presented in the motion and subsequent pleadings. The district court may have been influenced by the unusual nature of this case and abused its permissible discretion by improperly applying the established norms pertaining to subject matter jurisdiction, exhaustion of remedies, and statute of limitations under the ATS and the TVPA. Those, whether jurisdictional or procedural irregularities that, single or together warrant vacatur of the judgment, as they are intertwined with the substanstive issues in the ATS and TVPA.

The correct application of decisions and related statutory provisions and case law regarding the jurisdictional requirement of the Alien Tort Statute 28 U.S.C.A. § 1350 "ATS" and other procedural issues justify review by this court, for the Second Circuit summary order (Appendix A).

The practical ramifications of such a determination would be staggering. It would permit an unlimited of foreign plaintiffs, with or without violations of Customary International Law ("CIL"), thereby turning the United States federal courts into an ill-suited "International Tribunal".

The court's ruling that the District Court's finding of the jurisdictional state action requirement based on the complaint allegations is error. Several dispositive issues exist in this appeal, including whether there is a sustainable nexus between Petitioner and Respondents injuries, and the military, that would allow jurisdiction to attach under the ATS. The unsupported allegations do not meet the standard set forth by 42 U.S.C.A. § 1983, the only relevant statute for a determination of the requisite state action. Bigio V. Coca-Cola, 239 F.3d. 440,448 (2d Cir. 2000)

Furthermore, the pannel decline to consider a "Constitutional Issue" of procedural due process violation by the District Court. This claim is an exception to the general rule that appellate court does not consider an issue not passed upon below. The judgment was entered in a manner inconsistent with due process of law. R.R.C.P. rule 60(b)(4).

In assessing whether subject matter jurisdiction under the ATS. Courts must conduct, a more searching merits-based inquiry than required in a less sensitive area See, e.g., *Filartiga V. Pena-Irala* 630 F.2d. 876 (2d. Cir. 1980).

This threshold inquiry would reaffirm the "high bar" established by this court for ATS claims. *Sosa V. Alvarez-Machain* 542 U.S. 692,727 (2004).

Under such of narrow grant of jurisdiction, Federal Courts must rigorously apply well-settled norms of CIL, to properly determine when a private actor or corporation may be subject to liability.

The default judgment was not entered in compliance with *F.R.C.P.* rule 55, Respondents failed to exhaust local remedies, and complaint was filed more than the 10 years statute of limitations applicable to both the ATS and the TVPA. Moreover, under *F.R.C.P.* 60(b)(6) attorney gross negligence constitutes extraordinary circumstances warranting the vacatur of a default judgment. The complaint's allegations are based on a theory of vicarious liability, and lacks the level of specificity necessary to support any plausible inferences, by the trial court, of a violation of CIL, hence the lack of subject matter jurisdiction. The Second Circuit squarly conflicts with the two Circuits, which recently reached the conclusion that a prudential exhaustion analysis must be conducted by the district court at a jurisdictional threshold. see, e.g. *Sarei v. Rio Tinto Plc* 550 F.3d 822 (9th Cir. 2008). See, also Ehahoro V. Abubaker,

408 F.3d. 877 (7th Cir. 2005)

The Second Circuit, on the other hand rejected this petitioner's argument as a waived affirmative defense. However, if this court finds the exhaustion issue applicable to the ATS, as a jurisdictional predicate to a violation of CIL, the issue may be raised at any time of the proceedings.

Referring to petitioner's original 60(b) motion, various pleadings and submissions, this court will conclude that the facts relied upon therein, particularly with regard to substantive and procedural norms applicable in CIL case, did not support the second circuit affirmance of the trial court decision in this matter.

Therefore, the circuit court's decision rests on an erroneous construction of the ATS 28 U.S. § 1350, and raises important question of law, highlighting the foreign policy and commercial concerns that underline the vast majority of ATS cases, and the proper role of the Judiciary in this area. Clarification of this controversy as to the scope and meaning or effect of the ATS provisions warrant this court plenary review.

(1) Respondents' Complaint.

This suit was filed on December 22, 2004 in the Southern District Court of New York by three Haitian women, Jane Doe,I,II and III (collectively, "Respondents"), against Petitioner Emmanuel Constant, former Secretary General of the Front for the Advancement and Progress of Haiti, (F.R.A.P.H.) a legitimate Haitian political party. Respondents allege a

host of potential violations of the Law of Nations, including torture, attempted extrajudicial killing, and crime against humanity, violence against women. The complaint alleges that Petitioner violated the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA), based on information and belief and on alternative either/or. The back drop is a period, of economic, political instability, after the departure of the democratically elected President and the imposition of severe commercial and trade sanctions on the country. Various bands were roaming the country taking advantage of the general poventy. (See App. J)

The complaint goes on to describe various attacks, against respondents who are strangers which took place on separate dates and locations. The incidents, unrelated involved unidentified masked men, "some of them wearing green uniforms and boots, similar to those wore by the Armed Forces". Some of the incidents happened before the existence of F.R.A.P.H., yet the victims characterized the group of men as members of F.R.A.P.H. working in cooperation with the Haitian Military to carry out the violations.

While admitting Petitioner's lack of direct involvement and knowledge in their injuries, Respondents still find him liable on a theory of vicarious liability based of an allege conspiracy with Haitian Army High Command.

(2) Legal Proceedings.

In June 1994, while Petitioner was still in his native country, Haiti, a suit was filed against FRAPH, in the

Eastern District Court of New York by Alerte Belance. The action raised the same exact allegations of International Law Violations, as in the instant case. *Alerte Belance V. Front Pour I'Avancement et le Progress Haitien (FRAPH)*, 94-cv-2619 (EHN). On December 16, 1999, the case was dismissed.(Nickerson,J.) (App. H).

[redacted]

On July 5, 2006, Petitioner was arrested on an unrelated case in Suffolk County, New York, and received the district court order granting Respondents motion for default judgment against him. The order was dated August 16, 2006. (App. D).

Following a hearing on damages on August 29, 2006, the court's findings of fact and conclusions of law, dated October 24, 2006, awarded claimants $ 19 Million in compensatory and punitive damages. (App. F).

On October 11, 2007, petitioner filed a Pro-Se motion under rule 60(b) to vacate the judgment. (App. E). The Trial Court denial the motion on July 30, 2008. (App. B).

Petitioner filed a timely notice of Appeal with leave to proceed in Forma Pauperis. Leave was granted and Petitioner perfected the appeal. *Jane Doe I,II, and III V. Emmanuel Constant*, 08-4827-cv.

The Court of Appeals for the Second Circuit in a summary order dated Decembers 1, 2009, Affirmed the District Court order. (App. A).

A petition for rehearing and rehearing en Banc was denied on February 23, 2010. Petitioner respectfully submit a Writ of Certiorari to this Honorable Court, for review of the Court of Appeals' merits panel decision.

(3) Relief under Fed, R. Civ.P. 60(b).

On October 11, 2007, Petitioner moved the District court to vacate the default judgment granted to Respondents against him.

Petitioner's motion originally filed under subdivision (4) of the rule argues that the judgment was void in abnitio for "want of jurisdiction"; because, under claims brought under both ATS and TVPA, Respondents failed to; exhaust available and adequate local remedies, and the claims was barred by the 10 years filing requirement provided by both Statutes.

In the subsequent pleadings and submissions, however inartful, Petitioner addressed several essential jurisdictional issues: 1) Cause of action; claim of attempted judicial killing "in insufficiently well-defined under both ATS and TVPA, lack of merits for claims of crime against humanity; 2) failure to show that Petitioner conduct was "in violation" of the law of Nations 3) requisite state action is absent. 4) Jane Doe III's claims are barred by the doctrine of res. Judicata, and 10 years statute of limitations.

All Petitioner's arguments constitute meritorious defenses for purposes of determining whether relief from the default judgment should be granted. The District Court declined to examine the merits of most of them, e.g. limitations, remedies, res-judicata, for failure to be raised in the answer. However, under rule 60(b), like rule 55(c), three factors govern whether relief is available: 1) whether Plaintiff will prejudiciate; 2) whether movant has meritorious defenseas and; 3) whether culpable conduct on part of the defendant led to the default. *United Coin Meter Co. V. Seaboard Coastline R.R.*, 705 F. 2d. 839,845 (6th Cir. 1983). For the third prong, Petitioner asserted that the default was not deliberated or willful. but as explain below, was the result of retained counsel "gross negligence", who left him unrepresented. Petitioner's arguments were labeled "bold self serving" assertions by the trial Court.

Petitioner meritorious defense were all coginzable by law, See, *U.S. V. Kubrick*, 444 U.S. 111,117 (1979) ("we should regard the plea of limitations as a meritious defense, in itself serving a public interest". Failure to state a claim, lack of subject matter jurisdiction, failure to exhaust remedies, are also meritious defense, see, e.g. *Simmons V. Ohio CivilService Emp. Assoc.*, 259 F. Supp 677,686 (E.D. Tenn. 2003).

Petitioner may defend his position on the merits without losing his rights to press on direct review the jurisdictional objection, along with objection on the merits.

see, e.g *Baldwin v. Iowa State Traveling Men's Ass.*, 283 U.S. 522, 525 (1931), addressing a collateral attack following a default judgment.

Generally, once a default judgment is entered, the allegations in the complaint together with admissible evidence submitted are usually treated as true. In the context of an ATS action, "is less reason to do so when the allegations are broad and implicate conduct and policies of others beyond defendant's control..." *Doe v. Oi*, 349 F.Supp.2d 1258, 1309 (N.D. Cal. 2004). Claims of crime against humanity fall in this category of broad allegations that require adjudication on whether the Haitian Military was engaged in plan to eliminate segments of the population. "It would entail a judicial inquiry well beyond the concrete factual allegations pertaining to the individual claims. id. see also *Doe v. Exxon Mobil Corp.*, 393 F.Supp.2d 20, 25 (D.D.C. 2005).

Nonetheless, "the tenet that a Court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions". *Ashcroft v. Iqbal*, 566 U.S. _____, 129 S.Ct. 1937, 1949 (2009).

Furthermore, Petitioner's affidavit denying factual allegations of complaint was entitled to receive intende effect as denial of claims. *First Nat. Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 280, n.17 (1968). Petitioner's motion to vacate the void judgment, challenged 1) the legal sufficieny of all plaintiffs ATS ans TVPA

claims; 2) the legal and facual sufficieny of the claims insofar as those claims seek to hold Petitioner vicariously liable for their injuries, whether they were in fact committed by members of the Haitian Armed Forces; 3) the court jurisdiction, based on *Sosa* standards.

The Second Circuit's determination regarding the pleading of exhaustion of remedies, statue of limitations and rejudicata as "merely affirmative defense" is erroneous, (Ct. App. Order at 4).

Reasons for Granting the Writ.

-I-

WHETHER AN EXHAUSTION OF REMEDIES REQUIREMENT, AN UNIVERSAL AND BINDING NORM OF CUSTOMARY INTERNATIONAL LAW IS A JURISDICTIONAL LIMITATIONS UNDER THE ALIEN TORT LAW.

The Alien Tort Statue, 28 U.S.C § 1350, often referred to as Alien Tort Claim Act ("ATCA"), was included in the Judiciary Act of 1789 and provided jurisdiction in two (2) cases during the first 191 years of its enactment. see *Adra v. Clift*, 195 F.Supp. 857 (D. Md. 1961) and *Filartiga v.Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980). The earliest case was; *Bolchos v. Darrel*, 3 F cas. 810 (D.S.C. 1795)(no. 1, 607).

Prior to the Filartiga's decision, only twenty-one cases were reported. see *Kenneth C. Randell*: "Federal Jurisdiction over International Law claims 18 N.Y.V.J. Int'l & Pol. 1 4-5 n. 15 (1989). *Filartiga's* interpertation of ATS, was ratified by congress by passing the Torture Victim Protection Act ("TVPA") Pub. L. no. 102-256, 106 Stat. 73 (1992)

(codified at 28 U.S.C. § 1350 note).

The last 30 years following the seminal case, a growing number of CIL violations have reached the U.S. Courts against, Head of States, former and active, private individuals and corpartaions. In 2004, this court comprehensiliy addressed the ATS for the first time in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Mr. Justice Souter, writing for the majority, clarified some of the most basic tenets of the jurisdictional scope of the statute. However, the ATS still pose "complex and controversial questions regarding its meaning and scope". see *Flores v. Southern Peru Corp.*, 343 F.3d 140, 152(2nd cir. 1995). Put somewhat differently, Judge Edward's words in *Tele-Oren v. Lybian Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), still reasonate:("this is an area of the law that cries for clarification by the Supreme Court".)

In the instant case, one of the controversial questions is whether an exhaustion of local remedies should be applied to the ATS, as a jurisdictional requirement, in suits alleging acts "in violation" of the Law of Nations, when the exhaustion is a well settled norm of CIL, and violation of CIL necessary implicates violation of the norms.

A. The Ninth Circuit squarely conflicts with the Second Circuit and others on this issue.

Petitioner's motion raised, inter alia, the issue of local redress respondents failed to comply to. In support of his argument Petitioner cited the Torture Victim Protection

Act which provides in relevant part.

"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 occured". TVPA subd. 2(b).

While the TVPA is not jurisdictional, it establishes an "unambiguous and modern basis for a cause of action" *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

Plaintiff must first establish jurisdiction under ATS, and must complied to the statutory provisions set forth by the TVPA: 1) violation must occured under Color of Law; 2) claims must be filed with a 10 years limitations and; 3) Plaintiff must exhaust local remedies. Only two(2) claims can be brought, as specifically defined by the statute: 1) torture; 2) extra judicial killing.

The Ninth Circuit, until the appropriate clarification and guidance from this court, in a en banc plurality decision, cautionly held that district courts must conduct a prudential exhaustion analysis in a threshold inquiry 550 F.3d 822 (9th Cir. 2008). The determination contradicting the circuit precedents, was based on 1) the extensive analysis in the dissent of Circuit Judge Bybee's in *Sarei v. Rio Tinto PLC.*, 456 F.3d 1069, 1100 (9th Cir. 2006, and 487 F.3d 1193, 1224 (9th Cir. 2007), 2) this court opinion in dicta in *Sosa* noting that the exhaustion of remedies could be a possible argument against jurisdiction in ATS". 542 U.S. at 733 n.21. The 7th Circuit has reach the same conclusion in

Enahoro V. Abubakar 408 F. 3d. 877,886 (7th Cir. 2005), holding that "it may be that a requirement for exhaustion is itself a basis principle of International Law". The court remanded the case to the lower court for an inquiry even though the claim were not brought under the TVPA.

The Second Circuit in the present case qualified Petitioner's exhaustion argument as "affirmative defense" that "does[not] injudicate the subject matter jurisdiction of the District Court", both determinations are erroneous.

1.) The defense is not waived.

Respondents attempt to avoid the application of the exhaustion of remedies on the basis it is an affirmative defense which was waived by failing to plead it as required by Fed. R. Civ. P. 8(c). "It is a rule not applied automatically and as a practical matter there are numerous exceptions to it. Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1278, at 491 (2d ed. 1990).

Rule 8(c) requires a party to affirmatively "raise the defense in a respective pleading". However, Petitioner "never filed an answer to the complaint". Petitioner's motion for relief of judgment, was filed after a default judgment was entered. See Serrano V. Torres, 764 F 2d. 47 (1st Cir. 1985). The motion under rule 60(b) requires movant to plead meritorious defenses, which include an exhaustion of remedies defense, Simmons 259 F. Supp. at 686.

The purpose of rule 8(c) requiring the defendant to plead available affirmative defenses in his answer is to

avoid surprise and undue prejudice an demonstrate why the defense should not succeed. See Blonder-Tongue Labs, Inc. V. Univ. of Ill. Found., 402 U.S. 313,350 (1971). Here Respondent can not complain of prejudice or lack of notice. Respondent have filed a comprehensive response to Petitioner motion to vacate the default judgment. Their pleadings address and refute all aspects of Petitioner's meritorious defenses, drawing upon all facts relevant to these defenses. Thus demonstrating their complete understanding of the principles of law and facts involved. Their response demonstrate that they suffered no prejudice. The Court should have considered petitioner's defense raised at the most "progmatically possible time". The purpose requiring affirmative defense was satified. See Curry V. City of Syracuse, 316 F.3d. 324,331 (2d Cir. 2003); American Fed. group, LTD. V. Rothengerg 136 F 3d. 897,910 (2d Cir. 1998); Robinson V. Johnson, 313 F. 3d. 128,135 (3d Cir. 2002); Grant V. Preferred Research, Inc., 885 F 2d. 795,797 (11th Cir. 1989); Charpentier V. Godsil, 937 F2d. 859,864 (3d. Cir. 1991).

2.)Exhaustion of Remedies is Jurisdictional under the ATS.

Courts must frequently address the issue of exhaustion of local remedies. Absent specfic guidance from this court, Court of Appeals will adopted differing legal standards. When Congress enacted the TVPA, it explicity included the exhaustion requirement. TVPA 2(b), the requirement derived from a rule of general International Law requiring that, before a claim may be asserted in an international forum, the claimant musthave exhausted remedies in the domestic legal system. See Inter Handle case (Switz V. U.S.), 1959 I.C.J. 6,27 (Mar. 21). ("Local remedies well-established rule of Customary International Law); for other collective cases, See also Ian Brownlie; principle of International Law (6th. edition); 473, ("when the act complained of is a breach both of the local law and of an International agreement, or customary International Law, the rule of the exhaustion of local remedies applies"). Robert Jennings & Arthur Watts: OPPENHEIM'S International Law (9th. edition. 1996) (2000) ("It is also applied by International Human Rights bodies when determining the admissibility of individual application").

"The rule of exhaustion is in the principles of comity". Castille v. People, 489 U.S. 346, 349 (1989). It gives a state the opportunity to prevent or correct remedy conduct that would otherwise constitute a violation of International Law.

The absence of an explicit exhaustion requirement in the

ATS, has resulted in various speculation as to the intent of congress. The en banc plurality in Sarei 550 F.3d 822, 832 (9th Cir. 2008) concluded:

> "while the TVPA is not dispositive of the question whether exhaustion is required by the ATS, the TVPA nonetheless provides a useful template to guide our adoption of an exhaustion principle for the ATS".

see also Enahoro v. Abubakar, 408 F.3d 877, 890 (7th Cir. 2005) (Cuhady, J. dissenting). ("while not directly applicable to the ATS, the TVPA scheme is surely persuasive").

Circuit Judges Bea and Callahan, seating en banc in the same case concerned but stated the application somewhat differently:

> "I would hold the ATS requires the district court to engage in a two step exhaustion analysis, rather than allow the district court to pick and choose whether claims of torts committed in foreign lands merit such an analysis"".
> 550 F.3d at 833, n. 1
>
> "the two step process by which the district court considers (1) whether [Plaintiff] had local remedies is excused because local remedies are ineffective....".
> id at 833 n.1

This court in Sosa, addressing the exhaustion requirement as "principle limiting the availability of relief in federal courts for violations of CIL. held: ("we would certainly consider this requirement in an appropriate case".) id at 733 n. 21. Petitioner in that case did not raise an exhaustion issue, precluding the court to address it properly

at that time.

Judge Jay S. Bybee is a senior fellow in Constitutional Law, at William S. Boyd school of Law, Univ. of Nevada. He carefully demonstrates in his dissent from the merits panel majority opinion, "[e]xhaustion is a well established principle of international law recognized by courts and scholars both abroad and here..." Sarei v. Rio Tinto PLC 487 F.3d 1193, 1231 (9th Cir. 2007) (Bybee, J. dissenting).

Other case precedents have reached the same conclusion. see e.g. Republic of Austria v. Altmann, 54 U.S. 677, 714 (2004), ("[a] plaintiff who chooses to litigate in this Country in disregard of post deprivation remedies in the expropriating state may have trouble showing a taking in violation of international law); In Re Sinaltrainal Litigation, 578 F.3d 1252, 1262 (11th Cir. 2009), ("a violation of the Law of Nations is broadly understood as a violation of the "norms" of Customary International Law".) (emphasis added). Thus an act committed "in violation" of the Law of Nations suggest a violation of the norms embodied in the CIL, hence, the jurisdictional requirement of exhaustion under the ATS.

The lack of legislative history for the ATS, creates a confusion which should be resolved by specific canon of construction. "construction should go in the direction of constitutional policy". U.S. v. Johnson, 323 U.S. 273, 276 (1994). Construction should also be referred to congressional policy in a specific context. see Murray v.

Schooner Charming Betsy, 2 cranch 64, 118; 2 Led. 208 (1804) ("An act of congress ought never to be construed to violate the Law of Nations if any possible construction remains",) quoted in F. Hoffmann La Roche L.T.D. v. Empagran S.A., 542 U.S. 155, 164 (2004). (This rule of constriction reflects principles of customary international law, law that (we must assume) congress ordinarily seeks to follow.")

Nevertheless, Petitioner humbly believes that the legislative history of the TVPA, is relevant to the issue at hand. Evaluating congressional intent pertaining to the TVPA, demonstrates that exhaustion is jurisdictional and applicable to the ATS, not on a prudential basis, but as a prerequisite to exercising jurisdiction See, Reporter's Transcript of July 9, 2001 Proceedings (RT) at 16:17-20:

> "The Senate when it enacted the TVPA added the specified the exhaustion requirement based on - ... based on a finding that is a general requirement of international law". id.

The TVPA hearing on H.R 1417 before the subcomm, on Human Rights and International Organizations of the Comm. of Foreign Affairs. 102 Comp. (March 23):

> "The Alien Tort Claims Act...section 1350 has other important uses.., and should not be replaced. [claims based on torture and 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 exit or may ripen in the future into rules of Customary International Law.") id at 71 (Statement of Alice Henkin)

The committee clearly recognized that the ATS contains

Rules of CIL and must abide by them. Moreover, in a statement of M. Posner:

> "In addition, the language of the act includes several limitations... for example...A court could decline "jurisdiction" if there was clear and convincing evidence that the party brining the case had not exhausted adequate and available remedies in the nation where the alleged abuse occurred," id. at 31.

The operative word is: Jurisdiction. This statement suggests that even when the TVPA is non-jurisdictional, its provisions, like the statute of limitations, implicate ATS jurisdiction. The TVPA, codified at § 1350(note), is coextensive of the ATS. Congress simply clarified the ATS application standards.

B. This action is a approfricate case to be review by this court

In Sosa, this court state that it "would consider" the exhaustion issue in an "appropriate case", 543 U.S. at 733 n.21.

The case at bar represent an appropriate case for review. Attached to Petitioner's rule 60 (b) motion is an affidavit, from a practicing Haitian lawyer, Respondents submitted to the District Court, on August 25, 2006, 3 days prior to the evidentiary hearing.

The affidavit was prepared by Mario Joseph E.S.Q. of the "Bureau Des Avocats Internationaux", who is licensed to practice in the Republic of Haiti and whose organization is also an affiliate with Respondents' counsel organization, the

center for Constitutional Rights ("CCR"). Mr. Joseph Avers his close working relationship with Haitian Judges, Prosecutors and Government Officials in providing legal representation to victims of human rights abuse, and Sundry other responsabilities related to human rights abuses in Haiti. Mr. Joseph also explain that his office has been hosting internship for American Law students. Mr. Joseph has been offering these legal service since 1996. The affidavit explains that the Haitian Constitution (987) article 27 the Haitian Penal Code, Art. 85 et. seq. 289 and the Haitian Code of Procedural of Criminal Procedure, Art.1 et. seq. (providing a civil action for those who sustain damages due to a felony...), al contain provisions for human rights violations, and that Haitian Law provides compensation for injured parties. (Aff. id. at 4, App. E.)

Nevertheless, the complaint and Respondents' expert testimony assert the opposite. Mr. Joseph affidavit belies both. The remedies need not be identical to those in the United States. Piper Aircraft Co. V. Reyno, 454 U.S. 235,254 (1980). Respondents admit in the complaint their failure to seek local redress. (App. G. at 13). It should be noted that from September 1994, the U.S. Military took control of the country and the return of democratically President J.B. Aristide in October 1994, return the country to an appropriate climate for respondents to seek remedies. Respondents could have received "substantial reparation for the harm complained", Brownlie, supra at 474. The Military

Government was ousted and on Aristide Government was reconstructed. No threats of official retaliations could have prevent Respondents from availing their claims in the Haitian Forum, and identify the real perpetrators.

Respondents affirmatively stated that they failed to exhaust. The only remaining issue for this court would be to determine if the requirement is jurisdictional and applicable as a condition under the ATS.

This Court held in Woodford V. Ngo 548 U.S. 92,128 (2006), ("remedies are described as having been "exhausted" When there are no longer available, regardless of the reason"). Here, Petitioner has properly met the burden of demonstrating the existence of local remedies in Haiti. Furthermore, as in Sarei at 831 there is no "Significant United States nexus" to prevent the application of the exhaustion rule.

II

WHETHER THE SUBJECT MATTER JURISDICTION UNDER THE ALIEN TORT STATUTE, IN SUITS AGAINST PRIVATE ACTORS, MUST BE DETAIN BY PEFERENCE TO NORMS OF INTERNATIONAL LAW AND IN STRICT CONFORMITY WITH LEGAL AND JURISDICTIONAL STANDARDS SET FORTH BY THIS COURT.

One of the main question presented by this petition is whether the Second Circuit and the District Court properly applied the pleading standards set forth by this court to determine if Respondents sufficiently pled factual allegations under the ATS.

Federal Courts have subject matter jurisdiction when; 1) an Alien sues; 2) for a tort only; 3) committed "in

violation" of the law of nation CIL). Kadic V. Karadzic, 70 F. 3d. 232,238, (2d. Cir. 1995). Thus, the third point is at issue here, because the term "in violatiom of the Law of Nations implicate the jurisdictional basis and the element of the violation; hence an element of the offense and a vital prerequisite for the court jurisdiction. The jurisdictional issue is interwined with the substantive merits. "This is the type of case where the question of jurisdiction is depented on decision of the merits". Land V. Dollar, 330 U.S. 731,735 (1987). Petitioner's rule 60(b) motion challenges also, the Trial Court jurisdiction; "the court may inquire, by affidavit or otherwise into the facts as they exist. 330 U.S. at 735. This court concluded for case involving the Law of Nations or Treaty of the United States, "we proceed to dispose of the case on the merits". O'Reilly de Camara v. Brook, 209 U.S. 45,52 (1907).

Moreover, "it is not sufficient basis for jurisdiction to plead merly a colorable violation of the Law of Nations" Kadic, at 238. Plaintiffs must plead a violation..... at the jurisdictional threshold" id. This hightened pleading requirement held also in the Second Circuit seminal case Filartiga V. Pena Irala, 630 F. 2d. 876,887 (1980), was reaffirm by this court in Sosa 542 U.S. at 727 ("...reason for a high bar to new private cause of action...")

The more searching review proposed by Filartiga for a jurisdictional inquiry must consider these essential factors: 1) indentify Petitioner's alleged conduct that violate the

CIL and; 2) that the specific conduct occured under color of Law. 3) the allegations "must be more than an unadormed, the defendant-unlawfully-harmed me" in the complaint. Ashcroft V. Iqbal, 556 U.S. (2009).

The decision by the 11th Circuit in Sinaltrainal V. Coca Cola Company, 578 F.3d. 1252 (11th Cir. 2009), demonstrates that courts will strictly apply the pleading standards set forth by this court in Ashcroft, when construing and applying the ATS.

The complaint, in this case, does not make factual allegations sufficient to give rise to a plausible inference of Petitioner's direct or undirect involvement in Respondents' injuries. The Second Circuit decision rest on a restrictive view of the scope of the ATS jurisdiction. As explain above, under the ATS provision, the jurisdictional inquiring implicate also the merits. The "Tort only" in violation of the law of nations readily suggest that the failure to state a claims (the tort only) and the subject matter jurisdiction (in violation) are indistinguishable, 28 U.S.C. § 1350. This substantive issue has also divided a Second Circuit panel in an important case involving American, Canadian and European Corporations held liable for selling goods and materials, and made loans to the Union of South Africa during the aparteid era. see, e.g., Khulumani v. Barclay Nat. Bank LTD. 504 F.3d. 254 (C. A. 2 2007).

The exchange, between Kaztman, Hall, J.J and Korman, J., as in Tele-Oren V. Lybia Arab Republic 726 F. 2d. 774,775

(D.C. Cir. 1985), pertaining to ATS and TVPA applicable standard warrant clarification and guidance from this court.

The claims are brought not against the Haitian Military, or the government, or FRAPH, rather against Petitioner in his personal capacity. The complaint hold him accountable for injuries cause by others unknown to both Petitioner and Respondents, and not before this court. The complaint must established the same nexus to succeed on the merits of their claims, then it must allege to withstand a jurisdictional attack.

Petitioner's alleged unlawful conduct alleged is based on a theory of vicarous liability underlined by conpiraccy, aiding and abetting, and command responsability all based on broad and conclusory allegations.

A. The complaint failed to state a claim.

The host of claims for relief alleged in the complaint includes: Torture, Attempted extrajudicial killing, Crime against humanity, crued on unsual punishment, and violence against Women. The District Court found Petitioner liable for, torture. attemptrd judicial-killing and Crime against humanity. This Court intrusted Federal Courts to "execise great caution" before finding that a particular set of facts violate the Law of Nation. Sosa, 542 U.S. at 728.

The Court alaeted to the danger of Judgemade law in this area, requiring Court to use "vigalant donkeeping" id. at 730.

The TVPA allows cause of actions for torture and

extrajudicial killing which are both explicitly defined by the Act. The ATS encompasses torture and summary excution, that "when not perpetrated in the course of genocide and war crimes are proscribe by International Law only when committed by state actor or under color of law ". Kadic 70 F. 3d. at 234. There is no CIL norm against "attempted" extra judicial killing under both Statute, that meet the Sosa standard. See TVPA 28 U.S.C. § 1350 (defining extra judicial killing). Respondents have provided no authority to support their claims. There is no citation, treaty, foreign law. article that would verify their assertion.

Crimes against humanity is a broader claim that includes murder, enslavement, deportation, torture etc.... committed as part of a widespread and systematic attack Flores V. Peru Copper Corp. 343 F. 3d. 140 (C. AZ. 2003). A widespread attack is conducted on a wide scale against many people while a systematic attack is an organized effort to engage in the violence. (Prosecutor V. Kordic, case. No. IT-95-14/2-A judgment, Pg. 4 App. Chamber Dec. 17, 2004). The frame work of crimes against humanity, is not viable after Sosa. Although regularly used, those claims do not have a consensus definition. They fall with the "high level of generality" referred to in Sosa.

Moreover, "those broader claims which entail finding of systematic and widespread practice greatly enlarge the scope of the factual inquiry..." Doe V. Oi 349 F. Supp. 1258, 1307-11 (N.D. Cal. 2004), "this inquiry would involved fact beyond

that to which individual plaintiffs may competently testify" id. In fact, the complaint alleged "a pattern of practice of systematic or widespread human rights violations against civilian population..") (compl at 10), but do not allege facts of specific abuses suffered by other individuals Doe V. Oi at 1310, n.39. Those allegations do not meet the plausibility standard established by this court. See Ashcroft V. Iqbal, 566 U.S. 129 S.Ct. 1937 (2009)

Respondents have not indentify the source of the allegations except that they are based on "information and belief" not personal knowledge.

The claims do not satify rule 8(a)(2). The ATS claims are one of the "context" referred in Iqbal V. Hasty, 490 F. 3d. 143,157-58 (C.A.2. 2007). where the court held that the plausibility standard; ("obliges a pleader to amplify his claim with some factual allegations in those contexts where such amplification is needed to ponder the claim plausible).

B. Petitioner's conduct does not trigger the court jurisdiction under the ATS.

Respondents failed to demonstrate clearly what conduct of Such a severe nature as to their injuries would enable the trial court to invoke this extraordinary basis of jurisdiction the ATS provides.

1.) Petitioner Conduct. Petitioner was a private actor, a political leader from August 1993 to Setember 1994, when he resigned from his position. Petitioner was never a commander, nor he worked for the military in any capacity. Respondent's allegations do not point to no fact supporting their theory,

but they allege, nonetheless, that Petitioner "simultaneously sought to create a public facade for these violent activites by openly declaring he was leading a neo-duvalierist movement under the banner of FRAPH" (compl at 13). This statement, belies the other allegations of the complaint and confirm that Petitioner was not a state actor.

Respondents never alleged that Petitioner was involved or participated directy in their injuries. They claims are based exclusively on a theory of vicarous liability which is inapplicable to Bivens, and § 1983 suits...") Ashcroft V. Iqbal 556U.S. 129 S.Ct. 1937,1948 (2009).

The conducts alleged by Respondent are: aiding and abetting, conspiring with and command Responability. Those alleged conducts must be undertaken under color of law, and all fall within the vicarous liability theory.

In Central Bank of Denver V. First Interstate Bank of Denver 511 U.S. 164,182 held: "congress has not enacted a general civil aiding and abetting statute... there is no general jurisdiction that Plaintiff may also sue aiders and abetting". The Second Circuit recognized a aiding and abetters liability under the ATS, Judge Korman however dissenting in Khulumani, supra, held the contrary see 504 F. 3d, at 328. The issue is part of the exchange between the members of the panel.

In addition, the complaint failed to specifically and clearly indentify the FRAPH subordinates, the "group" or "person" under Petitioner's control who commit acts of

violence. The complaint even fail to identify the acttakers involved in Respondents' injuries. No information is asserted on how Respondent determined that some of the men "including" members of FRAPH. Thus, no conspirary theory or scheme can be established. No written agreement was specified. "[a] parallel conduct and a bare allegation of conspiring will not suffice".

Bell Atlantic Corp. V. Twombly, 550 U.S. 544, (2007). "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts to show illegality, "id."

The command responsability allegations are equally inadmissible. Respondents, from the outset, filed their claims against Petitioner as "commander" of the Revolutionary Armed Front of the People of Haiti. (FRAPH) changing the organization denomination from Front for the Advancement and Progress of Haiti. (FRAPH also). Respondent Jane Doe, IIIprvious suit with same counsel used the, which was qualified as an uncorporated association. (se, App. H). This tactic employed by Respondents was implemented to create Petitioner's image as a "commander" of an alleged paramilitary group, hence, establishing an alleged commander responsability and state action. The misnomer is addressed below.

However, Respondents alleged no acts or omissions on the part of Petitioner which evidence his deliberate indifference to their injuries, which could have established his

knowledge. See Estelle V. Gamble, 429 U.S. 97,106 (1976).

This court must review this case to set forth the appropriate pleading standards under the ATS 28 U.S.C. § 1350.

C.) Complaint failed to link Petitioner to state aid or the conduct of the state officials.

The general allegations describe alleged FRAPH activities but failed to explain and demonstrate Petitioner, even remote responsibility to Respondents injuries, as to find the jurisdictional prerequisite of state action. The Second Circuit must apply the proper pleading set forth by this court.

According to the panel these allegations of the complaint were sufficient to find state action: "Constant founded [FRAPH] in 1993, and worked in concert with the Haitian Military to terrorize the civilian population. Plaintiffs further alleged that FRAPH members received weapon, training, and financial support from the Haitian Military, and that at the time plaintiff were victimized by FRAPH troops, Constant exercised command and control over FRAPH forces, which operated as an extension of the Haitian armed force and under the auspices of haitian political police, the latter of which reported directly to the commander of Haitian armed forces.

The Supreme Court has articulated for tests to determine whether private coduct constitutes action: (1) "The Proximate cause" or nexus test; (2) The joint action test; (3) The symbiotic relationship test and; (The public functions test.

Brentwood Academy v. Tennessee Secondary School Athletic Assoc. 531 U.S. 288, 296 (2001). See also Lugar v. Edmonson OIl Co. 457 U.S. 922, 939 (1982) The "Public Function" test has no bearing between the Petitioner and the military and does not apply to the instant case. The Complaint fails to allege clearly and specifically the existence of a mutual benefit for the application of th esymbiotic relationship. Plaintiffs' assertions are to conslusory, and to vague to satisy the remaining of their tests as to properly ascribe a state action and the factual participation of Petitioner Constant, in their injuries. Burton v. Wilmington Parking Authority 365 U.S. 715, 860. The Supreme Court ruled that: "Only by supporting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance". id. Plaintiffs allegations are wholly conclusory and lack the underlying facts on which their inferences are based and lack supporting evidence

Respondent failure to properly identify the toxtfeasors in the complaint and in their testimony, is fatal for the state action jurisdictional requirement. The identification issue is essential for both the joint action test, proximate cause test to be satisfied.

The complaint in the relevant parts makee the following allegations: (1) "approximatively seven men, including members of FRAPH...the men all wore masks that cover their faces. Some of the men wore olive green uniform, the color

of uniform worn by the haitian armed forces, with large black boots". (compl at 20, 22) (2) several men, including members of FRAPH, come to the door...they all wore masks and carried arms" (compl at 28). No underlying facts or detail information are provided to explain how plaintiffs knew those men were FRAPH members, or even military.

In Chavez v. Carranza 413 F.Supp.2d 891, 900(W.D. Tenn. 2005) the court confronted a similar situation and concluded that "..in order to find the requisite state involvement in Chavez's claims, the Court would have to infer that from the fact the government's sponsored death squad operated in El Salvador during this period that the men who killed Chavez's parents must have been members of the death squad. The court granted defendant's motion to dismiss torture claim under the ATCA and TVPA. It had no jurisdiction over the claim.

In Chavez, like here, plaintiffs Chavez alleged, that group of men, members of a "death squad" working in conjunction with the government to carry out attacks on civilians, citing also the "Truth Commission Report" which states that Salvadorian armed forces "operated on the death squad model ...usually, and driving unmarked vehicules. Chavez saw one morning "in the corridor of the house a man dressed in "civilian clothes", "wearing mask" and carrying a riffle.." id at 895.

Same in the present case, Respondent at the evidentiary hearing stated on direct testimony that they could not identify the men. The witnesses made no reference pertaining

to uniforms or FRAPH members.id The Court, sua sponte, made the assumption that the men present were member of the organization. (Court finding at. 5 note 2), with no underlying facts to support this inference. Aldana v. Delmonte Fresh Produce 416 F.3d 1242, 1248 (11th Cir. 2005), ("..[the] [Court] is not required to draw plaintiff's inference".) Accord Iqbal supra at 1951 "stating concludory allegation are not entitled to be assumed true".

The connection is necessary to prove that petitioner himself as a private party or through his agents was the proximate cause of Respondents, injuries. "Faithful adherence to the state action requirement...requires careful attention to the Gravam of the plaintiffs complaint". American MFRS. MUT. Ins. Co. v. Sullivan 526 U.S. 40, 51 (1999) citing Blum v. Yaretsky 457 U.S. 991, 1003 (1982).

Here it is not clear from the complaint allegations that their injuries were provoked by (1) the military with the alleged assistance of unidentified masked men assumed to be members of FRAPH; or (2) alleged members of FRAPH with the "mantle of authority" of the military (state) or: (3) only alleged members of FRAPH. "Proximate cause...behavior must be sufficienty close to injury...sufficienty important in producing it...". Sosa v. Alvarez-Machain 542 U.S. 692, 693 (2004).

"In order to establish proximate cause, a plaintiff "must prove" that the private individual[] exercised control over the government official's decision to commit the section

1983 violation". (emphasis added) Brower v. Inyo County 817 F.2d 540, 547 (9th Cir. 1987) accord Arnold v. International Bus. Machines 637 F.2d 1350, 1356 (9th Cir. 1981). The complaint only states that Petitioner Constant exercised command and control over FRAPH subordinates and others, but is silent about the control or command for the specific incidents giving rise to this action, and to who are the others. Petitioner including their injuries could point to any facts that tend to indicate that Constant directed private or military violations against them, specifically. Plaintiffs' expert admitted in his testimony that he did not know of Constant direct knowledge of Jane Does, I, II, III incidents. (Damage Hearing)

The allegations are "diffuse and expansive....insufficient, unless amplified by specific instances of misconduct", Dwares v. City of New York 985 F.2d 94, 100 (2nd Cir. 1993). And do not comply with the Iqbal court or Tombly standards.

"In a typical case raising state action issue, a private party has taken the decisive step that caused harm to the plaintiff, and the question is whether the State was sufficiently involved, to treat that decisive conduct as state action". National Collegiate Athletic Ass'n v. Tarkanian 488 U.S. 179, 191 (1988).

III

WHETHER COUNSEL GROSS NEGLIGENCE LEAVING AN INCARCERATED LITIGANT UNREPRESENTED CONSTITUTES EXTRAORDINARY CIRCUMSTANCES FOR PURPOSES OF FRAPH 60(b) (6)

When deciding whether to set aside an entry of delault judgment, the district court must consider: 1) if the default was willful; 2) if the movant has prima facie meritorious defense; 3) Prejudice to the orhter party. Here, the default is attaibuable to counsel gross negligence. Petitioner was Misled by his counsel who, in fact left him unrepresented fore than 2 years. A little more than a month after his arrest petitioner was found in default. The district court also construed the motion under F.R.C.P. 60 (b)(b).

A. The decison below conflicts with this court decison in Klapprott v. United States 335 U.S. 601.

Petitioner is a layman, therefore he has the right to a counsel, Link V. Wabash Rail Company, 370 U.S. 626, 647 ((1962) (Mr. Justice Black dissenting). Petitioner should not be penalized for counsel "neglect so gross that it is inexcusable". Community Dental Services v. Tani 283 F.3d 1164, 1168 (4th Cir. 2002) (Collective cases).

In Klapprott this court confronted almost the same situation presented here, where petitioner was incarcerated when he was served with the default entry. "Without lawyer in his denaturalizaion proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges, he wa no more able to defend himself in New Jersey court than he would have been had he never received notice of charges." id at 613-614.

Contrary to the second circuit determination on this issue, the question is whether counsel behavior affected

petitioner ability to appeal the default entry within the prescribed statutory time limit, and force him to file a 60(b) motion. Petitioner was incarcerated and "protecting" himself against charges for two indictments in two counties. However, petitioner demonstrated by the numerous pleadings and submissions to the court afterward, that "he was not willing to forfeit his Rights". see Enron Oil v. Djakuhara 10 F.3d 90, 98 (2d Cir 1993. Here petitioner's criminal charges affect his immigration status and, if resulting in deportation to Haiti where for obvious reasons the prospect can be disastrous and fatal.

Most Circuits distinguish willfulness in a context of a judgment by default which requires something more than negligence and egregious or deliberate conduct" New York V. Green, 420 F. 3d 99,108 (2d Cir. 2005), See also community dental service at 1168.

Thus this case, like Klaprott V. U.S. should have been decided on the same principles.

IV

WHETHER DEFAULT JUDGMENT NOT ENTERED IN COMPLIANCE WITH F.RA.P.H. RULE 55 VIOLATES DUE PROCESS AND RENDERS THE JUDGMENT VOID.

The decision below affirmed the District Court entry of default judgment, when not in compliance with F.R.C.P. rule 55. The District Court entered a default judgment against Petitioner on August 16 2006, and held an evidentiary hearing on August 29 2006, to determine the amount of damages. Respondents never suggested or submitted an amount to the

court pertaining to damages sought. The case docket shows that prior to the entry of default by the Court, Respondents only submitted resumes from their expert witnesses.

A. The cases is properly before this Court for review. Second Circuit held that it would not consider "on issue raised for the first time on appeal" (order at 3). However, the court concluded that "the arguments are unavailing, Constant fails to present anything but conclusory allegations is support of his due process claim". id. at (3, n.1). Thus the court did comment on the issue which makes it properly reviewable by this court. "The District Court heard the case the merits. The court appeala in its turn specifically refferred to.... "we thus satified that the case is properly before U.S. Stevens V. Dept of Treasury 500 U.S. 1,8

Courts of Appeals are not limited to issue raised in a tribunal of first instance, they have a fair amount of discretion to determine what question to consider and resolve for the first time on appeal. See, Hormel V. Helvering, 312 U.S. 552,555-59 (1941). The discretion generally has been exercised in exceptional circumstances, such as here. "..recurring question of Federal Law" e.g. City of Newport V. Fact Concerts, Inc. 453 U.S. 247,255-57.

B. Entry of Default must comply with F.R.C.P. rule 55(b)(2)

In its pertinent part rule 55 provides that for a court to enter or effectiuate judgment, it needs to: (A) Conduct am Accounting; (B) Determine the amount of damages; (C) Established the truth of any allegations by evidence or; (D)

Investigate any other matter. F.R.C.P. 55 (2007) Mwani V. Bin Laden, 244 F.R.D. 20,33 (D.C. Cir. 2007)

In the alternative, the court which is not required to hold a hearing, may rely on detailed affidavit, or documentary evidence to evalute the sum. The records affirmatively shows that no sum was proposed by Respondent prior to the entry. The court awarded a $ 19 Million sum on October 24, 2006. See Grace V. Bank Leumi Trust Co. of N.Y., 443 F.3d. 180,191 (2d. Cir. 2006).

A procedural due process violation is a substantive law issue and must be addressed by this court in the interest of justice and proper justice adminstruction. This court explained some of the significent values underlying procedural due process in Marshall V. Jerrico, Inc. 446 U.S. 238 (1980). In Joint Anti- Jeseist Refugee Committee V. McGrath, Justice Brenman suggested; "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss" 341 U.S. 123,168 (1951) (Franfurter J. concurring).

V

WHETHER FAILURE TO COMPLY TO THE STATUTORY LIMITATIONS PROVIDED BY THE TVPA, DEFEAT THE CLAIM.

In the decision below the court held that the statute of limitations presented by Petitioner is a non-jurisdictional affirmative defense, and decline to review it. (order at 4).

The TVPA provides: "No action shall be maintained under this section unless it commenced within ten years after the cause of action arose". (TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1992) 28 U.S.C. § 1350 (note). The same statute of limitations applies to the ATS. See Papa V. U.S. 281 F. 3d. 1004,1012-13 (9th Cir. 2002).

A. The statute of limitations in a condition precedent and can not be waived.

Generally, statute of limitations must be affirmatively pled. However, under the TVPA this rule does not apply "where statute creating liability sets time within which action may be brought to enforce it... bringing of suit within such time is indispensable prerequisite to maintenance thereof and defense of statute of limitations need not to be raised by answer."

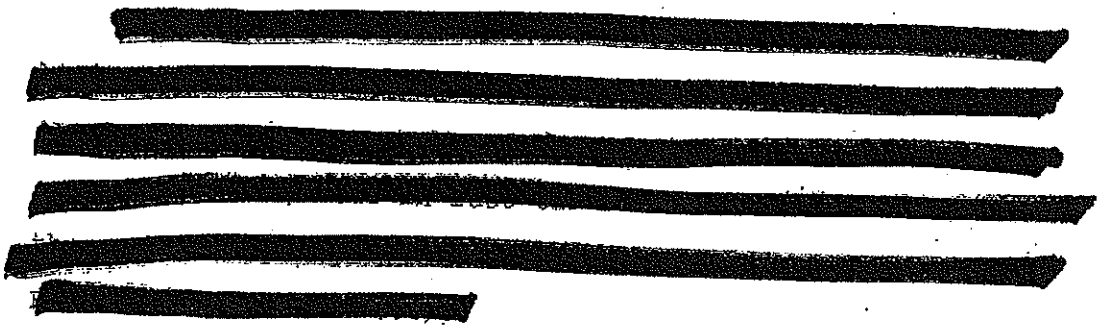
Berry V. Heller 79 F. Supp 476 (E.D. Pa. 1948); Magnotta V Leonard, 102 F. Supp. 593 (D.C. Pa. 1952). Here the ten years limitations is explicitly incorporated in the statute. The provision is a condition precedent, ordinarily, a time limitation is deemed a condition precedent if it is fixed in the statute that create the cause of action". Fishman V. Delta Airlines Inc 132 F.3d. 138,143 (2d. Cir.1998). The statute of limitation is a meritorious defense, see United States V. Kubrick 444 U.S. 111,117 (1979). Therefore, the defense is not waived and the plea not baned.

Moreover, no prejuctice resulted from the limitation pleading. Respondent were given the opportunity to adressed the issue on their opposition memoranda to Petitioner's

motion. § C.J.S. (limitations of actions § 349 Pg. 469-70.

B. The claims are defeated by the limitations provision of the TVPA.

Even when non-jurisdictional, the limitations provisions of the TVPA defeats Respondents' claims under the Act. Respondent are not entitled to equitable tolling when they fail to diligently exercise their rights. Petitioner's absence from the jurisdiction does not constitute extraordinary circumstance. Arce V. Garcia 400 F.3d. 1340,1351 (11th Cir. 2005). Petitioner was amenable at all time by mail, private delivery Research System Corp. V. Ipsos Publicite, 276 F.3d. 914,925 (7th Cir. 2002). Finally, service could have been effected on Petitioner's agent in New York, as Respondents' counsel had done in Belance V. FRAPN 94-cv-02619-(EHN) in July 1994. "The person in charge of the activities in the state, which are basis for the conclusion that defendant is present in the managing agent for purposes of service Grammenos V. Lemos 457 F. 2d 1067,1072 (2d Cir. 1972).



"Procedural requirement established by congress for gaining access to the Federal Courts are not to be disregarded out of a vague sympathy for particular

litigants'". Baldwin County Welcome Centa V. Brown 466 U.S. 147,151 (1984). This court should review this issue to set forth the standard for the application of the procedural provisions of the Act.

Conclusion

If, as Petitioner believes, there is a basis for the application of the exhaustion of remedies to the Alien Tort Statute, as this court suggestd, and if the complaint pleading standards also established by this court must be applied in CIL violation cases, the decision below squarly collides with this court precedents. Therefore, review should be granted, with summary reversal an appropriate disposition.

If, on the other hand, there might be basis for other considerations on all the issues raised in this writ, certiorari should be granted for plenary review on all these Important question.

Respectfully Submitted

Emmanuel Constant

Petitioner Pro-Se

May 21, 2010