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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANE DOE, 1, et al.,

Plaintiffs,

v.

04 Civ. 10108 (SHS)

EMMANUEL CONSTANT, a/k/a "Toto
Constant,"

Defendant.

-----x

December 21, 2005

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

SONNENSCHNEIN, NATH & ROSENTHAL, L.L.P.

Attorneys for Plaintiffs

BY: IVOR SAMSON
MONICA PA

CENTER FOR CONSTITUTIONAL RIGHTS

Attorneys for Plaintiffs

BY: JENNIE GREEN

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1 (Case called)

2 THE DEPUTY CLERK: Please, make your appearances for
3 the record.

4 MR. SAMSON: Good morning, your Honor. Ivor Samson,
5 Sonnenschein, Nath & Rosenthal, representing plaintiffs Doe 1
6 and 2. And also with me is Monica Pa from Sonnenschein, Nath &
7 Rosenthal, representing the same parties.

8 THE COURT: Good morning.

9 MS. PA: Good morning.

10 MS. GREEN: Jennifer Green representing Jane Does 1, 2
11 and 3. And for the record, we will be filing a notice of
12 withdrawal for Jane Doe 3.

13 THE COURT: A notice of withdrawal?

14 MS. GREEN: Yes.

15 THE COURT: All right. And there has been no answer?

16 MS. GREEN: That's correct.

17 THE COURT: So I think you can do that.

18 Do you have it now?

19 MS. GREEN: We will be filing it probably within the
20 next few days. We need to get the necessary paperwork back
21 from her.

22 THE COURT: So then this action, I will sign off on
23 that because I have to, even though I assume it is done under
24 41A.

25 MS. GREEN: Correct.

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1 THE COURT: So get that within the week, if you can.
2 So, we will then proceed on the basis of 1 and 2.
3 Please, be seated. I have a number of questions. I'm sorry, I
4 should let you tell me whatever you want to tell me first and
5 then I will ask my questions.

6 Go ahead, sir.

7 MR. SAMSON: Thank you, your Honor.

8 We are here on the motion, request to enter a motion
9 for default against the defendant Mr. Constant. He was
10 personally served in January of this year on January 14th,
11 2005. Proof of service was filed with the Court on January 26,
12 2005. There has been no answer or any attack on the complaint
13 filed by Mr. Constant.

14 On November 30, 2005, we filed a motion for judgment
15 by default. A clerk's certificate of default was entered on
16 December 1. There was an amended notice of a motion for
17 judgment by default which included the clerk's certificate
18 filed on December 7th, and then this hearing was set for today,
19 December 21st.

20 We are also requesting, your Honor, that the Court,
21 after default is entered, I hope, will set an evidentiary
22 hearing on the issue of damages, and we are requesting three
23 days of the Court's time for the evidentiary hearing, and
24 further requesting, just based on trial schedule, that the
25 Court not set that hearing before, probably the last two weeks

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1 of May.

2 I have a trial in California that's going to go six to
3 eight weeks beginning on March 10th, so I would prefer it after
4 May 15th, if possible.

5 THE COURT: How do you know -- I don't see it in front
6 of me at the moment, but I remember reading the affidavit of
7 service. Apparently the defendant was served outside of 26
8 Federal Plaza here. How do you know that it was the defendant?
9 Do you have that affidavit of service?

10 MR. SAMSON: We have the affidavit from the process
11 server. How that individual in fact knew it was Mr. Constant I
12 can only speculate. Mr. Constant has appeared in the media, he
13 has a fairly distinctive physical appearance. He is a large
14 man. And I would be speculating further, your Honor, but I'm
15 presuming that the process server had seen photographs or
16 pictures of Mr. Constant and knew him by sight to serve him.

17 THE COURT: Do you happen to have that affidavit of
18 service? I just can't find it in this pile.

19 MR. SAMSON: I have a copy of the return of service
20 here with me.

21 THE COURT: Yes, that's fine. Just hand it up. I
22 will give it back to you.

23 He doesn't have his description or anything like that.
24 I take it somebody knew that the defendant was going to be
25 appearing at 26 Federal Plaza on that day?

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1 MR. SAMSON: Your Honor, my understanding is that an
2 investigator was retained -- and I will defer to Ms. Green, she
3 may have further information on this. The defendant was
4 reporting on a periodic basis, I think weekly to immigration
5 authorities at that building. They knew the time that he was
6 supposed to come and, essentially, they were waiting for him.

7 THE COURT: Is that true?

8 MS. GREEN: Yes, that is my understanding, your Honor.

9 THE COURT: All right.

10 MS. GREEN: It is also my understanding that when
11 Mr. Constant was served, he was greeted by name and he did
12 confirm that he was in fact Mr. Constant.

13 THE COURT: By the investigator?

14 MS. GREEN: Yes, the person who served; yes.

15 THE COURT: Submit to me an affidavit of this person
16 that would be the investigator. Because on this return of
17 service I want additional information, in other words, how he
18 knew that the person he served was the defendant, if he had a
19 picture that he was using he should attach a copy of it; if he
20 greeted him by name and he responded or acknowledged that he
21 was Mr. Constant, I want that down. If it has, at this point,
22 a description of him physically, I would want that.

23 Whatever he can do to give me some degree of comfort
24 that the defendant is knowingly defaulting before I enter a
25 default judgment. All right? Do that within the next two

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1 weeks. The investigator may be on vacation. I'm going to hand
2 proof of service back.

3 That's point one.

4 MR. SAMSON: Thank you.

5 THE COURT: And, based on these papers, I take it that
6 you have served him by mail at his home, is that correct?

7 MR. SAMSON: That is correct, your Honor.

8 THE COURT: How do you know that that is his home?

9 MR. SAMSON: Your Honor, we know that he has received
10 mail at that address. That address appears on several public
11 records. For example, his social security is listed at that
12 address. That is the address of his mother and his aunt. And
13 apparently it's a matter of general public knowledge that he
14 lives with his mother.

15 We understand, through an investigator, that the
16 mailman, the postal clerk delivers mail to Mr. Constant at that
17 address.

18 THE COURT: Well, get me an affidavit setting forth
19 whatever you can that tells me that that's his address, all
20 right? You don't -- you don't have to give me an affidavit of
21 the postman, my guess is you wouldn't be able to get that, but
22 of whoever says that he knows that the post office delivers
23 mail there and all the other things that you have told me
24 about.

25 MR. SAMSON: Yes.

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1 THE COURT: The social security records, or whatever
2 it is, why you think that's his address because I also want
3 some degree of comfort that he received notice of this default
4 motion. So, be beyond the simple fact that it was mailed to an
5 address.

6 MR. SAMSON: Fair enough.

7 THE COURT: Do that within two weeks.

8 I have some preliminary questions but let me go to the
9 end questions first. What do you foresee occurring at this
10 default hearing? And why can't it be done or even shouldn't it
11 be done on the basis of affidavits?

12 MR. SAMSON: If I may, your Honor, let me address the
13 last question first, why it shouldn't be done on the basis of
14 affidavit.

15 First, it could be done on the basis of affidavits but
16 it should not be. Our plaintiffs have suffered grievously.
17 This is something that falls in the category of crimes against
18 humanity. And the purpose of this lawsuit, in addition to
19 bringing just individual justice on behalf of these two women,
20 is to shine the public light, if you will, on these political
21 crimes that have occurred. And that can best happen if the
22 victims have a chance to tell their story in court.

23 Secondly, your Honor, for these individuals, the
24 lawsuit itself it is not just about money, it is about them
25 individually seeking justice. I don't know how else to say it.

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1 But, it will have a cathartic effect for them if
2 someone in a position of authority in the United States is able
3 to hear what has happened to them and say that it is wrong. It
4 will be incredibly meaningful to them as well as to the Haitian
5 refugee community in the United States.

6 And so, for those two reasons alone, we would
7 respectfully like to have an evidentiary hearing rather than
8 the Court merely ruling on affidavits.

9 I hope that answers at least the last question.

10 With respect to how I would envision that the hearing
11 would occur, your Honor you would you like me to address that?

12 THE COURT: Yes; what you intended to do on that
13 hearing, because you have asked for three days, it is a little
14 unusual. I am concerned about having a hearing that -- in the
15 guise of an inquest on damages subsequent to a default, that's
16 fairly straightforward, but I'm concerned about such a
17 straightforward proceeding being used for other purposes. And
18 part of my concern will be alleviated on the basis of those
19 affidavits if I have a better sense that Mr. Constant indeed
20 has knowingly defaulted. That's part of the concern.

21 Then there is still some residual concern as to
22 whether it is an appropriate use of the Court system.

23 Go ahead.

24 MR. SAMSON: Your Honor, the hearing is simply to
25 focus on the damage. We anticipate that there will be four

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1 experts, a social historian, a psychologist, a forensic
2 physician, and there is a possibility of an economist.

3 THE COURT: Social historian, psychologist?

4 MR. SAMSON: And a physician.

5 THE COURT: Physician, and?

6 MR. SAMSON: And possibly an economist, that's still
7 being determined; in addition to the two plaintiffs themselves.

8 And I should also mention, your Honor, that neither
9 plaintiff is fluent in English, we have arranged for a Creole
10 to English certified interpreter.

11 THE COURT: That's fine.

12 MR. SAMSON: That that in itself is going to make the
13 proceeding a little bit longer than it might otherwise. But,
14 as the Court is aware, under the statutes as pled, punitive
15 damages are possible. In order to be able to assess the amount
16 of damages, first direct compensatory damages for the two
17 plaintiffs, the Court has to understand a little bit about
18 their lives and the impact of the crimes that have been alleged
19 on their lives.

20 Secondly, in order to make an assessment --

21 THE COURT: And therefore, what? That's why you are
22 having the plaintiffs testify?

23 MR. SAMSON: That's why we are having the plaintiffs
24 testify, why we are having the social -- pardon me, the
25 psychologist testify, as to talk about the impairment of their

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1 lives and essentially the impact on their lives.

2 THE COURT: This is somebody who has interviewed the
3 two plaintiffs and would, as a psychologist, talk about the
4 continuing damage due to the alleged crimes against them?

5 MR. SAMSON: Yes.

6 THE COURT: All right.

7 MR. SAMSON: The ongoing trauma, if you will.

8 The physician is necessary to talk about the physical
9 nature of the acts that occurred.

10 THE COURT: This is somebody who has examined the two
11 plaintiffs then?

12 MR. SAMSON: Particularly number 1, Doe number 1, who
13 was stabbed under the charge of attempted killing; and then the
14 economist -- and I say possibly an economist, your Honor,
15 that's still being worked out -- to attempt a method of
16 quantifying what the compensatory economic damages should be
17 for these women.

18 THE COURT: You mean the standard economic analysis of
19 what their earning power would have been and what it is now?
20 That sort of thing?

21 MR. SAMSON: To some degree. These are both women of
22 limited means with somewhat limited economic potential, so
23 we're trying to figure out how to best address that.

24 THE COURT: All right.

25 MR. SAMSON: And that hasn't been determined right

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1 now.

2 THE COURT: What about the social historian?

3 MR. SAMSON: The social historian, he may consider
4 himself a political scientist. I'm using the term social
5 historian.

6 THE COURT: One of my questions was going to be what
7 is a social historian, but go ahead.

8 MR. SAMSON: Basically to talk about the command and
9 control structure of what is known as FRAPH, F-R-A-P-H, the
10 paramilitary organization headed by Mr. Constant, and to be
11 able to describe the role of institutionalized violence as an
12 integral part of FRAPH's policy in order to understand, I guess
13 I would say the truly heinous nature of the crimes committed by
14 Mr. Constant, his responsibility for those crimes as it goes to
15 potential punitive damages.

16 THE COURT: All right.

17 Another of my concerns is if I don't have subject
18 matter jurisdiction I, theoretically, should not be entering a
19 default judgment because I can't do anything without subject
20 matter jurisdiction. And, unfortunately, when I only have one
21 side here it is hard for me to get a good handle on subject
22 matter jurisdiction.

23 I think your subject matter jurisdiction claims are
24 clearer or cleaner under your Tortured Victims' Protection Act
25 claims which are 1 and 2. They're a little less clear under

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1 claims 3, 4 and 5.

2 I think I would like some briefing from you on why I
3 have subject matter jurisdiction. Now, you should do all five
4 counts, as I say, just in analyzing it. I think the Tortured
5 Victims' Protection Act takes care of 1 and 2 but, nonetheless,
6 I want a submission from you on that.

7 MR. SAMSON: May we have 30 days?

8 THE COURT: Whatever time you want, yes. That's all
9 right. 30 days is fine.

10 MR. SAMSON: Thank you.

11 THE COURT: But, in terms of 3, 4 and 5. You just may
12 be making it more difficult on yourselves, and I'm not urging
13 this on you but I'm suggesting it, if you withdraw claims 3, 4
14 and 5, then I'm less concerned about subject matter
15 jurisdiction. I don't know if there is anything in particular
16 you gain -- I can't specifically tell you that 28 U.S.C. 1350
17 permits punitive damages but, if it does, then you have got
18 your punitive damages and your ability to obtain punitive
19 damages under 1 and 2, and it just may make it a more
20 straightforward litigation if I don't have that concern about
21 the impact of Alvarez-Machain which I think, at least insofar
22 as your Law of Nations claims are concerned, that is, Counts,
23 3, 4 and 5 and the impact on alien tort statute or the
24 relevance of the alien tort statutes.

25 So, do you want to respond to that suggestion?

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1 Anyone?

2 MS. GREEN: Yes, your Honor, if I may.

3 The claims 3, 4 and 5 are claims which we believe do
4 meet the Sosa v. Alvarez-Machain task. They are claims which
5 are specific, obligatory and universally condemned. The
6 violence against women claim, that is important because we
7 believe that specifies the hate crime nature. And the specific
8 gender-based violence has been recognized internationally and
9 that it is universally condemned.

10 In terms of the cruel and inhuman degrading treatment
11 and crimes against humanity, pattern of rape against women in
12 Haiti has been recognized by the Inter-American Commission on
13 Human Rights as a crime against humanity, so we do think that
14 there is a very strong legal basis for recognizing that as
15 well.

16 So, we are prepared to brief it more fully and lay out
17 the authority which supports it.

18 THE COURT: All right. Well then do it on all five
19 counts. And try to be as straightforward as you can be,
20 especially because I don't have anybody on the other side.

21 MS. GREEN: Okay.

22 THE COURT: So, to the extent that there are issues in
23 your analysis --

24 MS. GREEN: Lay them out.

25 THE COURT: Right, exactly. Be forthcoming, lay them

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1 out. It will make it easier on me and it will make you more
2 credible.

3 To the extent there are no issues, well then say it as
4 well. But Alvarez-Machain is not as transparent as one would
5 hope. All right?

6 MS. GREEN: Okay.

7 THE COURT: Now, there is another issue, and
8 Mr. Samson averted to it by talking about a political crime. I
9 think I have to be concerned about whether this is something
10 that I need to defer to the political branches on.

11 Has the United States been made aware of this action
12 and have they taken any position on it? Is there any
13 involvement of the State Department here? Because I think any
14 default judgment would, from your standpoint, would possibly
15 stand up better if we know what the view of the United States
16 is. Or, put another way, if the State Department has been
17 made -- I think it would be the State Department as opposed to
18 the Justice Department -- that somebody in the other branch is
19 made aware of this action and given the opportunity to indicate
20 whether they think there is an impact on the foreign policy of
21 the United States. I think that's fairly traditional here.

22 So, I guess the narrow question is, does somebody in
23 the political branch, specifically the executive branch, know
24 of the existence of this suit? Have they been given an
25 opportunity to tell me whether or not there is any impact on

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1 the foreign policy of the United States of a judgment here?

2 MR. SAMSON: If I can answer that at two levels, your
3 Honor? One, there has been no formal transmission of the
4 lawsuit or the complaint to any U.S. government agency that I
5 am aware.

6 At another level, I am aware that the Department of
7 Homeland Security is aware of the litigation and it has been
8 discussed between our co-counsel at the Center for Justice and
9 Accountability, and members of the Department of Homeland
10 Security staff.

11 THE COURT: But is that the first organization? I
12 thought you were dealing with the Center for Constitutional
13 Rights. What's the one you just mentioned?

14 MR. SAMSON: I'm sorry, your Honor?

15 THE COURT: The -- you said your co-counsel, I thought
16 that it was the Center for Constitutional Rights.

17 MR. SAMSON: It is. I'm sorry if I misspoke. The CJA
18 in San Francisco.

19 There is two public organizations, if we may, here.
20 There is the Center for Constitutional Rights with which
21 Ms. Green is affiliated, and then there is an organization in
22 San Francisco that appears on the pleadings, the Center for
23 Justice and Accountability.

24 THE COURT: All right.

25 MR. SAMSON: And, they are also listed as co-counsel

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1 on this matter.

2 Personnel from the Center for Justice and
3 Accountability in San Francisco have been in contact with staff
4 at the Department of Homeland Security and made them aware of
5 the lawsuit. I have not heard anything in terms of feedback
6 one way or the other.

7 THE COURT: Well, I may be creating my own problems,
8 but I think we are best off if the State Department is made
9 aware of the litigation and has an opportunity to inform me if
10 they believe there is any impact on the foreign policy of the
11 United States due to this litigation.

12 MS. GREEN: If I may, your Honor?

13 THE COURT: Yes.

14 MS. GREEN: One additional point, which is there is
15 some case law which has come up in other cases stating that
16 where the U.S. government has been made aware of a case and has
17 chosen not to intervene, that it might be improper for a Court
18 to basically force its hand. And I could get that authority
19 too.

20 THE COURT: I don't want to -- I'm not going to tell
21 them or I'm not going to have you tell them that I want a
22 response. It's simply an opportunity. Do you see what I mean?
23 Giving them an opportunity.

24 But, if you want me to hold off on that --

25 MS. GREEN: If we could get you that authority?

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1 THE COURT: If you have a cite now we can do it
2 ourselves.

3 MS. GREEN: I don't have it with me but I would be
4 happy to. In letter form?

5 THE COURT: Yes, of course.

6 What I am suggesting now is that there simply be a
7 letter from the plaintiffs here to the State Department
8 indicating that this litigation exists, attaching the
9 complaint, that there has been a default and making them aware
10 of it in case they want to -- in case there is any perceived
11 impact on the foreign policy of the United States.

12 The Court is not asking for a response from the State
13 Department because I don't think that's what the case law
14 requires. I think the case law does require the government to
15 be aware of -- so, that is my suggestion. I'm not directing
16 you to do it until I see whatever it is that you want to give
17 me and then I will get something back to you.

18 MS. GREEN: Great. Thank you.

19 MR. SAMSON: Okay.

20 THE COURT: But, Mr. Samson, how do you respond to
21 your reference to political crime that certainly suggests that
22 it really may be a foreign policy issue? That's something for
23 the political branches?

24 MR. SAMSON: When I say political --

25 THE COURT: It is not that you fell into a trap. I

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1 was thinking about this issue, you just used the phrase, so go
2 ahead.

3 MR. SAMSON: We are before this Court seeking justice
4 for individual plaintiffs for wrongful acts that were committed
5 abroad for which redress is allowed under the laws of the
6 United States. The purpose of this case and the purpose of
7 this hearing is simply for that. I'm not here to make a
8 political show trial.

9 I don't know how else to respond to the Court.

10 THE COURT: Okay.

11 So now, how are we leaving it? You are going to get
12 me briefing on why I should have comfort that I in fact have
13 subject matter jurisdiction over all five counts, that's one
14 thing; you are going to get me affidavits of the process server
15 that will make me feel comfortable that it was in fact
16 Mr. Constant who was served; and I'm going to have affidavit as
17 to why you believe that the address to where you mailed the
18 notice of this motion for default to, to actually be his home
19 address. And you are going to send me something within the
20 next couple of weeks as to why, if you think it is true, I
21 should not have you notify the State Department -- because I
22 think that's what you are suggesting.

23 Is that correct?

24 MS. GREEN: Correct, your Honor.

25 THE COURT: Okay.

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1 MR. SAMSON: And, your Honor, if you believe, after
2 you read Ms. Green's letter that the State Department should
3 still be notified, will you send us something to that effect?

4 THE COURT: Yes, sir. I will.

5 MS. GREEN: Your Honor, one more thing in terms of
6 scheduling.

7 THE COURT: Or if I think it is the Court that should
8 do that then I will send it and I will copy you, of course.
9 And copy the defendant as well.

10 I'm sorry, ma'am. Go ahead.

11 MS. GREEN: In terms of subject matter, the briefing
12 on subject matter jurisdiction, may we have until the end of
13 January for that?

14 THE COURT: Yes. If you don't want this hearing to go
15 forth for a while, of course. Okay?

16 Now, you wanted the hearing in May?

17 MR. SAMSON: Your Honor, if it is more convenient for
18 the Court it could be in early June too.

19 THE COURT: What about April?

20 MR. SAMSON: Your Honor, I may not be done with my
21 trial. My trial starts March 10th. It's set to go for six to
22 10 weeks -- pardon me, six to eight weeks. I am just afraid
23 that April is going to be pretty blown.

24 THE COURT: The problem is I have a several month
25 criminal trial that is probably about two months starting on

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1 May 1.

2 Let's set this down for May 29, 30 and 31. But, by
3 the beginning of May we will see where we stand on that other
4 trial, all right? In other words, when you get to the point
5 where you have to start making arrangements with all of your
6 people, notify me and I will let you know what's happening with
7 that criminal trial. We may have to put it off, put your
8 hearing off.

9 MR. SAMSON: Excuse me, your Honor. Is May 29th an
10 observed holiday?

11 THE COURT: Probably. I don't have it down but that
12 would be my guess, the Monday of Memorial Day. 30 May. Can we
13 do May 22, 23, 24?

14 MR. SAMSON: I can do that.

15 THE COURT: May 22, 23, 24. But, before you start
16 locking in your witnesses contact the Court, in writing, and I
17 will see where we stand on that criminal trial. Because those
18 things resolve themselves -- although somehow I don't think
19 this one is going to.

20 All right. I think we have a way of proceeding.
21 Anything else?

22 MR. SAMSON: No, your Honor. Thank you.

23 THE COURT: Thank you very much.

24 o0o

25