08-4827-CV

In The

United States Court of Appeals

for the Second Circuit

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

Plaintiffs-Appellees,

-against-

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

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

Plaintiffs-Appellees Jane Doe I, Jane Doe II, and Jane Doe III ("Plaintiffs") respectfully submit this brief in opposition to the Defendant's appeal of United States District Judge Sidney H. Stein's Order dated July 30, 2008 denying his motion pursuant to Federal Rule of Civil Procedure 60(b)(4) to vacate, as void, a default judgment against him dated August 16, 2006.

Defendant-Appellant Emmanuel Constant ("Defendant Constant" or "Defendant") filed his appellate brief on March 23, 2009. Plaintiffs submit this brief pursuant to this Court's order issued on March 25, 2009. Plaintiffs respectfully request that the Court deny Defendant Constant's appeal.

Plaintiffs Jane Doe I, II, and III brought this action against Defendant Constant, the principle leader and founder of a paramilitary organization known by its acronym, "FRAPH." During 1993 to 1994, members of FRAPH perpetrated a campaign of terror against the civilian population of Haiti, including attacks against Plaintiffs. Plaintiffs properly served Defendant Constant with the Summons and Complaint, as well as all subsequent pleadings in this matter, and he had ample opportunity to contest this Court's jurisdiction before default judgment was entered on August 18, 2006.

Defendant Constant's Rule 60(b)(4) motion came twenty-two months after the entry of a certificate of default by the Clerk of the Court and nearly fourteen

months after Plaintiffs' motion for a default judgment was granted. Defendant Constant's default was willful as he provided no valid reason for failing to prevent the default despite repeated attempts to secure his involvement. The District Court, in finding Defendant Constant's failure to appear in these proceedings was inexcusable, explicitly rejected his self-serving and unsubstantiated claims that he thought his lawyer was handling his case and that he was unable to respond because he was incarcerated.

Despite the unwarranted and unexplained delay, the Court nevertheless considered Defendant Constant's motion given the lenient standard for timeliness of Rule 60(b)(4) motions, but properly denied it under the correct legal standard that "there was *not* a total want of jurisdiction and no arguable basis on which it could have rested its finding it had jurisdiction." (emphasis supplied). (A.16.) The District Court also found that Defendant Constant's claims under Rule 60(b)(1) or 60(b)(6) are time-barred or fail on their merits.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the District Court correct when it found that it had subject matter jurisdiction and personal jurisdiction over Plaintiffs' claims and thereby denied Defendant Constant's Rule 60(b)(4) motion?
2. Was the District Court correct when it found Defendant Constant's affirmative defenses that Plaintiffs' claims are barred by the statute of

limitations, *res judicata* or their failure to exhaust, or that his attorney committed gross negligence, do not provide a basis for relief under Rule 60(b)(4)?

3. Did the District Court abuse its discretion when it found that Defendant Constant's motion was not cognizable under Rule 60(b)(1) because it was made more than one year following the August 16, 2006 Order granting Plaintiffs' motion for default judgment?

4. Did the District Court abuse its discretion when it found that Defendant Constant's motion was not made within a reasonable time and, in any event, Defendant Constant failed to demonstrate "extraordinary circumstances" excusing his failure to participate in the litigation, which are a prerequisite to relief under Rule 60(b)(6)?

STATEMENT OF THE CASE

On December 22, 2004, Plaintiffs filed a Summons and Complaint against Defendant Constant for claims brought under the Alien Tort Statute (the "ATS"), 28 U.S.C. § 1350; and the Torture Victim Protection Act (the "TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note). (Findings of Fact and Conclusions of Law (hereinafter "Findings of Fact"), A.20-A.21.) A process server, Ricardo R. Burnham, personally served Defendant Constant with the Summons and Complaint on January 14, 2005, in front of 26 Federal Plaza,

Duane Street Entrance, New York. (A.21.) The Summons was returned to the court with proof of service on January 26, 2005.[1] (*Id.*)

The Clerk of the Court entered a Certificate of Default on December 1, 2005, certifying that Defendant Constant had failed to answer or otherwise appear in this matter. (A.21, A.134.) The Certificate of Default was properly served on Defendant Constant, and the Plaintiffs moved for a default judgment on December 7, 2005. (*Id.*)

On January 31, 2006, pursuant to the District Court's December 22, 2006 order, (A.58.), Plaintiffs filed an extensive Memorandum of Law explaining why there was subject matter jurisdiction under the ATS and the TVPA. The memorandum was also properly served upon Defendant Constant.

The District Court issued an Order finding it had subject matter jurisdiction and granting Plaintiff's Motion for a Default Judgment on August 16, 2006, and setting the date for a hearing to determine damages. (A.56-A.57.) Plaintiffs served Defendant Constant with the Court's order. (*Id.*)

Expert reports containing documentation such as documents by the United States government on the activities of Defendant Constant were submitted to the

[1] Plaintiffs filed with the District Court on January 4, 2006, an additional Affidavit of Service from Mr. Burnham which established that the recipient of the personal service of process was Defendant Constant. (A.60.) Also on January 4, 2006, Plaintiffs filed an Affidavit of Service from Plaintiffs' Counsel Moira Feeney which established that Plaintiffs served all pleadings in this matter at Defendant Constant's true and accurate place of residence. (A.62.)

District Court. Defendant was served with all expert reports. (A.102, A.115, A.128.)

The District Court held a public evidentiary hearing on August 29, 2006, to address damages; however, neither Defendant Constant nor a representative appeared at the hearing. (A.134.) At the hearing, the District Court was presented with testimony from the following witnesses: Plaintiff Jane Doe I and Plaintiff Jane Doe II; Dr. Robert McGuire, a social studies expert who focuses on Haiti; and Dr. Mary Fabri, a psychologist who examined Jane Does I and II. The court also heard a pre-recorded video deposition of Dr. Benjamin Lerman, a physician who examined Jane Does I and II. Jane Doe III did not testify, but submitted a written declaration concerning her claims as well as a report from Dr. Kathleen Allden, her examining psychiatrist. (A.21.)

The District Court issued Findings of Fact and Conclusions of Law on October 24, 2006, which found Defendant Constant liable for torture, attempted extrajudicial killing, and crimes against humanity. (A.28.) The District Court awarded Plaintiffs compensatory and punitive damages totaling $19,000,000. (A.32.) During each stage of this litigation, as the District Court noted in its opinion, "Constant . . . failed to participate in this action despite repeated attempts to secure his involvement." (A.21.)

Nearly a year later, Defendant filed a Motion for Relief under Rule 60(b)(4) on October 11, 2007 and an Amended 60(b)(4) Memorandum on February 7, 2008, to which Plaintiffs responded. On July 30, 2008, the District Court issued an order denying Defendant's Rule 60(b)(4) motion on the ground that he failed to establish that the District Court had no arguable basis for determining it had jurisdiction and rejecting his affirmative defenses as time-barred and on the merits. (A.13.)

STATEMENT OF FACTS[2]

In September 1991, the Haitian Armed Forces overthrew the elected president, Jean Bertrand Aristide, in a violent *coup d'état*. (A.36, A.22.) During the years of military rule in Haiti from 1991 to 1994, the Haitian Armed Forces used paramilitaries to carry out a campaign of terror and intimidation against the people of Haiti. (A.36, A.22.) In 1993, Defendant Constant founded the paramilitary group the Front Révolutionnaire Pour L'Avancement et le Progrés d'Haiti ("FRAPH").[3] (A.22, A.34.)

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[2] The following facts all come from the record below. Specifically, they are drawn from the complaint and the District Court's Findings of Fact and Conclusions of Law based upon an extensive evidentiary hearing. These facts are included here to address Defendant Constant's contention that Plaintiffs' allegations are "too vague and conclusory to allow the court to determine subject matter jurisdiction" and "Plaintiffs presented no evidence to support their allegations." (Constant App.Br., 7.)

[3] FRAPH is alternatively known as the *Front Révolutionnaire Pour L'Avancement et le Progrés d'Haiti* (Revolutionary Front for the Advancement and Progress of Haiti), Haitian People's Armed Revolutionary Front, and The Front for the Advancement of Progress in Haiti. Plaintiffs pled in the Complaint that more than one version of the full name of the group was used during the relevant time, but that, more importantly, the group was always known as FRAPH. (A.36.)

Defendant Constant modeled the paramilitary group FRAPH after the "Tonton Macoutes" that were active throughout the years of the Duvalier dictatorship, during which Defendant's father served as an army commander. (A.37.) The Tonton Macoutes operated parallel to and in conjunction with the army while reporting directly to Duvalier. (A.37.) In 1993 and 1994, FRAPH became the second generation of Tonton Macoutes, nationally organized to monitor the population for opposition to the military government while inflicting terror on the people of Haiti. (A.22, A.37, A.157.)

FRAPH also operated in concert with, and as an extension of, the Haitian Armed Forces. (A.37, A.43.) In his role as the leader of FRAPH, Defendant Constant communicated regularly with the high command of the Haitian Armed Forces. (A.22.) FRAPH received arms, training, and funding from the Haitian Armed Forces and FRAPH was used by the military to maintain control over the population. (A.37, A.43, A.162-A.164.) Defendant Constant took orders and command from the military. (A.22, A.37, A.158-A.159.) FRAPH members operated without uniforms, thus providing the military with plausible deniability for controversial acts. (A.162.) The military and police in Haiti allowed members of FRAPH to operate with impunity, committing acts that terrorized the population without fear of arrest from governmental authorities. (A.167-A.168.)

Defendant Constant served on the Central Committee of FRAPH and acted as the de facto leader throughout its existence. (A.42, A.164-A.165, A.22.) The Central Committee coordinated with the armed forces, issued membership cards and directed FRAPH's activities at the regional levels. (A.42, A.165, A.22.) FRAPH maintained regional offices in every department of Haiti, as well as hundreds of local offices, strategically located in the poor neighborhoods where the political support for the deposed elected president was the strongest. (A.42, A.166, A.22.) By May 1994, Defendant Constant was Secretary General of FRAPH and the only active member on the Central Committee. (A.42, A.171, A.22.)

With the financial and logistical support of the Haitian Armed Forces, FRAPH terrorized the poor population of Haiti, including Jane Does I, II, and III, using rape and other forms of torture to punish and intimidate opponents of the military regime. (A.37-38, A.42, A.178-180, A.22-A.23.) Defendant Constant, commander and spokesperson of FRAPH, knew about FRAPH's use of rape and other abuses and could have stopped it, but did not. (A.44, A.183, A.23.)

On December 24, 1994, after fleeing Haiti, Defendant Constant entered the United States where he remains. (A.38, A.281.)

Haiti enjoyed a brief period of constitutional rule after elections in 1995, but in 2004, former members of FRAPH and the Haitian Armed Forces led an armed uprising that resulted in yet another overthrow of the constitutional government.

(A.38-A.39, A.184.) An interim government was installed from 2004 to 2006, and Haiti remained marred by continued political violence and the lack of a functioning judiciary. (A.45-A.46, A.183-A.185.) Despite elections in 2006, the Haitian judiciary continues to lack the capacity and will to prosecute those accused of human rights abuses from the 1991 to 1994 period. *See* November 20, 2007 Declaration of Mario Joseph ("November 2007 Joseph Declaration") A.289-A. 290. Judges are known to be corrupt, and the judiciary system has no infrastructure as many courthouses built or refurbished after 1995 were destroyed during the violence of 2003 to 2004. (A.45-A.46, A.184.) Other members of FRAPH and other human rights abusers have not been prosecuted and roam Haiti freely. November 2007 Joseph Declaration, A.289-A.290. Even if it were possible to bring a legal case or provide testimony against Defendant Constant or his cohorts from FRAPH in Haiti, it was established below that it remains too dangerous for Plaintiffs to do so. (A.47, A.183-A.184.)

Following an extensive evidentiary hearing, the District Court made the following findings of fact with respect to Jane Does I and II:

> Jane Doe I
>
> At the time of the military coup, Jane Doe I lived in Port Au Prince with her husband and three children. (*Id.* at 60.) After the coup, her husband, a pro-democracy activist involved in local politics, disappeared. (*Id.* at 62-63.) She had reason to believe that he was one of 15 victims of a massacre that occurred on the day of his

disappearance. (*Id.* at 63.) After that day, Jane Doe I began publicly to demand information about her husband's disappearance. (*Id.* at 63.) Within a few weeks, in the winter of 1992, she was confronted in her home by a group of five or six masked men, beaten, and dragged away; she was held at a penitentiary for five days and repeatedly beaten before being released in the street at night, alone and naked. (*Id.* at 64-66.)

In the ensuing months, Jane Doe I continued to speak out about her husband's disappearance. As a result, in April 1994 she was again visited by masked men at her home. (*Id.* at 66.) She was raped in front of her children; her eldest son, who was eight years old at the time, was also beaten by the men. (*Id.* at 67-69.) Before leaving, one of the men stabbed Jane Doe I in the left side of her neck and her left ear. (*Id.* at 69-70.) She was again attacked by masked men in June of that year; that time, in addition to being raped by five aggressors, one of the men slashed her left breast open. (*Id.* at 71-74.) The men left her unconscious. (*Id.* at 74.)[4]

* * * * *

Jane Doe II

Jane Doe II lived in the Martissant area of Haiti with her husband and their three young children at the time of the military coup. (*Id.* at 86.) Her husband was a member of the military but did not support the coup. (*Id.* at 88-89.) Instead, both husband and wife belonged to a pro-democracy organization. (*Id.* at 87.) As a result, Jane Doe II's husband was accosted by masked men in his house in October 1991; he was beaten and Jane Doe

[4] While the attacks on plaintiffs Jane Doe I and Jane Doe II were perpetrated by masked men. the District Court was satisfied that the attackers were members of FRAPH because 1) the methods employed by plaintiffs' attackers were similar to those employed by FRAPH; and, 2, the plaintiffs were among the politically unpopular population that was the target of FRAPH activities (A.24 n.2; A.180-A.182; A.296 (attributing emergence of rape in part as a tool of political repression by FRAPH).

> II was raped, all in front of their children. (*Id.* at 90.) They were then blindfolded and taken to a penitentiary, where Jane Doe II spent six months separated from her children. (*Id.* at 90-91.)
>
> In the months and years following her release, Jane Doe II lived in hiding in the Boutilier mountain region of Haiti near Port Au Prince, occasionally returning to the city to go to her brother's house. (*Id.* at 93-94.) On one such visit, in July 1994, she was attacked by masked men carrying guns and was shot in the leg. (*Id.* at 94-96.) Jane Doe II was raped and she witnessed the rape of her sister-in-law as well; she was also beaten, blindfolded, and taken away. (*Id.* at 97-98.) She was left at Titanyen, a location allegedly used as a dumping ground by FRAPH for bodies. (*Id.* at 98-99.)
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> * * * * *
>
> Jane Doe III [Section Under Seal]

(A.4-A.7.) The facts regarding Jane Doe III are available in the Court's sealed version of the Order dated October 24, 2006. (Docket Item 71.) The facts are also restated in the Declaration of Jennie Green in Support of Motion to Seal, dated April 24, 2009 ("Green Dec."), that was concurrently filed with this Brief.

State Mortgage Fraud Case

While living in the United States, Defendant Constant became the subject of a criminal mortgage fraud investigation conducted by the Attorney General of the State of New York. (A.297.) He has been serving a one to three year sentence after pleading guilty to crimes involving mortgage fraud in Suffolk County, New York. (A.298.) Most recently, on October 28, 2008, Defendant Constant was

again convicted of criminal mortgage fraud in Kings County and sentenced to 5 to 15 years. (A.294-A.295.) In its Order, the Kings County Supreme Court explicitly stated that Defendant Constant "has a truly heinous record of violence, murder, torture and intimidation under the brutal regime of the Duvaliers." (A.294.)

SUMMARY OF ARGUMENT

The District Court properly denied Defendant Constant's 60(b)(4) motion because his claims that the judgment against him was void for lack of personal jurisdiction and subject matter jurisdiction were wholly without merit. Defendant Constant did not come close to meeting his burden of showing that the District Court "plainly usurped jurisdiction" because there was a "total want of jurisdiction" and "no arguable basis" for the District Court to conclude it had jurisdiction.

Similarly, the District Court was correct when it ruled that the plaintiffs properly alleged claims pursuant to the ATS and TVPA, including a violation of the laws of nations under the ATS. The Court also properly rejected Defendant Constant's argument that Plaintiffs failed to establish that he acted "under color of law." In its Findings of Fact and Conclusions of Law, the District Court detailed the close relationship between FRAPH and the government of Haiti and the fact that that Constant and FRAPH worked in concert with the government. (A.22-A.23, A.28 n.3.)

The District Court also properly found that it had personal jurisdiction over Defendant Constant despite his allegation that the subpoena misstated his title and the proper name of his paramilitary organization, reasoning that there was no conceivable doubt that Defendant Constant was the leader of FRAPH, Defendant Constant had notice and has not shown any prejudice from the alleged misidentification. (A.18-A.19.)

Defendant Constant's other arguments regarding the statute of limitations, exhaustion of remedies and *res judicata* fail under Rule 60(b)(4) because they were non-jurisdictional affirmative defenses and thus did not provide a basis for relief under Rule 60(b)(4). These claims also fail on the merits. Plaintiffs filed this case within the applicable statute of limitations, plaintiffs exhausted adequate and available remedies in Haiti and Jane Doe III's claims are not barred by *res judicata.*

Mindful that Defendant Constant was *pro se*, the District Court explicitly found that even if it were to construe his motion under either Rule 60(b)(1) or Rule 60(b)(6), the motion would still be denied. (A.15.) The District Court did not abuse its discretion when it held that because Defendant Constant's motion was made more than one year following the August 16, 2006 Order granting plaintiffs' motion for default judgment, it was not cognizable under Rule 60(b)(1). (A.15.) With respect to Rule 60(b)(6), the District Court also did not abuse its discretion

when it held that given his unexcused disregard for the proceedings for nearly two years, Defendant Constant did not make his motion within "a reasonable time" and in any event, Defendant Constant also failed to demonstrate the requisite "extraordinary circumstances" excusing his failure to participate in the underlying litigation. (A.15.)

Further, the District Court properly found that Defendant Constant did not "provide a shred of support" for his argument that his attorney committed gross negligence and "inexcusably failed to contact the Court or make any attempt to protect his interest in this litigation for a period of nearly two years." (A.14.)

Finally, this Court should deny Defendant's appeal because Plaintiffs deserve finality in their judgment.

ARGUMENT

I. The District Court Was Correct When It Found That It had Jurisdiction Over Plaintiffs' Claims.

"While appeals of 60(b)(4) decisions are reviewed *de novo*, (*State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004), a trial court's ruling is only void for lack of jurisdiction if the court "plainly usurped jurisdiction," which requires a "total want of jurisdiction" and "no arguable basis" on which it could have rested a finding that it had jurisdiction. *Nemaizer v. Baker*, 793 F.2d 58, 65-66 (2d Cir. 1986); *see also Central Vermont Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 192 (2d Cir. 2003) (same). However,

"any factual findings that underlie the court's resolution of a Rule 60(b) motion" are reviewed on appeal for "clear error." *New York v. Green*, 420 F.3d 99, 105 (2d Cir. 2005).

Defendant Constant's arguments that the Court lacked jurisdiction because Plaintiffs failed to adequately plead that he acted under the "color of law" and their claims are barred on the grounds of statute of limitations, *res judicata* and failure to exhaust remedies were considered and properly rejected by the District Court. Defendant Constant does not identify under what provision of Rule 60(b) he contends his arguments regarding statute of limitations, *res judicata* and exhaustion entitle him to relief. (Defendant-Appellant's Brief dated March 16, 2009 ("Constant App.Br."), 23-28.) To the extent he seeks relief under Rule 60(b)(4), the District Court properly found since "none of these arguments, even if true, implicate the subject matter jurisdiction of the Court, they do not provide a basis for relief under Rule 60(b)(4)." (A.16-A.17 (citing cases).) Defendant Constant's new argument that Plaintiffs inadequately plead a violation of the law of nations fails because it is an argument improperly raised for the first time on appeal and, in any event, is without merit. Defendant Constant's argument that the District Court lacked personal jurisdiction over him was also properly rejected. Finally, Defendant Constant's new argument that he was not afforded due process also fail on the merits.

A. The District Court Had Much More Than An Arguable Basis For Determining It Had Subject Matter Jurisdiction

The District Court correctly found that the ATS and TVPA "provide jurisdiction over claims asserting violations of universally recognized norms of international law as well as over claims of torture and attempted extrajudicial killing…." (A.16.) After reviewing Plaintiffs' Complaint and an extensive Memorandum of Law on subject matter jurisdiction, the District Court ruled it had jurisdiction in an Order dated August 16, 2006. (A.56.) In its Findings of Fact and Conclusions of Law, the District Court properly applied *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) and 29 U.S.C. § 1350 (note) in explaining why Plaintiffs' claims fell within the ATS and TVPA. (A.26-A.27.)

1. The District Court Properly Found That Defendant Constant Acted Under The Color Of Law

The TVPA assesses legal liability upon any "individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial killing. 28 U.S.C. § 1350 note. Courts have found that the TVPA and the ATS have the same "state action" requirement for acts of torture or extrajudicial killing. *See, e.g., Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1149 (E.D. Cal. 2004). A defendant acts under color of law when he "acts together with state officials" or "with significant state aid." *Id.*

While Defendant Constant makes numerous untimely factual arguments regarding whether he acted under the "color of law," for purposes of determining whether the District Court properly found it had jurisdiction, the only relevant consideration is what Plaintiffs *alleged.* *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980).

The District Court properly rejected Constant's argument that plaintiffs failed to allege sufficient evidence that he acted "under the color of law" necessary to satisfy the "state action" element required to establish jurisdiction under the ATS and the TVPA. The District Court's factual findings are reviewed for clear error. *New York v. Green*, 420 F.3d at 105.

The District Court found that "pursuant to an extensive evidentiary hearing during which the Court heard the testimony of several lay and expert witnesses and received documentary evidence, the Court has already rendered factual findings detailing the close relationship between FRAPH and the government of Haiti." (A.17.) Defendant miscites *Abraham v. VOA*, 795 F.2d 238, 245 (2d Cir. 1986) and *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1990) for the proposition that "federals courts makes [sic] a preliminary inquiry into the merits before deciding whether jurisdiction is properly invoked" (Constant App.Br., 8); indeed, the cases say just the opposite. *See Abraham*, 795 F.2d at 245 ("In *Filartiga*, we held that under the Alien Tort Act a plaintiff is required to allege a

violation of the law of nations. This inquiry requires a court merely to examine the parameters of the law of nations, not to assess a plaintiff's likelihood of prevailing on the merits." (internal citation omitted).)

Plaintiffs' detailed allegations that the paramilitary group FRAPH, led by Defendant, worked in concert with the Haitian Armed Forces in their campaign of terror and repression against the civilian population of Haiti clearly meets this standard. (A.37, A.43-A.44.) Thus, the District Court clearly had an "arguable basis" for finding Plaintiffs' adequately alleged Defendant Constant acted under the "color of law" and properly rejecting "his bald self-serving assertions that FRAPH did not have anything to do with the government of Haiti…." (A.17-A.18.).[5]

[5] Even if the Plaintiffs failed to adequately plead that Constant was acting under the color of law, they have brought claims against Constant for crimes against humanity, a cause of action that does not require state action. *Kadic v. Karadzic*, 70 F.3d 232, 239-42 (2nd Cir. 1995); *see also Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 104 (2d Cir. 2000). In addition, the *Kadic* court held that no additional showing of state action was required to find liability under the ATS for torture or other abuses requiring state action, if the acts were committed in furtherance of crimes against humanity. *Id.*; *see also In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 52-54 (S.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 n.6 (D.D.C. 2003). Thus Defendant's motion to vacate the judgment on these grounds could not have been granted since it would not constitute a complete defense. *Badian v. Elliott*, 165 Fed. Appx. 886 (2d Cir. 2006)

2. Defendant Constant's New Argument That Plaintiffs Have Not Adequately Pleaded A Violation Of The Law Of Nations Similarly Fails

a. The Argument Is Waived Since It Was Not Raised Below

Defendant Constant's argument that the District Court lacked jurisdiction because the District Court "failed to state how it had arrived at the conclusion that a violation of the Law of Nations existed from the allegations of the complaint" is waived because it is raised for the first time on appeal. (Constant App., Br., 12). *See Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1077 (2d Cir. 1993) ("As these points were not raised in the trial court they come too late for our consideration since a party opposing summary disposition of a case must raise all arguments against such remedy in the trial court and may not raise them for the first time on appeal."); *see also Bayway Refining Co. v. Oxygenated Marketing and Trading A.G.* 215 F.3d 219, 222 (2d Cir. 2000); *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) ("This argument was not advanced below, and is therefore not before us on this appeal.")

b. Defendant Constant's Argument That Plaintiffs Have Not Alleged A Violation Of The Law Of Nations Also Fails On The Merits

Even if considered on the merits, Plaintiffs' detailed allegations of torture, rape and crimes against humanity constituted adequately plead violations of the Law of Nations for purposes of the ATS and TVPA, as the District Court concluded below. (A.26.) *See, e.g.*, *Filartiga*, 630 F.2d at 888 (claims are

actionable under the ATS if they are "well-established, universally recognized norms of international law"); *see also Sosa*, 542 U.S. at 732 (pointing to torture as the preeminent example of a violation of an international law norm with the definite content and sufficient acceptance among nations equal to the "historical paradigms familiar when [the ATS] was enacted."); *Flores v. Southern Peru Copper Corp.*, 44 F.3d 244, 261 (2d Cir. 2003)("Our position is consistent with the recognition in *Filartiga* that the right to be free from torture . . . has attained the status of customary international law"); *See Kadic*, 70 F.3d at 242 (rape and forced impregnation are "forms of torture").

B. Defendant Constant's Factual Arguments Under The Guise Of Challenging Jurisdiction Are Outside the Scope of Review Of A Collateral Attack on Subject Matter Jurisdiction

Defendant Constant primarily attacks the District Court's finding that there was jurisdiction by either mischaracterizing Plaintiff's detailed allegations as being vague and conclusory, or making improper factual arguments about the merits of Plaintiffs' claims.

Defendant Constant's thinly veiled attempt to dispute the merits of issues that have been decided against him by relabeling them jurisdictional is improper.[6]

[6] Defendant argues, for example, that Plaintiffs fail to adequately allege crimes against humanity because: "[t]hey have not submitted any reliable documents confirming their assertions;" that the allegations of widespread inhumane acts could be attributed to "the rising of the poverty level created by sanctions," instead of FRAPH; and "there has been no direct link to FRAPH and rape incidents" (Constant App.Br., 14, 22.)

These facts are outside the scope of review of a collateral attack on subject matter jurisdiction. *See U.S. v. Tittjung*, 235 F.3d 330 (7th Cir. 2000) ("The fact issues surrounding [appellant]'s cases have already been determined, and are therefore outside the scope of review of a collateral attack on subject matter jurisdiction. In an effort to have this court address these claims [appellant] labels these arguments 'jurisdictional.' However, [appellant] cannot bring his arguments on the merits within this Rule 60(b)(4) review simply by relabelling [sic] 'them jurisdictional.'"); *Honneus v Donovan*, 93 F.R.D 433, 437 (D. Mass 1982) (rule 60(b)(4) motion was denied because it appeared on face of the complaint that jurisdiction existed and defendant had opportunity to contest jurisdiction but failed to do so by defaulting).

Defendant Constant's arguments regarding vagueness are mischaracterizations of Plaintiffs' allegations. Defendant Constant argues, for example, that "although the complaint attributes the attacks as politically motivated it offers no details as to the plaintiff's position or involvement in a reknown [sic] political organization." (Constant App.Br., 12-13.) Putting aside the fact that, allegations in a complaint must be assumed as true for purposes of determining jurisdiction, *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980), Defendant Constant is simply

wrong. The Complaint alleges that each of the Plaintiffs were attacked because of their public support of President Aristide:

- Jane Doe I was "very outspoken about the disappearance of her husband," who was "abducted, tortured and killed and by member of the Haitian Armed Forces." (A.39.);
- Jane Doe II "was an active member of a grassroots Pro-Aristide organization" that "took to the streets after the coup in support of Aristide, pasting his picture up on the wall in public places." (A.40.); and
- Jane Doe III's husband "had been a pro-Aristide activist." (A.41.)[7]

Defendant Constant's reliance upon cases to support his vagueness contention are either factually or procedurally inapposite, misplaced or erroneous.

His reliance on cases where courts found "simply naked allegations" are factually inapposite. (Constant App.Br., 14). In *Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994), the Second Circuit found plaintiff's allegation of racial discrimination was "naked" because he "offered no reason to suspect that his being found guilty of sexual harassment had anything to do with his race, other than his assertion that the panel members were white and that he is Bengali." In contrast,

[7] Other mischaracterizations by the Defendant include his claim that Plaintiffs "mention some 'co-conspirators' … but failed to identify them in any manner, they do not state the nature of the conspiracy, nor the participants in the conspiracy." (Constant App.Br., 17.) The Complaint alleges FRAPH's conspiracy with the Haitian Armed Forces in detail. (A.36-A.37, A.43, A.44, A.45.). Defendant also argues that Plaintiffs failed to adequately allege that he aided and abetted, or is liable under *respondeat superior* for, the acts complained of because the Complaint does "not allege the type of substantial assistance Constant provided to the 'Masked Men'" or "[t]he command responsibility enunciated by Plaintiffs is not clear." (Constant App.Br., 19-20). The Complaint, however, alleges specific details about Defendant Constant's knowledge, assistance and role as the leader of FRAPH. (A.42-A.43, A.44-A.45).

Plaintiffs explain Defendant Constant's role as the principle leader and founder of FRAPH in detail.

Similarly, *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996), is factually and procedurally inapposite. This Court of Appeals affirmed the dismissal of a "complaint [because it] did not provide a plausible basis for inferring that the student editors were state actors in rejecting the advertisement" for a school newspaper. (Constant App.Br., 17.) Defendant's reliance on *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 122 (D.D.C. 2003) for the proposition that Plaintiffs' allegations fail to "link" him to any FRAPH acts is similarly flawed. (Constant App.Br., 15.) In *Islamic Salvation Front*, the court found the allegations that a non-member was affiliated with the group inflicting the harm was "too tenuous." *Id*. Here, however, Defendant Constant was the principle leader and founder of FRAPH. Further, *Islamic Salvation Front* involved the grant of summary judgment, not whether a court usurped jurisdiction.

Defendant Constant's reliance on *Dwares v. City of New York* is misplaced because "[t]he Second Circuit recently wrote that the standard set forth in *Dwares* may present too high a pleading burden for a plaintiff, and is overruled to the extent that it is inconsistent with *Swierkiewicz. See Phelps v. Kapnolas*, 308 F.3d 180, 187 n. 6 (2d Cir. 2002)." *Hernandez v. Goord*, 312 F. Supp. 2d 537, 546 (S.D.N.Y. 2004). (Constant App.Br., 17.) Defendant Constant's reliance on

cases such as *Khulumani v. Barclay Nat. Bank Ltd*., 504 F.3d 254 (2d Cir. 2007) is also misplaced because they involved claims against entities aiding and abetting organizations violating the TVPA; here, Defendant Constant led the organization that was directly responsible. (Constant App.Br., 19.)

Finally, *Chavez v. Carranza*, 413 F. Supp. 2d 891, 900 (W.D.Tenn. 2005), actually supports Plaintiffs' position. (Constant App.Br., 14.) The court, in response to defendants' argument that plaintiffs "simply presume-without proof-that the men who killed Chavez's parents were members of government-affiliated death squads," found an issue of fact and denied summary judgment. *Id*. Thus, even considering Defendant Constant's factual arguments leads to nothing more than an issue of fact, insufficient to prove the District Court usurped jurisdiction.

C. The District Court Was Correct When It Found That It Had Personal Jurisdiction Over Defendant Constant

Defendant Constant's argument that the District Court lacks personal jurisdiction because the Complaint inaccurately describes what the acronym FRAPH stands for, or what his title was within FRAPH, was properly rejected by the District Court. (A.18.) It applied the correct standard that "[d]efects in the form of summons are considered technical and dismissal is not proper unless the party can demonstrate prejudice." (A.18.) Defendant Constant presents no evidence that the District Court erred—and indeed the District Court was correct—when it found that Defendant Constant "has not shown any prejudice from his

alleged misidentification as the 'commander' instead of the 'Secretaire General' of FRAPH." *Kroetz v. AFT-Davidson Co.*, 102 F.R.D. 934, 937 (E.D.N.Y. 1984) (where a summons misnames the defendant but "the summons and complaint [give him] adequate notice that [he is] being sued, and ... no prejudice result[s] from the misnaming," dismissal of the action is improper.)

Moreover, the District Court was correct in holding "there is no conceivable doubt that defendant was the leader of FRAPH, a violent and brutal paramilitary organization in Haiti." (A.18-A.19, A.22-A.23.) Defendant Constant's assertion that the summons was addressed to the wrong organization fails. FRAPH is alternatively known as the *Front Révolutionnaire pour l'Avancement et le Progrés d'Haiti*,(Revolutionary Front for the Advancement and Progress of Haiti), Haitian People's Armed Revolutionary Front, and The Front for the Advancement of Progress in Haiti. In his appeal, Defendant Constant uses the name "The Front for the Advancement and Progress of Haiti." (Constant App.Br., 2.) As expert-witness Dr. Robert McGuire explained at the August 29, 2006 damages hearing, FRAPH is an acronym that was developed first and given meaning later. (A.150-A.151.) The acronym forms the Creole word for "severe blow." (Id.) Professor McGuire explained that, in 1994, Defendant Constant changed the meaning of the acronym to the Haitian People's Armed Revolutionary Front. (A.151.) Regardless of the underlying meaning, the acronym stayed the same. *Id*. Plaintiffs

pled in the Complaint that more than one version of the full name of the group was used during the relevant time, but that, more importantly, the group was always known as FRAPH. (A.36.)

II. The Default Judgment Was Entered Consistent with Due Process Standards

For the first time, Defendant Constant now asserts that he was denied due process of law. (Constant App., Br. 28-29.) "A default judgment may be considered void if the judgment has been entered in a manner inconsistent with due process of law." *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004) (internal citation and quotation marks omitted.) Defendant Constant was afforded due process of law, but he deliberately chose not to avail himself of that due process and instead willfully defaulted. Defendant Constant inexcusably failed to participate in this litigation despite receiving notice at every stage of the proceedings. (A.14.). Defendant Constant does not provide a shred of evidence for his new claim that he was denied due process of law because the default was entered without any evidentiary hearings, affidavits or evidence, and the "record here does not show which means the court used to order the amount of damages entered." (Constant App.Br., 28-29.) Indeed, his claim is patently false. The District Court conducted an extensive evidentiary hearing to determine damages and its Findings of Fact and Conclusions of Law explained the basis for awarding compensatory and punitive damages in detail.

(A.29-A.32.) Plaintiffs served Defendant Constant with the Order setting the date for the evidentiary hearing (A.21.), however neither Defendant Constant nor a representative appeared at the evidentiary hearing. (A.134-A.137.) Accordingly, the default judgment was entered consistent with due process of law.

III. The District Court Did Not Abuse its Discretion When It Rejected Constant's Arguments Under Rule 60(b)(1) and 60(b)(6).

To the extent Defendant Constant's arguments regarding statute of limitations, *res judicata*, exhaustion and the gross negligence of his counsel may be construed as seeking relief under Rule 60(b)(1) or 60(b)(6), the District Court did not abuse its discretion when it ruled that they fail as time-barred or on their merits. Because a Rule 60(b)(1) or 60(b)(6) motion does not involve questions of jurisdiction, the District Court's decision is reviewed for an abuse of discretion. *Central Vermont Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003); *In re Lawrence*, 293 F.3d 615, 623 (2d Cir. 2002).

A. Defendant Constant's Claims Under Rule 60(b)(1) And 60(b)(6) Are Time-Barred

Defendant Constant fails to rebut the District Court's sound finding that his arguments are time barred under Rule 60(b)(1) because "motions pursuant to Rule 60(b)(1) must be made within one year of entry of the order or judgment from which relief is sought." Nor does he rebut its finding that "although not subject to the strict one-year period, a Rule 60(b)(6) motion must still be made within a

'reasonable' time," citing Fed. R. Civ. P. 60(c)(1). (A.15 n.1.) The District Court did not abuse its discretion when it found that the near two year delay was not "reasonable," citing *Young v. Coughlin*, No. 87-Civ-01122, 2001 U.S. Dist. Lexis 15323, at *4 (N.D.N.Y. Sept. 24, 2001) (fourteen month delay in filing a motion under Rule 60(b)(6) was unreasonable). (A.15 n.1.)

B. Defendant Constant's Argument That The Default Judgment Should Be Set Aside Under Rule 60(b)(6) Fails On The Merits

The District Court did not abuse its discretion when it found that, "even if the Court were to entertain the motion pursuant to Rule 60(b)(6), Constant has failed to demonstrate 'extraordinary circumstances' excusing his failure to participate in the underlying litigation, which are a prerequisite to relief under Rule 60(b)(6). (A.15 n.1.), citing *Grace v. Bank Leumi trust Co. of NY*, 443 F.3d 180, 190 n.8 (2d Cir. 2006)." Generally, "[i]t is well established ... that a 'proper case' for Rule 60(b)(6) relief is only one of 'extraordinary circumstances,' or 'extreme hardship.' In typical civil proceedings, this Court *very* rarely grants relief under Rule 60(b)(6) for cases of alleged attorney failure or misconduct. " *Harris v. U.S.*, 367 F.3d 74, 81 (2d Cir 2004), *citing U. S. v. Cirami*, 563 F.2d 26, 32 (2d Cir.1977); *see also Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 462 (2d Cir. 1994); *Alvarado v. Manhattan Worker Career Center*, 2003 WL 22462032, 2 (S.D.N.Y. 2003) ("an attorney's mistake or omission based on ignorance of the law, failure to follow rules and deadlines, inability to handle

caseload and complete and total disregard for client rights or professional ethics are not bases for relieving a party from a final judgment").

Courts traditionally have used three principal factors to guide their decision on whether to vacate a default judgment pursuant to the provisions of Rule 60(b): "(1) whether the default was willful, (2) whether the defendant demonstrates the existence of a meritorious defense, and (3) whether, and to what extent, vacating the default will cause the nondefaulting party prejudice.'" *Green*, 420 F.3d at 108.[8]

1. Defendant Constant's Default Was Willful

The District Court did not abuse its discretion when it found that "[d]espite receiving notice at every stage of these proceedings, Defendant Constant inexcusably failed to contact the Court or make any attempt to protect his interests in this litigation for a period of nearly two years." (A.14.)

Where a defendant is properly served, default is willful where "the conduct of counsel or litigant was egregious and was not adequately explained." *SEC v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998). Conduct is not adequately explained where "neither the memorandum nor . . . affidavit gave any indication that

[8] In *Green*, this Court recognized that it is somewhat unsettled whether this three part test, traditionally applied under Rule 60(b)(1), also applies to motions under Rule 60(b)(6), or whether only the "extraordinary circumstances" test applies to arguments made under Rule 60(b)(6). 420 F.3d at 108 n.3. Here, regardless of which test applies, Defendant Constant's arguments fail.

[d]efendant had done anything whatsoever to prevent the default's occurrence." *Id.* at 740; *see also Todtman, Nachamie, Spizz & Johns, P.C. v. Ashraf*, No. 05 Civ. 10098, 2007 U.S. Dist. LEXIS 16486, at *10 (S.D.N.Y. 2007)(dismissal proper where defendant "ignored the summons and complaint for over seven months without satisfactory explanation").

Defendant Constant is a sophisticated individual as is demonstrated from the record and the pleadings he has made in this case. He attended college, has held numerous professional positions in both the Haitian and American public and private sectors. (Constant App.Br., 1.) In addition to being the leader of FRAPH, he served in the diplomatic corps in Haiti and as the Chief of Staff for the Secretary of Commerce. (*Id.*) Despite his education and competence, Defendant Constant provides no adequate explanation for defaulting.

Defendant does not contest that he was properly served with the Summons and Complaint and all subsequent pleadings in this matter, including the notice that the clerk had entered a default against him. (Constant App.Br., 3-4.)

Defendant Constant's self-serving and unsubstantiated claim that he thought his lawyer was handling his case still does not explain why he failed to respond for fourteen months after being served with a default judgment. (*See* A.14.) (Constant App.Br., 3-5.) There has been no appearance made in this case by Mr. John E. Tiffany or any other attorney on behalf of Defendant Constant. Nor did Defendant

Constant provide evidence that he had reason to believe that Tiffany had answered the Complaint on his behalf or responded to the Court at any time from January 14, 2005 until October 11, 2007, when Defendant Constant finally filed his motion to void the judgment. Thus, the District Court did not abuse its discretion when it rejected these self-serving claims on the ground that he "does not present a shred of support for these assertions…." (A.14.)

Constant relies upon *U.S. v. Cirami*, 563 F.2d 26, 34 (2d Cir. 1977) as "present[ing] similarities," but it involved critically different facts because the client was unaware that his counsel had been served with summary judgment; here, Defendant was served with every pleading. (Constant App.Br., 9). Further, *Cirami* involved detailed and corroborated allegations of "the possibly unique fact" defendant's attorney "allegedly suffer[ed] from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it….." 563 F.2d at 34.[9]

Defendant Constant also points to his arrest on July 5, 2006 as reason for his failure to participate in this proceeding. (Constant App.Br., 4.) His arrest came 18 months after he was served with the Summons and Complaint. He offers no

[9] Defendant Constant's claims, however, even if accepted as true, are more analogous to *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962), which was cited with approval by *Cirami*, where the Supreme Court rejected a similar argument because "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."

explanation for his silence during these 18 months, a period when he was properly served with multiple pleadings in this matter. Moreover, the District Court found that Defendant Constant conceded that "he has been able to participate 'in other' cases while incarcerated." (A.14.) Thus, the District Court did not abuse its discretion in rejecting this argument.[10]

2. Defendant Constant Has Failed to Present Facts that Would Constitute a Meritorious Defense

Defendant Constant's arguments that Plaintiffs' claims are barred by the statute of limitations, failure to exhaust or *res judicata* do not constitute meritorious defenses. "[T]he absence of such a defense is sufficient to support [a] district court's denial" of a Rule 60(b) motion. *New York v. Green*, 420 F.3d at 109.

a. The Law of Equitable Tolling Dictates the Plaintiffs' Claims Are Not Barred by the Statute of Limitations

The TVPA provides a ten-year statute of limitations for claims brought pursuant to the Act, stating that "[n]o action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose." TVPA

[10] Defendant Constant's argument that his attorney committed gross negligence (Constant App.Br,. 9), is to be construed as seeking relief Rule 60(b)(1), which is subject to the one year limit. *New York v. Green*, 420 F.3d 99, 108 (2d Cir. 2005) ("In the past we have stated that motions under Rule 60(b)(6) may not be based on excusable neglect and are proper only where the asserted grounds for relief are not recognized in the other clauses of Rule 60(b)."). As demonstrated in this section, even if considered under the willfulness prong of the three part test set forth in *Green*, this argument fails.

§ 2(c). The ATS does not expressly provide a statute of limitations, but it is well-established that the ten-year statute of limitations for TVPA claims also applies to ATS claims. *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002).

Limitations periods are "customarily subject to equitable tolling, unless tolling would be inconsistent with the text of a relevant statute." *Young v. U. S.*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted). Although this Court of Appeals has not had to directly address equitable tolling in the TVPA context, no court has held that equitable tolling does not apply to the TVPA. In fact, the Eleventh Circuit held in *Arce v. Garcia*, 434 F.3d 1254, 1262 (11th Cir. 2006) that, in passing the TVPA, Congress clearly intended for courts to toll the statute of limitations while a defendant remains outside the jurisdiction of the United States. *See also Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996). These equitable tolling principles also extend to the ATS. *See e.g., Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005).[11]

According to Defendant Constant in a deposition taken June 7, 1995, he remained in Haiti until December 19, 1994, traveled to the Dominican Republic,

[11] Similarly, in other non-TVPA/ATS cases where the defendant was unreachable, courts have also applied equitable tolling to preserve a plaintiff's claims. *See Cabello v. Fernandez-Larios*, 157 F. Supp.2d at 1368; *U. S. v. Myerson*, 368 F.2d 393, 395 (2d Cir. 1966); *see also Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 *61 n.23 (S.D.N.Y. Feb. 22, 2002)

and then entered the United States on December 24, 1994. Deposition of Constant, *See* A.281:1-2) ("I said I went into the United States on December 24th, [1994].") Accordingly, Plaintiffs Complaint, filed on December 22, 2004, was within the ten-year statute of limitations.

b. Defendant Constant Does Not Demonstrate that Plaintiffs Have Failed to Exhaust Remedies in Haiti

The TVPA states that a "court shall decline to hear a claim if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350(2)(b). Defendant alleges Plaintiffs have failed to exhaust all adequate and available remedies in Haiti. (Constant App.Br., 23-25.) Even if true, this assertion fails to provide a complete defense because there is no exhaustion of remedies requirement for claims brought under the ATS. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n. 44 (S.D.N.Y Mar. 19, 2003); *Jean*, 431 F.3d at 781. Therefore, the exhaustion requirement does not apply to the ATS claims brought in this matter.

The TVPA's exhaustion requirement is to be construed liberally and waived whenever foreign remedies are obviously futile. *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 n. 6 (S.D.N.Y. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass 1995). Under the TVPA, "defendants, not plaintiffs, bear the burden of demonstrating that plaintiffs have not exhausted 'alternative and adequate'

remedies." *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *55-56 (S.D.N.Y. Feb. 28, 2002).

Not only have Plaintiffs properly alleged that Haiti lacks adequate remedies and pursuit of those remedies would be futile (A.45-A.47.), but Plaintiffs also provided the District Court with the expert testimony of Dr. Robert Maguire who testified that political violence and the lack of a functioning judiciary system mean that adequate and available remedies for Plaintiffs do not exist in Haiti. (A.183-A.185.) *See also Jean*, 431 F.3d at 778, 782-783 (holding district court erred in dismissing Jean's claims for failure to exhaust her remedies in Haiti).

c. Jane Doe III's Claims Are Not Barred By *Res Judicata*

Jane Doe III's claims are not barred by *res judicata* because the *Belance* case was dismissed without prejudice. *See* A.299; *Camarano v. Irvin*, 98 F.3d 44, 47 (2d Cir. 1996) ("It is well established that a dismissal without prejudice has no *res judicata* effect on a subsequent claim. 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2367 (1981)".)

Further, the doctrine of *res judicata* is inapplicable because Defendant Constant's assertion is both untimely and without merit. Defendant Constant's delay in raising the defense amounts to a waiver of that defense, but even absent such a waiver, the doctrine of *res judicata* would not apply here because Defendant

Constant has presented no evidence to show how the parties to this action are the same as those in *Belance.*

It is well established in this circuit that *res judicata* is an affirmative defense that is waived if it is not pled in a timely manner. See *Scherer v. Equitable Life Assurance Soc'y of the U. S.*, 347 F.3d 394, 398 (2d Cir. 2003); *Curry v. City of Syracuse*, 316 F.3d 324, 330-331 (2d Cir. 2003) ("Under Fed.R.Civ.P. 8(c), collateral estoppel, like *res judicata*, is an affirmative defense. As such, it normally must be pled in a timely manner or it may be waived."); *Pangburn v. Culbertson*, 200 F.3d 65, 68 n. 1 (2d Cir.1999); *Totalplan Corp. of Am. v. Colborne*, 14 F.3d 824, 832 (2d Cir. 1994) ("Appellees' failure to raise *res judicata* until appeal constitutes waiver of that defense"); *Evans v. Syracuse City School Dist*., 704 F.2d 44, 47 (2d Cir.1983) ("there could have been no doubt that *res judicata* should have been asserted timely if it was to be relied upon by defendant to preclude the present action in the federal courts").

Furthermore, even if Constant had not waived this defense, it fails on the merits. Defendant Constant was not a party to the 1994 lawsuit *Belance v. FRAPH*, Case No. 94-CV-02619 (E.D.N.Y.) and did not exercise control over the prior lawsuit on behalf of FRAPH—nothing in his brief suggests otherwise. Thus, the principles of *res judicata* do not apply. *National Fuel Gas Distrib. Corp. v. TGX Corp*., 950 F.2d 829, 839 (2d Cir. 1991)(quotation omitted) (whether *res*

judicata applies depends on extent to which the new defendant exercised control or "substantially participate[d] in the control of the presentation" on behalf of the prior defendant). This previous lawsuit, brought solely against the organization FRAPH, was dismissed in 1999 after the plaintiff requested that the judgment be held in abeyance because of fear of threats to her daughter in Haiti. *Belance v. FRAPH*, Case No. 94-CV-02619, A.301. Defendant Constant's only involvement in that case was that he gave a deposition during which he made several admissions that were entered into evidence in this matter at the August 29, 2006 hearing on damages. This limited involvement is insufficient to trigger the doctrine of *res judicata*. *TGX Corp*., 950 F.2d 829, 839.

3. Vacating the Default Would Prejudice Plaintiffs

Plaintiffs have invested time and effort, at great emotional and personal risk, into the timely litigation of their claims against Defendant Constant. Plaintiffs deserve finality after diligently pursuing their claims. At the damages hearing on August 29, 2006, the District Court heard the emotional testimony of Jane Doe I and II. (A.190-A.233.) Also at the hearing, the court heard from Dr. Mary Fabri, an expert on the psychological impact of rape and torture. *Id.* A.238. Dr. Fabri testified to the severity of Post Traumatic Stress Disorder symptoms suffered by both women as a result of the underlying atrocities they endured at the hands of FRAPH. *Id.* A.238-A.263. Bringing a case against Defendant Constant and

testifying in court took tremendous courage on the part of the plaintiffs.[12] Denying finality in this case would thus severely prejudice these diligent plaintiffs.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant Constant's appeal and affirm the District Court's July 30, 2008 Order denying Defendant Constant's Rule 60(b)(4) motion. Plaintiffs deserve finality and it would be unfair to allow Defendant Constant to conduct a trial on the merits through a Rule 60(b) motion after he willfully ignored the pleadings in this case for nearly two years.

Dated: New York, New York
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[12] Similarly, Jane Doe III also demonstrated great courage by participating in the litigation. (*See* Green Decl.)

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,371 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: April 24, 2009

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ANTI-VIRUS CERTIFICATION

Case Name: Jane Does v. Emmanuel Constant

Docket Number: 08-4827-CV

I, Daniel Pancotti, hereby certify that the Brief of Plaintiffs-Appellees submit in PDF form as an e-mail attachment to prosecases@ca2.uscourts.gov in the above-referenced case, was scanned using McAfee VirusScan Enterprise Version: 4.0.0.1421and was found to be VIRUS FREE.

Dated: April 24, 2009

Respectfully submitted,

/S/
Daniel Pancotti

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE DOE I, JANE DOE II, AND JANE DOE III, Plaintiffs-Appellees, v. **EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,** Defendant-Appellant.	Case No.: 08-4827-CV **CERTIFICATE OF SERVICE**

I, Daniel Pancotti, hereby certify that on April 24, 2009, I caused true and correct copies of the foregoing **BRIEF OF PLAINTIFFS-APPELLEES AND APPENDICES** to be served via United States Postal Service, Express Mail upon

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