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

JANE DOE I, JANE DOE II AND JANE DOE III, Plaintiffs, v. **EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,** Defendant.	**Case No.: 04-CV-10108 (SHS)** **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF OF A VOID JUDGMENT PURSUANT TO RULE 60(b)(4) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Plaintiffs Jane Doe I, Jane Doe II and Jane Doe III respectfully submit this memorandum of law in opposition to the Defendant's Motion For Relief of a Void Judgment Pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure filed by Defendant Emmanuel Constant ("Defendant Constant" or "Defendant") on October 11, 2007. Plaintiffs respectfully request the Court deny Defendant's motion.

INTRODUCTION

Plaintiffs Jane Doe I, II and III brought the above-captioned action against Defendant Constant, the principle leader and founder of a paramilitary organization known as the *Front Révolutionnaire pour l'Avancement et le Progrés d'Haiti* (Revolutionary Front for the Advancement and Progress of Haiti or "FRAPH"). During Defendant's reign as the leader of FRAPH from 1993 to 1994, members of FRAPH perpetrated a campaign of terror against the civilian population of Haiti, including attacks against Plaintiffs Jane Doe I, Jane Doe II and Jane Doe III.

Defendant Constant's motion is untimely, and brought without excuse nearly fourteen months after entry of judgment. 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 claims are wholly without merit. First, Plaintiffs have

properly established subject matter jurisdiction over their claims. Next, Plaintiffs properly filed this case within the applicable statute of limitations and Defendant has failed to allege facts that would support an exhaustion of remedies defense. Finally, Plaintiffs deserve finality in their judgment.

STATEMENT OF FACTS

During the years of military rule in Haiti from 1991 to 1994, Defendant Constant's paramilitary group known as FRAPH exacted widespread violence against opponents of the military regime, including plaintiffs Jane Does I, II and III. *Doe v. Constant*, 04 Civ. 10108, "Findings of Fact and Conclusions of Law," Docket Number 71 at 3-4 (hereafter "Findings of Fact").. On December 24, 1994, after fleeing Haiti, Defendant Constant entered the United States where he remains. Compl. ¶15; *See also* Declaration of Moira Feeney, ¶ 2 at Exhibit A at 197:1-2. 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. Compl. ¶¶ 16-17; Tr. of 8/29/06 Hearing, at 53, Docket Entry 70. An interim government was installed, but Haiti remained marred by continued political violence and the lack of a functioning judiciary. Compl. ¶¶ 43-45; Tr. of 8/29/06 Hearing, at 52-54. Even if it were possible to bring a legal case or provide testimony against Defendant Constant or his cohorts from FRAPH in Haiti, doing so has been and remains too dangerous for Plaintiffs. Compl. ¶ 47; Tr. of 8/29/06 Hearing, at 52-54.

On December 22, 2004, Plaintiffs filed with this Court a Complaint for Attempted Extrajudicial killing, Torture, Cruel, Inhuman, or Degrading Treatment or Punishment, Violence Against Women and Crimes Against Humanity against Defendant Constant. Findings of Fact, at 1. 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. *Id.* at 2. The Summons was returned to the Court with proof of service on January 26, 2005. *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. Findings of Fact, at 2. The Certificate of Default was properly served on

Defendant Constant, and the Plaintiffs moved for a default judgment on December 7, 2005. *Id*.

Plaintiffs filed with the Court on January 4, 2006, an additional Affidavit of Service from Mr. Burnham which established how and why he knew that the recipient of the personal service of process was Defendant Constant. Docket Entry 39. Also on January 4, 2006, Plaintiffs filed an Affidavit of Service from Plaintiffs' Counsel Moira Feeney providing how and why Plaintiffs knew that all pleadings in this matter were being served at Defendant Constant's true and accurate place of residence. Docket Entry 40.

On January 31, 2006, pursuant to the Court's December 22, 2006 order (Docket Entry 38) Plaintiffs filed a Memorandum of Law Regarding Subject Matter Jurisdiction in which Plaintiffs set forth their arguments for subject matter jurisdiction 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). Docket Entry 43. The memorandum was also properly served upon Defendant Constant. *Id*.

This Court issued an Order Granting Plaintiff's Motion for a Default Judgment on August 16, 2006, and setting the date for a hearing to determine damages. Findings of Fact, at 2. Plaintiffs served Defendant Constant with the Court's order. *Id*.

The Court held an evidentiary hearing on August 29, 2006 to address damages, however neither Defendant Constant nor a representative appeared at the hearing. *See* Tr. of 8/29/06 Hearing, at 53. The Court issued Findings of Fact and Conclusions of Law on October 24, 2006, awarding Plaintiffs compensatory and punitive damages totaling $19,000,000. Findings of Fact, at 13. During each stage of this litigation, as the Court noted, "Constant . . . failed to participate in this action despite repeated attempts to secure his involvement." *Id*. at 2.

ARGUMENT

I. DEFENDANT CONSTANT'S MOTION IS UNTIMELY.

A motion for relief from a judgment must be filed "within a reasonable time." Fed. R. Civ. Pro. 60(b). Defendant Constant filed his motion on October 11, 2007, approximately fourteen-months after the Court's August 16, 2006 grant of a default

judgment in this matter, and 23 months after the Clerk's entry of default. Motions brought under Rule 60(b)(4) fourteen-months after judgment are not brought "within a reasonable time." *See* Graham v. Sullivan, No. 86 Civ. 163, 2002 U.S. LEXIS 18240, at *13 (S.D.N.Y. Sept. 23, 2002).

Moreover, "[i]n considering Rule 60(b) motions, courts have been unyielding in requiring that a party show good reason for . . . failure to take appropriate action sooner." *United States v. Martin*, 395 F. Supp. 954, 961 (S.D.N.Y. 1975). Courts must "balance the interest in finality with the reasons for the delay." *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir. 1983); *Freedom N.Y., Inc. v. United States*, 438 F. Supp. 2d 457 (S.D.N.Y. 2006). Rule 60(b) motions should be denied where a defendant fails to "provide any justification for their own failure to take action after receiving notice that the clerk had entered a default against them." *New York v. Green*, 420 F.3d 99, 109 (2d Cir. 2006).

Here, Defendant offers no explanation for his untimeliness, nor does he contest that he was properly served with the Summons and Complaint and all subsequent pleadings in this matter, including the Clerk's entry of default or the August 16, 2006 default judgment. Indeed, as proof that he has been properly served throughout the proceedings, Defendant Constant attaches to his present motion the Declaration of Mario Joseph, a document dated August 25, 2006. The Joseph Declaration (Docket Number 63) was provided to the Defendant on August 25, 2006, as an attachment to Plaintiffs' Memorandum of Points and Authorities on Damages. Docket Number 59. The inclusion of the declaration here serves only to show that Defendant had been receiving copies of Plaintiffs' pleadings in this matter and that such pleadings have been consistently and regularly served upon him. Because Defendant offers no excuse for his untimely motion, his motion should be denied.

II. DEFENDANT CONSTANT'S MOTION IS WITHOUT MERIT.

Courts 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. Here, each of these factors

unequivocally demonstrates that Defendants' motion to vacate lacks merit.

A. Defendant Constant's Default was Willful.

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 [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 does not contest that he was personally served the Summons and Complaint, nor that he has been served with the subsequent pleadings in this matter. Nevertheless, he ". . . failed to participate in this action despite repeated attempts to secure his involvement." Findings of Fact, at 2. Unsurprisingly, no excuse is offered for Defendant's failure to take action in response to these "repeated attempts to secure his involvement." *Id*. Accordingly, the Court should confirm that Defendant Constant's default was willful, and deny his motion to vacate.

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

Defendant's motion seeks to void the judgment based on an alleged lack of subject-matter jurisdiction. However, this Court has already determined that it has subject matter jurisdiction over Plaintiffs' claims of torture, attempted extrajudicial killing and crimes against humanity pursuant to the ATS. Findings of Fact, at 7 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (ATS confers jurisdiction for a modest number of international law violations). This Court also held it has jurisdiction over Plaintiffs' claims of torture and attempted extrajudicial killing pursuant to the TVPA. Findings of Fact, at 8 (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 245 (2nd Cir. 2003).

In challenging the timeliness of Plaintiffs' filing and whether Plaintiffs have exhausted remedies in Haiti, Defendant raises two potential affirmative defenses. *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006)("The statute of

limitations is an affirmative defense; defendants must plead and prove it. Fed. R. Civ. P. 8(c)"); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at *54 (S.D.N.Y. Feb. 22, 2002) (exhaustion of remedies under the TVPA is an affirmative defense). "'In order to make a sufficient showing of a meritorious defense in connection with a motion to vacate a default judgment . . . he must present evidence of facts that, if proven at trial, would constitute *a complete defense*.'" *Badian v. Elliott*, 165 Fed. Appx. 886 (2d Cir. 2006) (quoting *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 167 (2d Cir. 2004)) (emphasis added). As demonstrated below, Defendant Constant's allegations lack merit and, in any event, would not constitute a complete defense, even if proved at trial.

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

Defendant Constant correctly states in his motion that the acts giving rise to Plaintiffs' claims are based upon conduct that occurred no later than July 1994. Mot. at ¶ 8. However, under the law of equitable tolling, the clock does not start ticking for statute of limitations purposes until Defendant Constant entered the United States on December 24, 1994. Plaintiffs filed this matter on December 22, 2004, within the ten-year statute of limitation.

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 commenced within 10 years after the cause of action arose." TVPA § 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) ("…in accordance with the consensus of federal courts that the TVPA is both the most analogous statute and the one that best accommodates federal policies . . . the TVPA ten-year statute of limitations applies to [ATS claims].")[1]

[1] *See also Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005) (internal citations omitted) (applying the TVPA's ten year statute of limitations to both TVPA and ATS claims); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154-55 (11th Cir. 2005) (citation omitted); *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002); *Wiwa*, 2002 U.S. Dist. LEXIS 3293; *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.D.C. 2003); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1363 (S.D. Fla. 2001); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1194-96 (S.D.N.Y 1996).

Limitations periods are "customarily subject to equitable tolling, unless tolling would be inconsistent with the text of a relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted). Although the Second Circuit 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* 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. 434 F.3d 1254, 1262 (11th Cir. 2006) (citing S. Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991)) ("[t]he statute of limitation should be tolled *during the time the defendant was absent from the United States*"). *Arce* states that the ten-year limitation is equitably tolled "so long as the defendant remain[s] outside the reach of the United States courts or the courts of other, similarly fair legal systems." *Id*.; *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (citing S. Rep. No. 102-249 at 10-11). These equitable tolling principles also extend to the ATS. *See e.g., Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005) (holding equitable tolling principles applicable to both TVPA and ATCA claims); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005) (citation omitted).

Similarly, in other TVPA/ATS cases where the defendant was unreachable, courts have also applied equitable tolling to preserve a plaintiff's claims. In *Cabello v. Fernandez-Larios*, the court held that the defendant's participation in the witness protection program tolled the statute of limitations since "the Defendant was ostensibly absent from this jurisdiction, in that he could not be served." *Cabello*, 157 F. Supp. 2d at 1368. Indeed, in a criminal prosecution for income tax evasion, the Second Circuit stated that "[t]here is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country." *United States v. Myerson*, 368 F.2d 393, 395 (2d Cir. 1966); *see also Wiwa*, 2002 U.S. Dist. LEXIS 3293 *61 n.23 (noting that New York state tolling provision, N.Y.C.P.L.R. § 207, "allows tolling 'if, when a cause of action accrues against a person, he is without the state, the time within which the action must be commenced shall be computed from the time he comes into or returns to the state.'").

Thus, there is no doubt the statute is tolled during the period of Defendant Constant's absence from the United States. According to Defendant Constant in a deposition taken June 7, 1995, he remained in Haiti until December 19, 1994, traveled to the Dominican Republic, and then entered the United States on December 24, 1994. Deposition of Constant, at 197:1-2. (*See* Declaration of Moira Feeney, ¶ 2 at Exhibit A.) He states, "I said I went into the United States on December 24th, [1994]." *Id*. Accordingly, Plaintiffs Complaint, filed on December 22, 2004, was within the ten-year statute of limitations.

2. Defendant 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. Mot. at ¶19. 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) (noting that the legislative history of the TVPA indicates that the exhaustion requirement "was not intended to create a prohibitively stringent condition precedent to recovery under the statute"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass 1995) (holding that "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile," exhaustion pursuant to TVPA is not required) (quoting S. Rep. No. 102-249 (1991)).

Not only have Plaintiffs properly alleged that Haiti lacks adequate remedies and pursuit of those remedies would be futile (Comp. ¶¶ 43-48), but Plaintiffs have also provided this 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. Tr. of 8/29/06 Hearing, at 52-54. In 2004, in the months leading up to the filing of the Complaint in this matter, Haiti underwent yet another overthrow of the democratically-elected government. *Id*. Former members of the military and FRAPH terrorized regions of the country and as a result the use of rape as a tool of repression and intimidation re-emerged in Haiti. Comp. ¶ 44. In addition, the judiciary has proven unable and unwilling to objectively adjudicate cases involving notorious human rights abusers, including Defendant Constant's second-in-command of FRAPH, Louis Jodel Chamblain. Comp. ¶ 45. Any progress made during the period of democratic government rule toward accountability for human rights abuses during the military regime was undone during the period of interim government. Comp. ¶¶ 44-45. Finally, Plaintiffs have properly alleged that they would be in grave danger if they had to return to Haiti to file a case or provide testimony. Comp. ¶¶ 46. Their need to remain anonymous based on the threat that exists in Haiti remains on-going. Any attempt to exhaust remedies in Haiti would be futile.

Moreover, 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). The exhaustion requirement is an affirmative defense that requires the defendant to bear the burdens of production and proof. *Jean*, 431 F.3d at 781; *See also Hilao*, 103 F.3d at 778, n.5; *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003). At a minimum, Defendant must "demonstrate that a [Haitian] court would be amenable to a suit for violations of international law." *Wiwa*, 2002 WL 319887, at *57. Defendant Constant alleges only that a non-profit organization, Bureau des Avocats Internationaux" or "BAI", exists in Haiti to represent Plaintiffs. Mot. at ¶16. The existence of the BAI does not, unfortunately, make up for a corrupt and lethargic judiciary in Haiti. That the BAI strives to litigate on behalf of victims of human rights abuses does not overcome the reality that the Haitian courts are still unable to provide redress to such victims and Defendant Constant offers no evidence to the contrary.

C. 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 Constant. Plaintiffs deserve finality after

diligently pursuing their claims. At the damages hearing on August 29, 2006, the Court heard the emotional testimony of Jane Doe I and II. Tr. of 8/29/06 Hearing, at 59 - 102. Also at the hearing, the Court heard from Dr. Mary Fabri, an expert on the psychological impact of rape and torture. *Id*. at 107. 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*. at 107-132. Bringing a case against Defendant Constant and testifying in court took tremendous courage on their part. Denying finality in this case would thus severely prejudice these diligent plaintiffs.

CONCLUSION

Defendant Constant has filed an untimely motion that is without merit. He willfully ignored the Complaint against him and willfully waited more than fourteen-months after judgment was entered to make this motion. His claims are erroneous and do not provide a complete defense in this matter. Re-opening this case at this late date would deny finality and severely prejudice the Plaintiffs. For each of these reasons, Plaintiffs respectfully request the Court to deny Defendant Constant's motion.

/s/
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To:

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CERTIFICATE OF SERVICE

I, Jessica Woelfel, hereby certify that on October 26, 2007, I caused a true copy of the foregoing to be served, by Certified Mail, upon:

Emmanuel Constant
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Dated: San Francisco, CA
October 26, 2007

_____/s/_____
Jessica Woelfel