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

JANE DOE I AND JANE DOE II, Plaintiffs, v. **EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,** Defendant.	**Case No.: 04-CV-10108 (SHS)** **MEMORANDUM OF LAW REGARDING SUBJECT MATTER JURISDICTION**

Plaintiffs Jane Doe I and II respectfully submit this Memorandum of Law Regarding Subject Matter Jurisdiction, as requested by the Court at the December 21, 2005 status conference.

I. INTRODUCTION

Plaintiffs Jane Doe I and II,[1] who were actively opposed to Haiti's repressive military regime in the early 1990s, were severely brutalized by members of the Haitian paramilitary organization known as the *Front Revolutionnaire pour l'Avancement et le Progres d'Haiti* ("FRAPH"). *See* Complaint ¶¶s 2, 7-8. On two occasions, Jane Doe I was gang raped in front of her family by several armed members of FRAPH, and on the second occasion, she was stabbed in the neck and left for dead. *Id.* ¶¶s 20-22. Jane Doe II was also severely beaten and gang raped by several masked and armed members of FRAPH in front of her family. *Id.* ¶¶ 27-29. Both women now reside in the United States. *Id.* ¶¶s 7-8.

[1] As counsel informed the court on December 21, 2005, Jane Doe III is withdrawing as a plaintiff. Counsel will file a Notice of Withdrawal on her behalf as soon as we are able to obtain written authorization from her. *See* attached Decl. of Jennifer M. Green (Jan. 31, 2006) (filed herewith). For this reason, Jane Doe III's claims are not addressed in this memorandum.

On December 24, 1994, Defendant Emmanuel "Toto" Constant, the principal leader and founder of FRAPH, fled Haiti and moved to Queens, New York. *Id.* ¶¶ 5-6. Plaintiffs have instituted this lawsuit against Defendant to seek redress for the wrongs perpetrated against them that occurred under his direct command. Specifically, Plaintiffs allege that Defendant is liable for the abuses against Plaintiffs in his role as a commander over FRAPH, for aiding and abetting the FRAPH members who attacked Plaintiffs and/or for conspiring with those FRAPH members.

On December 22, 2004, Plaintiffs commenced this action by filing the Summons and Complaint, copies of which were served on Defendant by personal service of process on January 14, 2005. *See* Aff. of Moira Feeney at ¶ 6 (November 30, 2005). Defendant did not answer or otherwise respond to this action within the time permitted. Accordingly, on December 1, 2005, the clerk of court issued a certificate of default, and Plaintiffs filed an Amended Notice of Motion for Judgment by Default on December 7, 2005. On December 22, 2005, counsel for Plaintiffs appeared before this Court, at which time the Court requested additional briefing on its exercise of subject matter jurisdiction over the five asserted causes of action asserted, which include claims for "Attempted Extrajudicial Killing" under the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C §1350 note) and the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS")[2] (Count 1); "Torture" under the TVPA and ATS (Count 2); "Cruel, Inhuman or Degrading Treatment or Punishment" under the ATS (Count 3); "Violence Against Women" under the ATS (Count 4); and "Crimes Against Humanity" under the ATS (Count 5).

[2] The ATS is also commonly referred to as the Alien Tort Claims Act or ATCA.

This memorandum will address subject matter jurisdiction for three of the five causes of action: Torture, Attempted Extrajudicial Killing and Crimes Against Humanity. In an effort to streamline Plaintiffs' case, Plaintiffs have hereby cease pursuing their claims for Violence Against Women and Cruel, Inhuman or Degrading Treatment or Punishment, with the exception that, should the Court determine that Plaintiffs' claim for torture is unavailing, Plaintiffs' be permitted to revive these claims.

II. ARGUMENT

A. Preliminary Matters Applicable to Each Cause of Action

Plaintiffs will address in turn the Court's subject matter jurisdiction over each of Plaintiffs' remaining claims. However, several points apply broadly across each claim asserted. In an attempt to assist the Court, Plaintiffs has addressed these more global issues first. Specifically, Plaintiffs outline the test for which customary international law claims are actionable under the ATS, describe which sources may be consulted by the Court to determine customary international law, provide authority to show that the TVPA does not extinguish claims under the ATS, and provide authority to show that Plaintiffs meet the state action requirement for their torture and attempted extrajudicial killing claims.

1. The ATS Recognizes Claims Involving Customary International Law

In the Second Circuit, a claim is actionable under the ATS when it involves a "well-established, universally recognized norm[] of international law." *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). Twenty-four years after the Second Circuit's landmark decision first recognized human rights claims under the ATS, the Supreme Court approvingly cited *Filartiga* in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). There, the Supreme Court confronted the ATS for the first time and determined that Congress intended that the "common law would provide a cause of action for [a] modest number of international law violations" under

the ATS. *Id*. at 724. The Court therefore limited common law claims that can be brought under the ATS to those that rest on a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" the Court recognized – namely violation of safe conduct, infringement of the rights of ambassadors and piracy. *Id*. at 725, 732 ("federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."). In so ruling, *Sosa* cited with approval cases, in addition to *Filartiga,* that permitted ATS claims for violations of international norms that were specific, universal and obligatory.[3] *Id*. (*citing Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) ("definable, universal and obligatory"); *In re Estate of Ferdinand Marcos, Human Rts. Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("specific, universal, and obligatory")).

The Second Circuit Court of Appeals has not yet had the opportunity to address squarely the post-*Sosa* limits of common law claims in this area. However, many district courts in the Second Circuit have summarized the holding in *Sosa* and analyzed claims under or with citation to the Second Circuit's two pre-*Sosa* cases. *See., e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) and *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, *repub. at* 414 F.3d 233 (2d Cir. 2003); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 46-47, 130-31 (E.D.N.Y.

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[3] "Specific" (or "definable") requires "an interpretation sufficiently precise so that the conduct outlawed is clear, and not vague or ambiguous." BETH STEPHENS AND MICHAEL RATNER, INT'L HUMAN RIGHTS LITIG. IN U.S. COURTS 52 (1996). However, it is not necessary that there be unanimous consensus about every detail of the definition. *Id, (citing Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995)). "Universal" means there is "general recognition among states that a specific practice is prohibited," but does not require that every nation be in agreement. *Id.* (*citing Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988)). "Obligatory" means "the prohibition is considered a requirement, not just a desirable goal …." *Id.*

2005); *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 138-41 (E.D.N.Y. 2004); *Weiss v. The American Jewish Comm.*, 335 F. Supp. 2d 469, 476 (S.D.N.Y. 2004).

Based on the above authorities, the test for determining whether a claim is actionable under the ATS in the Second Circuit remains that initially laid out in *Filartiga*: namely, that claims are actionable under the ATS if they are "well-established, universally recognized norms of international law." 630 F.2d at 888; *see also Kadic*, 70 F.3d at 239.

2. Customary International Law Is Determined By Reference to A Range of Sources

To determine what constitutes universally recognized norms of international law actionable under the ATS, courts consider numerous sources including multilateral and regional agreements, decisions of international tribunals and other forms of state practice. Treaties, whether ratified, self-executing or not, provide evidence of whether a particular customary international legal norm exists. *See, e.g.*, *Sosa*, 542 U.S. at 733-34*; Kadic*, 70 F.3d at 242-43; *Filartiga*, 630 F.2d at 883-84; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 339, *motion to certify, appeal den.*, No. 01 Civ. 9882, 2005 WL 2082847 (S.D.N.Y. 2005). International declarations, though non-binding, are also of evidentiary value under *Filartiga* and *Flores* to the extent that they describe state custom and practice. *See Flores*, 414 F.3d at 261 (endorsing the *Filartiga* analysis of the Universal Decl. of Human Rts.)); *see also Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.* 158 F.3d 92, 118 (2d Cir. 1998); *Kadic*, 70 F.3d at 241; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 317 (S.D.N.Y. 2003).

In addition, the statutes and rulings of international courts and tribunals, as well as other sources of international law, are also indicative of customary international law norms. *See Sosa*,

542 U.S. at 734, 736 n.27 (citing the International Court of Justice ("ICJ") in discussion of whether arbitrary detention violates customary international law); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *Flores*, 414 F.3d at 250-51; *U.S. v. Yousef*, 327 F.3d 56, 96, 101 (2d Cir. 2003); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005); *Talisman*, 374 F. Supp. 2d at 338, 339 n.11; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 478 n.21 (S.D.N.Y. 2005); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d at 134-37; *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1155 (E.D. Cal. 2004).

3. The Enactment of the TVPA does not Preclude Claims for Torture and Extrajudicial Killing Under the ATS

In addition to the ATS, the TVPA also provides an avenue by which to seek redress for international violations. The TVPA, however, does not extinguish claims brought under the ATS. *See Kadic*, 70 F.3d at 241 ("The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act"); *see also Aldana v. Fresh Del Monte Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *4 (S.D.N.Y. Feb. 28, 2002); *but see Enahoro v. Abubakar*, 408 F.3d 877, 885 (7th Cir. 2005)

pet. for cert. filed, 74 U.S.L.W. 3371 (U.S. Oct. 20, 2005) (No. 05-78).[4]

4. The Attempted Extrajudicial Killing and Torture Alleged by Plaintiffs Satisfy the Element of State Action

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. *See Saravia*, 348 F. Supp. 2d at 1149-50.

A defendant acts under color of law when he "acts together with state officials" or "with significant state aid." *Kadic*, 70 F.3d at 245; *see also Aldana*, 416 F.3d at 1247. *Kadic* held that it was Congress' intent to "'make [] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to

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[4] The *Enahoro* court was concerned that the plaintiffs there would plead under the ATS specifically to avoid the exhaustion of remedies requirement under the TVPA. *Id.* However, in the present case, Plaintiffs have not pled in a manner to evade the exhaustion of remedies requirement, but instead affirmatively plead that no remedies exist in Haiti. Compl. ¶¶ 43 – 48. Plaintiffs have brought their claims of torture under both the ATS and the TVPA because, as Judge Cudahy explained in dissent in *Enahoro*, "[t]he two acts thus are not competing provisions but are meant to be complementary and mutually reinforcing (if somewhat coextensive)." 408 F.3d at 888 (Cudahy, J., dissenting). Judge Cudahy's dissent is in line with all other federal courts that have decided the issue. *See id.* at 888-89 (*citing Kadic*, 70 F.3d at 241 *Flores*, 343 F.3d at 153; *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168-69 (5th Cir. 1999); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778-79 (9th Cir. 1996); *Wiwa*, 2002 WL 319887, at *4; *Doe v. Islamic Salvation Front*, 993 F.Supp. 3, 7-9 (D.D.C. 1998).

Moreover, at least one appellate court has implicitly accepted the validity of pleading torture and extrajudicial killing under both the TVPA and ATS even where exhaustion of remedies is an issue. In *Jean v. Dorelien* – another case involving abuses during the 1991-94 time periods in Haiti – the Eleventh Circuit held that there is no exhaustion requirement under the ATS and remanded the case for reinstatement of both the ATS and TVPA claims. 431 F.3d 776, 781 (11th Cir. 2005).

deal with torture or killing by purely private groups.'"[5] 70 F.3d at 245 (*quoting* H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991)). Even when there is no evidence that the individual himself had engaged in the actual human rights violations but was merely in control of certain forces that ultimately perpetuated the underlying wrongs, economic, military or political support by the government to that controlling, private individual, along with the government's acquiescence in human rights abuses, meets this state action test.[6] *Id.*

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[5] An attenuated and indirect connection between the actions of the government and the private actor is not enough to satisfy the state action requirement. *See Bigio v. Coca-Cola Co*., 239 F.3d 440, 448 (2d Cir. 2001). The appellants in *Bigio* sought damages from Coca-Cola for the "unlawful manner" in which their property had been seized by the Egyptian government and sold to the Coca-Cola Company. *Id.* at 443-444. The court found that the allegations were unsupported, and that "[a] private party does not 'act under color of law' simply by purchasing property from the government." *Id. at 448.* Consequently, the appellate court concluded that the district court did not have subject matter jurisdiction over the Bigios' claims. *Id.* at 449.

By contrast, this case alleges that Constant acted in concert with state officials and significant state aid consistent with the standard endorsed in *Kadic;* Plaintiffs' allegations go well beyond the activities of the Coca-Cola Company alleged in *Bigio.* The Complaint includes specific allegations of the Haitian state providing arms and training to the members of FRAPH. Compl. ¶ 13. FRAPH committed human rights abuses, including acts of torture, using the material aid and support of the Haitian Armed Forces. *Id.* The close relationship between FRAPH and the Haitian government is not the attenuated and indirect connection that the court in *Bigio* wanted to avoid. Accordingly, Defendant's actions, as the commander of FRAPH, meet the "color of law" requirement in both *Kadic* and *Bigio.*

[6] Another version of the state action test is whether the defendant is a 'willful participant' in joint action with the state or its agents" in human rights violations. *See Wiwa,* 2002 WL 319887, at *13-14 (holding that the plaintiff need not show that the defendants acted in concert with the state with respect to each human rights violation. A showing of conspiracy between the government and the private person is sufficient for state action.)

In *Wiwa,* the court found state action based on allegations of meetings to plot with the government, payments to the Nigerian military and police, purchase of weapons for the Nigerian police, coordinated intelligence, and furnishing the Nigerian military with boats and helicopters. *Wiwa,* 2002 WL 319887, *13; *see also Talisman,* 244 F. Supp. 2d at 328 (allegations of paying Sudan for protection, knowing that protection included unlawful acts; purchasing dual-use military equipment and permitting Sudanese military to use certain facilities to launch attacks on civilians; and helping to plan a strategy for "ethnic cleansing"); *compare In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004) (benefiting financially from engaging in business with an unlawful state is not enough to show state action).

In the present case, the allegations in the Complaint satisfy the "under the color of law" test laid out in *Kadic*. Plaintiffs have alleged 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. Compl. ¶ 13. FRAPH received financial and logistical support from the Haitian Armed Forces, who used the paramilitary group to maintain control over the population. *Id.* Plaintiffs have alleged that Defendant maintained a close association with the High Command of the Haitian Armed Forces through *Le Bureau d'Information et Coordination* (Office of Information and Coordination or BIC), the political police that reported directly to the Commander-in-Chief of the Haitian Armed Forces, Raoul Cedras. Compl. ¶¶ 36-37. Defendant exercised command and control over the ranks of FRAPH during all relevant times. *Id.* at ¶¶ 34-35. These allegations support a finding that Defendant was operating under the color of law at all times relevant to Plaintiffs' claims.

B. This Court has Subject Matter Jurisdiction over Plaintiffs' Torture Claim

1. Torture is a Violation of Customary International Law

"[F]or purposes of civil liability, the torturer has become — like the pirate and slave trader before him — *hostis humani generis,* an enemy of all mankind." *Sosa*, 542 U.S. at 732 (*quoting Filartiga*, 630 F.2d at 890). The *Sosa* court pointed to torture as the preeminent example of a violation of an international law norm with the definite content and sufficient

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The facts alleged in the Complaint in the present case against Defendant also constitute state action under the "joint action test." Plaintiffs have alleged that Defendant personally founded FRAPH and based it on the model created by Haiti's former dictator Duvalier with his Tonton Macoutes. Compl. ¶ 13. The paramilitaries operated parallel to and in conjunction with the army while reporting directly to Defendant. *Id*. Plaintiffs allege that the modus operandi of FRAPH was to team up with members of the Haitian military to raid homes and gang rape the women of the house. *Id.* at ¶ 14. Furthermore, the facts alleged about the attack on Jane Doe I indicate that some of the attackers were wearing uniforms customarily worn by the Haitian Armed Forces. *Id.* at ¶ 20. Accordingly, the allegations of joint activity between members of FRAPH and the Haitian Armed Forces meet the joint action test.

acceptance among nations equal to the "historical paradigms familiar when [the ATS] was enacted." *Sosa*, 542 U.S. at 732.

When the Second Circuit originally confronted the issue of torture in *Filartiga*, it examined numerous international agreements and the official policies of nations to determine that torture violates "the law of nations" under the ATS. 630 F.2d at 878. Since that time, the Second Circuit has consistently held that torture is prohibited by universally accepted norms of customary international law. *See Kadic*, 70 F.3d at 243; s*ee also Flores*, 44 F.3d at 261 ("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"). Following the Second Circuit's lead, courts throughout the United States have repeatedly recognized that torture is a violation of customary international law, and therefore actionable under the ATS. *See, e.g., Aldana*, 416 F.3d at 1246-50; *In re Estate of Ferdinand Marcos*, 25 F.3d at 1474; *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1331 (S.D. Fla. 2002), *aff'd sub. nom., on other grounds, Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178, 184-85 (D. Mass. 1995).

2. Plaintiffs' Allegations Meet the Definition of Torture Under Both the ATS and TVPA

The acts alleged in the Complaint constitute torture under both customary international law (for ATS purposes) and the TVPA's statutory definition. Although there is significant

overlap, the standards for torture under the ATS and TVPA differ in certain respects.[7] While the allegations in this case satisfy both standards, it is important not to confuse or conflate them. *See Sosa*, 542 U.S. at 728 (in enacting the TVPA, Congress "did not intend to interfere with the jurisdiction of the ATS") (*quoting* H.R.Rep. No. 102-367, pt. 1, p. 4 (1991)).

For ATS purposes, under customary international law "torture" has been defined as follows:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflected on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflected by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not included pain or suffering arising only from, inherent in or incidental to lawful sanctions.

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, part I, article I, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N./ Doc./ A/39/51 (1984), reprinted in 23 I.L.M/ 1027; *see, e.g., Kadic*, 70 F.3d at 243-44; *Aldana*, 416 F.3d at 1251-52; *In re Estate of Marcos*, 25 F.3d at 1475; *Lin v. U.S. Dep't of Justice*, 432 F.3d 156 (2d Cir. 2005); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

[7] The TVPA has the additional requirements that the victim be in the custody or physical control of the offender, and that the victim suffered prolonged mental harm. *See infra* Sec. 4.

Although the TVPA's definition of torture is slightly narrower, both the ATS and TVPA's definitions of torture share the following basic elements:[8]

(1) willful infliction of severe pain or suffering, whether physical or mental;

(2) for the purpose of

(a) obtaining information or a confession;

(b) punishment;

(c) intimidation or coercion; or

(d) for any reason based on discrimination of any kind.

Plaintiffs' allegations of rape and beatings satisfy these basic elements of torture under both the ATS and TVPA in every respect.

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[8] The definition of torture under the TVPA is:

(1) . . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –

(A) the intentional inflection or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 note.

a) Rape Is a Form of Torture

U.S. courts have repeatedly held that rape constitutes torture. *See Kadic*, 70 F.3d at 242 (rape and forced impregnation are "forms of torture"); *see also Doe I v. Unocal Co.*, 395 F.3d 932, 945, 955 (9th Cir. 2002) (stating "[r]ape can be a form of torture" and equating torture with rape); *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2002) ("Rape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity."); *Talisman*, 244 F. Supp. 2d at 326 n.34 (recognizing liability for aiding and abetting torture, including rape); *In re Extradition of Suarez-Mason*, 694 F. Supp. 676, 682 (N.D. Cal. 1988) ("shock sessions were interspersed with rapes and other forms of torture"); *cf. United States v. Bailey*, 444 U.S. 394, 423 (1980) (rape "is the equivalent of torture, and is offensive to any modern standard of human dignity"); *Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (Blackmun, J., concurring) (rape is "nothing less than torture").[9]

In addition, rape is widely recognized as torture by international criminal tribunals. The International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have consistently held rape and sexual violence to be forms of torture meriting criminal punishment under their respective statutes. *See, e.g.*, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23/I-A (Appeal Judgment) (June 12, 2002) ¶¶ 134-156, 185 (upholding the Trial Chamber's convictions of torture for rape and other forms of sexual violence); *Prosecutor v. Delalic*, Case No. IT-96-21/T (Trial Judgement) (November 16,

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[9] U.S. State Department officials have also condemned rape as torture. *See, e.g.*, U.S. DEP'T OF STATE, OFFICE OF INT'L WOMEN'S ISSUES, *FACT SHEET: IRAQI WOMEN UNDER SADDAM'S REGIME: A POPULATION SILENCED* (MARCH 20, 2003) ("Women in Saddam's jails are subjected to the following forms of torture: brutal beatings, systematic rape, electrical shocks, and branding."), *available at* http://www.state.gov/g/wi/rls/18877.htm); *see also* INT'L HUMAN RIGHTS ABUSES AGAINST WOMEN: HR'G BEFORE THE SUBCOMM. ON HUMAN RIGHTS. AND INT'L ORG. OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 101st CONG., 2d Sess. 142 (1990).

1998) ¶ 496 (rapes and other forms of sexual violence which occurred in a detention center constitute acts of torture); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A (Appeal Judgment) (July 21, 2000) ¶ 113 (upholding Trial Chamber's finding that acts of rape and other forms of sexual violence committed during interrogation constitute torture); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Trial Judgment) (September 2, 1998) ¶ 685-90 (rape and sexual violence charged as "other humane acts" and so adjudged, noting that rape compares to torture "as a violation of personal dignity").

Regional human rights institutions have likewise recognized rape as a form of torture. *See, e.g. Aydin v. Turkey*, Eur. Ct. H.R. 23178/94 (1997) ECHR 75 (September 25, 1997), *available at* http://www.worldlii.org/eu/cases/ECHR/1997/75.html; *Mejia v. Peru*, Case 10/970, Inter-Am. C.H.R. 157. PEA/se.L/V/II.88, doc. 10 rev. (1995), *available at* http://www.cidh.org/annualrep/95eng/Peru10970.htm. Indeed, one of the early regional bodies to recognize rape as torture was the Inter-American Commission on Human Rights in regard to the rape of women in Haiti. The Commission stated: "the rape and other sexual abuse of Haitian women inflicted physical and mental pain and suffering ….Rape and the threat of rape against women also qualifies as torture …. it is clear that in the experience of torture victims, rape and sexual abuse are forms of torture which produce some of the most severe and long-lasting traumatic effects. REPORT ON THE SITUATION OF HUMAN RIGHTS. IN HAITI, OEA/Ser.L/V/II.88 Doc.10 rev. February 9, 1995 (para. 134), *available at* http://www.cidh.org/countryrep/EnHa95/ EngHaiti.htm. (last visited Jan. 31, 2006). International scholars have similarly found rape to be torture. *See, e.g.*, Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 Am. J. Int'l L. 424, 425 (1993); Evelyn Mary Aswad, *Torture by Means of Rape*, 84 Geo. L.J.

1913 (1996). Accordingly, it is clear that rape is universally recognized as "torture" under U.S. and international authorities and is actionable under the ATS.

b) Rape Entails Physical *and M*ental Pain and Suffering

There can be no doubt that rape meets the ATS and TVPA's requirement that the alleged torturer willfully inflict severe physical and mental suffering. In *Prosecutor v. Kunarac* IT-96-23/1-A, ICTY at ¶¶ 150-51 (June 12, 2002), the Appeals Chamber held that the enormity of the suffering inflicted by rape *per se* meets the severity of pain and suffering required by the norm of torture: "[S]ome acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously one of those acts. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture…the act of rape necessarily implies such pain or suffering." *Id.*

Moreover, numerous studies have shown that victims of rape generally suffer from Post Traumatic Stress Disorder ("PTSD") among other physical and mental ailments. *See* Carlo Faravelli et al., *Psychopathology After Rape*, 161 Am. J. Psychiatry 1483–85 (2004) (One central and almost universal effect of rape is post-traumatic stress disorder ("PTSD"), which is developed by 95% of women who have experienced sexual trauma); Human Rights Watch, National Coalition for Haitian Refugees (HRW/NCHR), *Rape in Haiti: A Weapon of Terror* (July 1994) (physical consequences suffered by victims of rape in Haiti have included death by vaginal hemorrhaging and unwanted pregnancies), available at http://www.nchr.org/reports/rape_in_haiti_1994.pdf; *Prosecutor v. Delalic*, *supra* at § 495 (rape inflicts particularly severe psychological suffering that "may be exacerbated by social and cultural conditions and [that] can be particularly acute and long lasting."); Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UN Doc. E/CN.4/1997/47 ¶19 (February 12, 1997) (stressing the frequency of

post-traumatic stress disorder as a result of rape); *Mejia v. Peru*, Case 10.970, Inter-Am. C.H.R. 157, OEA/se.L./V/II 91, doc. 7 rev. at Part V.B.3.a (Marcy 1, 1996) (rape causes "psychological trauma…from having been humiliated and victimized"); *available at* *h*ttp://www.cidh.org/annualrep/95eng/Peru10970.htm.[10]

Finally, studies have also shown that the impact of rape and sexual abuse may be heightened when done in one's own home and when inflicted in the presence of others, particularly children, husbands, and other family members – which is precisely what happened to Plaintiffs in this case. *See* H.S. Resnick et al., *Assessment of Rape-Related Posttraumatic Stress Disorder: Stressor and Symptom Dimensions*, 3 Psychological Assessment: A Journal of Consulting & Clinical Psychology 561–72 (1991) (trauma of sexual assault is aggravated when the victim is trapped in surroundings familiar to those in which the rape took place, and when the victim has suffered previous trauma).

Here, the abuses alleged by Plaintiffs Jane Doe I and II easily satisfy the element of torture that requires the intentional infliction of physical and mental pain and suffering. Jane Doe I alleges that she was gang raped on two separate occasions when armed member of FRAPH broke into her home. On both occasions, her three children were forced to watch their mother being attacked and raped by several men. *See* Compl. ¶¶ 20, 22. Moreover, Jane Doe I became pregnant as a result of one of the gang rapes, causing severe emotional distress that continues to

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[10] The U.N. Guidelines on Prevention and Response to Sexual Violence Against Refugees issued by the U.N. High Commissioner on Refugees in 1995 equate sexual violence with torture, stating that "an act of forced sexual behavior can be life-threatening. Like other forms of torture it is often mean to hurt, control and humiliate…all victims experience psychological trauma. They may feel paralyzed by terror, experience physical and emotional pain, intense self disgust, powerlessness, worthlessness, apathy, denial and an inability to function in their daily lives." SEXUAL VIOLENCE AGAINST REFUGEES: GUIDELINES ON PREVENTION AND RESPONSE, CH. 1, 1.5 (1995), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3b9cc26c4

this day. *Id.* Jane Doe II was also gang raped in front of family members and suffered repeated kicks to her stomach that still causes her substantial and continual pain.[11] *Id.* ¶ 28.

c) Plaintiffs Were Attacked For Reasons Listed in The Torture Definition

To be liable for torture under both customary international law and the TVPA, the alleged act must be inflicted as a means to accomplish a particular end. Here, the Complaint alleges that the type of gang rape and beatings suffered by Jane Doe I and II was the pattern and practice of FRAPH which used these acts as a means to punish, intimidate and/or discriminate against persons for political and social reasons.

(i) As punishment and intimidation

FRAPH commonly raped women in Haiti to punish or intimidate them because of their own political and community activities or because of their association with other activists.[12] Plaintiffs have pled that Defendant conceived FRAPH for the purpose of maintaining control over the Haitian population on behalf of the military regime. *See* Compl. ¶ 13. In order to maintain control, members of FRAPH would target individuals and communities that were organizing in resistance to the military regime. *Id.* In the cases of both Jane Doe I and II, FRAPH members targeted them for their pro-Aristide political activities.

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[11] Severe beatings also constitute torture under the ATS and the TVPA. *See Mehinovic*, 198 F. Supp. 2d at 1344-47. Here, Jane Doe II continues suffers intense abdominal pain as a result of repeated kicks to her stomach when she was attacked. *Id.* ¶ 29.

[12] The Inter-American Commission for Human Rights, in its report on Haiti, recognized that rape and other sexual abuse of Haitian women "inflicted physical and mental pain and suffering in order to punish women for their militancy and/or their association with militant family members and to intimidate or destroy their capacity to resist the regime…" *Report on the Situation of Human Rights in Haiti, supra* 14 ¶ 134; *see also* HUMAN RIGHTS WATCH, NATIONAL COALITION FOR HAITIAN REFUGEES ("HRW/NCHR"), *Rape in Haiti: A Weapon of Terror* at 3 (July 1994), *available at* http://www.nchr.org/reports/rape_in_haiti_1994.pdf; U.S. STATE DEP'T, HAITI HUMAN RIGHTS PRACTICES (1994), *available at* http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_ara/Haiti.html.

Jane Doe I had been outspoken about the disappearance of her husband by members of the Haitian Armed Forces. Compl. ¶ 19. When the first attempt to quiet her failed (in April 1994), FRAPH returned to her home a second time on or about June 6, 1994. *Id.* ¶¶ 20-22. During the interim, she had continued to demand information about her husband's disappearance. *Id.* Jane Doe I has alleged that the FRAPH members who attached her were punishing her for speaking out against the military regime and were attempting to intimidate her into silence.

Jane Doe II was an active member of a grassroots pro-democracy organization. *Id.* ¶ 25. As a member of this organization, Jane Doe II often pasted pictures of the displaced President Aristide on walls of public places. *Id.* Jane Doe II has alleged that the attack by FRAPH on her was also conducted for the purposes of punishing her for her pro-democracy activities and trying to intimidate her from continuing her activist work.

(ii) For reasons based on discrimination

FRAPH's campaign of violence directed at women, including a pattern of rape and other sexual abuse, constituted discrimination, based both on political views and gender. Rape and sexual abuse of women are expressions and acts of discrimination as well as tools of intimidation and terror designed to subordinate women. The United Nations General Assembly adopted by consensus the U.N. Declaration on the Elimination of Violence Against Women, which states: "violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men." *See*

GENERAL ASSEMBLY RESOLUTION 48/104, A/RES/48/104 (1994), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/ A.RES.48.104 En?Opendocument.[13]

In Haiti, several reports by human rights monitors show that rape is a form of harm reserved for particularly women. The Inter-American Commission's report on human rights abuses in Haiti recognized that – whether combined with other purposes or not – gender-specific abuse was directed at women because they are women. For these reasons, Defendant and FRAPH discriminated against both Jane Doe I and II based on both their pro-democracy, anti-military regime political beliefs, and their gender.

d) Plaintiffs' Allegations Constitute Torture Under the Heightened Standard of the TVPA

The TVPA contains two additional requirements that customary international law does not: custody or physical control by the perpetrator and "prolonged" mental harm. Plaintiffs satisfy both these elements.

(i) Plaintiffs' Were Under Their Attackers' Custody or Physical Control

Under U.S. law, a person is in custody if, in view of all the circumstances surrounding the incident, a reasonable person would have believed she was not free to leave. *United States v.*

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[13] In its *Recommendation No. 19 on Violence Against Women*, the Committee on the Elimination of all Forms of Discrimination Against Women recognizes that violence against women, in all its aspects, is a form of discrimination. *See* GENERAL RECOMM. ¶ 1, Violence Against Women (11th Sess., 1992), U.N. Doc. A/47/38 at 1 (1993), available at http://www1.umn.edu/humanrts/gencomm/generl19.htm. (defining violence against women as "violence that is directed against a woman because she is a woman or which affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.").

The Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women likewise recognizes that "[v]iolence against women is an offense to human dignity and a manifestation of the historically unequal distribution of power between women and men..." CONVENTION PREAMBLE, AG/RES. 2012 (XXXIV-O/04), 33 I.L.M. 1534 (1994).

Mendenhall, 446 U.S. 544, 554 (1980), *jdgmt. aff'd in part, rev'd in part on other grounds*, 518 U.S. 81 (1996); *see also I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984); *Cruz v. Miller*, 255 F.3d 77 (2d Cir. 2001); *United States v. Koon*, 34 F.3d 1416, 1446 (9th Cir. 1994). The Court in *Mendenhall* explained that a "seizure" may occur when there is "some physical touching of the person of the citizen" that leads them to believe they are unable to leave.[14] 446 U.S. at 554.

Jane Doe I and II have sufficiently alleged that they were in the custody or physical control of their offenders during the attacks and gang-rapes. Jane Doe I alleges that during the two separate attacks that she suffered at the hands of FRAPH members, at least seven armed men forced their way into her home. *See* Compl. ¶¶ 20, 22. At the time of the forced entries and rape, she was alone in the home with her minor children. *Id.* Jane Doe II alleges that a group of armed men broke into her brother's home and attacked her. *Id.* ¶ 28. For these reasons, the custody or physical control element of the TVPA is satisfied.

(ii) Plaintiffs Suffered Prolonged Mental Harm

The TVPA states that prolonged mental harm can be caused by the intentional inflection or threatened infliction of severe physical pain or suffering or the threat of imminent death. 28 U.S.C. § 1350 note, § 2. Plaintiffs each allege that they suffered mental pain or suffering leading to prolonged mental harm consistent with this definition. *See* Compl. ¶¶ 64, 69, 73. In addition to the mental suffering each Plaintiff suffered as a result of being repeatedly raped, Jane Doe I alleges that, after she was stabbed, her attackers left her to die. *Id.* The threat of her imminent death has contributed to her mental pain and suffering. *Id.* ¶ 64.

[14] The definition of "custody" for purposes of applying Fifth Amendment protections also provides guidance. In *Miranda v. Arizona*, the Supreme Court stated that a "custodial interrogation" referred to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. 436, 444 (1966).

Prolonged mental harm under the TVPA can also result from the threat that another individual will imminently be subjected to death or severe physical pain or suffering. 28 U.S.C. § 1350 note, § 3(b)(2). Being forced to witness the beating of a child or other family member constitutes the infliction of severe mental pain and suffering. *Cf. Qi*, 349 F. Supp. 2d at 1318 (finding that a prisoner had been subjected to "mental torture" when she "was forced to witness the guards' severe mistreatment of a close friend"). Both Jane Doe I and II were forced to witness the severe beating of family members. Compl. ¶¶ 20, 22, 28. Jane Doe I alleges that her eight year-old son was repeatedly kicked in the head. *Id.* ¶ 20. His hands were then tied behind his back and he was left on the ground bleeding from his nose and ears. *Id.* Jane Doe II was forced to watch her sister-in-law being raped and beaten. *Id.* ¶ 28.

* * *

In conclusion, for each of the reasons stated above, Plaintiffs have adequately pled allegations that constitute torture under both the customary international law definition and under the TVPA. The Court therefore has subject matter jurisdiction over Plaintiffs' second cause of action, for "Torture."

C. This Court Has Subject Matter Jurisdiction Over Jane Doe I's Claim for Attempted Extrajudicial Killing

1. Attempted Extrajudicial Killing Is Actionable under the ATS

Extrajudicial killing has long been recognized as a violation of the law of nations, and thus actionable under the ATS. *See Kadic*, 70 F.3d at 243; *Saravia*, 348 F. Supp. 2d at 1153; *Xuncax*, 886 F. Supp. at 184; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) *reconsid. granted in part on other grounds*, 694 F. Supp. 101 (N.D. Cal. 1988); *Wiwa*, 2002 Wl 319887, at *12. Similarly, Jane Doe I's claim for "Attempted Extrajudicial Killing" is also actionable under the ATS.

In determining whether an attempt is actionable under the ATS, the Court should look to domestic common law. *Sosa* established that the ATS recognizes a cause of action, derived from the common law, for certain violations of international law. "The jurisdictional grant [in the ATS] is best read as having been enacted on the understanding that the *common law* would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Sosa*, 542 U.S. at 724 (emphasis added). The contours of the cause of action are therefore defined by the common law, not by the law of nations *per se.* International law can define the underlying conduct as wrongful and establish the obligation of nations to follow it. However, international law "never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their municipal laws." *Tel-Oren*, 726 F.2d at 778 (J. Edwards, concurring). Indeed, "to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of [the ATS]." *Id.* Accordingly, in determining whether attempt is actionable under the ATS, the Court should examine domestic law as well.

Domestic U.S. law, has long punished attempted crimes and torts, and specifically attempted murder. The crime of attempt has been defined as part of the common law since at least the late 18th century. *See, e.g., Rex. v. Scofield*, Cald. 397 (1784); *Rex v. Higgins*, 102 Eng. Rep. 269, 275 (1801). The federal murder statute now criminalizes "attempts to commit murder or manslaughter." 18 U.S.C § 1113. Although the attempt statute does not define the requisite intent, it is a well settled principle that attempt requires the specific intent to commit the underlying offense. *See Morissette v. United States*, 342 U.S. 246, 263 (1952). In *United States v. Martinez*, 775 F.2d 31 (2d Cir. 1985), the Second Circuit held that intent to kill is sufficient to

satisfy the intent element of 18 U.S.C § 1113, and that there is no requirement of a particular motive for attempted murder.[15]

Given the long history under common and statutory law of punishing attempt in addition to completed crimes, attempt is actionable with regard to violations of customary international law. This Court therefore has the jurisdiction to hear Jane Doe I's claim for attempted extrajudicial killing.

Even if the Court relies on international law rather than domestic common law to determine whether attempted torts are actionable under the ATS, customary international law likewise prohibits attempts to violate human rights norms. A number of international conventions and tribunals, as well as the U.S. Congress, prohibit attempts to carry out acts which, if completed, would be violations of customary international law actionable under the ATS.

Although there is no specific convention against extrajudicial killing similar to those against genocide, torture or forced disappearance, reference to those conventions is instructive because they demonstrate the wide prohibition against attempts to violate human rights norm

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[15] New York state law defines second degree murder, in part, as the intentional killing of another person. NY CLS Penal § 125.25(1) (2005) ("with intent to cause the death of another person, he causes the death of such person or of a third person"). A person is guilty of attempt to commit a crime when "with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." NY CLS Penal § 110.00 (2005); *see People v. Falu*, 37 A.D.2d 1025, 325 N.Y.S.2d 798 (3d Dep't 1971) (holding that attempt requires the specific intent to commit the underlying offense). To determine whether a person has attempted to commit a crime, courts focus upon the mind and intent of the actor and not upon the result of the act. *See People v. Rosencrants*, 80 Misc. 2d 721, 392 N.Y.S.2d 808 (N.Y. County Ct. 1977). The test is "whether defendant, acting with intent to kill, engaged in conduct tending to effect the commission of murder … Attempt is established by conduct carrying the project forward within dangerous proximity to the criminal end to be attained." *People v. Larrabee*, 201 A.D.2d 924, 607 N.Y.S.2d 769, 770 (4th Dep't 1994) (internal quotes and citations omitted).

within the international community.[16] Genocide has been clearly recognized by U.S. courts as a violation of international law. *See Kadic,* 70 F.3d at 242. Article 3(d) of the Convention on the Prevention and Punishment of the Crime of Genocide states that an "attempt to commit genocide" shall be punishable under this treaty. 78 U.N.T.S. 277, Jan. 12, 1951, art. 3(d).

As discussed above, torture is amply recognized and prohibited as a violation of customary international law by a number of courts. *See, e.g., Kadic*, 70 F.3d at 243; *Xuncax*, 886 F. Supp. at 184. Similarly, "attempted torture" has been recognized by a number of international conventions, including the CAT. The Convention states, "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture…." CAT, *supra* at 11, art. 4(1). Moreover, the U.S. Congress has criminalized attempted torture. *See* 18 U.S.C. § 2340A (2004) ("Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both…).

U.S. case law has recognized that forced disappearance is a violation of customary international law. *See Forti v. Suarez-Mason*, 694 F. Supp. 707, 711, (N.D. Cal 1988); *Xuncax*, 886 F. Supp. at 185-86. The Inter-American Convention on Forced Disappearance of Persons requires state actors to "punish within their jurisdictions, those persons who commit or *attempt* to

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[16] Victims of attempted extrajudicial killings should not be denied recourse due to the lack of a specific treaty on the crime they endured. In part, there was no specific treaty against extrajudicial killing because numerous treaties already protect the right to life. *Se, e.g*, INT'L COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 6, G.A.Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N.Doc. A/6316 (1966); AM. CONVENTION ON HUMAN RIGHTS, ART. 5, OAS TREATY SERIES No. 36, OAS Off. Rec. OEA/Ser. 4 v/II 23, doc. 21, rev. 2 (English ed. 1975); EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, ART. 5, 213 U.N.T.S. 222 (1953); UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 3, G.A.Res. 217A, U.N. Doc. A/810 (1948). These treaties focus on setting forth positive rights (*i.e*., the right to life) rather than prescribing punishments for violations of those rights in the manner of the conventions on genocide and torture. Nonetheless, the latter treaties demonstrate that the international community has prohibited attempted violations of fundamental human rights norms.

commit the crime of forced disappearances of person and their accomplices and accessories." INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCES, March 28, 1996, 33 I.L.M. 1429(b), article 1.b (emphasis added), *available at* http://www.oas.org/cim/English/Convention%20Violence%20Against%20Women.htm#1.

The Rome Statute of the International Criminal Court ("Rome Statute") gives the International Criminal Court jurisdiction over genocide, crimes against humanity and war crimes. *See* Rome Statute, U.N. Doc. A/CONF.183/9, art. 5, *available at* http://www.un.org/law/icc/statute/romefra.htm. The statute explicitly confers jurisdiction to punish "attempts to commit such [] crime[s] by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions." *Id.*, art. 25(3)(f). Under article 25(3), an attempt to commit a killing in these circumstances is a punishable offense.

The ICTY and ICTR follow similar patterns. The ICTY criminalizes killing as a predicate act of genocide and then provides jurisdiction for the court to prosecute attempted genocide. *See* UPDATED STATUTE OF THE INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, *available at* http://www.un.org/icty/legaldoc-e/index.htm, arts. 4(2)(a) and 4(3)(d). The ICTR takes an identical approach. *See* STATUTE OF THE INT'L CRIM. TRIB. FOR RWANDA, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1602 (1994), *available at* http://www.un.org/ictr/statute.html, arts. 2(2)(a) and 2(3)(d). Notably, there has been a successful prosecution of attempted murder at the ICTY with respect to the two survivors of an incident in which the defendant had made seven people stand on a bridge and then shot them all into the river below. *See* Amended Indictment, *Prosecutor v. Vasiljevic*, *supra* 14-15, Trial Chamber II (July 12, 2001).

Here, the facts alleged by Plaintiff Jane Doe I demonstrate that her attackers attempted to murder her. Jane Doe I alleged that she was brutally attacked and stabbed in the neck by members of FRAPH. (Compl. ¶ 22.) She has alleged that her attackers attempted to kill her in retaliation for her efforts to seek the whereabouts of her husband, who had been disappeared. (Id. at ¶¶ 21, 22.) The attack was a failed execution, committed without any authorization by a court and constitutes a violation actionable under the ATS. Because the crime of attempt has been recognized by both domestic and international bodies of law, this Court has subject matter jurisdiction over Plaintiff's claim for "Attempted Extrajudicial Killing" under the ATS.[17]

2. Attempted Extrajudicial Killing Is Actionable Under the Torture Victim Protection Act

Extrajudicial killing is defined specifically by the TVPA as "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people." 28 U.S.C. § 1350 note.

While the TVPA does not specifically list "attempt" as a punishable offense, the TVPA is based directly on the CAT, and draws its definitions largely from that Convention. *Xuncax*, 886 F. Supp. at 178. The CAT, as noted above, *does* recognize attempt as a violation of the convention. Accordingly, under the TVPA, attempted extrajudicial killing is a logical extension of the Act and should be afforded subject matter jurisdiction by this Court.

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[17] This result is sensible. The fact that a victim survives an intended murder should not diminish the illegality of the act carried out by the perpetrator. To hold otherwise would require the victim or the prosecutor to plead a lesser offense which would not accurately capture the brutality of the act. The conventions recognize this principle and incorporate attempt into the list of prohibited actions.

D. This Court Has Subject Matter Jurisdiction Over Plaintiffs' Cause of Action For Crimes Against Humanity

The prohibition against crimes against humanity is a well-settled norm of customary international law that is actionable under the ATS. Crimes against humanity have been recognized as violations of international law since the trials of German and Japanese leaders after World War II. *See Mehinovic*, 198 F. Supp. 2d at 1352-53; *see also* Rest. (Third) of the Foreign Relations Law of the United States § 702, rpt. note 1 (1987). The Charter of the International Military Tribunal at Nuremberg defined crimes against humanity as any of the following acts committed against a civilian population: murder, extermination, enslavement, deportation, persecution on political, racial or religious grounds, or other inhuman acts. *See id.* art. 6(c), 82 U.N.T.S. 284 (August 8, 1945); *see also Talisman*, 226 F.R.D. at 480; *Saravia*, 348 F. Supp. 2d at 1154-55; *Mehinovic*, 198 F. Supp. 2d at 1352-53.

Similarly, several international agreements have codified the prohibition of crimes against humanity. *Saravia*, 348 F. Supp. 2d at 1155 CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITS TO WAR CRIMES AND CRIMES AGAINST HUMANITY, Nov. 26, 1968, 660 U.N.T.S. 195, *reprinted in* 8 I.L.M. 68 (1969); PRINCIPLES OF INT'L CO-OPERATION IN THE DETECTION, ARREST, EXTRADITION AND PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES AND CRIMES AGAINST HUMANITY, G.A. Res. 3074 (XXVIII), 28 GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030/Add.1 (1973)).

Moreover, the ICTY has jurisdiction to prosecute crimes against humanity. The ICTY statute defines crimes against humanity as any of the following crimes when committed in armed

conflict,[18] and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; or other inhumane acts. *See* UPDATED STATUTE OF THE INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, at art. 5, s*upra* at p. 25. The ICTR maintained the same list of predicate acts set out in the ICTY statute but required that they be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. *See* STATUTE OF THE INT'L CRIM. TRIB. FOR RWANDA, *supra* at p. 25.

Through their rulings, the ICTY and ICTR have both confirmed the status of crimes against humanity under customary international law. *See, e.g., Saravia*, 348 F. Supp. 2d at 1155; *Prosecutor v. Tadic*, Case No. IT-94-1, (May 7, 1997), at ¶ 623 ("the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned.").

The Rome Statute likewise codifies the current definition of crimes against humanity under international law. *See Saravia*, 348 F. Supp. 2d at 1155-56. Article 7 of the Rome Statute

[18] Although the ICTY statute contains a requirement that the attack be committed during armed conflict, that element is generally not required under customary international law. "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict." *Talisman*, 226 F.R.D. at 481 (*quoting Prosecutor v. Tadic*, No. IT-94-1A, ¶ 141 1995 WL 17205280 (App. Chamber, Int'l Crim. Trib. for the Former Yugoslavia) (Oct. 2, 1995)). Neither the ICTR statute nor the Rome Statute requires a nexus to an armed conflict. *See infra*.

defines crimes against humanity as one of a list of predicate acts[19] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[20]

Since the Supreme Court's decision in *Sosa*, U.S. courts have found crimes against humanity actionable under the ATS. Indeed Justice Breyer's concurring opinion in *Sosa* acknowledges that crimes against humanity are among the offenses that are both "universally condemned" and for which there is "agreement that universal jurisdiction exists to prosecute" such conduct, therefore supporting the exercise of jurisdiction under the ATS. *Sosa*, 542 U.S. at 762; s*ee also Presbyterian Church of Sudan v. Talisman, Energy, Inc.*, 2005 U.S. Dist LEXIS 18399, at *24 (S.D.N.Y. Aug. 31, 2005); *Mujica*, 381 F. Supp. 2d at 1180; *Saravia*, 348 F. Supp.

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[19] The predicate acts are: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; enforced disappearance of persons; the crime of apartheid; or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[20] While the United States is not a party to the Rome Statute, its renunciation was unrelated to the status of crimes against humanity under international law. Indeed, the United States has approved several United Nations resolutions recognizing the status of crimes against humanity under international law. *See Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1360-61 (S.D. Fla. 2001). Also, in a submission to the Trial Chamber of the ICTY the United States argued:

> The relevant law and precedents for the offences in question here – genocide, war crimes and crimes against humanity – clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all states, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals.

Amicus Curiae Brief of the United States, *Prosecutor v. Tadic*, IT-94-I-T, Motion Hearing (July 25, 1995), *quoted in* Sharon A. Williams, "The Rome Statute on the International Criminal Court: From 1947 - 2000 and Beyond," 38 OSGOODE HALL LAW JOURNAL 297, 313 (2000).

2d at 1157. Other courts, while not expressly ruling on the actionability of the norm, have implicitly accepted claims of crimes against humanity. *See, e.g.*, *Cabello*, 402 F.3d at 1154 ("[C]rimes against humanity … have been a part of the United States and international law long before Fernandez's alleged actions.") (citation omitted); *Talisman*, 226 F.R.D. at 480-82.[21]

Prior to *Sosa*, numerous courts, including the Second Circuit, held that the prohibition of crimes against humanity was a part of customary international law. *See, e.g.*, *Flores*, 414 F.3d at 244 n.18 ("Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II.") (citations omitted); *Kadic*, 70 F.3d at 232 ("[W]e hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity…"); *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002); *Wiwa*, 2002 WL 319887, at *27; *Mehinovic*, 198 F. Supp. 2d at 1352; *Cabello*, 157 F. Supp. 2d at 1360 (*citing Princz v. F.R.G.*, 26 F.3d 1166, 1173 (D.C. Cir. 1994)); *Quinn v. Robinson*, 783 F.2d 776, 799-800 (9th Cir. 1986); *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 566-8 (N.D. Ohio 1985).

Several U.S. courts have found that the norm against crimes against humanity is "specific, universal and obligatory." *See, e.g.*, *Saravia*, 348 F. Supp. 2d at 1144; *Mehinovic*, 198 F. Supp. 2d at 1344, 1352-54; *Wiwa*, 2002 WL 319887, at *5, 9, 27; *but see Mujica*, 381 F.

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[21] Even courts that have dismissed crimes against humanity claims have done so on other grounds, not because the norm is not actionable under the ATS. *See Aldana*, 416 F.3d at 1247 (claim of crimes against humanity not properly pled); *Qi*, 349 F. Supp. 2d at 1308-12 (consideration of "broader claims" of genocide and crimes against humanity is not appropriate in a default context); *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005) (although "[g]enocide and crimes against humanity are generally actionable under the Alien Tort Statute as international law violations," such claims would require the court to evaluate the policy or practice of a foreign state).

Supp. 2d at 1177 n.12 (rejecting argument that plaintiffs can pursue any claims that are "specific, universal and obligatory" but nonetheless finding crimes against humanity actionable under the ATS).

Notably, the other two branches of the U.S. government have enacted laws authorizing prosecutions of foreign officials for crimes against humanity. For example, Congress passed the 1998 Iraq Liberation Act, urging that Saddam Hussein be prosecuted for crimes against humanity. *See* IRAQ LIBERATION ACT OF 1998, Pub. L. No. 105-338, 112 Stat. 3178 (1998). The Iraqi Special Tribunal established individual criminal responsibility for crimes against humanity. *See* STATUTE OF THE IRAQI SPECIAL TRIB., *available at* http://www.cpa-iraq.org/human_rights/Statute.htm.

As the international authorities and domestic jurisprudence indicate, the norm prohibiting crimes against humanity is a part of customary international law. It is therefore a claim that can be brought under the ATS.

1. Rape is a crime against humanity

U.S. courts have acknowledged the international standard specifically prohibiting rape as a crime against humanity. *See In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d at 135-36 ("The list of the specific crimes contained within the meaning of crimes against humanity has been expanded…to include, in the ICTY and the ICTR, rape and torture"); *Wiwa*, 2002 WL 319887, at *9 (finding that rape is a crime against humanity).

Both the statutes of the ICTY and ICTR list rape among the predicate acts that are crimes against humanity. The U.N. Secretary-General's Report on the ICTY states:

> Crimes against humanity refer to inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population ... such inhumane acts have taken the form of so-called "ethnic

> cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

REP. OF THE SEC'Y-GENERAL PURSUANT TO PARAGRAPH 2 OF SEC'Y COUNCIL RESOL. 808; U.N. SCOR, 48th Sess., art. 5, U.N. Doc. S/25704 (1993), para. 48.

The ICTY has confirmed numerous indictments for crimes against humanity based on acts of rape. *See* Kelly Dawn Askin, *Devs. in Int'l Crim. Law: Sexual Violence in Dec. and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97 (1999). The seminal case involving gender-based violence is *Prosecutor v. Gagovic*, otherwise known as the *Foca* case, in which defendants were accused of detaining women for prolonged periods, forcing them to perform manual labor, and subjecting them to repeated acts of rape and other sexual violence. *Gagnovic and Others*, no. IT-96-23 (June 26, 1996), *amended* No. IT-96-23-I (July 13, 1998). These acts of sexual violence were charged as both rape and enslavement constituting crimes against humanity.[22] *Askin, supra*, at 119.

The ICTR has also dealt with rape and other sexual violence as crimes against humanity. In the *Akayesu* case, the Trial Chamber convicted the defendant of crimes against humanity for rape and other sexual violence.[23] *Prosecutor v. Akeyesu,* Case No. ICTR-96-4-T, (Sep. 2, 1998), ¶¶ 685-97. Similarly, the Inter-American Commission on Human Rights has found that "use of

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[22] These acts were charged as crimes against humanity and war crimes even though (unlike some of the other indictments involving sexual violence) they did not appear to have a strategic military or political purpose. *Id*. at 120.

[23] Rape was directly charged as a crime against humanity, and other sexual violence, such as forced nudity, was charged as "other inhumane acts" constituting crimes against humanity. *Akayesu,* ¶ 690. The decision also recognized sexual violence as an integral part of the genocide in Rwanda. *Id*. ¶ 731.

rape as a weapon of terror also constitutes a crime against humanity under customary international law." REP. ON THE SITUATION OF HUMAN RIGHTS. IN HAITI, *supra* 14, ¶ 135.

Finally, the international community's evolving recognition of gender-based violence as a grave violation of the norms of customary international law was codified in the aforementioned Rome Statute. In Article 7(1)(g), the Rome Statute includes rape as a predicate act for crimes against humanity, and also adds sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and "any other form of sexual violence of comparable gravity" to the list.

2. The Attacks on Plaintiffs Were Part of a Widespread or Systematic Attack on the Civilian Population

Plaintiffs have alleged that the acts committed against them were part of a widespread or systematic attack against a civilian population.[24] Compl. ¶ 33. Plaintiffs allege that several thousand people were killed by FRAPH and the military between 1991 and 1994. *Id.* The abuses caused thousands of Haitians to flee the country, often in crowded, unseaworthy boats. *Id.* FRAPH also looted and burned or destroyed homes in an effort to break the resistance of the population to military rule. *Id.* ¶ 13. FRAPH, over which Defendant had command and whose members he aided, abetted and conspired with, used rape and sexual assault to punish and intimidate women. *Id.* ¶ 14. The practices of FRAPH included extrajudicial killings, forced disappearances, arbitrary arrest and detention, rape and other torture and violence against women. *Id.* ¶ 11.

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[24] The "civilian population" requirement is fulfilled by "either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodological plan is evident." *Tadic*, Case No. IT-94-1-T. at Para 648. The notion of widespread abuses includes "the cumulative effect of a series of inhumane acts." *Id. See also Wiwa*, 2002 WL 319887, at *10 (defining "widespread" and "systematic") (citing *Prosecutor v. Rutuganda*, Case No. ICTR-96-3-T, Judgment and Sentence Para 65 (Dec. 6, 1999)).

Plaintiffs have also sufficiently alleged that Defendant knew or should have known that a widespread or systematic attack was being carried out against the civilian population of Haiti. *Id.* ¶ 38. Defendant recruited former violent paramilitary members to join FRAPH. *Id.* ¶ 13. FRAPH members received training from the Haitian military. *Id.* Defendant openly declared that he was leading a movement rooted in the style of a previous dictator. *Id.* Defendant named himself "General Secretary" of FRAPH, and directed 297 regional branches of FRAPH. *Id.* ¶ 35. Reports of rape were common and increased with the creation of FRAPH. *Id.* ¶ 14. The abuses committed by FRAPH were widely reported in the national and international media. *Id.* ¶ 38. Foreign diplomatic officials, human rights organizations and others openly voiced their concerns to Haitian authorities and the Haitian media about these abuses. *Id.* These allegations, if taken as true, show that Defendant knew or should have known about the widespread or systematic attack carried out by FRAPH against the civilian population of Haiti.

Therefore, because the prohibition of crimes against humanity is actionable under the ATS, the Court has subject matter jurisdiction over Plaintiffs' claim for crimes against humanity.

III. CONCLUSION

Based on the above, this Court has subject matter jurisdiction to hear each of Plaintiffs' remaining claims. Specifically, the Court has jurisdiction under the TVPA and the ATS to hear the "Torture" claim of Plaintiffs Jane Doe I and II and the "Attempted Extrajudicial Killing" claim of Jane Doe I. The court also has jurisdiction to adjudicate the Plaintiffs' claim for "Crimes Against Humanity."

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New York, NY

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