

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANE DOE I, JANE DOE II AND JANE DOE :
III, : 04 Civ. 10108 (SHS)
 : FINDINGS OF FACT AND
 : CONCLUSIONS OF LAW
 :
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 Plaintiffs, :
 :
 :
 -against- :
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 EMMANUEL CONSTANT, :
 a.k.a. TOTO CONSTANT, :
 :
 :
 Defendant. :
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SIDNEY H. STEIN, U.S. District Judge.

Jane Does I, II, and III, proceeding anonymously by permission of the Court, have sued Emmanuel “Toto” Constant for the violent attacks committed against them and others by a Haitian paramilitary organization he founded and led. The complaint states claims pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note). On August 16, 2006, the Court entered a default judgment against Constant due to his repeated failure to appear in this action. The Court subsequently held an evidentiary hearing at which witnesses testified and documentary evidence was received in order to determine the amount of damages, if any, owing to plaintiffs. Due deliberation having been had, it is hereby ORDERED AND ADJUDGED that the following constitute this Court’s findings of fact and conclusions of law:

I. FINDINGS OF FACT

A. *Procedural Posture*

This action was commenced on December 22, 2004 by the filing of a Summons and Complaint, which were personally served on defendant Emmanuel Constant on

January 14, 2005 by Ricardo R. Burnham in front of 26 Federal Plaza in New York, New York. Proof of service was filed on January 26, 2005 and supplemented on January 24, 2006. (Doe v. Constant, 04 Civ. 10108, Return of Service dated Jan. 14, 2005; Affidavit of Service dated Jan. 4, 2006.)

After Constant failed to answer the complaint, the Clerk of Court for the Southern District of New York issued a certificate of default on December 1, 2006 stating that Constant had not filed an answer to the complaint and that the time for him to answer had expired. Plaintiffs then filed a Motion for Judgment by Default on December 7, 2005 on notice to the defendant, returnable on December 21, 2005. Defendant did not respond to that motion. On August 16, 2006, this Court issued an order granting plaintiffs' motion and setting the date for a damages hearing. Defendant was also served with a copy of that order by plaintiffs.

A fact hearing was held on August 29, 2006. The witnesses were Dr. Robert McGuire, a social studies expert who focuses on Haiti; Dr. Mary Fabri, a psychologist who examined Jane Doe I and Jane Doe II; and Jane Does I and II themselves. The Court was also shown a videotaped deposition of Dr. Benjamin Lerman, a physician who examined Jane Doe I and Jane Doe II. Plaintiff Jane Doe III did not testify; instead, she submitted an affidavit regarding the events at issue as well as the report of Dr. Kathleen Allden, her examining psychiatrist.

The Court is fully aware of the problems inherent in rendering factual findings based on an evidentiary presentation by only one side to a litigation, but Constant has failed to participate in this action despite repeated attempts to secure his involvement.

B. Findings Regarding FRAPH

For a three year period beginning in September 1991, following a coup that overthrew an elected president, Jean Bertrand Aristide, Haiti was governed by military rule. (Tr. of 8/29 Hearing, at 24-25.) During that time, the governing body utilized paramilitary forces to exact violence upon its political opponents. (Id. at 18.) Emmanuel Constant founded in approximately 1993 the Front Revolutionnaire Pour L'Avancement et le Progres d'Haiti ("FRAPH"), one such paramilitary organization. (Id.) Prior to forming FRAPH, Constant had worked for the military government as the director of the government welfare office. (Id. at 25.)

Once formed, FRAPH was overseen by a central committee of five members. (Id. at 33.) Constant was the only individual to serve on the committee throughout the entire period of military government. (Id. at 33, 40) That central committee coordinated FRAPH's activities with the armed forces, issued membership cards, and oversaw FRAPH's offices. (Id. at 34.) Constant was at all times the de facto leader of FRAPH and was active in its daily operations. (Id. at 39-40.) By May 1994, he was the organization's Secretary General and was the only active member of the central committee. (Id. at 40.) He communicated regularly with top commanders in the armed forces, and received funding from the military to support FRAPH's activities. (Id. at 26-27, 32.)

FRAPH maintained regional offices as well as hundreds of local offices, the latter of which were positioned primarily in poor urban neighborhoods where support for Aristide was strongest. (Id. at 35-36.) FRAPH closely surveilled dissenters. (Id. at 35.) It exacted widespread violence against opponents of the military regime, including, as

described below, plaintiffs Jane Does I, II and III. FRAPH raided neighborhoods populated by Aristide supporters, raping and abducting its targets. (Id. at 47-49.)

As FRAPH's commander and spokesperson, Constant was well aware of and at least implicitly improved of these acts. He was active in FRAPH's daily operations and was the organization's primary agitator, although he did not necessarily commit attacks upon dissenters himself. (Id. at 19, 39.) Dr. McGuire testified that, in his professional opinion, Constant must have known about the violent attacks perpetrated by his own organization. (Id. at 54-55.) Further, contemporaneous media reports widely documented FRAPH's activities. See John Shattuck, Human Rights Abuses in Haiti Worsen, Miami Herald, July 14, 1994.

C. Jane Doe I

At the time of the military coup, Jane Doe I lived in Port Au Prince with her husband and three children. (Id. at 60.) After the coup, her husband, a pro-democracy activist involved in local politics, disappeared. (Id. at 62-63.) She had reason to believe that he was one of 15 victims of a massacre that occurred on the day of his disappearance. (Id. at 63.) After that day, Jane Doe I began publicly to demand information about her husband's disappearance. (Id. at 63.) Within a few weeks, in the winter of 1992, she was confronted in her home by a group of five or six masked men, beaten, and dragged away; she was held at a penitentiary for five days and repeatedly beaten before being released in the street at night, alone and naked.¹ (Id. at 64-66.)

¹ This incident and any other incident that occurred prior to FRAPH's formation have not been considered in fashioning plaintiffs' damages award.

In the ensuing months, Jane Doe I continued to speak out about her husband's disappearance. As a result, in April 1994 she was again visited by masked men² at her home. (Id. at 66.) She was raped in front of her children; her eldest son, who was eight years old at the time, was also beaten by the men. (Id. at 67-69.) Before leaving, one of the men stabbed Jane Doe I in the left side of her neck and her left ear. (Id. at 69-70.) She was again attacked by masked men in June of that year; that time, in addition to being raped by five aggressors, one of the men slashed her left breast open. (Id. at 71-74.) The men left her unconscious. (Id. at 74.)

After that attack, Jane Doe I spent a day regaining her strength and then walked for three days with her children to the mountains to reach refuge. (Id. at 74-75.) Throughout this time period, she continued to bleed and struggled to remain conscious. (Id. at 75-76.) It was several months before Jane Doe I received medical attention for her injuries and when she did, she learned that she was pregnant as a result of the rapes. (Id. at 77.) She gave birth in February 1995. (Id.)

Jane Doe I sustained numerous injuries as a result of these attacks. The medical evidence was that she suffered un-sutured, nearly fatal stab wounds to her breast, neck and cheek. (Dep. of Benjamin S. Lerman, M.D. ("Lerman Dep.") at 14-20.) Her life was permanently altered, since she experienced and continues to experience shame and fear resulting from the trauma. (Tr. at 118-20.) According to Dr. Mary Fabri, the psychologist who evaluated Jane Doe I, she suffers from severe chronic Post-Traumatic

² All attacks on plaintiffs Jane Doe I and Jane Doe II were perpetrated by masked men. Plaintiffs therefore have been unable to identify their attackers. However, the Court is satisfied by a preponderance of the evidence that given that the methods employed by plaintiffs' attackers were similar to those employed by FRAPH, and given that plaintiffs were among the politically unpopular population that was the target of FRAPH activities, plaintiffs were attacked by FRAPH members. See Tr. at 49-51; Pl.'s Ex. 6, OAS/UN International Civilian Mission in Haiti, Press Release dated May 19, 1994 (attributing emergence of rape in part as a tool of political repression by FRAPH).

Stress Disorder (“PTSD”), with symptoms that include insomnia, nightmares, flashbacks, and the inability to concentrate (Dr. Mary Fabri’s Psychological Evaluation of Jane Doe I at 9; Tr. at 118.). She is socially isolated and suffers from severe migraine headaches (Tr. at 120, 122.)

D. Jane Doe II

Jane Doe II lived in the Martissant area of Haiti with her husband and their three young children at the time of the military coup. (Id. at 86.) Her husband was a member of the military but did not support the coup. (Id. at 88-89.) Instead, both husband and wife belonged to a pro-democracy organization. (Id. at 87.) As a result, Jane Doe II’s husband was accosted by masked men in his house in October 1991; he was beaten and Jane Doe II was raped, all in front of their children. (Id. at 90.) They were then blindfolded and taken to a penitentiary, where Jane Doe II spent six months separated from her children. (Id. at 90-91.)

In the months and years following her release, Jane Doe II lived in hiding in the Boutilier mountain region of Haiti near Port Au Prince, occasionally returning to the city to go to her brother’s house. (Id. at 93-94.) On one such visit, in July 1994, she was attacked by masked men carrying guns and was shot in the leg. (Id. at 94-96.) Jane Doe II was raped and she witnessed the rape of her sister-in-law as well; she was also beaten, blindfolded, and taken away. (Id. at 97-98.) She was left at Titanyen, a location allegedly used as a dumping ground by FRAPH for bodies. (Id. at 98-99.)

As a result of these attacks, and particularly the second attack, Jane Doe II suffered a head injury with scarring on the back of her neck and a bullet wound on her shin. (Lerman Dep. at 22-24.) She still suffers from constant headaches and pain in her

back and abdomen. (Id. at 24.) The evidence is also that she suffers from chronic severe PTSD, as well as from anxiety and depression. (Dr. Mary Fabri’s Psychological Evaluation of Jane Doe II at 9-10.)

E. Jane Doe III [Section Under Seal]

II. CONCLUSIONS OF LAW

A. *Subject Matter Jurisdiction*

As the Court has previously determined, it has subject matter jurisdiction over plaintiffs’ claims of torture, attempted extrajudicial killing and crimes against humanity pursuant to the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note). (August 16, 2006 Order.)

The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. In Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), the U.S. Supreme Court held that the ATS does no more than confer jurisdiction on the district courts and does not affirmatively create any private rights of action. Id. at 713. However, the Supreme Court in Sosa noted that rights of action do exist for which the ATS provides jurisdiction. Because the Congress that enacted the ATS in 1789 understood that the “common law would provide a cause of action for [a] modest number of international law violations,” id. at 724, the ATS today encompasses violations of those international law norms possessing both (i) definite content and (ii) the same force and acceptance “among civilized nations [as] the historical paradigms familiar when [the ATS] was enacted.” Id. at 732.

In deciding Sosa, the Supreme Court cited with approval the Second Circuit's decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) holding that ATS claims can be brought for violations of "universally recognized norms of international law." Id. at 888. The Sosa Court also cited with approval Filartiga's recognition of torture as actionable under the ATS. Sosa, 542 U.S. at 732 (citing Filartiga, 630 F.2d at 890). Moreover, post-Sosa courts have found torture, extrajudicial killing and crimes against humanity all actionable under the ATS. See Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179-80 (C.D. Cal. 2005); Doe v. Saravia, 348 F. Supp. 2d 1112, 1154-57 (E.D. Cal. 2004); see also Sosa, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (ban on torture and crimes against humanity among universally recognized international norms). Accordingly, the Court has jurisdiction over plaintiffs' claims pursuant to the ATS. The Court also has jurisdiction over plaintiffs' claims of torture and attempted extrajudicial killing pursuant to the TVPA. See 28 U.S.C. § 1350 (note); Flores v. S. Peru Copper Corp., 414 F.3d 233, 245 (2d Cir. 2003).

B. Personal Jurisdiction

Constant was personally served with the complaint and summons in the Southern District of New York and is accordingly subject to the personal jurisdiction of this Court. (Doe v. Constant, 04 Civ. 10108, Return of Service dated Jan. 14, 2005; Affidavit of Service dated Jan. 4, 2006.)

C. Constant's Default

The complaint alleges that defendant Constant is liable for each of the atrocities described above, specifically, the torture and attempted extrajudicial killing of Jane Does I and III, the torture of Jane Doe II, and crimes against humanity. Constant having

defaulted, see 9/16/6 Order, the allegations of the complaint are accepted as true. Cotton v. Sloane, 4 F.3d 176, 181(2d Cir. 1993). Plaintiffs have stated claims against Constant for torture, attempted extrajudicial killing, and crimes against humanity and by default Constant is therefore liable to them on those claims.³ This is so even though there is no evidence in the record of this litigation that Constant personally perpetrated the violence described above upon plaintiffs, due to the fact that he was the founder and leader of FRAPH and was aware of the attacks it carried out. See Doe v. Karadzic, No. 93-Civ.-0878, 2000 U.S. Dist. LEXIS 8108 at *2 (S.D.N.Y. June 13, 2000); S. Rep. No. 249, 102d Cong., 1st Sess., at 9 (1991) (noting with regard to TVPA that “anyone with higher authority who authorized, tolerated or knowingly ignored those acts [of torture or extrajudicial killing] is liable for them”).

³ Torture pursuant to international law has been defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing [that person].” Lin v. Dep’t of Justice, 432 F.3d 156, 159 (2d Cir. 2005) (citing 8 C.F.R. § 1208.18(a)(1)); see also Filartiga, 630 F.2d at 883. The alleged torture must have been carried out by state officials or under color of state law, which includes paramilitary organizations working in concert with the government. See Arar v. Ashcroft, 414 F. Supp. 2d 250, 264 (2d Cir. 2006) (governmental involvement required); Doe v. Saravia, 348 F. Supp. 2d 1112, 1149-51 (E.D. Cal. 2004). The TVPA – but not the ATS – also requires that the plaintiff have been in the “offender’s custody or physical control” when being tortured. 28 U.S.C. § 1350 (note); Arar, 414 F. Supp. 2d at 260. Each of these requirements has been met here: two plaintiffs were forcibly raped, which constitutes torture, see Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995), and plaintiff Jane Doe III was the victim of a brutal attack that also constitutes torture. The attacks were under color of state law, given that FRAPH operated in tandem with the military dictatorship, and plaintiffs’ attackers clearly possessed physical custody over them.

Additionally, plaintiff Jane Doe I was the victim of a brutal stabbing and Jane Doe III the victim of an attack that were attempts to kill them. As such, liability has been clearly established for attempted extrajudicial killing, which is defined as “a deliberated 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 peoples.” 28 U.S.C. § 1350 (note). Finally, FRAPH’s activities – including the extreme violence perpetrated against plaintiffs – involved the commission of inhumane acts “as part of a widespread or systematic attack against any civilian population.” Presbyterian Church of Sudan v. Talisman Energy, Inc., 226 F.R.D. 456, 480-81 (S.D.N.Y. 2005); see also In re Agent Orange Prod. Liability Litig., 373 F. Supp. 2d 7, 37 (E.D.N.Y. 2005). Thus, plaintiffs have stated a claim for crimes against humanity.

C. Damages

Courts in this district and nationwide regularly award damages for violations of the ATS and the TVPA. See Tachiona v. Mugabe, 216 F. Supp. 2d 262, 267-69 (S.D.N.Y. 2002), rev'd on other grounds, 386 F.3d 205 (2d Cir. 2004), cert denied, 126 S. Ct. 2020, 164 L. Ed. 2d 806 (2006); Doe v. Karadzic, No. 93 Civ. 0878, 2001 U.S. Dist. LEXIS 12928, at *1-2 (S.D.N.Y. Aug. 27, 2001); Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006). The amount and type of damages to be awarded is governed by both federal common law and by the law of the nation in which the abuses occurred. See Tachiona, 216 F. Supp. 2d at 267-68; Xuncax v. Gramajo, 886 F. Supp. 162, 197-99 (D. Mass. 1995); Filartiga v. Pena-Irala, 577 F. Supp. 860, 864-65 (E.D.N.Y. 1984).

Damages are permitted under Haitian law to compensate victims for their physical injuries and for pain and suffering. (Aff. of Mario Joseph, filed 9/11/06, ¶¶ 3-8.) Although plaintiffs concede that Haitian law does not provide for punitive damages, the common law of ATS and TVPA awards does provide for such damages in order to make the remedies pursuant to those statutes “commensurate with the real repugnance” of the actions involved. Tachiona v. Mugabe, 234 F. Supp. 2d 401, 417-18 (S.D.N.Y. 2002). Several federal courts have accordingly authorized punitive damages in the context of ATS or TVPA cases. See id. at 441; Filartiga, 577 F. Supp. 2d at 864-67; Saravia, 348 F. Supp. 2d at 1158; Xuncax, 886 F. Supp. at 198. The compensatory and punitive damage awards rendered by courts and juries in ATS cases differ, but all involve significant sums. See, e.g., Tachiona, 234 F. Supp. at 441 (\$1,000,000 in compensatory damages and \$5,000,000 in punitive damages to estates of individuals tortured to death); Saravia, 348 F. Supp. at 1159 (\$5,000,000 in compensatory and \$5,000,000 in punitive damages in

case involving extrajudicial killing and crimes against humanity); see also Karadzic, No. 93 Civ. 0878, 2001 U.S. Dist. LEXIS 12928, at *1-2 (noting jury award of \$4.5 billion in case involving genocide and crimes against humanity).

In keeping with these standards, and based on Constant's default and on the evidence presented at the August 29, 2006 hearing, this Court will award plaintiffs both compensatory and punitive damages. Though no price tag can be placed on the atrocities visited upon these plaintiffs and other innocent civilians by FRAPH, plaintiffs are indeed entitled to monetary compensation and the Court will therefore grant it, guided in part by awards rendered in similar ATS and TVPA cases. Specifically, plaintiffs are awarded compensatory damages as follows:

1. Jane Doe I. As discussed more fully above, Jane Doe I was gang-raped by multiple FRAPH members on two separate occasions in front of her children; was beaten by those members; witnessed the beating of her oldest son; was stabbed in both her neck and the cheek near her ear; and was slashed through the breast. She did not receive medical attention for months after sustaining her injuries. The record reflects that these injuries caused her enormous physical and psychological injuries that continue to today. As commander of the organization that inflicted this pain and suffering upon Jane Doe I, defendant Constant shall be liable to her for compensatory damages in the amount of \$1,500,000.

2. Jane Doe II. As discussed more fully above, Jane Doe II was gang-raped by FRAPH members; witnessed her sister-in-law being gang-raped by FRAPH members; was shot in the leg by a FRAPH member and was badly beaten by FRAPH members. Jane Doe II still suffers from physical and psychological anguish due to these events. As

such, defendant Constant shall be liable to her for compensatory damages in the amount of \$1,000,000.

3. *Jane Doe III [Under Seal]*.

4. Finally, punitive damages shall be assessed against defendant Constant.

Punitive damages are awarded to punish a defendant and to deter that defendant from committing the same offense again. Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). They are particularly appropriate where a defendant's actions are malicious or wanton. See Schmidt v. Devino, 206 F. Supp. 2d 301, 308 (D. Conn. 2001). As noted above, courts have recognized that acts of the type committed by FRAPH – such as murder, rape, and other types of torture exacted upon innocent civilians – meet this standard. See, e.g., Abebe-Jiri v. Negewo, No. 90 Civ. 2010, 1993 U.S. Dist. LEXIS 21158, at *12 (N.D. Ga. Aug. 19, 1993); Filartiga, 577 F. Supp. at 866-67.

Constant's conduct was clearly malicious. As commander of FRAPH, Constant founded and oversaw an organization that was dedicated principally towards terrorizing and torturing political opponents of the military regime. His direction – or at a minimum, approval – of FRAPH's state-backed campaign of violence constitutes an inexcusable violation of international law and merits a stiff punishment. This is particularly so because given that the government of Haiti has not and likely will not prosecute Constant for his actions, "the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages." Id. at 864; see Tr. at 52-54 (testimony of Dr. McGuire that inadequate means of legal redress exist in Haiti and that, to his knowledge, no FRAPH members have to date been held accountable by Haitian

authorities). Considering all of the factors warranting an award of punitive damages, and in particular the high degree of reprehensibility of Constant's conduct, see BMW of North America v. Gore, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the Court hereby finds that Constant is liable for \$15,000,000 in punitive damages; \$5,000,000 of this sum shall be awarded to each plaintiff in this matter.

III. CONCLUSION

The Court finds that defendant Constant is liable for torture, attempted extrajudicial killing, and crimes against humanity pursuant to the ATS and TVPA, and that Plaintiffs are entitled to compensatory and punitive damages as follows:

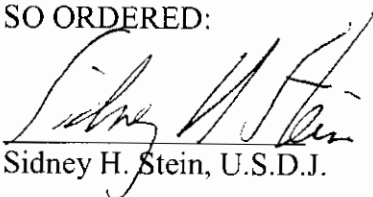
Jane Doe I: Compensatory damages of \$1,500,000 and punitive damages of \$5,000,000

Jane Doe II: Compensatory damages of \$1,000,000 and punitive damages of \$5,000,000

Jane Doe III: Compensatory damages of \$1,500,000 and punitive damages of \$5,000,000

Dated: New York, New York
October 24, 2006

SO ORDERED:


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