

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

JANE DOE I, JANE DOE II AND JANE DOE III,)	
)	
Plaintiffs,)	Case No.: 04-CV-10108 (SHS)
)	
v.)	
)	AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT BY DEFAULT
EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,)	
)	
Defendant.)	

Plaintiffs Jane Doe I, Jane Doe II and Jane Doe III respectfully submit this memorandum in support of their motion for judgment by default against Defendant Emmanuel Constant (“Defendant Constant” or “Defendant”) in the above-captioned civil action in an amount to be determined according to proof submitted at an evidentiary hearing. The Court has ordered the motion for default judgment to be made returnable on December 21, 2005, at 11:00 a.m. in courtroom 23A. Plaintiffs respectfully request that an evidentiary hearing on damages be set for a date to be determined, at which time the Plaintiffs intend to present live testimony from the Plaintiffs and other witnesses. Based on the trial schedule of lead counsel, Plaintiffs respectfully request that such a hearing be set for a date no earlier than April 2006.

I. INTRODUCTION

In 1993 and 1994, the civilian population of Haiti suffered under a campaign of terror perpetrated by a paramilitary organization known as the *Front Révolutionnaire pour l’Avancement et le Progrès d’Haiti* (Revolutionary Front for the Advancement and Progress of Haiti or “FRAPH”). Defendant Constant was the principle leader and founder of FRAPH. During Constant’s reign as the leader of FRAPH, members of his organization severely brutalized Plaintiffs Jane Doe I, Jane Doe II and Jane Doe III. To date, no one has been held responsible for these abuses.

Plaintiffs are entitled to a default judgment against Defendant Constant on the claims pled in the Complaint, namely: violations of the law of nations, including the prohibitions against attempted extrajudicial killing; torture; cruel, inhuman or degrading treatment or punishment; violence against women and crimes against humanity; under the Alien Tort Statute (the “ATS”), 28 U.S.C. § 1350; and violations of the prohibitions against attempted extrajudicial killing and torture under the Torture Victim Protection Act (the “TVPA”), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note). The Complaint alleges that Defendant Constant exercised command responsibility over, conspired with, and/or aided and abetted subordinates in FRAPH or persons or groups acting in coordination with FRAPH or under its control. Accordingly, Plaintiffs seek a judgment that Constant is liable under international and domestic law for their injuries, pain and suffering. This Court has jurisdiction over this action under the ATS, the TVPA and 28 U.S.C. § 1331.

II. STATEMENT OF FACTS

A. Procedural History

On December 22, 2004, Plaintiffs filed a Complaint and Summons in the above-captioned action against Defendant Constant for violations of the ATS and the TVPA for his role as a commander over FRAPH during 1993 and 1994, when members of the paramilitary organization subjected Plaintiffs to attempted extrajudicial killing; torture; cruel, inhuman or degrading treatment or punishment; violence against women and crimes against humanity. Ricardo R. Burnham personally served Defendant Constant with the Complaint and Summons on January 14, 2005, in front of 26 Federal Plaza, Duane Street Entrance, New York. Proof of such service was filed with the Court on January 26, 2005. Defendant Constant has failed to file an answer or otherwise move against the Complaint. He has not communicated with or responded to Plaintiffs since the initiation of this action. By Order dated November 7, 2005, this Court found that Defendant Constant has failed to answer or otherwise appear. The Clerk of this Court issued a Certificate of Default on December 1, 2005, a copy of which is attached hereto.

B. Background

Because Plaintiffs' claims stem from attacks by FRAPH, the paramilitary organization run by Constant, and Plaintiffs have requested punitive damages, a brief history of the formation of FRAPH and Constant's role in the organization is necessary.

1. Defendant Constant

From October 1993 to December 1994, Defendant Constant was the founder and head of FRAPH. (Complaint ¶ 6.) During this period, FRAPH was responsible for a widespread campaign of violence against the civilian population of Haiti. (*Id.* at ¶ 11.) Defendant Constant left Haiti in December 1994 shortly after constitutional order was restored. (*Id.* at ¶¶ 6, 15.) He entered the United States on December 24, 1994 and has been living and working in New York, New York, for over ten years. (*Id.* at ¶¶ 5, 6, 15.)

2. The Overthrow of President Aristide and the Formation of FRAPH

In September 1991, Haitian President Jean-Bertrand Aristide was overthrown in a violent *coup d'état* led by elements of the Haitian military. (Complaint ¶ 10.) From October 1991 to October 1994, an unconstitutional and brutal military regime governed Haiti. (*Id.*) The three-year military dictatorship was characterized by widespread state-sponsored human rights violations committed by the Haitian Armed Forces and members of FRAPH. (*Id.* at ¶ 11.) The practices of the military and FRAPH included extrajudicial killings, forced disappearances, arbitrary arrest and detention, rape and other torture, and violence against women. (*Id.*) In 1993 and 1994, FRAPH worked in concert with the Haitian Armed Forces in their campaign of terror and repression against the civilian population of Haiti. (*Id.* at ¶ 12.)

From the beginning of the military dictatorship, the Haitian Armed Forces used civilian attachés or paramilitaries to support their campaign of intimidation and repression against the people of Haiti. (*Id.*) In 1993, Defendant Constant and others provided the name FRAPH (a pun for the French and Creole word "*frapper*," meaning "to hit" or "to beat") to the principal paramilitary organization active in Haiti. (*Id.*) Defendant Constant modeled FRAPH after the former Haitian dictator Francois Duvalier's notorious "Tonton Macoutes." (*Id.* at ¶ 13.) Officially labeled the *Volontaires de la Sécurité Nationale* (National Security Volunteers or "VSN"), the Tonton Macoutes had operated parallel to and in conjunction with the army and reported directly to Duvalier. (*Id.*) Defendant Constant recruited directly from the ranks of the VSN to form the membership of FRAPH. (*Id.*)

Under Defendant Constant, FRAPH members received arms and training from the Haitian Armed Forces who were running the government. (*Id.*) The Haitian Armed Forces provided Defendant Constant and FRAPH financial and logistical support for operations. (*Id.*) The military used FRAPH to maintain control over the population through a systematic campaign of murder, disappearances, rape and other torture, and arson targeted at the poorest neighborhoods and regions of Haiti. (*Id.*) The objective of this campaign was to break the resistance of the population to military rule. (*Id.*) Gang rapes perpetrated by FRAPH in concert with members of the Haitian military increased dramatically after 1993 and were particularly targeted at women in the slum areas of the capital, Port-au-Prince. (*Id.* at ¶ 14.)

3. Rape as a Tool of Political Repression

Reports of rape at the hands of the Haitian Armed Forces and armed attachés were common in the months after the *coup d'état* in 1991. (Complaint ¶ 14.) However, Haiti saw a sharp increase in the incidents of rape toward the end of 1993 and the beginning of 1994 with the creation of FRAPH. (*Id.*) Under the command of Defendant Constant, FRAPH operatives used rape and other sexual assault to punish and intimidate women for their actual or imputed political beliefs, or those of their husbands, and terrorized them during violent sweeps of pro-democracy neighborhoods. (*Id.*)

One pattern and practice of FRAPH members was to team with the Haitian Armed Forces and raid homes in poor neighborhoods in the middle of the night. (*Id.*) Heavily armed, the attackers would ransack a house looking for the men of the house (who were usually forcefully abducted) and evidence of pro-democracy activity such as photos of President Aristide. (*Id.*) The armed men then gang raped the women of the house in front of remaining family members. Victims included girls as young as 10 and women as old as 80. Often sons were forced at gunpoint to rape their own mothers. (*Id.*)

4. Attacks Against Plaintiffs Perpetrated by FRAPH

a. Jane Doe I

Jane Doe I became an outspoken advocate against the abuses of the Haitian military after the 1992 abduction, torture, and murder of her husband by the Haitian Armed Forces. (Complaint ¶ 19.) Despite five days in detention, during which she suffered severe and repeated beatings while blindfolded, Jane Doe I was not silenced. (*Id.*) On April 29, 1994, seven men, all wearing masks and heavily armed, forcibly entered Jane Doe I's home at two o'clock in the

morning. (Complaint ¶ 20.) Some of the men were FRAPH members, while some men wore olive green uniforms and black boots, the uniform worn by the Haitian Armed Forces. (*Id.*) The men first attacked Jane Doe I's eldest son, who was eight years old at the time. (*Id.*) They kicked him in the head repeatedly, tied his hands behind his back, and left him on the ground bleeding from his nose and ears. (*Id.*) The men then took turns raping Jane Doe I in front of her three minor children. (*Id.*)

Despite this attack, Jane Doe I continued to demand information about the disappearance of her husband. On June 6, 1994, FRAPH returned to her home in the middle of the night. (*Id.* at ¶¶ 21-22.) In the same manner as before, a group of masked, heavily armed men, including some in olive green uniforms and black boots, gang raped Jane Doe I in front of her children. (*Id.* at ¶ 22.) During the attack one of the men took a long sharp object and stabbed it into Jane Doe I's neck in an attempt to kill her, and left her for dead. (*Id.*) Jane Doe I blacked out and suffered massive bleeding. (*Id.*)

While in hiding after the attack, Jane Doe I learned that she was pregnant as a result of the rape. She later gave birth to a son. (*Id.* at ¶ 23.)

b. Jane Doe II

Plaintiff Jane Doe II belonged to a pro-democracy organization, *Movement Jeunesse Concrete pour la Démocratie* (Concrete Youth Movement for Democracy or "MJCD") that actively protested the 1991 *coup* against President Aristide. (Complaint ¶ 26.) Shortly after the *coup*, members of the Haitian Armed Forces came to Jane Doe II's house and raped her in front of her husband and children. (*Id.*) They arrested her and held her in prison for six months, subjecting her to continued physical beatings and denying her food. After her release from detention, Jane Doe II went into hiding. (*Id.* at ¶ 27.)

In July 1994, Jane Doe II briefly came out of hiding. While at the home of her brother and sister-in-law, she was attacked by armed and masked members of FRAPH who forced down the door in the middle of the night. (*Id.* at ¶ 28.) While her brother was able to hide, she and her sister-in-law were gang raped by FRAPH members. (*Id.*) Jane Doe II was also kicked repeatedly in the abdomen, causing her intense pain that continues to this day. (*Id.*)

c. Jane Doe III

In October 1993, Jane Doe III was abducted from her home by members of FRAPH. (Complaint ¶ 32.) She was targeted because her husband was a known pro-Aristide activist. (*Id.*) The FRAPH members brutally attacked Jane Doe III, leaving her for dead. (*Id.*)

5. Defendant Constant's Command and Control of FRAPH Forces

Defendant Constant exercised command and control over the members of FRAPH during its widespread campaign of human rights violations from October 1993 to October 1994, including the abuses committed against Plaintiffs. (Complaint ¶¶ 33-35.) Defendant Constant acted as a military commander in that he had the authority and responsibility to give orders to and direct operations of the members of FRAPH. (*Id.* at ¶ 35.) He recruited and approved membership in the ranks of FRAPH, personally signing their membership cards. (*Id.*) Defendant Constant named himself "General Secretary" of FRAPH, and directed 297 regional branches of FRAPH. (*Id.*) He also had the ability to appoint, remove and discipline personnel among the FRAPH forces. (*Id.*)

Defendant Constant operated FRAPH as an extension of the Haitian Armed Forces. He operated with the actual or apparent authority of the Haitian military government 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. (*Id.* at ¶ 36.) FRAPH members received arms and training from Haitian authorities, and often committed crimes in the presence of the military and the police. (*Id.*) FRAPH's central command was in the same public square in which the National Palace and the headquarters of the Haitian Armed Forces were located. (*Id.*)

Defendant Constant knew or should have known of the pattern and practice of human rights violations committed by his subordinates by virtue of his position as the commander over FRAPH. (*Id.* at ¶ 38.) In addition, he knew or should have known of about violations by his subordinates due to widespread reports of abuses committed by members of FRAPH in the national and international media. (*Id.*) Nonetheless, Defendant Constant failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses. (*Id.* at ¶¶ 38-39.)

6. The Return of President Aristide to Haiti

The United States military intervened in Haiti in September 1994 to secure the return of the democratically-elected government headed by President Aristide. (Complaint ¶ 15.) By October 15, 1994, President Aristide had returned to Haiti and constitutional order was restored. (*Id.*) The Haitian Armed Forces were officially disbanded and the members of the high command fled Haiti, escaping to nearby countries. (*Id.*) In December 1994, after the Haitian government issued a warrant for his arrest, Defendant Constant fled from Haiti to the Dominican Republic. (*Id.*) He then traveled to the United States, which he entered on December 24, 1994. (*Id.*)

III. ARGUMENT

Plaintiffs' Complaint sets forth specific allegations of Defendant Constant's liability under international and domestic law for attempted extrajudicial killing; torture; cruel, inhuman or degrading treatment or punishment; violence against women and crimes against humanity. Accordingly, this Court has jurisdiction over this action pursuant to the ATS, 28 U.S.C. § 1350 and the TVPA, 28 U.S.C. § 1350 note, and 28 U.S.C. § 1331. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 732 (2004); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D.Cal. 2004).¹

Plaintiffs request compensatory and punitive damages in this matter. As Plaintiffs' damages are not for a sum certain or an amount that can be made certain by computation, Rule 55(b) of the Federal Rules of Civil Procedure requires Plaintiffs to make a motion to the court for a default judgment. Default judgment is appropriate where: 1) a defendant properly served with the Summons and Complaint fails to appear or otherwise defend within the time permitted by law; 2) the moving party has established the fact of such failure by affidavit or declaration; 3) the defendant is not an infant or incompetent person; and 4) a default has been entered against the defendant. *Id.*

As presented in the accompanying Affidavit in Support of Motion for Judgment by Default, dated November 30, 2005, Defendant Constant was properly served with the Summons and Complaint on January 14, 2005, and failed to appear or otherwise defend in this action

¹ Plaintiffs welcome the opportunity to submit further briefing on any other legal issues the Court wishes to address in this proceeding.

within the time permitted for his answer or other responsive pleading. Defendant Constant is not incompetent or a minor. Plaintiffs have submitted with their Amended Notice of Motion for Judgment by Default and this Amended Memorandum the Clerk's Certificate of Default dated December 1, 2005.

As Plaintiffs' claims for compensatory and punitive damages are not for a sum certain, Plaintiffs hereby request an evidentiary hearing pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure to establish their entitlement to damages. Due to the importance of this case, Plaintiffs plan to present the testimony of the Plaintiffs and other witnesses, as well as documentation, about the damages Plaintiffs have suffered and the reprehensible and heinous nature of Defendant Constant's actions. Based on the trial schedule of lead counsel, Plaintiffs respectfully request that such a hearing be set for a date no earlier than April 2006.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter a judgment by default against Defendant Emmanuel Constant in an amount to be determined according to proof at an evidentiary hearing on damages.

Dated: San Francisco, California
December 7, 2005

Respectfully Submitted,

/s/

Moira Feeney

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