

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.)	
)	MEMORANDUM OF POINTS AND
EMMANUEL CONSTANT,)	AUTHORITIES ON DAMAGES
a.k.a. TOTO CONSTANT,)	
)	
Defendant.)	

Plaintiffs submit this Memorandum of Points and Authorities on Damages pursuant to the Court’s August 16, 2006 Order granting Plaintiffs’ Motion for Judgment by Default. As explained in detail below, Plaintiffs are entitled to significant awards of compensatory and punitive damages as a result of the abuses they suffered, for which Defendant Emmanuel “Toto” Constant (“Defendant Constant”) is liable.

A. Courts Have Routinely Awarded Compensatory and Punitive Damages in Human Rights Cases

Courts in the Second Circuit have regularly awarded both compensatory and punitive damages for violations of international law under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, and the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note. *See, e.g., Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 441 (S.D.N.Y. 2002); overruled on other grounds, 386 F.3d 205 (2d Cir. 2004); cert denied, 126 S. Ct. 2020, 164 L. Ed. 2d 806 (2006) (awarding \$1,000,000 in compensatory damages and \$5,000,000 in punitive damages each for torture claims by estates of two decedents tortured to death); *Doe v. Karadzic*, No. 93 Civ. 0878, 2001 U.S. Dist. LEXIS 12928 (S.D.N.Y. Aug. 28, 2001) (awarding total of \$4,500,000,000 in compensatory and punitive damages for claims of genocide, torture, extrajudicial killing and

other violations by 22 plaintiffs); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 9, 1996) (awarding \$500,000 in pain and suffering and \$1,000,000 in punitive damages to each of five plaintiffs for each relative killed, plus additional \$5,000,000 in punitive damages to each plaintiff); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984) (awarding between \$175,000 and \$200,000 in compensatory damages and \$5,000,000 each in punitive damages for torture claims by two survivors of relative tortured to death).¹

B. The Court Should Award Both Compensatory and Punitive Damages

As these cases demonstrate, Plaintiffs are entitled to both compensatory and punitive damages under the ATS and TVPA. Courts have generally not needed to conduct a choice-of-law analysis to determine that plaintiffs can recover damages solely under the TVPA. *See Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 267 (S.D.N.Y. 2002); overruled on other grounds, 386 F.3d 205 (2d Cir. 2004); cert denied, 126 S. Ct. 2020, 164 L. Ed. 2d 806 (2006) (examining damages under the TVPA separately from damages under the ATS); *Saravia*, 348 F. Supp. 2d at 1158 (same); *Xuncax*, 886 F. Supp. at 198-99 (same). However, the federal courts, including the Second Circuit, have never definitively resolved the issue of what substantive law should be applied in ATS cases, including on damages. *In re “Agent Orange” Prod. Liab. Lit.*, 373 F. Supp. 2d 7, 82 (S.D.N.Y. 2005) (“Agent Orange”) (citing *Wiwa v. Royal Dutch Petroleum Co.*,

¹ Courts in other jurisdictions have likewise awarded compensatory and punitive damages in ATS and TVPA cases. *See, e.g., Arce v. Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006) (awarding \$54,600,000 in compensatory and punitive damages to three victims for claims of torture); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005) (awarding \$3,000,000 in compensatory damages and \$1,000,000 in punitive damages to estate and survivors of decedent tortured to death); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1158 (E.D. Cal. 2004) (awarding \$5,000,000 in compensatory damages and \$5,000,000 in punitive damages to one survivor on claims of extrajudicial killing and crimes against humanity); *Xuncax v. Gramajo*, 886 F. Supp. 162, 197-99 (D. Mass. 1995) (awarding, *inter alia*, \$1,000,000 in compensatory damages and \$2,000,000 in punitive damages to one victim for claim of torture, and \$3,000,000 in compensatory damages to another victim for claim of torture); *Paul v. Avril*, 901 F. Supp. 330, 336 (S.D. Fla. 1994) (awarding between \$2,500,000 and \$3,500,000 in compensatory damages and \$4,000,000 each in punitive damages to six victims for claims of torture and arbitrary detention).

226 F.3d 88, 105 n.12 (2d Cir. 2000). Prior to the Supreme Court’s decision upholding the validity of the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Second Circuit directed courts in ATS cases to conduct a traditional choice-of-law inquiry to determine the substantive law to be applied. *Wiwa*, 226 F.3d at 105 n.12 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980)). The Second Circuit did not conduct its own analysis but instead left the issue to be resolved by the district courts. *Agent Orange*, 373 F. Supp. 2d at 82-83. *Sosa* does not appear to change this analysis.²

Choice-of-law analysis is “primarily concerned with fairness.” *Filartiga*, 630 F.2d at 889 (citing *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930)). Prior to *Sosa*, courts in the Second Circuit assessing damages applied a choice-of-law analysis but focused on the need to “fashion relief commensurate with the real repugnance of international wrongs and their profound effects.” *Tachiona*, 234 F. Supp. 2d at 417. This requires adopting standards on damages that avoid treating torture survivors “as if they had suffered nothing more than common law defamation and battery.” *Id.* The *Filartiga* court looked first to the foreign law of the country where the abuses occurred but, when the laws of that nation provided for only compensatory damages and not punitive damages, the court assessed punitive damages anyway, holding that “the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages.” *Filartiga*, 577 F. Supp. 2d at 864. Although the

² After *Sosa*, at least one district court in the Second Circuit has found that *Sosa*, while not “crystal clear,” generally adopts federal choice-of-law rules for international law claims such as those brought under the ATS. *Id.* The *Agent Orange* court followed the reasoning of the Ninth Circuit in *Doe v. Unocal Corp.*, 395 F.3d 932, 948-49 (9th Cir. 2002), in holding that international law should be applied in the ATS context. *Id.* Two other district courts post-*Sosa* have simply applied international law without conducting a choice-of-law analysis. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 335 (S.D.N.Y. 2005); *In re South African Apartheid Lit.*, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004). While these post-*Sosa* cases deal with the application of substantive law at the motion to dismiss stage, Plaintiffs are not aware of an ATS case in the Second Circuit that specifically analyzes the issue of damages in the post-*Sosa* context.

Tachiona court found that foreign law provided for punitive damages for torture, 234 F. Supp. 2d at 422, the court was clear that:

in the event the local law of the foreign state...conflicts with federal or international law, or does not provide an appropriate remedy, or is otherwise inadequate to redress the international law violations in question, a remedy may be fashioned from analogous principles derived from federal law and the forum state, or from international law embodied in federal common law...

234 F. Supp. 2d at 418.

Under this analysis Plaintiffs are entitled to both compensatory and punitive damages. Damages are permitted under Haitian law to compensate victims for physical injury, medical expenses, and pain and suffering, that is, traditional compensatory damages in the United States.³ *See* Declaration of Mario Joseph (attached hereto as Exhibit A). Haitian law does not precisely provide for punitive damages, although it does take into account the heinousness and intentional nature of the act. *Id.* Nonetheless, Plaintiffs are entitled to punitive damages under *Filartiga* and *Tachiona* in order to make their remedies “commensurate with the real repugnance” of the torture and crimes against humanity they endured, notwithstanding that Haitian law does not explicitly provide for punitive damages. *Tachiona*, 234 F. Supp. 2d at 417.

The *Filartiga* and *Tachiona* reasoning is reflected in the fact that courts in ATS cases have awarded punitive damages despite differing on which substantive law to apply. Many courts have simply assessed punitive damages without extensive analysis. *See, e.g., Saravia*, 348 F. Supp. 2d at 1158, n.4; *Mehinovic*, 198 F. Supp. 2d at 1359; *Paul*, 901 F. Supp. at 336. Other courts have held that international law permits the application of punitive damages. *See, e.g., Abebe-Jiri v. Negewo*, No. 1:90-CV-2010, 1993 U.S. Dist. LEXIS 21158 at *12 (N.D. Ga. Aug.

³ The availability of compensatory damages is rarely discussed in ATS cases. Most courts have simply assessed compensatory damages without extensive analysis. *See, e.g., Paul*, 901 F. Supp. at 335. However, some courts have specifically held that international law provides for compensatory damages. *See, e.g., Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1358 (N.D. Ga. 2002).

20, 1993); *Filartiga*, 577 F. Supp. at 865. Another court cited a string of ATS cases and held that “federal common law” allows for punitive damages. *Xuncax*, 886 F. Supp. at 198, n.44. Although courts have employed varying justifications for assessing damages, the cases clearly show that Plaintiffs are entitled to both compensatory and punitive damages for their claims under the ATS.

C. The Court Should Award Plaintiffs Significant Damages

1. Compensatory Damages

The Court should award Plaintiffs significant compensatory damages for the physical and emotional pain and suffering they have endured as a result of their torture. *See* section A, *supra*. All three women were brutally attacked, and Jane Doe I and II were raped, which also constitutes torture. *See* Plaintiffs’ Memorandum of Law Regarding Subject Matter Jurisdiction, filed January 31, 2006 (D.E. 31). Plaintiffs anticipate that evidence presented at the hearing on damages will show that they suffered extreme physical and emotional pain and suffering at the time they were tortured and that they continue to suffer effects to this day. The evidence will show that Jane Doe I suffered, and continues to suffer, greatly from being gang raped twice by members of FRAPH, from knowing that her children were forced to watch the rapes, from seeing her son beaten, and from being stabbed and left for dead. The evidence will show that Jane Doe II suffered, and continues to suffer, greatly from being gang raped by members of FRAPH and kicked repeatedly, and from being forced to witness the gang rape of her sister-in-law. The evidence submitted for Jane Doe III shows she suffered, and continues to suffer, greatly from being savagely attacked and left for dead.

Although “[o]ne cannot place a dollar value” on what Plaintiffs have endured, “a monetary judgment is all the Court can award.” *Mushikiwabo*, 1996 U.S. Dist. LEXIS 4409 at

*6. Therefore, based on the extreme injuries Plaintiffs suffered and continue to suffer, and based on the cases cited above, Plaintiffs respectfully request that the Court award compensatory damages to each one of the Plaintiffs in the amount of at least \$1,000,000 per plaintiff.

2. Punitive Damages

The Court should also award Plaintiffs significant punitive damages as a result of Defendant Constant's conduct. Punitive damages are designed to teach and punish a defendant and to deter others from committing the same offenses. *Mehinovic*, 198 F. Supp. 2d at 1360 (citing *Filartiga*, 577 F. Supp. at 866). An award of punitive damages is proper when the defendant's actions were malicious, wanton or oppressive. *See Abebe-Jiri*, 1993 U.S. Dist. LEXIS 21158 at *12; *Paul*, 901 F. Supp. at 336. In determining the amount of punitive damages, the Court should consider the nature and malice of the acts and the "depth of the international revulsion against torture and ... the enormity of the offense."⁴ *Filartiga*, 577 F. Supp. 2d at 866.⁵ *See also Paul*, 901 F. Supp. at 336 (egregiousness of the defendant's conduct, the central role he played in the abuses, and the international condemnation with which these abuses are viewed); *Saravia*, 348 F. Supp. 2d at 1159 (brutality of the act, egregiousness of defendant's conduct, unavailability of criminal remedy, international condemnation of act, deterrence of others from committing similar acts, provision of redress to plaintiff, country and world).

⁴ The defendant's financial wealth is a factor, but the burden is on the defendant to present evidence of a lack of assets. *Filartiga*, 577 F. Supp. 2d at 866. *See also Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978).

⁵ The Second Circuit has not provided a list of factors in awarding punitive damages in ATS and TVPA cases. More generally, the U.S. Supreme Court has provided three "guideposts" to assess the reasonableness of punitive damage awards, but these standards apply to *ex post* review of an award already granted. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The guideposts are "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *Gore*, 517 U.S. at 575).

Defendant Constant's actions were malicious, wanton and oppressive. The complaint details the vicious campaign that FRAPH, led by Defendant Constant, carried out during 1993 and 1994.⁶ FRAPH killed arbitrarily detained, raped and otherwise tortured or mistreated civilians in the poorest neighborhoods and regions of Haiti. (Complaint, ¶ 13.) FRAPH used rape, sexual assault and other torture to punish and intimidate women for their actual or imputed political beliefs, or those of their husbands, or to terrorize them during violent sweeps of neighborhoods. (*Id.*, ¶14.) Defendant Constant, as the commander of FRAPH, possessed and exercised command and control over the organization and its members, including those who carried out the attacks on Plaintiffs. (*Id.*, ¶¶ 34-35.) 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.*, ¶ 39.) Further evidence at the damages hearing will show the widespread nature of the abuses in Haiti and the systematic way in which FRAPH carried them out. Evidence will also be presented showing Defendant Constant's leadership of and control over FRAPH.

There can be no doubt that torture, attempted extrajudicial killing and crimes against humanity are universally abhorred and condemned. *See* Plaintiffs' Memorandum of Law Regarding Subject Matter Jurisdiction, filed January 31, 2006 (D.E. 31). *See also Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 156 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *Filartiga*, 630 F.2d at 884; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 480 (S.D.N.Y. 2005); *Saravia*, 348 F. Supp. 2d at 1156-57; *Mehinovic*, 198 F. Supp. 2d at 1352-53.

⁶ Upon default, the allegations in the complaint are accepted as true. *Ivoclar Vivadent v. New Wave Dental*, No. 01-CV-0211E, 2002 U.S. Dist. LEXIS 25514 at *4 (W.D.N.Y. Dec. 16, 2002) (citing *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir. 1997); *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853 (2d Cir. 1995).

Therefore, Plaintiffs respectfully request that the Court award each of the Plaintiffs punitive damages. The Supreme Court has held that punitive damage awards must be “reasonable and proportionate to the amount of the harm to the plaintiff and to the general damages recovered.” *Campbell*, 538 U.S. at 426. The court cautioned against “awards exceeding a single-digit ratio between punitive and compensatory damages.” *Id.* at 425. Therefore, Plaintiffs respectfully request that the Court award punitive damages to each Plaintiff in an amount commensurate with the parameters of *Campbell*.

Dated: August 25, 2006
New York, NY

Respectfully Submitted,

_____/s/_____
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