

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ESTATE OF WINSTON CABELLO, *et al.*,) CASE NO.: 99-0528-CIV-LENARD
Plaintiffs,) Magistrate Judge Turnoff
v.)
ARMANDO FERNÁNDEZ-LARIOS,)
Defendant.) Oral Argument Requested
_____)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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INTRODUCTION

In his latest attempt to dismiss the allegations against him, defendant Armando Fernandez-Larios (“defendant”) returns to the same themes he unsuccessfully used to challenge the prior complaint—that he was an innocent junior officer in the Chilean Army who was simply following orders, and that the plaintiffs’ indisputable claims for the torture and murder of a Chilean civilian are time barred. However, this Court has already ruled that the claims are not time-barred, and defendant offers no new facts or law demonstrating otherwise. *See Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001) (the “Court’s Order” or “*Cabello*”). Similarly, defendant ignores the fact that courts have repeatedly refused to recognize his “*Nuremberg* defense,” that is, that he was “just following orders.” Defendant also improperly attempts to rely on facts outside the Complaint in this motion.

Defendant’s motion to dismiss plaintiffs’ Second Amended Complaint (“SAC” or “Complaint”) rests on three grounds: First, defendant moves against all of the claims for failure to state a claim; second, defendant moves to dismiss all of the claims on the grounds that they are time-barred; and third, defendant moves to dismiss claims four, five and seven for lack of standing. As plaintiffs show below, the allegations in the SAC sufficiently state claims against defendant under the Alien Tort Claims Act, 28 U.S.C. § 1350 (“ATCA”) and the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note) (“TVPA”). For reasons previously stated by this Court, these claims are not time-barred under the ten-year statute of limitations. Moreover, consistent with federal and Florida law governing the survival of federal claims, plaintiff Zita Cabello Barrueto has standing to sue as the legal representative of Winston Cabello’s Estate (the “Estate”) under the ATCA and

TVPA. For these reasons and others more fully set forth below, defendant's motion to dismiss the SAC should be denied.

PROCEDURAL AND FACTUAL BACKGROUND

Pursuant to the Court's Order, plaintiffs filed their SAC on September 17, 2001, in which they re-pled certain claims consistent with the Court's Order. Specifically, because the Court held that the Estate could not sue on its own behalf under the TVPA and ATCA, plaintiff Zita Cabello Barrueto, acting as legal representative of the Estate, now alleges the claims for torture (claim four), crimes against humanity (claim five), and cruel, inhuman or degrading treatment or punishment (claim seven). In addition, the Court directed plaintiffs to re-plead their first claim for extrajudicial killing to comply with Federal Rule of Civil Procedure 10(b). Plaintiffs thus have re-pled the claims of Elsa Cabello, Karin Cabello Moriarty, and Zita Cabello Barrueto, in her individual capacity, under the TVPA for the extrajudicial killing of Winston Cabello as claim one; a claim on behalf of the Estate, brought by Zita Cabello Barrueto as its legal representative, under the ATCA for extrajudicial killing as claim two; and a claim on behalf of Aldo Cabello under the ATCA for extrajudicial killing as claim three.

The critical allegations in the Complaint for purposes of this motion are similar to those previously alleged and detailed in the Court's Order. *See Cabello*, 157 F. Supp. 2d at 1349-50. Defendant was a member of the Caravan of Death that traveled throughout Northern Chile immediately after the 1973 *coup d'etat*. The Caravan of Death brutally killed and tortured political prisoners in several towns, including the town of Copiapó, where Winston Cabello was detained and later killed. SAC, at ¶¶ 33-44. The Complaint alleges that defendant himself is directly responsible for torturing and killing Winston Cabello. It alleges, for

example, that “Defendant Fernandez Larios actively participated in the extrajudicial killing of the decedent, Winston Cabello.” *E.g.*, SAC ¶ 58. Defendant does not dispute that he accompanied the Caravan of Death’s tour or that the Caravan committed human rights violations, nor has he ever done so in any pleading in this case. Defendant makes much of the fact that plaintiffs do not allege in their SAC that defendant *personally* slashed the decedent with a *corvo*. *See* Defendant’s Memorandum in Support of Motion to Dismiss the SAC (“Def. Mem.”) at 4-5. Defendant fails to note, however, that plaintiffs allege that defendant was armed with a *corvo* the night Cabello was killed, that Cabello and other political prisoners were slashed with a *corvo*, *see* SAC ¶¶ 35, 43, and that defendant “actively participated” in the killing and “inflicted severe pain and suffering on [] Winston Cabello.” SAC ¶¶ 58, 81.¹

As they did in their earlier complaint, plaintiffs also continue to allege that “[d]efendant Fernandez Larios also participated in the extrajudicial killing of the decedent, Winston Cabello, as a joint tortfeasor, co-conspirator, and participant in a common plan, design and scheme.” SAC ¶¶ 58, 65, and 73; *see also* SAC ¶¶ 34-38, 42-43; First Amended Complaint (“FAC”) ¶¶ 4, 54, 58. In addition, plaintiffs continue to allege that “[d]efendant Fernandez Larios inflicted severe pain and suffering on the decedent, Winston Cabello.” SAC ¶ 81; *see also* SAC ¶¶ 92, 99, 106, 114; FAC ¶¶ 65, 66. As discussed below, these and other allegations

¹ Similarly, defendant notes that plaintiffs no longer allege that defendant participated in the federal witness protection program. Despite reports in the American and Chilean press that defendant had participated in the Witness protection program, *see e.g.*, “U.S. Officials Said to Accept Chilean’s Denial of Abuses,” *The Washington Post*, February 12, 1987, at A2, it now appears that defendant was only briefly under the government’s protection prior to his guilty plea and sentencing. Transcript of Deposition of Armando Fernandez Larios at 298-99. Plaintiffs note these facts by way of explanation only, and do not rely on them for purposes of this motion. However, plaintiffs do allege that defendant “secretly entered the United States in or about January 1987 and lived in an undisclosed location under the protection of the United States government.” SAC at ¶ 15.

in the SAC are sufficient to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1082 (S.D. Fla. 1997) (“A motion to dismiss should not be granted unless the plaintiff can prove no set of facts in support of its claim entitling it to relief.”) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957)).

ARGUMENT

I. Plaintiffs’ Allegations State Viable Federal Causes of Action Against Defendant for Human Rights Torts Committed by Defendant Against Plaintiffs.

Defendant argues that plaintiffs’ SAC attempts “to add back claims for conspiracy which were previously dropped.” Def. Mem. at 3. In addition, defendant argues that the Complaint attempts to hold him liable “for the acts of his military superiors” and for simply being “physically near where the illegal events took place.” Def. Mem. at 4-5.

Defendant further argues that the Complaint does not allege his direct participation in the death of Cabello, and that therefore plaintiffs have failed to state any claim against him. However, defendant mischaracterizes the allegations in the Complaint. In addition, he fails to cite any case law that states that plaintiffs must plead that defendant personally committed the act that caused Cabello’s death in order to be held liable for the allegations in the Complaint.

A. The Complaint States that Defendant Caused and/or Participated in Winston Cabello’s Torture and Execution.

The SAC unambiguously alleges that defendant killed and tortured Winston Cabello. It states that “Chilean military officers, including defendant Armando Fernandez Larios, conspiring together and acting in concert, counseled, procured, directed, ordered and caused Winston Cabello . . . to be tortured, abused and summarily executed in Copiapó.” SAC ¶ 1; *see also* SAC ¶ 34. The SAC does not rely solely on theories of secondary liability; it

clearly alleges that defendant “actively participated in the [] killing” and that “defendant [] inflicted severe pain and suffering on [] Winston Cabello.” SAC ¶¶ 58, 81; *see also* SAC ¶¶ 65, 73, 92, 99, 106, 114. Even if the Complaint could be misconstrued to indicate only indirect participation in the murder and torture of Cabello, it would still state a claim. As a member of the Caravan of Death who had knowledge of the Caravan’s deeds, any acts that defendant did to assist the Caravan’s murderous mission throughout Northern Chile may supply a basis for holding defendant liable for the illegal actions of the Caravan as a whole.

The Complaint also alleges sufficient facts to show that defendant was intimately involved in the Chilean military’s campaign to torture and kill civilian prisoners in several towns throughout Northern Chile. SAC ¶¶ 30-44. Indeed, contrary to defendant’s assertion that there is nothing in the SAC to indicate that defendant was anything other than a bystander, plaintiffs explicitly allege that defendant participated in the selection of prisoners at Copiapó for execution; that defendant and the members of the Caravan of Death, along with local military officers, carried out the execution of Cabello with a *corvo*²; and that defendant was armed with a *corvo*. SAC ¶¶ 35, 37, 38, 42, 43. Plaintiffs also allege that defendant participated in the Caravan of Death’s mission by “engag[ing] in acts including acts of violence designed to injure, harm, torture, and result in the deaths of the prisoners.” SAC ¶ 34.

Plaintiffs further allege that while he was participating in the Caravan of Death, defendant “was

² Defendant incorrectly states that plaintiffs now allege that Cabello’s execution was “done by military personnel not part of” the Caravan. *See* Def. Mem. at 5. However, plaintiffs allege Fernandez-Larios and other members of the Caravan, along with local military personnel, carried out the executions in Copiapó. SAC ¶ 42-43.

aware of the deaths of the prisoners at or near the time of the Caravan's visit" to the various cities in Northern Chile, including Copiapó. SAC ¶¶ 33, 34.³

Moreover, defendant's argument that plaintiffs are attempting to resurrect a civil conspiracy claim that they previously abandoned is without merit. Although plaintiffs are no longer pursuing a claim for civil conspiracy *under Chilean law*, they previously alleged and still allege that defendant's liability for the torts of extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading treatment or punishment, may be predicated on his *indirect* participation in furthering and/or aiding and abetting the commission of such torts. *See* SAC ¶¶ 34-38, 42-43; FAC ¶¶ 4, 54, 58.⁴

B. Individuals Who Participate in Committing Human Rights Violations Either Directly or Indirectly May Be Liable For Their Actions

Plaintiffs need not plead—nor prove—that defendant personally caused Winston Cabello's death. Pursuant to well-established international law, an individual who did not directly commit acts constituting human rights violations may be liable for those acts if he

³ Defendant improperly attempts to argue facts outside the Complaint. Specifically, he argues that he was the "lowest ranking officers of the 'Caravan of Death'"; that he did not order the decedent's death; and that he "has been living and working in Miami (under his own name) since 1988." Def. Mem. at 2, 5. All of these assertions of fact in defendant's pleading are outside the Complaint and are therefore irrelevant to this motion. Were the Court to allow the parties to go outside the pleadings, the facts would reflect that eyewitnesses saw defendant in Copiapó holding a mace (a steel ball with spikes), which he used to beat some of the prisoners (Transcript of Deposition of Enrique Vidal Aller at 12-13); and that defendant was present in a meeting with Arellano and a local officer in Copiapó when Arellano stated that certain prisoners needed to be "eliminated." (Transcript of Deposition of Ivan Murua Chevesich at 23).

⁴ Plaintiffs abandoned their claim for civil conspiracy under Chilean law, because they concluded that they did not have standing to pursue that claim, and not because they did not believe that defendant was a co-conspirator in the Caravan's mission. *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss the FAC on Standing Grounds at 2 n.1.

assisted those who committed them. In the case of *United Nations Tribunal Prosecutor v. Dusko Tadic*, Appeals Chamber of the International Tribunal (for cases regarding the former Yugoslavia) (July 15, 1999),⁵ the appellate chamber reversed the trial chamber's finding that the accused did not participate in the killing of five Muslims in the area of Prejidor in Bosnia, and found him liable as a co-conspirator because he had the "common criminal purpose" to commit "inhumane acts" of ethnic cleansing. *Id.* at ¶¶ 231-34. Significantly, there was no evidence linking the accused directly to the killings; rather, there was evidence showing that the accused had participated in segregating Muslim men from women and children in the region where the killings occurred and inferential evidence linking the paramilitary group of which the accused was a member to the killings. *Id.* at ¶¶ 178-84, 230-34. In its opinion, the appellate chamber stated that the United Nations statute contemplated that indirect participants could be liable for the primary acts of murder:

Most of the time these crimes [against humanity] do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less—or

⁵ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was established by the Statute of the International Tribunal, as originally adopted by the U.N. Security Council and General Assembly in 1993, pursuant to U.N. Security Council Resolution 827, and subsequently amended in 1998 and 2000, pursuant to Resolutions 1166 and 1329. This Court has already noted that United States has approved this U.N. statute, and therefore the Court may look to the statute and to decisions from the Tribunal as authoritative sources of international law. *See Cabello*, 157 F. Supp. 2d at 1360-61 (citing U.N.S.C. Res. 827, U.N. Doc. S/Res/827 (1993), *reprinted in* 32 I.L.M. 1159, 1170 (1993)). The *Tadic* case discussed herein may be found at www.un.org/icty/tadic/appeal.

indeed no different—from that of those actually carrying out the acts in question.

Id. at ¶ 191.⁶

Similarly, under American concepts of civil conspiracy, a defendant’s knowing participation in the acts of a conspiracy may form the basis for holding him liable for the acts of others. *See, e.g., Time Warner Entertainment /Advance Newhouse Partnership v. Worldwide Electronics, L.C.*, 50 F. Supp. 2d 1288, 1301 n.13 (S.D. Fla. 1999) (noting that “civil conspiracy . . . provides for the extension of liability to one that participates in tortious conduct”) (citing *Sackman v. Liggett Group, Inc.*, 965 F. Supp. 391, 394 (E.D.N.Y. 1997)); *Amerifirst Bank v. Bomar*, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991) (“[T]he majority of case law, including that in Florida, recognizes a cause of action for aiding and abetting common law torts, such as a breach of fiduciary duty.”). Defendant is mistaken in attempting to characterize the allegations as stating nothing more than his mere presence at the atrocities in Copiapó, and the law is clear that he is liable for participating either directly or indirectly in Winston Cabello’s torture and murder. Each of the claims against defendant is, therefore, well stated.

C. Junior Officers May be Held Liable When They Follow Orders Directing Them to Violate International Laws Protecting Human Rights

Defendant’s argument that he is not be liable for any of the acts of the Caravan because he was merely a junior officer who was following the orders of his superiors also must be rejected. The United States and other nations have long recognized the principle that individuals may not shield themselves from liability for violations of fundamental international

⁶ *See also* Article 25 of the Rome Statute of the International Criminal Court (providing for individual liability to those who facilitate the commission of crimes), U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999 (1998), *signed but not ratified by the United States.*

rights by claiming to have been following orders when, as in the case of defendant, they were helping their superiors carry out such illegal orders. Article Six of the Charter of the Nuremberg International Military Tribunal states that any individual who participated in any “common plan or conspiracy” to commit crimes against humanity and war crimes is “responsible for all acts performed by any persons in execution of such plan.”⁷ United States courts have also rejected the “Nuremberg defense.” *See, e.g., United States v. Kinder*, No. ACM 7321, 1954 WL 2209, 14 C.M.R. 742, at **776 (AFBR Feb. 1, 1954) (when “the orders of a superior officer . . . are so palpably illegal on their face . . . , then the fact of obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders”) (citing *United States of America v. Otto Ohlendorf*, Case no. 9, Nuremberg Military Tribunals, Vol. IV at 470). These principles were again affirmed by the United Nations when it approved the Statute of the International Tribunal regarding the former Yugoslavia, *see supra* note 5, which established tribunals to adjudicate cases involving human rights violations in the former Yugoslavia. The statute provides for individual liability for illegal killings against civilians in international and internal conflicts when such acts were done at the command of superior officers. Article 7 of the Statute states that “[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility.”

There is no doubt that the orders given by Pinochet and Arellano to defendant and others were illegal. *See* SAC ¶¶ 31-32. This Court has already held that the illegality of the human rights violations of which defendant is accused (extrajudicial killing, crimes against

⁷ The Charter of the International Military Tribunal, Nuremberg, of 8 August 1945, confirmed by G.A. Res. 3, U.N. Doc. A/50 (1946) and G.A. Res. 95, U.N. Doc. A/236 (1946).

humanity, and cruel, inhuman or degrading treatment or punishment) was well established in 1973, and that defendant was “obligated not to commit [those] torts.” *Cabello*, 157 F. Supp. 2d at 1366-67. Thus, pursuant to the principles firmly established in the *Nuremberg* trials, since international law prohibiting individuals from committing such offenses was well established by 1973, defendant cannot shield himself from liability for his participation in the atrocities in Copiapó by insisting that he was only following orders.

Defendant also suggests that, *as a military officer*, he may not be liable *for conspiracy* for having followed the orders of a superior. As an initial matter, defendant is precluded from making this argument because he did not make it in his motion to dismiss plaintiff’s first amended complaint. This argument was equally applicable to the allegations in the previous complaints, and his failure to make it then forecloses it now. *See* Federal Rule of Civil Procedure 12(g); *Skrnich v. Thornton*, 267 F.3d 1251, 1262 (11th Cir. 2001) (“Rule 12(g) specifically prohibits a party that has previously filed a motion to dismiss from filing a second pre-answer motion to dismiss raising an omitted defense that could have been presented in the first motion to dismiss.”). In any event, defendant’s argument flies in the face of well-established international law, as discussed above. *See id.*; *see also Kinder*, 1954 WL 2209, 14 C.M.R. 742. Not surprisingly, defendant does not cite a single case in support of his argument.⁸

⁸ *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986), which defendant cites, has nothing to do with the issue of whether defendant may be liable to plaintiffs for his participation in a military campaign that violated the human rights of Cabello, among others. In *Bois*, the D.C. Circuit Court of Appeals refused to recognize claims by United States military personnel against their superiors for civil rights violations under the civil rights conspiracy statute, 42 U.S.C. § 1985(3). The plaintiff, formerly an active member of the army, sued one of her military superiors for sex discrimination and also sought damages against him under Section 1985(3). *Id.* at 464-65. In refusing to permit an inter-military action under Section 1985(3), the Court

II. Plaintiffs' Claims Are Not Time-barred For the Reasons Previously Identified by the Court.

In its Order dismissing defendant's first motion on statute of limitations grounds, the Court held that the statute of limitations was tolled at least through 1990 for several reasons. First, the Chilean military and other Chilean authorities deliberately concealed Cabello's body from plaintiffs until 1990. *Cabello*, 157 F. Supp. 2d at 1368. Second, Chilean authorities created "confusion" surrounding the circumstances of Cabello's death "by the three death certificates sent to the decedent's family between 1973 and 1991." *Id.* Third, the Court found that so long as Pinochet's regime was in power, it was impossible for Cabello's family to discover either his body—including for the purposes of giving him an appropriate burial—or other facts surrounding Cabello's extrajudicial killing. Thus, the Court held "that once the civilian government under the leadership of President Patricio Aylwin replaced General Pinochet's military regime in 1990, the tolling ceased, *and the limitations period commenced.*" *Id.* (emphasis added); *see also* Order Denying in Part Defendant's Motion to Strike, entered August 21, 2001, at 4 ("Moreover, as the Court found in its Order [] of August 10, 2001, the limitations period for bringing [the ATCA and TVPA claims] was equitably tolled by *inter alia* the period of time in which Pinochet was in power, as his regime precluded Plaintiffs from conducting critical discovery to this case—in particular, an ability to see the deceased body of Winston Cabello."). Pursuant to the clear ruling of the Court, the ten-year statute of limitations

stated "[a]llowing conspiracy claims to proceed would not only entail second guessing of military decision by civilian courts . . . , it would also tend to pit a plaintiff's superiors against one another. . . . A risk likewise exists that a subordinate officer may be found to have participated in the conspiracy merely by carrying out orders." *Id.* at 470. Against this context, the court's language is not applicable to this case, and defendant's reliance on this language is misplaced.

did not begin to run until 1990. Accordingly, since the statute of limitations for the TVPA and the ATCA is ten years, plaintiffs' claims, which were filed in 1999, were timely.

Significantly, defendant does not identify any new allegation in the SAC that undermines the Court's reliance on the three factors listed above to toll the statute through 1990. These factors have been re-pled in plaintiffs' second amended complaint. SAC ¶¶ 46-49. Instead, defendant argues that the now-omitted allegation of his participation in the witness protection program was the "key factual premise" in the Court's finding that the statute was tolled. *See* Def. Mem. at 5. Defendant claims that he was available for suit in the United States at any time after 1987. However, while the Court cited the defendant's alleged participation in the witness protection program as a fourth factor supporting its finding, *see Cabello*, 157 F. Supp. 2d at 1368, the Court also based its finding on the reasons noted above as separate grounds for tolling the statute through 1990.

Defendant simply chooses to overlook the Court's finding that, until 1990, plaintiffs could not have had definitive evidence of defendant's crimes and were deliberately misled by defendant and the Chilean military authorities as to the cause of Cabello's death. *See* Order Denying in Part Motion to Strike at 4 ("The Court therefore finds that Plaintiffs' allegations regarding both Winston Cabello's burial in a mass grave and the Pinochet regime's effort to conceal the deceased's body from Plaintiffs are relevant to show that the limitations period was equitably tolled."). Defendant's availability to be served with summons is irrelevant if plaintiffs at that time were unable, through no fault of their own, to establish the proof needed to maintain a claim against him for his tortious conduct. *See Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135 (E.D. N.Y. 2000) (tolling statute of limitations *since World War II* on plaintiffs' claims against French banks for their complicity with Nazis based on

plaintiffs' allegations that French banks engaged in a "policy of systematic and historical denial and misrepresentation concerning the custody of the looted assets to plaintiffs and the public at large"; noting that equitable tolling may be merited "where plaintiffs can show that it would have been impossible for a reasonably prudent person to learn or discover critical facts underlying their claim"); *see also Seattle Audobon Society v. Robertson*, 931 F.2d 590, 596 (9th Cir. 1991) ("Even when physical access to a functioning court is possible, equitable tolling may nevertheless be proper if there is no real possibility of gaining relief in court.").

Defendant's argument is also inconsistent with the concept of equitable tolling as applied in this case and in other human rights cases in which evidence was concealed from plaintiffs. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (citing "intimidation and fear of reprisals" as factors supporting equitable tolling); *Bodner*, 114 F. Supp. 2d 117; *Doe v. Unocal Corp.*, 963 F. Supp. 880, 897 (C.D. Cal. 1997) (noting that TVPA may be tolled where "defendant's wrongful conduct prevented plaintiff from asserting the claim"). In fact, defendant appears to contest the Court's holding that equitable tolling should be applied to toll the statute during the seventeen-year period when the location of Cabello's body was concealed from the plaintiffs, when he argues that the limitations period expired as soon as the bodies were exhumed. *See* Def. Mem. at 6. However, the cases cited by defendant, *see* Def. Mem. at 7-8, all involve a plaintiff who was aware of his claim and in some cases had commenced judicial proceedings, but attempted to extend the limitations period because of procedural delays caused by plaintiff or his counsel.⁹ Significantly, defendant does not cite a

⁹ None of the cases defendant cites dictate that another result be reached by this Court. *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999), supports the doctrine of equitable tolling in "extraordinary circumstances that are both beyond [plaintiffs'] control and unavoidable even with diligence," such as those presented by this case. Similarly, *Pacific*

single case in which a court held that the statute of limitations actually began to run *during* the time that evidence of the tort was concealed from plaintiffs.

The Court's previous ruling in this case is also consistent with Congressional intent. The legislative history of the TVPA explicitly states that courts, in calculating the limitations period, do so "with a view toward giving justice to plaintiff's rights." S. REP. NO. 102-249, at 10-11 (1991). Because of the complex and highly public nature of the human rights cases brought under the ATCA and TVPA, the application of equitable tolling should be applied in such a way that gives plaintiffs the benefit of the full statute of limitations *once their claims are known to them*. Thus, the Court correctly tolled the running of the statute of limitations until the point in time at which plaintiffs became aware of the true circumstances underlying their claim, thereby providing plaintiffs the ten-year limitations period in which to investigate and weigh the grave consequences of bringing a lawsuit against the defendant.

III. Plaintiffs Have Standing To Bring Claims Four, Five and Seven.

Defendant argues that Zita Cabello Barrueto lacks standing as the legal representative of Winston Cabello's Estate to bring the fourth, fifth and seventh claims in the SAC. Defendant cites no case law to support his argument. Defendant simply asserts that

Harbor Capital, Inc. v. Barnett Bank, N.A., 252 F.3d 1246 (11th Cir. 2001), which deals with the period of tolling in RICO claims, supports the Court's finding in this case by recognizing that equitable tolling is justified so long as plaintiffs are prevented from "discover[ing] the basis of their claims," as plaintiffs were in this case. *See id.* at 1252 (internal quotation omitted). *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993), which is not controlling on this Court, states the obvious point that the plaintiff must demonstrate diligence in pursuing his or her claim during the period he or she seeks to toll the statute of limitations. The court also recognized that a plaintiff is not "required to sue within statutory limitations period if he cannot, under the circumstances, reasonably be expected to do so." *Id.* *Booker v. Ward*, 94 F.3d 1052, 1057 (7th Cir. 1996), also not controlling, simply held that a defendant who had failed to name additional defendants in his original complaint, despite having the opportunity to

because the Court only found that Zita Cabello Barreuto has standing to sue as legal representative of the Estate for the claim of extrajudicial killing, she does not have standing to sue as legal representative with respect to the other claims asserted by her on behalf of the Estate. Def. Mem. at 8, 10. Of course, since plaintiffs brought the claims of torture, crimes against humanity, and cruel, inhuman and degrading treatment or punishment on behalf of the Estate rather than the legal representative, the Court did not pass on whether the legal representative had standing to bring those claims. *See Cabello*, 157 F. Supp. 2d at 1353-54.

In holding that Zita Cabello Barreuto could act as the legal representative of the Estate with respect to the extrajudicial killing claim, but that the Estate could not sue on its behalf with respect to other claims, the Court held that “federal and Florida law contemplate that representatives bring lawsuits on behalf of estates.” *Id.* at 1353-54. Contrary to defendant’s assertion, the Court’s conclusion indicates that the substitution of Zita Cabello Barreuto, as legal representative of the Estate, in place of the Estate as the plaintiff to bring claims four, five and seven is consistent with both federal and Florida law. Other federal courts addressing the standing of administrators to bring federal civil rights claims have found that administrators may pursue such claims on behalf of estates of decedents. *See O’ Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1348 (E.D. Va. 1981) (holding that “state law governs the survivability of [42 U.S.C.] 1983 actions, but a federal rule of survival supercedes any state law requiring abatement in an action where the acts of the defendants caused the death of the injured party” and finding that plaintiff was a qualified administrator of estate under applicable state law). *Cf. Jaco v. Bloechle*, 739 F.2d 239, 244 (6th Cir. 1984)

do so within the limited period, could not avail himself of equitable tolling to add those defendants to his suit after the statute of limitations expired.

(holding that Ohio's survival law would not be permitted to abate a section 1983 survival action brought by decedent's personal representative).

Defendant additionally contends that Zita Cabello Barrueto may not act as legal representative of the Estate because Chilean law does not recognize her as a beneficiary of the Estate. Def. Mem. at 8-9. Defendant conflates the question of whether a legal representative of an estate has standing to sue on the estate's behalf with the question of which persons are the beneficiaries of a decedent under Chilean law. As noted above, the first question is controlled by federal and Florida law, while the second question, in this case, is controlled by Chilean law. As the Court found, Florida permits claims to be brought on behalf of estates by their legal representatives, and Florida has determined that Zita Cabello Barrueto is the legal representative of the Estate of Winston Cabello. *Cabello*, 157 F. Supp. 2d at 1356. Accordingly, Zita Cabello Barrueto has standing to bring the fourth, fifth and seventh claims on behalf of the Estate of Winston Cabello as the legal representative of the Estate.

IV. The Legal Representative of the Estate Has Standing to Bring a Claim for Torture Under the TVPA On Behalf of the Estate.

As he did in his previous motion to dismiss, defendant contends, incorrectly, that Zita Cabello Barrueto lacks standing to assert the claim of torture (claim five) on behalf of the Estate, because "the TVPA plainly limits standing to bring an action for torture to the individual actually victimized by the torture." Def. Mem. at 9; *see* Defendant's Memorandum in Support of Motion to Dismiss the FAC on Standing Grounds at 3. The TVPA provides that a person who acts under color of law and "subjects an individual to torture shall . . . be liable for damages to that individual." 28 U.S.C. § 1350 note § (2)(a)(1) (1992). Defendant compares the language in section 2(a)(1) of the TVPA to the language in section 2(a)(2) and draws the mistaken conclusion that no one has standing to bring a claim on behalf of a dead

torture victim.¹⁰ Def. Mem. at 9. Once again, defendant conflates two separate concepts—standing and damages. The phrase “to that individual” in section 2(a)(1) is intended to prevent *a third party, such as a family member*, from suing for the harm suffered by that party as a result of the victim’s torture. It is not intended to prevent a decedent’s survivors from asserting claims on behalf of the decedent for torture. In contrast, section 2(a)(2) permits third parties to sue for damages resulting from an extrajudicial killing by stating that an “individual may be liable . . . to any person who may be a claimant in an action for wrongful death.” Defendant mistakenly concludes that absence of this language in section 2(a)(1) means that the legal representative of a torture victim may not sue for damages for torture.

The legislative record of the TVPA also shows that Congress intended a torture victim’s claims to survive his or her death under section 2(a)(1). The House Report states that the “legislation authorizes the Federal courts to hear cases brought by *or on behalf of* a victim of . . . torture.” H.R. REP. NO. 102-367, at 4 (1991) (emphasis added), *reprinted in* 1992 U.S.C.C.A.N. 84, 87.¹¹ The Senate Report states that the TVPA was enacted “to ensure that

¹⁰ Section 2(a) of the TVPA provides in relevant part as follows:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, *or to any person who may be a claimant in an action for wrongful death.*

28 U.S.C. § 1350 note § 2(a) (1992) (emphasis added).

¹¹ Congress’s intent is consistent with federal common law providing for the survival of a certain actions after the death of the plaintiff, such as civil rights claims. *See Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468 (1980) (holding that *Bivens* claims survive claimant’s death and may be brought by administrator of claimant).

torturers . . . are held legally accountable for their acts,” and that they “will no longer have a safe haven in the United States.” S. REP. NO. 102-249, at 3. Under defendant’s approach, a torturer whose victim later died of other causes could find a safe haven in the United States, contrary to Congress’s intent. Moreover, defendant’s reading of the statute would preclude the survivors of an individual who was tortured and killed from suing for both torture and extrajudicial killing, regardless of the suffering endured by the victim prior to death. Accordingly, consistent with Congress’s intent, the Court should hold that Winston Cabello’s torture claim survives his death and may be asserted by his Estate’s legal representative.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the Court to deny defendant's motion to dismiss the second amended complaint.

Respectfully submitted,

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