IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)

Teőfila Ochoa Lizarbe, *et al*.,

Plaintiffs

v.

Juan Manuel Rivera Rondon,

Defendant

Civil Action No. 8:07-CV-01809
Honorable Peter J. Messitte

DEFENDANT'S MOTION FOR CERTIFICATION OF THE COURT'S FEBRUARY 26, 2009 ORDER DENYING DEFENDANT'S MOTION TO DISMISS

In accordance with 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(3), Defendant Juan Manuel Rivera Rondon moves the Court to certify for immediate appeal its February 26, 2009 Order denying Defendant's Motion to Dismiss, and as grounds states:

I. Introduction

On July 11, 2007, the plaintiffs sued this defendant based upon events alleged to have occurred 22 years earlier, in August 1985, when he was a low-ranking officer in the Peruvian military acting in his official capacity. *See* Complaint, Dock. #1, at ¶¶ 6, 49, 54. On December 21, 2007, Defendant moved to dismiss the Complaint on a variety of grounds. Dock. # 19. Following a hearing on April 14, 2008, the Court denied Defendant's Motion in an Order and Opinion filed on February 26, 2009. Dock. # 53-54. Defendant respectfully requests that the Court amend the February 26, 2009 Order to certify the Order for immediate appeal under 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(3).

Defendant has a right to an interlocutory appeal of the Court's Order on certain grounds, including that that he is immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). The Court's denial of Defendant's Motion on that and other grounds is immediately

appealable under the collateral order doctrine. *See Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 277 (5th Cir. 2007); *Gupta v. Thai Airways Int'l, LTD*, 487 F.3d 759, 764 (9th Cir. 2007); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006). Defendant therefore intends to note an interlocutory appeal.

The Court should amend its Order to certify all the issues therein for immediate appeal. Defendant's Motion to Dismiss, and the Court's denial of that motion, satisfy the requirements of 28 U.S.C. § 1292(b) because Defendant's Motion "involves . . . controlling question[s] of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Under Fed. R. App. P. 5(a)(3), the Court has discretion amend its Order to certify it for immediate appeal. For the reasons outlined below, the Court should do so. Moreover, because Defendant is noting an interlocutory appeal of some issues under the collateral order doctrine, allowing the Defendant to appeal the other issues in his Motion and the Court's ruling would advance the interests of judicial economy. [1]

II. Law and Analysis

28 U.S.C. § 1292(b) gives the Court discretion to certify an order as appropriate for an interlocutory appeal:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in

[1] All of the issues raised in Defendant's Motion to Dismiss are reviewable by the Court of Appeals in the exercise of its pendent appellate jurisdiction. Under that exception to the final judgment rule, the appellate court "retain[s] the discretion to review issues that are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review." *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). Certain issues in the Court's ruling are immediately appealable under the collateral order doctrine. Defendant expressly reserves his right to argue on appeal that all the issues raised in his Motion to Dismiss are so interconnected that they warrant concurrent review, irrespective of the Court's ruling on this Motion.

> the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Thus, "[c]ertification for an interlocutory appeal is proper where: (1) the order to be appealed involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 741 (D. Md. 2003). The Court's February 26, 2009 Order denying Defendant's Motion to Dismiss satisfies each of the above factors and is therefore appropriate for an immediate appeal.

A. The Court's Order involves controlling questions of law and an immediate appeal will materially advance the ultimate termination of the litigation.

It is well-settled that, "if resolution of the question being challenged on appeal will terminate the action in the district court, it is clearly controlling." 19-203 George C. Pratt, *Moore's Federal Practice - Civil* § 203.31. If the case presents a controlling question of law, it follows that an appeal will advance the ultimate termination of the litigation. *Id*. "Thus a court will require only that the appeal present a controlling question of law on an issue whose determination may materially advance the ultimate termination of the case." *Id*.

Defendant moved to dismiss this action on nine grounds: (1) the claims asserted are barred by the statute of limitations; (2) the Defendant is immune from suit under the Foreign Sovereign Immunities Act of 1976; (3) Plaintiffs failed to exhaust their remedies in Peru; (4) the case should be dismissed under the political question doctrine; (5) Plaintiffs' claims are barred by the Act of State doctrine; (6) the Complaint fails to state a claim upon which relief can be granted; (7) the Alien Tort Claims Act does not provide the Court with jurisdiction; (8) improper venue; and (9) the decedents failed to allege that they appeared before the Court through duly-appointed personal representatives on behalf of the open estates. Patently, a different ruling by the Court on any one of the above issues would be dispositive of the case. Thus, Defendant's Motion to Dismiss, and the Court's denial of that Motion, undoubtedly involve controlling

questions of law and an immediate appeal of those issues will materially advance the ultimate termination of the litigation.

B. There is substantial ground for difference of opinion on the questions of law.

Defendant respectfully submits that there is substantial ground for difference of opinion on all the questions of law in his Motion to Dismiss.

1. The claims asserted are barred by the statute of limitations.

The Torture Victims Protection Act (TVPA) contains a ten-year statute of limitations. *See* 28 U.S.C.A. § 1350, note. ("No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."). The Complaint relies entirely on incidents alleged to have occurred in August of 1985. *See* Complaint, ¶ 48, 54, 60, 66. The Complaint was filed on July 11, 2007. Thus, this lawsuit was filed almost ***22 years*** after the alleged events in question.

In rejecting Defendant's statute-of-limitations argument, the Court relied on the doctrine of "equitable tolling." The Court found that equitable tolling should apply because "Plaintiffs have pled that until at least the year 2000, the political climate in Peru was unremittingly hostile to any effort on their part to pursue remedies against Rivera Rondon in Peru." Op. at 12. The Court therefore apparently found that equitable tolling applies because "the plaintiff[s] in some extraordinary way ha[ve] been prevented from asserting [their] rights." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (C.A.3 Pa. 1994) (internal quotation marks omitted).

There are several substantial grounds for a difference of opinion on this issue. First, the Fourth Circuit Court of Appeals has cautioned that equitable tolling should apply only sparingly and in the most extreme circumstances:

> **…any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of**

> **excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where-due to circumstances external to the party's own conduct-it would be unconscionable to enforce the limitation period against the party and gross injustice would result.**

Harris v. Hutchinson, 209 F.3d 325, 328 - 330 (C.A.4 Md., 2000) (emphasis added). Defendants respectfully submit that the Plaintiffs have failed to satisfy this stringent test.

Second, there are substantial grounds for Defendant's position that Plaintiffs were not prevented from asserting their rights. In order to apply equitable tolling under this prong of the analysis, the plaintiffs bear the heavy burden that **"any resort to equity must be reserved for those rare instances where-due to circumstances external to the party's own conduct-it would be *unconscionable* to enforce the limitation period against the party and *gross injustice* would result."** *See Harris v. Hutchinson*, 209 F.3d 325, 328 - 330 (C.A.4 Md., 2000).

In denying Defendant's Motion, the Court relied on allegations in the Complaint that "Plaintiffs could not have brought a lawsuit in the United States against Defendant Rivera Rondon…prior to the removal of Alberto Fujimori…as president of Peru in or about November 2000" given the allegedly repressive nature of the Fujimori presidency. *See* Complaint, ¶81. The Court of Appeals for the Tenth Circuit rejected a similar contention in *Van Tu v. Koster*, 364 F.3d 1196, 1199-1200 (C.A.10 2004).

Van was an Alien Tort Claims Act case like the current matter. The plaintiffs were residents of the Village of Son My in the Republic of Vietnam. They brought suit on their behalf and as representatives of deceased victims and survivors of the My Lai Massacre, which occurred thirty-two years prior to the filing of the suit. The defendants were alleged to have committed atrocities, including murder, against civilian residents of the village of Son My (My Lai). Similar to this case, the plaintiffs in *Van* argued for equitable tolling "on the basis of plaintiffs' poverty, their status as

subjects of a Communist government, the Vietnam War, and their inability to travel." *Van Tu v. Koster*, 364 F.3d 1196, 1199 -1200 (2004).

In *Van*, the district court entered an order dismissing the entire action, with prejudice, on statute-of-limitations grounds. The Tenth Circuit Court of Appeals upheld the dismissal, stating as follows:

> The district court properly determined that plaintiffs were required to bring their action within the ten-year statute of limitations, and that they failed to do so….Plaintiffs argue that the aforementioned statutes of limitations should be tolled because of exceptional circumstances. We agree with the district court that **even if some degree of equitable tolling were appropriate on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel, plaintiffs have made no showing sufficient to justify tolling the *Bivens* claim for twenty-eight years, and their *Alien Tort Statute claim for twenty-two***. We therefore reject their equitable tolling argument.

Van Tu v. Koster, 364 F.3d 1196, 1199 - 1200 (C.A.10 2004) (emphasis added).

Moreover, the admissions in the Complaint demonstrate the total fallacy of the plaintiffs' position. There was no bar to investigating or filing the present claim as a result of the Fujimori presidency because, *according to the Complaint*, the claims asserted here were in fact being investigated and filed in multiple forums while Mr. Fujimori was president. Specifically, the Complaint alleges that during the Fujimori presidency: 1) "In or about October 1985, the Peruvian Senate commission published its report concluding that 69 people were killed in the Accomarca [events]." *see* Complaint, ¶91; 2) "Around the same time [*i.e.*, October 1985], both government prosecutors and military authorities opened their own investigations." *see* Complaint, ¶91; 3) "[T]he Peruvian Supreme Court eventually ruled that the case was solely within the jurisdiction of the military justice system." *see* Complaint, ¶91; 4) "In or about 1987, two years after the Accomarca [events], a military court absolved Defendant Rivera Rondon and others…." *see* Complaint, ¶93; and 5) "The court's 1987 ruling was thrown out by the Supreme Council for Military Justice. In or

about 1989 the lower military court again dismissed the charges against all the defendants [including Rondon] except Hurtado [who is not a party here]." *see* Complaint, ¶94.

The plaintiffs admit in their Complaint that within the statute of limitations, the Peruvian Senate, government prosecutors, military authorities, military courts and the Peruvian Supreme Court were all investigating and adjudicating issues related to the events at Accomarca. Having so admitted, the plaintiffs next strain credulity by asking this Court to accept that no one could investigate or file these claims within the statute of limitations.[2]

The plaintiffs claim to have been unable to investigate their potential suit prior to 2000, but in the same Complaint they allege that a Peruvian Senate Commission Report, *including the defendant's name and details of his alleged involvement*, was made public in 1985. *See* Complaint, ¶ 91. Thus, the existence of the numerous contemporaneous investigations and the public findings related thereto *preclude* any reliance on the doctrine of equitable tolling:

> **Where regulatory or other proceedings involving the defendant's wrongdoing are recorded, the plaintiff may be held to a standard of inquiry notice and may not successfully invoke the equitable tolling doctrine.**

Council v. Better Homes Depot, Inc., 2006 WL 2376381, *10 (E.D.N.Y 2006); *see also Armstrong v. McAlpin,* 699 F.2d 79, 90 (2d Cir. 1983) (appellant plaintiffs' failure to timely file was inexcusable, because they should have discovered the fraud with reasonable diligence due to well publicized Securities Exchange Commission action).

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[2] Likewise, as noted in the Motion to Dismiss and the Reply, the events at Accomarca were contemporaneously known virtually worldwide. *See* Motion to Dismiss, Exhibit 1 (October 24, 1985 *New York Times* article reporting that, "Andean peasants asserted today that soldiers in Ayacucho Province shot or stabbed to death 59 people in a massacre in two villages late in August"… "A [Peruvian] military investigation confirmed that at least 49 people were slain by soldiers on Aug. 14 in the hamlet of Accomarca, also in Ayacucho Province."); *see* Motion to Dismiss, Exhibit 2 (September 19, 1985 *Houston Chronicle* article reporting that the Peruvian "government revealed that soldiers massacred about 40 peasants in an Andean village last month….The disclosure Wednesday by President Alan Garcia's new administration was the first time in the five-year war against the Shining Path, a Maoist guerrilla movement, that Peru's government or armed forces acknowledged that soldiers killed civilians….Garcia has put the Joint Armed Forces Command under orders to end human rights abuses….Garcia directed the military last week to make an 'exhaustive investigation'…."). The fact that "Andean peasants," *one of whom was named in the article*, were free to speak out about the events in question to the extent of being quoted in the *New York Times* mere months afterwards in 1985 flies in the face of the plaintiffs' position that the regime publicly investigating these events was so repressive that this case could not be brought until 22 years later.

Accordingly, based on the foregoing, there is substantial ground for difference of opinion as to the applicability of the equitable tolling doctrine and whether Plaintiffs' claims are barred by the statute of limitations.

2. The Defendant is immune from suit under the Foreign Sovereign Immunities Act of 1976.

Defendant has a right to appeal the Court's denial of his Motion to Dismiss under the Foreign Sovereign Immunities Act ("FSIA") based on the collateral order doctrine. *See Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 277 (5th Cir. 2007); *Gupta v. Thai Airways Int'l, LTD*, 487 F.3d 759, 764 (9th Cir. 2007); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006). Defendant intends to note a direct appeal on that basis.

Even assuming, *arguendo*, that the collateral order doctrine did not apply to Defendant's FSIA argument, however, there is substantial ground for difference of opinion as to this issue, and it would therefore be appropriate for certification under 28 U.S.C. § 1292(b).

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 ("FSIA") provides that a defendant acting in an official capacity on behalf of a foreign government is immune from suit for actions taken in his official capacity. *See Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C. 2006) (FSIA barred a suit brought by citizens of Lebanon against former Israeli General pursuant to the ATCA and the TVPA, alleging that a bombing in Lebanon, by the Israeli military, constituted war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman, or degrading punishment); *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. May 2, 2007) (FSIA barred plaintiffs' suit against former director of the Israeli General Security Service under the ATCA and the TVPA alleging that the Director authorized, planned and directed military personnel in the bombing of a residential neighborhood in Gaza City and developed, implemented, and escalated Israel's alleged targeted killing policy); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (FSIA applies to insulate actions of Nazi government of Austria); *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL

75283 (E.D.N,Y. Feb. 13, 1996)(FSIA barred claims against Israel's Minister of Police and former Prime Minister for allegedly directing the beating of the plaintiff by police); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 670 (D.C. Cir. 1996) (FSIA barred the plaintiff's claim that Jordanian officials acting "in an individual capacity" had him detained and tortured by military police); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 370 n.3 (S.D.N.Y. 1996) (rejecting claims against U.N. official individually as "none of [his] alleged actions are outside of the scope of his official duties").

In denying Defendant's motion to dismiss, the Court determined that FSIA does not shield government agents who are acting outside the scope of their official capacity. Op. at 13-14. The Court further found that, in this case, "the embassy of Peru has filed a letter with the Court stating that Rivera Rondon was not acting in his official capacity at Accomarca." Op. at 14. The Court considered this letter over Defendant's Motion to Strike, which the Court denied.

There is substantial ground for difference of opinion on this issue for the simple reason that the allegations in Plaintiffs' Complaint are to the contrary. There is simply no getting around the fact that the plaintiffs themselves have unequivocally alleged that the actions taken by the defendant were done in his official capacity as an officer in the Peruvian military based on policy set at the highest levels of the Peruvian government:

1. "Peru was in a state of civil war," and that the Peruvian Army was "fighting the Maoist rebel group" Shining Path, which "committed widespread abuses, including massacres, bombings and targeted assassinations" *see* Complaint, ¶ 35;

2. "national elections" were held in 1980, and that the newly-elected government "declared a state of emergency" in an area to include where the alleged events occurred in an effort to fight the Maoist terrorists in that region *see* Complaint, ¶ 39;

3. it was "the government" which "deployed the Peruvian Army" to the alleged location where the events at issue occurred so that "military operations" could be carried out in the region *see* Complaint, ¶ 40, 42;

4. it was the "Peruvian Army" that "targeted the Accomarca District" where the events in question allegedly took place *see* Complaint, ¶ 43;

5. a Peruvian General who was "Chief of the Political-Military Command" for the area involved, "ordered the General Staff of the Peruvian Army's Second Infantry Division to devise an operational plan to 'capture and/or destroy terrorist elements'" *see* Complaint, ¶ 15, 48;

6. the military "operation" was "placed under the control of" a Lieutenant Colonel who was the "Chief of Operations of the General Staff" s*ee* Complaint, ¶ 48;

7. at all relevant times, the defendant was a low-ranking officer in the Peruvian military, referred to as a "*military actor*" in the Complaint *see* Complaint, ¶6, 12 (heading);

8. the defendant was allegedly "called" to attend a meeting by his superior officer, the Lieutenant Colonel, regarding a military operation in Accomarca; ***there is no allegation that atrocities or wrongdoing of any type was planned or even discussed at this meeting*** *see* Complaint, ¶ 49; and

9. the defendant was merely a Lieutenant at the time and allegedly involved in the resulting operation as such and while wearing his military uniform and using military equipment *see* Complaint, ¶ 49, 54.

The allegations against the Defendant in the Complaint clearly demonstrate that he was a military officer acting in his official capacity. There is substantial ground for difference of opinion as to whether it was appropriate for the Court to deny Defendant's Motion to Dismiss based on external document that is directly contradicted by the Plaintiffs' allegations in the Complaint. Thus, even if this issue were not immediately appealable under the collateral order doctrine, it would be proper for the Court to certify it for immediate appeal under 28 U.S.C. § 1292(b).

3. The Plaintiffs failed to exhaust their remedies in Peru.

The TVPA provides that, a "court shall decline to hear a claim if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350(2)(b). Thus, as the Plaintiffs conceded, TVPA claims carry a requirement to exhaust remedies in the local jurisdiction prior to filing suit here and remedies in Peru must be effectively non-existent. A difficult or time-consuming process is insufficient. Instead, the Peruvian process must be followed unless it is "unobtainable, ineffective, inadequate, or obviously futile."

The plaintiffs admit in the Complaint and their papers that remedies exist in Peru and that they are being pursued there by the very same plaintiffs who filed this case:

1. "In or about 2005, Peruvian prosecutors filed murder charges in civilian court against Defendant Rivera Rondon…." *see* Complaint, ¶100.

2. "In or about June 2005, the Third Supraprovincial Criminal Court…opened an investigation against…Defendant Rivera Rondon." *see* Complaint, ¶101.

3. **"Soon thereafter, Plaintiffs each exercised their right to become a parte civil [civilian party]…By doing so, Plaintiffs have done the equivalent to 'suing' under United States law…."** *See* Opposition at 38.

4. "Under Peruvian law, victims of human rights abuses, including Plaintiffs, are not entitled to civil compensation until a criminal case in a civilian court results in a conviction…." *see* Complaint, ¶104.

Moreover, in opposing Defendant's Motion to Dismiss, Plaintiffs admitted for the first time that they have sued the Defendant in Peru.[3] Having so admitted, the plaintiffs cannot contend that there is no process in Peru to address their grievances. Not only is there a process, but they are participating in it (a fact they did not admit in the dozens of pages of their Complaint).

In denying Defendant's Motion to Dismiss, the Court reasoned that "[u]nder the TVPA, the defendant bears the burden of proving that available and adequate local remedies exist in Peru." Op. at 16. The Court concluded that "Rivera Rondon has not met his burden in this regard." Op. at 18.

There is substantial ground for difference of opinion on this issue. As Defendant pointed out in his Reply, not only is there a current process in Peru, but there was a process previously. The allegations underlying the Complaint were the subject of extensive investigation and review by Peruvian Courts, where the defendant was initially cleared of all wrongdoing. *See* Complaint, ¶91,

[3] The plaintiffs did not allege in the Complaint that they had actually become partes civil to the prosecution in Peru. As noted in the Motion to Dismiss, without such allegations, this case could not proceed. *See Ruiz v. Martinez*, 2007 WL 1857185, 6 (W.D.Tex. May 17, 2007)("Most importantly, Ruiz fails to allege that he submitted a grievance regarding the alleged torture to Mexican authorities….Until Ruiz exhausts the "adequate and available remedies" of Mexico, the ATS bars his torture claim in the United States, and the Court has no jurisdiction over this issue.").

93, 94. In fact, the Center for Justice and Accountability (the group bringing the present lawsuit as co-counsel for the plaintiffs) admits on its website that, **"Rivera Rondón and the others were exonerated."** *See* http://www.cja.org/cases/Peru_Faqs/peru_faqs.shtml (last visited December 20, 2007). The plaintiffs allege that after a new regime came to power in Peru, and despite the prior exoneration of the defendant, *new charges were placed against him*. (a clear violation of his right to dues process of law and double jeopardy if these concepts applied under the new Peruvian regime). The allegation in the Complaint is that he has yet to stand trial and has, therefore, never been convicted of these charges. Nevertheless, there was a process in Peru which had run its course prior to installation of a new regime politically motivated to re-prosecute the defendant if possible. It is not the case that the plaintiffs have no rights in Peru so much as that they do not like the outcome of the process in Peru and would like Rondon retried there, yet again.

For the foregoing reasons, there is a substantial difference of opinion on the question of whether the Plaintiffs have adequately exhausted their remedies in Peru—a statutory prerequisite to this action.

4. The Plaintiffs' case should be dismissed under the political question doctrine.

Courts have long held that the judicial branch must take special care not to become entangled in political questions best left to the executive under our tripartite separation of powers. In oft-cited language, the Supreme Court, in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), set forth six independent tests for the existence of a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S.Ct. 691. If any *one* of these factors is present, the Court should ordinarily dismiss the claim. *See id*. As Defendant pointed out in his Motion to Dismiss and Reply, none of the above factors is present in this case.

The Court disagreed, holding that official U.S. government policy was opposed to the Defendant's alleged conduct, finding that the cases cited by Defendant were distinguishable, and ruling that, "it can only be assumed that, in enacting the TVPA, Congress and the President were fully mindful of the potential for reciprocal treatment of U.S. forces." Op. at 22-23. Defendant respectfully submits that there is substantial ground for disagreement on those issues.

First, the relevant question is not whether the U.S. government subsequently decried Defendant's alleged conduct. The salient point under *Baker v. Carr* is that, regardless of whether the executive would want this suit to go forward or whether it is in keeping with or degradation of the executive's position on Accomarca, foreign policy is a matter for the executive, not the courts. As such, this matter should not be permitted to go forward here under the first of the *Baker* factors.

Second, respectfully, the basis on which the Court distinguished the cases cited by the Defendant is inapposite. In his Motion to Dismiss, the defendant cited and discussed *Doe v. Liu Qi*, No. C 02 0672 CW, at 4-5 (N.D. Cal., Sept. 27, 2002). *Doe* is an ATCA case against certain *Chinese* officials for persecuting a religious group called the Falun Gong. The case did not involve any actions of U.S. officials. In *Doe*, the United States State Department asked the Court "to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy," including suits alleging international law violations against individuals "in carrying out their official functions under the Constitution, laws and programs of the United States." Likewise, should the Court now rule that a Peruvian soldier may be sued here for actions taken in his official capacity as a soldier, the Court effectively places its imprimatur on foreign government's permitting the same types of cases against our own members

of the armed forces deployed throughout the world. This case directly supports Defendant's Motion to Dismiss based on the political question doctrine.

Third, there is nothing in the text of the TVPA to suggest that the political question doctrine is inapplicable under the circumstances of this case. Accordingly, there is substantial ground for disagreement as to the applicability of the political question doctrine in this case.

5. Plaintiffs' claims are barred by the Act of State doctrine.

The Act of State doctrine applies to bar judicial intervention where "the outcome of the case turns upon [] the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). The policies underlying the doctrine include "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick & Co.*, 493 at 408.

As the Court noted in its Opinion, the Supreme Court has articulated a three-factor test for applying the Act of State doctrine: (a) "the degree of codification or consensus concerning a particular area of international law," (b) the extent to which the issue "touch[es] ... sharply on national nerves," with greater justification for "exclusivity in the political branches" the more "important the implications of an issue are for our foreign relations," and (c) whether "the government which perpetrated the challenged act of state is no longer in existence." *Sabbatino*, 376 U.S. at 428.

The Court held that this case fails to satisfy any of the three factors. However, there is substantial ground for disagreement on this question.

As a threshold matter, Plaintiffs' Complaint undoubtedly raises allegations regarding acts of state. Indeed, Plaintiffs pleaded the following in the Complaint:

1. "Peru was in a state of civil war," and that the Peruvian Army was "fighting the Maoist rebel group" Shining Path, which "committed widespread abuses, including massacres, bombings and targeted assassinations" *see* Complaint, ¶ 35;

2. "national elections" were held in 1980, and that the newly-elected government "declared a state of emergency" in an area to include where the alleged events occurred in an effort to fight the Maoist terrorists in that region *see* Complaint, ¶ 39;

3. **it was "the government" which "deployed the Peruvian Army"** to the alleged location where the events at issue occurred so that "military operations" could be carried out in the region *see* Complaint, ¶ 40, 42;

4. **it was the "Peruvian Army" that "targeted the Accomarca District"** where the events in question allegedly took place *see* Complaint, ¶ 43;

5. **a Peruvian General who was "Chief of the Political-Military Command" for the area involved, "ordered the General Staff of the Peruvian Army's Second Infantry Division to devise an operational plan to 'capture and/or destroy terrorist elements'"** *see* Complaint, ¶ 15, 48;

6. **the military "operation" was "placed under the control of" a Lieutenant Colonel who was the "Chief of Operations of the General Staff"** s*ee* Complaint, ¶ 48;

7. at all relevant times, the defendant was a low-ranking officer in the Peruvian military, referred to as a ***"military actor"*** in the Complaint *see* Complaint, ¶6, 12 (heading);

8. **the defendant was allegedly "called" to attend a meeting by his superior officer, the Lieutenant Colonel, regarding a military operation in Accomarca**; there is no allegation that atrocities or wrongdoing of any type was planned or even discussed at this meeting *see* Complaint, ¶ 49; and

9. **the defendant was merely a Lieutenant at the time and allegedly involved in the resulting operation as such and while wearing his military uniform and using military equipment** *see* Complaint, ¶ 49, 54.

As to the first *Sabbatino* factor, the *Doe* case discussed above applies equally to the Act of State analysis. In *Doe*, as here, the plaintiffs claimed that the defendants committed extrajudicial killings and failed to prevent civilian casualties. The *Doe* court held that:

> The actions challenged by plaintiffs are classic acts of state. Tort challenges brought against foreign military officials for such alleged harms as unlawful detention during a political revolution implore the courts to "declare invalid and deny legal effect to acts of a military commander representing the ... government." Plaintiffs do not

> challenge the actions of third parties in procuring the alleged unlawful acts; rather, they ask this Court directly to declare that they were treated illegally by Israeli defendants on Israeli soil. Such a determination would offend notions of international comity and sovereignty.

400 F. Supp. 2d at 113 (citations omitted).

This case, like *Doe*, calls upon the Court to "declare illegal" the "acts of a military commander" (albeit a low-level one), "during a political revolution" carried out by the Shining Path guerillas. Likewise, here, as in *Doe*, plaintiffs ask the court to declare that they were treated illegally by Peru on Peruvian soil. Such a determination, like the one the Court was asked to make in *Doe*, "would offend notions of international comity and sovereignty." As such, this matter should be dismissed under the Act of State doctrine. *See also Roe v. Unocal Corp.*, 70 F.Supp. 2d 1073, 1079 (C.D. Cal. 1999); *Saltany v. Reagan*, 702 F.Supp. 319, 320-21 (D. D.C. 1988), *reversed in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989).

The Court's finding that "the acts alleged in the Complaint violate universally agreed upon legal principles, involving, as they do, acts of torture, extrajudicial killing, and crimes against humanity," is simply not supported by the Complaint itself. Op. at 25. As noted above, the allegations of the Complaint do not support a finding that the defendant committed human rights abuses. As a result, his persecution by the plaintiffs is not in keeping with any announced policy of the United States.

As noted in Defendant's Motion to Dismiss and Reply, the second *Sabbatino* factor -- the sensitivity of the issue for foreign relations -- weighs heavily in favor of this Court exercising its discretion not to hear this matter for the reasons detailed above. Likewise, the third *Sabbatino* factor clearly applies here: Peru is a relatively stable democracy, with continuity of government and has been since the events in question.

There is, therefore, substantial ground for disagreement on the issue of the applicability of the Act of State doctrine. The Court should thus certify this question for immediate appeal.

6. The Complaint fails to state a claim upon which relief can be granted.

In their Opposition to Defendant's Motion to Dismiss, the Plaintiffs took the position that their claims against Defendant are grounded on three theories of indirect liability: conspiracy, aiding and abetting, and joint criminal enterprise. Defendant moved to dismiss because Plaintiffs' Complaint fails to state a claim under any of those theories. The Court nevertheless found that the Complaint alleges direct conduct by Defendant, and further found that the Complaint alleges valid causes of action based on indirect liability. Op. at 29.

There is substantial ground for disagreement on these issues for all the reasons cited in Defendant's Motion to Dismiss and Reply, and, in particular, for the following reasons. First, irrespective of whether Plaintiffs' theories of indirect liability are cognizable under the ATS or TVPA, their claims depend on the fallacy that Defendant could somehow conspire with himself.

The defendant is only alleged to have conspired with, aided and abetted and joined in a criminal enterprise with other members of the Peruvian Army. It is legally impossible to conspire with oneself or to aid and abet oneself. *United States v. Gisehaltz,* 278 F.Supp. 434, 437 (S.D.N.Y. 1967); *Miller v. Edward Jones & Co.*, 355 F.Supp. 2d 629, 644 (D.Conn.,2005) ("it is clear that 'one cannot aid or abet oneself'"); *Iyorbo v. Quest Intern. Food Flavors & Food Ingredients Co.*, 2003 WL 22999547, *3 (D.Minn., Dec. 19, 2003) ("one cannot aid and abet oneself"); *U.S. v. Verners*, 53 F.3d 291, 295 (C.A.10 (Okl.),1995)("[o]ne cannot aid and abet an aider and abetter, nor can one aid and abet oneself"); *California Int'l Chemical Co. v. Neptune Pool Service, Inc.*, 770 F.Supp. 1530, 1535 (M.D.Fla. 1991) ("One can not aid and abet oneself in the performance of an act."); *State v. Pacheco*, 27 Utah 2d 281, 282, 495 P.2d 808, 808 (Utah 1972) ("one cannot aid and abet oneself").

Likewise, a corporation cannot conspire with or aid and abet its officers or agents. *See id.*; *Marmott v. Maryland Lumber Company*, 807 F.2d 1180, 1184 (4th Cir. 1986); *Rokeach v.*

Eisenbach, 1985 WL 4831, 7 (N.D.Ill., Nov. 27, 1985) (stating, in the context of corporate officers alleged to have conspired with the corporation, "[t]here can be no doubt that one cannot conspire with oneself.").

Under the same principles, one Peruvian Army solider cannot legally conspire with another soldier when both are acting in an official capacity. This is because, as demonstrated above, both officers are acting on behalf of Peru. In effect, the conspiracy and aiding and abetting theories here ask the Court to find that Peru (acting through the defendant) conspired with itself (acting through other soldiers). Such a conclusion is contrary to the great weight of case law. *See id*.

The Court's rationale that "no court has ever so held in the ATS/TVPA context" does not preclude the existence of a legitimate, good-faith disagreement on this issue. As explained above, there is a valid basis for disagreement on this important legal question, and the Court should therefore permit an immediate appeal on this point.

The Court further found that the Complaint sufficiently averred Defendant's knowledge of the alleged atrocities and knowing assistance in the criminal enterprise. As the Court recognized, Plaintiffs' pleading on this point is limited to "the assertions in the Complaint that Rivera Rondon attended the preliminary meeting where the Quebrada de Huancayoc operation was discussed, oversaw the firing on villagers and burning of homes, and set up a blockade of any escape route." Op. at 31. However, the pleading requirements for indirect liability are much higher.

In order to proceed on theories of indirect liability, the defendant must have known about and been part of a common scheme or plan to commit atrocities or to cover them up after the fact. *See, e.g., Gosden v. Louis,* 687 N.E.2d 481, 496 (Ohio App. 1996) (there must be at least "a common understanding or design, even if tacit, to commit an unlawful act" in order to support a conspiracy claim); *Hooks v. Hooks,* 771 F.2d 935, 944 (6th Cir.1985); *Halberstam v. Welch,* 705 F.2d 472, 478 (D.C.Cir.1983) (aiding and abetting focuses on whether a defendant ***knowingly*** gave

"substantial assistance" to someone who performed wrongful conduct"). An element of aiding and abetting is the defendant's knowledge of the illegal activity he is alleged to have assisted and his *knowing* assistance:

> Under a proper application of § 876 to ATCA civil aiding and abetting claims, **liability should be found only where there is evidence that a defendant furthered the violation of a clearly established international law norm in one of three ways:** (1) by **knowingly** and substantially assisting a principal tortfeasor, such as a foreign government or its proxy, to commit an act that violates a clearly established international law norm; (2) by encouraging, advising, contracting with, or otherwise soliciting a principal tortfeasor to commit an act **while having actual or constructive knowledge that the principal tortfeasor will violate a clearly established customary international law norm** in the process of completing that act; or (3) by facilitating the commission of human rights violations by providing the principal tortfeasor with the tools, instrumentalities, or services to commit those violations **with actual or constructive knowledge** that those tools, instrumentalities, or services will be (or only could be) used in connection with that purpose.

Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, *288 -289 (C.A.2 (N.Y.),2007). Moreover, the defendant's alleged knowledge of the planned wrongdoing must rise to the level of the specific intent to aid in misconduct:

> Moreover, in *Boim v. Quranic Literacy Institute,* the same court held that 18 U.S.C. § 2339A, which created a civil cause of action for those injured by terrorist acts against individuals who provided support to terrorist groups, survived a First Amendment challenge **"so long as the plaintiffs are able to prove that the defendants knew about the organization's illegal activity, desired to help that activity succeed and engaged in some act of helping."** 291 F.3d 1000, 1028 (7th Cir.2002). *Cf. Halberstam v. Welch,* 705 F.2d 472, 488 (D.C.Cir.1983) (holding that "desire to make the venture succeed" is a factor in determining aiding-and-abetting liability).
>
> **There is no allegation here that the defendants acted with the intent to make the violation succeed…."[o]ne who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture."** *Corrie v. Caterpillar, Inc.,* 403 F.Supp.2d 1019, 1027 (W.D.Wash.2005) (citing *Blankenship,* 970 F.2d at 285-87), *aff'd* on other grounds, *Corrie v. Caterpillar, Inc.,* 503 F.3d 974 (9th Cir.2007); *see also* N.Y. Penal Code § 115.05 (criminal facilitation). Indeed, such conduct does not violate customary international law. *See The Ministries Case,* 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 621-22.

Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 318 (C.A.2 (N.Y.),2007).

The pleading standards regarding the defendants' alleged knowledge of the conspiracy and the existence of it are high. *See Fullman v. Graddick,* 739 F.2d 553, 556-57 (11th Cir.1984) ("In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed. A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy."). These standards are even higher when the plaintiffs seek to employ theories of indirect liability in an ATCA case such as this:

> Furthermore, a number of courts have required some level of specificity in ATCA cases involving similar allegations. *See Aldana,* 416 F.3d at 1248-1253 (affirming in part dismissal of ATCA complaint for inadequate pleading); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165-169 (5th Cir.1999) (affirming dismissal of complaint asserting claims under the ATCA and TVPA for lack of specificity).

In re Sinaltrainal Litigation, 474 F.Supp.2d 1273, 1296 (S.D.Fla., 2006).

Here, the plaintiffs have failed to allege that the defendant knew anything about the atrocities in Accomarca before they were committed. In fact, the plaintiffs have not alleged that anyone knew these atrocities would occur in advance, leaving open the *very real* possibility that a decision made by the unit in the town at the time lead to the events which later unfolded. Likewise, the plaintiffs have failed to allege that the defendant did anything to knowingly cover up the events in Accomarca after the fact. As a result, no theory of indirect liability should survive.

Finally, there is substantial ground for disagreement as to whether the theory of joint criminal liability may be asserted in a civil action and, if so, whether the Complaint satisfies the requirements for such a claim. In finding that there is such a civil cause of action, the Court noted that a single court—the United States District Court for the Northern District of California—has so held. Op. at 30 (citing *Bowoto v. Chevron Corp.*, 2006 WL 2455752 (N.D. Cal., Aug. 22, 2006)). That single holding, which is not binding on this Court or the Court of Appeals, does not preclude a

legitimate disagreement on this point based on the reasoning and authorities cited in Defendant's Motion to Dismiss and Reply. Accordingly, for the reasons outlined above, and in Defendant's Motion to Dismiss and Reply, there is substantial ground for disagreement over whether the Plaintiffs' Complaint sets forth a claim upon which relief can be granted.

7. The Plaintiffs are not alleged to be "aliens" under the Alien Tort Claims Act.

The Alien Tort Claims Act grants district courts "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 (emphasis supplied). The term, "alien" is not defined in the statute, but Black's Law Dictionary defines "alien" as follows: "[a] person who resides within the borders of a country but is not a citizen or subject of that country." *See* Black's Law Dictionary, Seventh Ed. (1999). Thus, only those who are citizens of other countries, *but residing in the United States*, may bring claims under the ATCA. The Complaint alleges that "Plaintiff Teofila Ochoa…is a citizen and *resident of Peru*;" and "Plaintiff Cirila Pulido Baldeon…is a citizen and *resident of Peru*." *See* Complaint, ¶ 8, 10. Therefore, neither individual is an "alien" and the present ATCA claims should be dismissed.[4]

In denying Defendant's Motion to Dismiss on this issue, the Court relied solely on *Rasul v. Bush*, 542 U.S. 466 (2004), where the Supreme Court held that it has jurisdiction over *habeas corpus* claims brought by detainees at Guantanamo Bay. Defendant respectfully submits that *Rasul* is distinguishable from the present case. The *Rasul* Court began its analysis by noting that, "for more than two years [the plaintiffs] have been imprisoned in territory over which the United States

[4] *See also Johnson v. Eisentrager*, 339 U.S. 763, 777-778; 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (interpreting an analogous statute as follows, "[w]e have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

exercises exclusive jurisdiction and control." *See Rasul v. Bush*, 542 U.S. 466, 476, 124 S.Ct. 2686, 2693 (U.S. 2004). Next, the *Rasul* Court built its analysis on this point, stating as follows:

> Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian *479 can be reached by service of process."
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> * * *
>
> In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Cf. *Braden,* 410 U.S., at 495, 93 S.Ct. 1123. *484 Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

Rasul v. Bush, 542 U.S. 466, 478-479, 483-484; 124 S.Ct. 2686, 2695, 2698 (U.S. 2004).

In *Rasul*, the court based its jurisdiction on the fact that the aggrieved individuals were in United States custody at Guantanamo Bay. Here, the plaintiffs are not residents of the United States (and therefore not "aliens" for ATCA purposes) and they are *not* in United States custody. As a result, there is substantial ground for disagreement as to whether the limited exception established in *Rasul* applies here, and the Court should therefore certify its Order for immediate appeal.

8. Venue is not proper in this Court.

Actions against "foreign states" as defined by the FSIA must be brought in the United States District Court for the District of Columbia, unless the events at issue occurred in the United States. 28 U.S.C. § 1391 (f)(4). As discussed above, the claim against the defendant is a claim against Peru because the defendant was acting in his official capacity as an officer in the Peruvian military carrying out orders which amounted to official policy. Therefore, venue in this District is improper. *Tannenbaum*, 1996 WL 75283 at *3 (Eastern District of New York was improper venue for action against Israeli officials).

In denying Defendant's Motion to Dismiss, the Court found that "Rivera Rondon has been sued in his individual, not his official capacity." Op. at 34. As noted above, however, in their

Complaint, the plaintiffs unequivocally alleged that the actions taken by the defendant were done in his official capacity as an officer in the Peruvian military based on policy set at the highest levels of the Peruvian government. There is, therefore, substantial ground for disagreement as to whether this is an action against a foreign state brought in an improper venue.

III. Conclusion

For the foregoing reasons, Defendant respectfully requests that, pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(3), the Court amend its February 26, 2009 Order to state that the Order "involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Respectfully submitted,

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served pursuant to the electronic filing protocol of this Court this 27th day of March, 2009, to Wade B. Wilson, Esquire, Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

/s/

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