

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

Teófila 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 TO STRIKE LATE-FILED, EXTRA-RECORD
AND UNSWORN LETTER TO THE COURT AND
MOTION TO SHORTEN TIME FOR A RESPONSE**

Comes now the defendant, through undersigned counsel, and files the above-referenced motion, stating as follows:

1. The hearing on defendant’s Motion to Dismiss is scheduled for Monday, April 14, 2008. As the Court is aware, said motion hearing was set some time ago and said motion has been extensively briefed by the parties.

2. On Thursday, April 10, 2008, the undersigned received, for the first time, a document which was not originally copied to counsel, but which purports to be a letter from the Ambassador of Peru to the United States to the Court and dated April 3, 2008. This document is not sworn.

3. No local rule of this Court; nor any federal rule of procedure permits the filing of unsworn letters with the Court by third parties. As the author of the letter correctly observed, it does not “constitute the usual procedure to convey...remarks” to the Court. There is simply no authority whatsoever for this letter from a third party to be accepted or considered by the Court. As such, this letter is not properly part of the record. It should be struck therefrom and disregarded by the Court. The defendant so moves.

4. Even setting the foregoing aside, and assuming the letter is authentic (a point *not* conceded herein), the author is mistaken in a number of critical respects. First, the suggestion is made that the defendant will “declare” that he “participated in the massacre of civilians in the town of Accomarca...in August of 1985.” Nothing could be further from the truth. The defendant did not participate in any massacre; he will certainly not be “declaring” that he did so.

5. Moreover, despite the information apparently provided to the author of the letter, the defendant is not even alleged to have participated in the events in the town of Accomarca. Mr. Rondon is alleged *only* to have: 1) been a low-ranking officer in the Peruvian military; 2) attended a meeting he was ordered to attend where he was told his unit would block a road during a military operation against a terrorist group recognized as such by the United States; 3) followed orders by reporting to duty at the designated road; and 4) accurately filed a report to the effect that neither he nor his unit came into contact with any civilians. Importantly, there is no allegation that the atrocities at Accomarca were planned in advance or that the defendant knew of any such plan. Nor is there an allegation that the defendant *knowingly* covered up any atrocities. In short, on the day of the events at Accomarca, the defendant is alleged to have waited by a road outside of town without having so much as seen a civilian, much less interacted with or harmed one.

6. Apparently, the Honorable Ambassador (if, in fact, he is the letter’s author) has been misinformed. The balance of the letter very likely turns on this misinformation and, therefore, the basis of the unsworn opinions expressed therein is in serious doubt. Hence, the letter is unreliable on its face.

7. Moreover, the author of the letter suggests that the defendant was not acting in his official capacity despite the allegations outlined above. Clearly, the author is further misinformed in this regard. In fact, the author of the letter might be surprised to learn that the plaintiffs’ themselves all but admit that the defendant was acting in his official capacity at the time of the events in question. The plaintiffs have very effectively 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” *see* 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.

8. The author of the letter never suggests that his letter represents the official position of his country. As a result, the letter is inadequate for the purposes the plaintiffs would hope to use it. Therefore, it is irrelevant and the Court should strike it from the record.

9. At best, even if it represented the official position of Peru and even if it were otherwise properly before the Court, the letter at issue is simply an *ex post facto* attempt to distance the

government of Peru from its policies at the time. The suggestion, made by the letter's author and the plaintiffs themselves, that the *current* attempts to prosecute Mr. Rondon in Peru mean that his actions in 1985 were not in his official capacity then is hopelessly flawed. In 1985, Mr. Rondon was clearly operating in an official capacity in connection with the allegations of the Complaint. His actions then were not only sanctioned, but directed by the Peruvian government.

10. Attempts by the government to distance itself now from the events at Accomarca ring hollow. Lest there be any doubt, the Complaint alleges that [i]n or about 1995, [the Peruvian] government passed a sweeping law that granted amnesty to all members of the military and police for actions taken as part of the 'fight against terrorism' dating back to May 1980." See Complaint, ¶ 83. This law was passed well after the events at Accomarca were well know, published in the media worldwide and had been investigated by a Peruvian Senate Commission as well as the Peruvian military. It is simply not credible to suggest, as the author of the letter does, that the Government granted amnesty in connection with any actions the defendant is alleged to have taken, but that these actions were not pursuant to official policy. Moreover, the Complaint also alleges that, "[e]ven after information about the Accomarca [events] became public, Defendant Rivera Rondon was promoted within the Peruvian Army." See Complaint, ¶ 83. Here again, it strains credulity to suggest that the defendant was some rogue acting outside of his official capacity given his subsequent promotion.

11. Additionally, the author of the letter offers nothing more than an opinion on one of the ultimate legal issues for the Court to decide. Such an opinion is inadmissible because it invades the province of the Court. This is yet another reason why the letter should be stricken.

12. Finally, if the Court accepts the letter and the opinions offered therein, it should be accepted wholesale and not piecemeal. In particular, the letter states that:

on the date of this unfortunate event, President Alan Garcia Perez was just starting his first democratically elected term in office. He commenced his administration by reaffirming his unrestricted respect for civil liberties and the human rights of Peruvian citizens and the strengthening of democratic institutions in the country. Therefore, it is

an untruthful statement that the actions of Mr. Rivera Rondon were the result of directives or regulations coming from the Government.

The plaintiffs in this case have suggested exactly the opposite:

From about 1985 to 1990, including at the time of the Accomarca [events], Alan Garcia [sic] served as president of Peru. Throughout his presidency, Peruvian government forces, and in particular the Peruvian Army, continued to commit widespread and systematic human rights abuses against the civilian population of Peru. Government forces abducted, tortured and disappeared suspected “subversives” and murdered civilians in military operations.

See Complaint, ¶ 83.

13. Based on allegations such as those made in Paragraph 83 (quoted above), the plaintiffs claim that they faced an “insurmountable deterrent” to filing suit within the statute of limitations due to the repressive nature of the Peruvian government.¹ *See id.*, ¶ 81. The only theory under which the plaintiffs assert that they can bring this lawsuit *22 years after the events in question and well after the expiration of any statute of limitations* is pursuant to the disfavored doctrine of equitable tolling.² The argument to toll the statute of limitations turns on the allegation that the Peruvian government from 1985 until at least 2000 was so oppressive that no relief could be sought in Peru by the plaintiffs. The Honorable Ambassador’s letter puts any such notion to rest. If it is accepted by the Court, the Court should take note of the letter’s complete refutation of the notion that this suit could not have been brought very soon after the events in question and well within the statute of limitations.³ As a result, even if the letter is credited by the Court, this case should be dismissed.

¹ The relevant case law is of little help to the plaintiffs. *See, e.g., Van Tu v. Koster*, 364 F.3d 1196, 1199 - 1200 (C.A.10 2004) (living under the repressive communist government in post-war Vietnam was not sufficient grounds to toll the statute).

² 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).

³ In addition, the other allegations of the Complaint fly in the face of the suggestion that those who wished to investigate Accomarca or pursue relief faced “insurmountable” obstacles: 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],

14. The defendant is filing this motion within hours of receiving the letter at issue.

Unfortunately, given the author's choice to send the letter at the eleventh hour, the defendant was left with no choice as to the timing of this motion. In order that this matter might be fully briefed before the hearing set for Monday, the defendant respectfully requests that the Court shorten time for a response and require any responsive paper to be filed on or before 3 p.m. on Friday, April 11, 2008. While admittedly brief, such a deadline would provide the plaintiffs much more time to respond to this motion than the defense was given to respond to the letter by filing the present motion.

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 Accamarca [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; *see also* 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.

