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 MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS COMPLAINT

On July 11, 2007, the plaintiffs sue 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, ¶6, 49, 54. Strikingly, in the Complaint's 157 paragraphs, there are virtually no allegations about this defendant and certainly none sufficient to maintain any cause of action against him.

Although organized as seven counts, the Complaint pleads claims cognizable under only two statutes and no common law theories. Specifically, the plaintiffs have filed a statutory cause of action under the Torture Victim Protection Act, and they have raised matters of international law under the jurisdiction purportedly granted by the Alien Tort Claim Act.

This lawsuit should be dismissed. First, because this case has been filed almost 22 years after the alleged events, it is barred by the ten-year limitations period provided in 28 U.S.C.A. § 1350. The doctrine of equitable tolling is unavailable here because suit could have been filed within the statute of limitations.

Second, Congress has specifically denied United States courts subject matter jurisdiction over actions taken by foreign officials in an "official capacity." This is such a case and, thus, this Court lacks subject matter jurisdiction.

Third, the Torture Victims Protection Act precludes suits in circumstances where there is an adequate process for dealing with the alleged wrongs in the country where they occurred - in this case, Peru. As admitted in the Complaint, there is an adequate process for redress in Peru and, in fact, it is underway. As a result, this matter should be dismissed with prejudice.

Fourth, as demonstrated below, the Complaint should be dismissed because it raises non-justiciable political questions regarding the propriety of military tactics and techniques used against the Shining Path terrorists at a time when Peru was receiving military training and other aid from the United States.

Fifth, as demonstrated below, the Complaint should be dismissed under the Act of State doctrine because the defendant was acting in an official capacity as an officer in the Peruvian Army on behalf of Peru.

Sixth, the Complaint fails to state a cause of action. The defendant is first alleged to have attended a meeting called by his superior officers. There is no allegation that any wrongdoing was committed or even discussed at the meeting. Next, the defendant is alleged to have been stationed outside of a town where the other events alleged in the Complaint took place. The defendant is not alleged to have had any involvement in the events in the town, nor is the defendant alleged to have come into any type of contact at any time with any of the plaintiffs or their decedents.

Finally, the defendant is alleged to have written a report stating that he did not come into contact with any civilians, which is entirely consistent with the allegations of the Complaint, which do not allege that he came into contact at anytime with any civilians, much less the plaintiffs or their decedents. There is no cognizable cause of action stated in the Complaint or in the sparse facts

actually alleged about the defendant (as opposed to the scathing indictment in the Complaint of third parties and institutions like former presidents of Peru, the Peruvian military and the Peruvian justice system, none of whom are defendants here.).

Seventh, this Court does not have jurisdiction under the Alien Tort Claims Act because the plaintiffs are not aliens. As a result, the international law counts brought under this jurisdictional theory *only* should be dismissed.

Eighth, the claims brought by the estates of the decedents should be dismissed because they are not alleged to have appeared before this Court through duly-appointed personal representatives on behalf of open estates.

Ninth, under the Foreign Sovereign Immunity Act, venue for this claim is only proper, if at all, in the United States District Court for the District of Columbia.

The present Complaint could be properly dismissed based on any *one* of the *nine* defenses asserted herein. While some of these questions are matters of first impression in the Fourth Circuit, district courts, including one in this Circuit, have recently dismissed virtually identical statutory claims on some of the very grounds raised in defense here. *See, e.g.*, *Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C. 2006); *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. May 2, 2007); *Yousuf v. Samantar,* 2007 WL 2220579, 8 (E.D.Va. 2007). For the following reasons, the defendant respectfully requests that this Court dismiss the Complaint with prejudice.

II. Factual and Procedural History

In the more than 150 paragraphs of the Complaint, the plaintiffs allege gross violations of the most basic human rights, which are now historically acknowledged to have occurred at the hands of both the Peruvian military and Shining Path guerillas.

However, not a single violation is alleged to have been carried out, directly or indirectly, by this defendant. Juan Manuel Rivera Rondon is not alleged to have fired a shot

or to have ordered that a shot be fired. He is not alleged to have killed anyone or to have ordered that anyone be killed. He is not alleged to have touched a single alleged victim. The defendant is not alleged to have even seen any alleged victims. No plaintiff or witness, living or deceased, has ever identified the defendant, in the Complaint or elsewhere, as having personally committed or ordered even a single atrocity.

Other than attending a meeting as a soldier "called" to do so by his superior officer, prior to the alleged events in Accomarca and being officially stationed by the military with his squad *outside of the town,* the Complaint makes no allegations whatsoever that the defendant did anything to harm anyone or was involved in any other way in the events with which the plaintiffs take issue. *See* Complaint, ¶ 49, 62.

There are very few other facts relevant to the disposition of this matter, but they are all alleged or admitted in the Complaint. First, the alleged events occurred in August of 1985. *See* Complaint, ¶ 48, 54, 60, 66.

Second, at all relevant times, the defendant was acting in his "official capacity" as a low-ranking officer in the Peruvian military following the orders of his superiors. *See* Complaint, ¶6, 49, 54, 91, 93, 94. The allegations in the complaint make this unmistakably clear. Plaintiffs took great pains to charge that the alleged actions of the defendant were in direct response to policy set by the elected president and passed down to the defendant through the chain of command as part of the Peruvian government's war against terrorism.

The Complaint alleges that during the relevant period of time, "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. In point of fact, **Shining Path is on the U.S. Department of State's "Designated Foreign Terrorist Organizations" list**, and the European Union and Canada likewise regard them

as a terrorist organization and prohibit providing funding or other financial support for them. *See* US Department of State, October 11, 2005. "Foreign Terrorist Organizations (FTOs)" Accessed through web archive on 2007-11-17.; Council Common Position 2005/936/CFSP. March 14, 2005. Available online. Accessed 2007-11-17; Government of Canada. "Listed Entities". Accessed 2007-11-17.

The plaintiffs note that "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. The plaintiffs allege that it was "the government" which "deployed the Peruvian Army" to the alleged location where the events at issue occurred. *See* Complaint, ¶ 40. Thereafter, the soldiers, such as the defendant, were alleged to be carrying out, "military operations" in the region. *See* Complaint, ¶ 42. Finally, it is alleged that it was the "Peruvian Army" that "targeted the Accomarca District" where the events in question allegedly took place. *See* Complaint, ¶ 43.

The plaintiffs allege that 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. The Complaint alleges that 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. The plaintiffs assert that the defendant attended a meeting called by his superior officer, the Lieutenant Colonel, to "plan" a military operation in Accomarca. *See* Complaint, ¶ 49. Further, it is alleged that 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 foregoing allegations, taken as a whole, unquestionably demonstrate that the alleged conduct of the defendant was taken entirely in his official capacity as an officer in the Peruvian military pursuant to orders given him through the chain of command and consistent with a policy designed to fight terrorism and ultimately emanating from the elected president of Peru himself.

Third, 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, 93, 94.[1] In any event, there is now a process available in Peru for the redress of any alleged wrongs. As demonstrated below, these allegations or admissions mandate dismissal.

Fourth, the plaintiffs here are not aliens in the United States, but "residents of Peru." *See* Complaint, ¶ 9, 10.

Fifth and finally, the two individual defendants are not alleged to be the duly-appointed personal representatives of the properly-opened estates of the decedents, nor do they allege any other standing recognized by this court.

III. Analysis

A. The Standard of Review.

In considering the present motion to dismiss, a court must determine whether the plaintiff has stated a claim, accepting the material facts alleged in the complaint as true. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Lerner v. Fleet Bank*, N.A., 318 F.3d 113, 128 (2d Cir. 2003).

To the extent this motion challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the pleadings may be regarded as evidence on the issue and evidence outside the pleadings may be

[1] 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. 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.

considered without converting the motion to dismiss into a motion for summary judgment. *See Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir .2004).

In addition, to the extent that "the motion to dismiss is based on a claim of foreign sovereign immunity, which provides protection from suit and not merely a defense to liability, ... the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial." *Id*. (*quoting Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027-28 (D.C. Cir. 1997)). Thus, should there be any doubt in the Court's mind as to the question of jurisdiction after having reviewed this motion, a brief period of *limited jurisdictional discovery* may be appropriate. However, the defendant respectfully suggests that this will not be necessary as the allegations in the Complaint itself demonstrate that this Court lacks subject matter jurisdiction over the claims asserted.

B. The Claims Asserted Are Barred by the Statute of Limitations.

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.

The Torture Victims Protection Act (TVPA) contains a ten-year statute of limitations. *See* 28 U.S.C.A. § 1350, note.[2] (**"**No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."). In certain cases, the TVPA's ten-year statute of limitations can be applied to a cause of action arising under the Alien Tort Claims Act, 28 U.S.C.A. § 1350 (ATCA).[3] *See, e.g., Doe v. Islamic Salvation Front,* 257 F.Supp.2d 115, 119 (D.D.C. 2003). The defense assumes for purposes of this motion, *without conceding the point*, that

[2] The two statutes at issue here are inextricably intertwined. In fact, The TVPA is appended as a statutory note to the ATCA, codified at 28 U.S.C. § 1350, note.

[3] *See Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.)*, 978 F.2d 493, 497 (9th Cir. 1992) ("[T]he FSIA trumps the [ATCA] when a foreign state or ... an individual acting in her official capacity is sued."); H.R. Rep. No. 102-367(1), at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88 ("The TVPA is subject to restrictions in the [FSIA]."); S. Rep. No. 102-249 (1991), at 7 (same).

the ATCA counts asserted here qualify for the TVPA's ten-year statute of limitations. In any event, ten years is certainly the longest limitations period even arguably applicable to the two types of statutory claims brought here. Thus, the present lawsuit was filed approximately 12 years after the end of the longest possible limitations period.

The sole theory under which the plaintiffs might seek to maintain this lawsuit so long after the limitations period expired is the *disfavored* doctrine of "equitable tolling." The Fourth Circuit Court of Appeals has held that the doctrine of "equitable tolling," is to be used sparingly:

> **…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).

Thus, the first critical test to determine whether the doctrine of equitable tolling may be applied is 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 id*.

The Complaint alleges that the statute of limitations should be equitably tolled because the political situation in Peru was such that, until 2000, the claims at issue could not be investigated or filed due to the alleged repressive nature of the Fujimori presidency. Specifically, the Complaint alleges 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." *See* Complaint, ¶81. Setting aside, for the moment, that suit was not filed for almost *seven years* after Fujimori's presidency ended, the allegations seeking to support equitable

tolling miss the mark by a wide margin. Critically, the Complaint alleges in great detail that the events at Accomarca and the defendant himself were actively being investigated by multiple entities *during the Fujimori presidency*. **Obviously, there was no bar to investigating or filing the present claim as a result of the Fujimori presidency because the claims asserted here were in fact being investigated and filed in multiple forums while Mr. Fujimori was president.**

The Complaint alleges that Alberto Fujimori was the president of Peru until November 2000.[4] *See* Complaint, ¶81, 84. The Complaint also alleges that:

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.

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.

It is abundantly evident from the admissions made in the Complaint that there was certainly no bar to the investigation and prosecution of the defendant from August of 1985 (when these events were alleged to have occurred) until July 28, 1990 when President Fujimori took office. In fact, the Complaint alleges that there was *a Senate Commission report, a military investigation, a civilian investigation, a Peruvian Supreme Court case, and not one, but two military Court trials*. All of this occurred during the period of time when the plaintiffs suggest that the claims at issue could not possibly be investigated or filed due to the alleged nature of the Peruvian executive.

[4] Albeto Fujimori was the 45th president of Peru, serving from July 28, 1990 until November 22, 2000.

There was no bar to investigating the events at Accomarca prior to 2000 - in point of fact, the Complaint alleges that these events - and the defendant's alleged involvement - were investigated *ad infinitum* during this time period.

Given the numerous public investigations and the Peruvian Senate Commission Report which was made public in 1985, the events at issue - as well as the names of the alleged participants, including the defendant - were obviously well known since at least 1985. The existence of these 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).

Furthermore, the plaintiffs allege that they were themselves witnesses to the events in question. *See* Complaint ¶ 8, 10 (the plaintiffs allege that they each, "bring[] claims…for [their] own mental pain and suffering in witnessing the Accomarca [events]."). As of 1985, the plaintiffs knew or should have known: 1) the details of the events at Accomarca; and 2) the identities of the alleged participants in the events. No further "investigation" was required to file the present claims. Thus, in point of fact, these claims could have been filed in 1985. Given that this case could have been filed in 1985, it is not a candidate for equitable tolling. *See Harris v. Hutchinson*, 209 F.3d 325, 328 -330 (C.A.4 Md. 2000).

Lest there be any doubt about the fact that this suit could have been filed within the statute of limitations, the Court should be aware that these events were well know worldwide shortly after

they occurred. For instance, on October 24, 1985, the New York Times reported 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." *See* Exhibit 1. The article goes on to state that, "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 id*.

These "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. This succinctly rebuts the plaintiffs' claim that they were unable to investigate or file a claim for another fifteen years. The plaintiffs, who claim to be eyewitnesses, were certainly free to investigate and file this lawsuit or a similar action in Peru. As such, the doctrine of equitable tolling is inapplicable.

Likewise, on September 19, 1985, the *Houston Chronicle* reported 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'…." *See* Exhibit 2. Obviously, these events were well know and widely reported at the time.

Obviously, the events in question at the time were well known, both to the plaintiffs who claim to be eyewitnesses, and to the world at large. This fact demonstrates that the Complaint could have been timely filed within the limitations period. Moreover, the Complaint does not allege *any facts whatsoever* specific to any particular plaintiff sufficient to show why any specific plaintiff could not investigate the events at issue or file the present claim in 1985. Without such allegations,

the plaintiffs have not demonstrated that, "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); *Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 152, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants."); *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (noting that equitable tolling "is to be applied sparingly.").

Courts beyond this Circuit have looked to various other factors in determining whether to apply the doctrine of equitable tolling, all of which weigh against its application here:

> there are three principal, though not exclusive, situations in which equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (C.A.3 Pa. 1994) (*citing School Dist. v. Marshall,* 657 F.2d 16, 19-20 (3d Cir. 1981) (*quoting Smith v. American President Lines, Ltd.,* 571 F.2d 102, 109 (2d Cir. 1978)); *see also Miller v. Beneficial Management Corp.,* 977 F.2d 834, 845 (3d Cir. 1992); *Okokuro v. Pennsylvania Dept. of Welfare ,* 2001 WL 185547, 4 (E.D.Pa. 2001).

In the present case, it is not alleged that the defendant himself did anything to actively mislead the plaintiffs respecting the plaintiff's cause of action. Thus, the first prong in the three-part test above is not satisfied. Nor is it sufficiently alleged that the plaintiffs in some extraordinary way were prevented from asserting their rights for the reasons detailed above (compare this case, for instance, with *Van, infra.,* in which a much stronger argument for equitable tolling failed). Finally, there is no allegation here that the plaintiffs have timely asserted their alleged rights mistakenly in the wrong forum.

The Seventh Circuit has recognized an additional test for the application of equitable tolling which cannot be met here:

> Under the equitable tolling doctrine, when the wrongdoing "has been concealed or is of such a nature as to conceal itself, the statute of limitations is tolled until the plaintiff has obtained knowledge of the fraud *or in the exercise of due care should have obtained knowledge of the fraud.*" *Sperry v. Barggren,* 523 F.2d 708, 710 (7th Cir. 1975) (citations omitted) (emphasis supplied). Although the plaintiff need not allege affirmative acts of concealment under this doctrine, the plaintiff must establish due diligence in inquiring into the circumstances surrounding the alleged wrongdoing. *Tomera v. Galt,* 511 F.2d 504, 510 (7th Cir. 1975).

United Nat. Records, Inc. v. MCA, Inc., 609 F.Supp. 33, 37 (D.C. Ill. 1984). There is no allegation that the alleged wrongdoing was concealed - quite the contrary - the plaintiffs claim to have been witnesses to it and further allege that it has been duly investigated almost continuously for the last 22 years. Thus, the defendants had actually and constructive notice of the wrongdoing well within the ten-year statute of limitations. Moreover, the plaintiffs have not alleged any due diligence whatsoever - no prior attempts to bring this case or contact counsel or investigate - nothing on which this Court might find that the extraordinary doctrine of equitable tolling should apply.

A similar issue arose 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).

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).

In *Van*, the Court refused to toll the Alien Tort Claims Act for 22 years based on: 1) poverty; 2) an inability to travel; 3) being subjects of a Communist government; and 4) the Vietnam War itself. Here, the Court should refuse to toll the Alien Tort Claims Act for 22 years based on the allegation that the plaintiffs are subjects of an allegedly repressive regime. The Court in this case has been presented with much less reason to toll the statute than the *insufficient* grounds asserted in *Van*.

Ultimately, the Supreme Court has summarized the requirements for the application of the doctrine of equitable tolling in federal courts as follows:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Veterans Administration, 498 U.S. 89, 96, 111 S.Ct. 453, 457-58, 112 L.Ed.2d 435 (1990).

None of the *Irwin* factors are present here. First, there is no allegation that the plaintiffs pursued there claims timely, but in the wrong forum. Second, there is no allegation that the plaintiffs were "tricked" by the defendant into waiting 22 years to file their alleged claims. Finally, there is no allegation sufficient to support a finding that the plaintiffs exercised due diligence (or any diligence at all) in seeking to preserve their claims.

Simply put, *none* of the requirements of equitable tolling, no matter how stated or by which court, have been met here. As a result, the present lawsuit should be dismissed because it is barred by the ten-year statute of limitations.

C. The defendant is immune from suit under the Foreign Sovereign Immunities Act of 1976.

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. Section 1604 of Title 28 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the] Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." Section 1605 provides certain general exceptions to the applicability of the FSIA, including: waiver under § 1605(a)(1); disputes arising from commercial activities of a foreign state under § 1605(a)(2); disputes arising from certain tortious acts committed within the United States under § 1605(a)(5); and certain actions by state sponsors of terrorism under § 1605(a)(7). None of these exceptions is even remotely implicated here.

The immunity provided by the FSIA protects not only foreign states, but also those acting in an official capacity on behalf of foreign states:

> Although the statute is silent on the subject, **courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state**….Claims against the individual in his official capacity are the practical equivalent of claims against the foreign state. *Chuidian,* 912 F.2d at 1101.

Velasco v. Government Of Indonesia, 370 F.3d 392, 398 -399 (C.A.4 2004); *see also, Chuidian v. Philippine Nat'l Bank,* 912 F.2d 1095, 1101-03 (9th Cir.1990) (interpreting section 1603(b) to include individuals sued in their official capacity); *In re Estate of Ferdinand E. Marcos Human Rights Litigation,* 978 F.2d 493, 496 (9th Cir.1992), *cert. denied, Marcos-Manotoc v. Trajano,* 508

U.S. 972, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993) (same); *El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 671 (D.C.Cir.1996) (individual sued for actions on behalf of government bank was immune from suit under FSIA); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.,* 182 F.3d 380, 388 (5th Cir.1999) (FSIA protects individuals acting within their official capacity as officers of corporations considered foreign sovereigns); *Bryks v. Canadian Broadcasting Corp.,* 906 F.Supp. 204, 210 (S.D.N.Y.1995) (immunity extends to agents of a foreign state acting in their official capacities).

In *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283 (E.D.N,Y. Feb. 13, 1996), the plaintiff sued Israel's Minister of Police and former Prime Minister Yitzhak Rabin for allegedly directing the beating of the plaintiff by police. The plaintiff attempted to sue the defendants individually, but the Court found them immune from liability:

> Although the complaint names the defendants in their individual as well as their official capacities, Tannenbaum alleges no acts committed directly by the late Prime Minister Rabin, nor any by Shachal, nor any by "John Doe" other than those committed "at the direction of' the other two defendants. Tannenbaum alleges only that defendant police officer "John Doe" was "acting at the direction of Defendants Rabin and Shachal," when he committed the acts of which plaintiff complains ....[] In short, Tannenbaum's claim is against the defendants in their official roles only and therefore, as agencies or instrumentalities of a foreign state under 28 U.S.C. §§ 1603(a) - (b).

Id. at *3. Similarly, in *El-Fadl v. Central Bank of Jordan*, the plaintiff claimed that Jordanian officials had him detained and tortured by military police. 75 F.3d 668, 670 (D.C. Cir. 1996). The plaintiff was careful to allege that these actions were undertaken "in an individual capacity." *Id*. at 671. The D.C. Circuit nevertheless held that the officials had acted on behalf of the sovereign and were entitled to immunity. *Id*. at 671. *Accord 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").

The State Department has urged courts to be "especially careful" where a claim against a foreign official criticizes policies of a foreign state, because "denial of immunity in such circumstances would allow 'litigants to accomplish indirectly what the [FSIA] barred them from doing directly,' ... by the simple expedient of naming a high level foreign official as a defendant rather than a foreign state." *Statement of Interest of the United States, Doe v. Liu Qi*, No. C 02 0672 CW, at 4-5 (N.D. Cal., Sept. 27, 2002) (*quoting Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-02 (9th Cir. 1990)).

Furthermore, the defendant is entitled to sovereign immunity even though he is no longer in the Peruvian Army. *See In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 788-89 (S.D.N.Y. 2005)(relevant inquiry is whether acts "were undertaken at a time when the individual was acting in an official capacity").

In the present case, the plaintiffs 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. As noted above, the plaintiffs allege that:

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, to "plan" a military operation in Accomarca; there is no allegation that atrocities or wrongdoing of any type was planned or 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.

It is hard to imagine a plainer example of a military officer acting in his official capacity than that alleged by the plaintiffs themselves in their own Complaint. The government declared a state of emergency and deployed the army to a particular region to conduct military operations. Once in that region, the Army targeted a particular district. A General in the Army ordered his staff to develop an operational plan. A plan was developed by the General's staff, including a Lieutenant Colonel, who was placed in charge of the operation. That Lieutenant Colonel then ordered the defendant, a mere Lieutenant, to attend a meeting and carry out a minor portion of the operation (which is not alleged to have included any contact with the Shining Path, the defendants or the decedents). At all times, the defendant was obviously acting pursuant to the policy traced in the Complaint from the highest levels of government, through the chain of command and directly to the defendant who, *in his uniform and acting in his capacity as an officer*, followed the orders he was given.

Obviously, the actions the defendant is alleged to have taken (attending a meeting as a military officer called to do so by his superior, being stationed outside of a particular town as a member of the military while on duty, and drafting an official military report pursuant to military

protocols) were lawfully within the scope of his official duties as a Lieutenant in the Peruvian Army.

The allegations in the Complaint preclude liability. Given that it is alleged that the defendant was acting in his official capacity, he is immune from all liability under FSIA. As a result, the present lawsuit should be dismissed with prejudice.

The United States District Court for the Eastern District of VA recently dismissed a claim very similar to that asserted here on exactly these grounds in the case of *Yousuf v. Samantar,* 2007 WL 2220579, 8 (E.D.Va. 2007). In *Yousuf*, the plaintiffs were members of the Isaaq clan of Somalia, who filed suit under the TVPA and the ATCA against Mohamed Ali Samantar, a former First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia. In their complaint, plaintiffs alleged that Samantar, "as the official who was in charge of the Somalia Armed Forces in the 1980s and 1990s, is liable for acts of torture; extrajudicial killing; attempted extrajudicial killing; crimes against humanity; war crimes; cruel, inhuman, and degrading treatment or punishment; and the arbitrary detention of the plaintiffs." *See id*.

In *Yousuf*, the Court carefully analyzed the FSIA, and, in language equally applicable to the present case, held as follows:

> The allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation. To allow such a suit to proceed would, in the words of the Chuidian court, "amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." 912 F.2d at 1102. "The rule that foreign states can be sued only pursuant to the specific provisions of sections 1605-07 would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings [by naming an individual official of the government instead of the foreign state itself]." *Id*.
>
> * * *
>
> For the above stated reasons, Samantar is entitled to sovereign immunity under the FSIA for the acts he undertook on behalf of the Somali government. Accordingly, the Court does not have subject matter jurisdiction over the plaintiffs' claims, brought under the TVPA and the ATCA, and Defendant Samantar's Motion to Dismiss Second Amended Complaint has been granted.

See Yousuf v. Samantar, 2007 WL 2220579, 8 (E.D.Va. 2007). Likewise, here, the defendant is alleged to have acted pursuant to the directives of the then-Peruvian government in an official capacity, and not for personal reasons or motivation. As a result, the defendant enjoys the immunity granted by the FSIA and this case should be dismissed.

Other Courts have reached the same conclusion as the *Yousuf* Court. In *Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C. 2006), the Court dismissed a claim under the doctrine of foreign sovereign immunity rooted in the FSIA. *Belhas* was a suit brought by citizens of Lebanon against former Israeli General Moshe Ya'Alon 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. The defendant general was alleged to have been involved in the bombing attack. The defendant moved to dismiss on, among other grounds, that the suit was barred by the FSIA.

The *Belhas* plaintiffs alleged that the defendant "had command responsibility for the attack," "participated in the decision," and was "acting under color of Israeli law," *id*. at 130-31. As in the present matter, the plaintiffs in *Belhas* did not allege that the defendant was acting in his personal capacity or that his activities were private in any way. As a result, the court concluded that it "is undisputed that General Ya'alon was acting in his official capacity with respect to the events underlying this lawsuit." The Court dismissed the suit based upon FSIA official capacity immunity. *Id*. at 131.

Belhas is virtually identical to the present case. A military officer, acting pursuant to orders and the policies of his government, was sued under the TVPA and the ATCA for actions undertaken in his official capacity. As a result, he was entitled to FSIA sovereign immunity, and the case was dismissed. The same result should be reached here and for the same reasons.

Another instructive case is *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. May 2, 2007). There, plaintiffs sued Avraham Dichter, the former director of the Israeli General Security Service under the ATCA and the TVPA. Specifically, plaintiffs alleged that the General Security Service officer 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. 2007 WL 1276960 at *1.

The court dismissed the Complaint under the FSIA after concluding that "[p]laintiffs unquestionably sue Dichter in his official capacity [because] [n]othing in the Complaint permits an inference that Dichter's alleged conduct was 'personal and private in nature.'" *Id*. (*citing Leutwyler v. Al-Abdullah*, 184 F.Supp.2d 277, 287 (S.D.N.Y. 2001); *Belhas*, 466 F.Supp.2d at 130-131). The exact same is true here. Nothing in the Complaint permits the inference that the defendant acted in anything other than his official capacity. As a result, the Complaint should be dismissed under the FSIA.

D. <u>The Plaintiffs have failed to exhaust remedies available in Peru</u>.

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). This provision precludes liability here based on the following facts alleged in the Complaint:

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. "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.

The foregoing demonstrates plainly that there are adequate and available remedies in Peru which the plaintiffs have not exhausted. The plaintiffs themselves admit that under the proper circumstances, they are "entitled to [seek] civil compensation." *See id*. Moreover, the Peruvian courts have been deemed by the United States Courts to be adequate forums for the redress of wrongs. *See Torres v. Southern Peru Copper Corp.,* 965 F.Supp. 899, 903 (S.D.Tex. 1996), *aff'd,* 113 F.3d 540 (5th Cir. 1997) (finding Peru to be an adequate alternative forum); *Vargas v. M/V Mini Lama,* 709 F.Supp. 117, 118 (E.D.La. 1989) (same). Therefore, adequate remedies exist in Peru.

Anticipating this argument, plaintiffs aver that the alleged criminal prosecution cannot go forward with the defendant in the United States and that they cannot pursue a civil action in Peru until the criminal action is completed there. *See* Complaint, ¶103, 104. However, these averments are insufficient to meet the statutory standard. It is not enough that the process available in Peru might take some time or that it might be difficult. Instead, the process only need be "adequate and available." 28 U.S.C. § 1350(2)(b). There is no argument that the compensation provided by a Peruvian Court would not be adequate. Instead, the plaintiffs rely solely on the argument that there is no process "available."

Critically, the plaintiffs have not alleged that they did anything to attempt to seek compensation in Peru. Such attempts are critical prerequisites to bringing the present claim. In the recent TVPA case of *Ruiz v. Martinez*, 2007 WL 1857185, 6 (W.D.Tex. 2007), the Court held as follows:

> The TVPA requires a plaintiff to seek compensation abroad before suing in the United States. *Corrie v. Caterpillar, Inc.,* 403 F.Supp.2d 1019, 1025 (W . D.Wash. 2005). "A court shall decline to hear a claim under this section 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.A. § 1350 note § 2(b). Congress enacted this requirement to " 'ensure[ ] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred,' under the theory that this requirement 'will also avoid exposing U.S. courts to unnecessary

> burdens,' and 'to encourage the development of meaningful remedies in other countries.' "*Harbury v. Hayden,* 444 F.Supp.2d 19, 41 (D.D.C.2006) (quoting H.R.Rep. No. 102-367(I), at 5, *reprinted in* 1992 U.S.C .C.A.N. 84, 87-88). Courts usually find a foreign remedy adequate unless it "is no remedy at all." *See, e.g., Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n. 22 (1981) (holding foreign remedy was adequate despite the fact that a strict liability theory was unavailable).
>
> …Ruiz's Complaint does not adequately allege a violation of the TVPA. Ruiz alleges that Miranda investigated him for making a false declaration, and subjected him to "psychological and physical torture." Pl.'s Compl., Docket No. 1, at 38. The Complaint offers no further detail as to this allegation. **Most importantly, Ruiz fails to allege that he submitted a grievance regarding the alleged torture to Mexican authorities.** While Ruiz's Complaint and its supporting exhibits document numerous grievances that Ruiz has filed over time, both in Mexico and the United States, none of these filings satisfy the exhaustion requirements of the TVPA. **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.**

Ruiz v. Martinez, 2007 WL 1857185, 6 (W.D.Tex. 2007) (Emphasis added). Here, as in *Ruiz*, there is no allegation that the plaintiffs have ever attempted to file charges with Peruvian authorities or to sue the defendant in Peru. As a result, the present claim should be dismissed for failure to exhaust local remedies as required by the TVPA.

E. <u>The Complaint raises non-justiciable political questions</u>.

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), we 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 Baker v. Carr*, 369 U.S. 186, 217 (1962). All of these factors weigh heavily in favor of the conclusion that the Court is being asked to adjudicate a political question in this case.

First, it is the executive branch, and to a lesser extent, the legislative branch, to which the conduct of foreign policy has been entrusted in our constitutional democracy. The plaintiffs in this case call upon the Court to decide whether the defendant acted pursuant to orders and the official policy of Peru in combating the Shining Path terrorists during a period of time when the United States was providing significant military aid to Peru to fight the terrorists and reduce drug traffic.

One small example of this aid is what was then known as the "School of the Americas." The School of the Americas was a training camp for elements of the military of various Latin American countries, including Peru, and including some of the very officers involved in the events at Accomarca. The School of the Americas was charged by Congress (P.L. 100-180 (10 USC 4415)) with the mission of developing and conducting instruction for the armed forces of Latin America, using the most doctrinally sound, relevant, and cost-effective training programs possible. Effectively, the United States made a foreign policy decision to train and equip the Peruvian military to fight the Shining Path terrorists in the 1980s. Indeed, it was on one of these very missions that the events at Accomarca occurred. Thus, this case implicates serious political questions which the judiciary should abstain from answering.

The Supreme Court long ago explained why judges should tread cautiously when political questions related to foreign policy are implicated in a pending lawsuit:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor

> responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 13, 111 (1948). As the Supreme Court has observed, nothing short of our representative democracy turns on ensuring that political questions are left to the elected representatives of the people on both the executive and legislative branches of government. *See id*.

The Eleventh Circuit applied the same principles in *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997). In *Aktepe*, Turkish sailors sued for injuries after an aircraft carrier mistakenly attacked their ship during a training exercise. The Court held that the case had been properly dismissed on political question grounds. The Court found that because the claim arose from a NATO exercise, it necessary implicated the relationship between the United States and its allies. Second, the Court held that assessing whether the Navy properly fired the missiles required a determination of how a "reasonable military force" should have acted. *Id*. at 1404. In the Court's view, it was "difficult to conceive of an area of governmental activity in which the courts have less competence," because "courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *Id*. The same problems implicated the third and fourth Baker factors, because the judgments sought "inevitably would require ... initial policy decisions of a kind appropriately reserved for military discretion," and would "express a lack of respect for the political branches of government." *Id*.

This is true with particular force here. Besides the fact that this case implicates the relationship between the United States and Peru at a pivotal point in their history together, there is no judicially discoverable and manageable standard for resolving this case because it implicates the same types of military judgments at issue in *Aktepe*. Courts are generally not the proper or best forum in which to debate military policies and procedures like how best to fight terrorists blending into the population of a region which generally supports them, and how to distinguish between

terrorists and civilians in the fog of a war in a jungle many thousands of miles removed from the United States.

In *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985), a British group challenged deployment of U.S. missiles in the United Kingdom. The Court found that the complaint raised "issues which have been committed by the Constitution to coordinate political departments ... and request[ed] relief which cannot be granted absent an initial policy determination of a kind clearly for nonjudicial discretion." *Id*. at 37; *Holtzman v. Sch.lesinger*, 484 F.2d 1307 (2d Cir. 1973) (the propriety of military decisions was a "bluntly political and not a judicial question.").

In addition to the fact that a United States District Court has no judicially discoverable and manageable standard on which to make these types of determinations, and it would be impossible to proceed further in this matter without an initial policy determination of a kind clearly for nonjudicial discretion, there is a serious potential here for "embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). On the one hand, the United States has provided significant aid to fight the Shining Path. On the other hand, this Court is being asked to judge the propriety of efforts undertaken in the fight against the Shining Path.

Finally, there is one additional aspect of its decision the Court might wish to consider. In an ATCA case against certain Chinese officials for persecuting a religious group called the Falun Gong, 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." Statement of Interest of the United States, *Doe v. Liu Qi*, No. C 02 0672 CW, at 4-5 (N.D. Cal., Sept. 27, 2002). This case implicates the same issues. Should the Court 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 governments permitting the same types of cases against our own members of the armed forces deployed throughout the world.

F. The Complaint should be dismissed under the Act of State doctrine.

The Act of State doctrine applies 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 US: 400, 406 (1990). The Supreme Court has described the doctrine "as a consequence of domestic separation of powers, reflecting the 'strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Id*. at 404 (*quoting 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." *Id*. at 408.

The Supreme Court has articulated a three-factor test for applying the Act of State doctrine, focusing on: (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. Of these factors, "[t]he 'touchstone' or 'crucial element' is the potential for interference with our foreign relations." *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981).

The third factor clearly applies here: Peru is a relatively stable democracy, with continuity of government and has been since the events in question. The second 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.

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.

Similarly, a case asserting ATCA claims against the United Kingdom as a result of civilian deaths allegedly caused by U.S. military intervention in Libya was dismissed under the Act of State doctrine in *Saltany v. Reagan*, 702 F.Supp. at 320-21. The Court held that "[w]hat is charged is, quite simply, Britain's complicity in an illicit act of war committed by the United States. By any definition that description of the United Kingdom's allegedly wrongful conduct constitutes an archetypal act of state." *Id*. Here, the Court is asked to weigh an even more direct act of state: Peru's direct involvement, pursuant to policy set at the highest levels, in the events at Accomarca. This case, like *Saltany*, should therefore be dismissed.

Finally, in *Roe v. Unocal Corp.*, the Court dismissed an ATCA claim that would "ultimately place the Court in the position of evaluating the legitimacy of orders directed to subordinate officers" of a foreign military. 70 F.Supp. 2d 1073, 1079 (C.D. Cal. 1999). The Court reasoned that this:

> process, necessitating discovery into, among other things, "details of their command structure and the authority of commanding officers," would place the court "in an unseemly, if not impossible position." *Id*. Because U.S. courts "rarely, if ever, entertain suits challenging the propriety of orders from the United States Armed Forces," the Court was not persuaded that it should undertake such an inquiry with respect to a foreign military.

Id. at 1080. The same is true here: this case will require an inquiry into the command structure and the authority of the defendant and others in Peru 22 years ago. Rather than be placed in this "impossible position," the Court should dismiss this matter.

G. <u>The Complaint fails to state a cause of action</u>.

Simply put, the defendant is not alleged to have done anything unlawful. While the Complaint makes sweeping allegations against the former president of Peru, a host of military and civil leaders, and the Peruvian justice system, there are no allegations in the Complaint sufficient to state a cause of action *against the defendant*.

As noted above, all seven counts in the Complaint turn on only two statutes. Specifically, the TVPA and the ATCA. The allegations made by the plaintiffs do not meet the elements of a claim under either statute. Under the TVPA, a plaintiff must allege and prove that the defendant:

> **(1) subject[ed] an individual to torture…or**
> **(2) subject[ed] an individual to extrajudicial killing…**

28 U.S.C.A. § 1350, note.

Taking each element in turn, it is plain that the defendant is not alleged to have committed either. First, under the TVPA:

> **(1)** the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or

> suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
> **(2)** mental pain or suffering refers to prolonged mental harm caused by or resulting from-**(A)** the intentional infliction or threatened infliction of severe physical pain or suffering;
> **(B)** the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> **(C)** the threat of imminent death; or
> **(D)** the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

See id. Nowhere in the Complaint is the defendant alleged to have tortured anyone, to have ordered the torture of anyone or to even have been aware of the torture of anyone. Nor is the defendant alleged to have ever had anyone in his "custody or physical control," which is a required element of "torture" under the TVPA. There are simply no facts whatsoever to support a claim that the defendant tortured anyone.

Next, the defendant is not alleged to have killed anyone, to have ordered the killing of anyone, or to have even been aware of the killing of anyone in any fashion, much less in an "extrajudicial" manner. In addition "extrajudicial killing," under the statute, "does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." 28 U.S.C.A. § 1350, note. The complaint contains no allegations whatsoever to suggest that any alleged killing was not lawfully carried out under the authority of Peru. In fact, the Complaint strongly suggests, in the language quoted above, that the events at Accomarca were in keeping with Peruvian law and Peru's struggle against terrorist elements in its own country.

The plaintiffs cannot state a claim under the Alien Tort Claims Act either. The ATCA 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. The ATCA is a jurisdictional statute that does not, in itself, create a cause of action. *Sosa v. Alvarez-Machain,* 542 U.S. 692, 724, 124 S.Ct. 2739, 2761, 159 L.Ed.2d 718 (2004). Therefore, the ATCA claim necessarily rises and fall with the TVPA claim in this case. In other words, under the ATCA, a plaintiff must allege and prove that the defendant committed "a tort," which is, in this case, alleged to be a violation of the TVPA and/or a host of violations of international law.

Even setting the foregoing issue aside, the allegations against the defendant are not sufficient to sustain a cause of action for any tort, whether sounding in international law or otherwise. As noted above, the only allegations directly against the defendant are that he: 1) attended a meeting where the military operation in Accomarca was planned as a soldier "called" to do so by his superior officer; 2) was stationed by his superiors with his squad *outside of the town*; and 3) filed a report in his official capacity which did not detail any interaction with civilians (this alleged report was entirely consistent with the Complaint, which does not allege that he had any interaction with civilians). *See* Complaint, ¶ 49, 62 & 66. *The defendant is not alleged to have done anything else at all*.

The defendant is not alleged to have fired a weapon or ordered anyone else to do so. The defendant is not alleged to have touched a plaintiff or decedent or ordered anyone else to do so. The defendant is not alleged to have seen or even to have been able to see any of what took place in the town. The defendant is not alleged to have seen or even to have been able to see any plaintiff or decedent. ***No plaintiff or decedent is alleged to have ever identified the defendant as having committed or ordered any unlawful act whatsoever.***

In the matter of *Lizarbe, et al v. Hurtado*, United States District Court fore the Southern District of Florida, Case No. 07-21783, the same plaintiffs here have sued another individual, Telmo Ricardo Hurtado, for the Accomarca events. It is Hurtado, and not the defendant in this case,

who the plaintiffs allege was the person who actually ordered and committed the alleged atrocities in Accomarca. In fact, the Center for Justice and Accountability (the group brining the present lawsuit as co-counsel for the plaintiffs) admits on its website that, "***Hurtado*** and *his soldiers* [Hurtado is alleged to have commanded a different company from the defendant here] went house to house forcibly removing villagers from their homes.…The troops forced scores of people, including several pregnant women and elderly residents, into two buildings. ***Hurtado*** ordered *his troops* to open fire on the buildings." *See* http://www.cja.org/cases/Peru_Press_ Releases/peru_filing.shtml (last visited December 20, 2007). Ultimately, even the plaintiffs admit that the defendant here was not the perpetrator of the events at Accomarca.

Throughout the Complaint, the plaintiffs repeat the conclusory allegation that the defendant, "engaged in a joint criminal enterprise with, conspired with, and/or aided and abetted officers and soldiers in the Peruvian Army" who planned and carried out the events at Accomarca. *See, e.g.*, Complaint, ¶ 129. The simple answer to this allegation is that there are no more facts to support it than those addressed above. As a result, it must fail as well.

First, neither the Courts nor the statute recognize a separate "joint criminal enterprise," conspiracy or "aiding and abetting" count in connection with alleged violation of the TVPA. There is simply no such cause of action.

Second, as for the claims brought pursuant to the ATCA, these types of claims, sounding in international law, do not ordinarily support *independent causes of action* for a "joint criminal enterprise," conspiracy or "aiding and abetting" count. *See* 15 United Nations War Crimes Commissions, Law Reports of Trials of War Criminals 90-91 (1949) (observing that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, "the United States Military Tribunals" established at that time did not "recognis[e] as a separate offence conspiracy to commit war crimes or crimes against humanity"). The International

Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a " joint criminal enterprise" theory of liability, but only as a count dependant on the substantive offense (akin to aiding and abetting), not as an offense on its own. *See Prosecutor v. Tadić,* Judgment, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999); *see also Prosecutor v. Milutinović,* Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Case No. IT-99-37-AR72, ¶ 26 (ICTY App. Chamber, May 21, 2003) (stating that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for ... conspiring to commit crimes"). Given that none of these claims is an independent cause of action, and there is no underlying cause of action here on which they are based, they should be dismissed.

Third, 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. *United States v. Gisehaltz,* 278 F.Supp. 434, 437 (S.D.N.Y. 1967). Likewise, a corporation cannot conspire with officers or agents. *See Marmott v. Maryland Lumber Company, et al.,* 807 F.2d 1180, 1184 (4th Cir. 1986). Under the same principles, one Peruvian Army solider cannot legal 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.

Fourth, the other elements of conspiracy-type liability are not met here. The defendant is not alleged to have known about any plan to commit atrocities in advance. The defendant is not alleged to have knowingly taken any affirmative action towards the commission of atrocities. There is no allegation of a common scheme or plan to commit atrocities and no facts alleged which might suggest one. Nothing the defendant is alleged to have done is independent wrong or tortious.

Simply put, taking all of the Counts in the Complaint into consideration, nothing in the scant allegations which actually involve the sole defendant here states a cause of action and, therefore, this case should be dismissed.

H. The Alien Tort Claims Act does not provide this court with jurisdiction over the present claims <u>because the plaintiffs are not alleged to be aliens</u>.

As noted above, 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). While the statute does not define alien, the term is properly and succinctly defined in Black's Law Dictionary 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 does not allege that the defendants reside in the United States. In fact, the Complaint alleges exactly the opposite: "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. Thus, the plaintiffs may not maintain causes of action under the ATCA because they are not aliens and the statute covers only claims made by aliens. Of course, this distinction makes perfect sense because, absent a requirement that the plaintiff reside in the United States, the federal courts of this country risk becoming the international courts for the whole world.[5]

The only other basis for jurisdiction cited in the Complaint is 28 U.S.C. § 1331, which provides for what is commonly referred to as "federal question" jurisdiction. The only federal

[5] *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.").

statute implicated in this case is the TVPA. As a result, and given that the Court does not have jurisdiction under the ATCA, *the only claim over which this Court may assert jurisdiction is the TVPA claim*. Thus, to the extent that the Complaint can be read to assert violations of the law of nations and treaties of the United States (cognizable here only other the ATCA), these claims should be dismissed for want of jurisdiction.

I. The claims brought by the estates of the decedents should be dismissed because they are not alleged to have appeared before this Court through duly-appointed personal representatives on behalf of open estates.

The two individual plaintiffs allege that they have filled suit in part on behalf of the estates of Silvestra Lizarbe Solis, Gerardo Ochoa Lizarbe, Victor Ochoa Lizarbe, Ernestina Ochoa Lizarbe, Celestino Ochoa Lizarbe, Edwin Ochoa Lizarbe, Fortunata Baldon Gutierrez and Edgar Baldeon. *See* Complaint, ¶¶ 9, 10.

The Complaint further alleges that the individual plaintiffs have attempted to open estates and applied to be appointed as personal representatives, but the Complaint fails to allege that estates have actually been opened or that personal representatives have been appointed. *See id*. Unless and until such time as valid estates are open and personal representatives appointed with legal capacities to maintain such an action, the decedents have no standing before this Court and their purported cases should be dismissed.

J. This case should be dismissed for lack of jurisdiction under the Foreign Sovereign Immunities Act.

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).

IV. Conclusion

For the foregoing reasons, the defendant, by and through counsel, respectfully requests that this Honorable Court dismiss the Complaint in its entirety with prejudice.

REQUEST FOR HEARING

The defendant respectfully requests a hearing in connection with the above-referenced motion.

Respectfully submitted,

JOSEPH, GREENWALD & LAAKE, P.A.

/s/

Timothy F. Maloney (Bar No. 03381)
Cary J. Hansel (Bar No. 14722)
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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served pursuant to the electronic filing protocol of this Court this 21st day of December, 2007 to Wade B. Wilson, Esquire, Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

/s/

Cary J. Hansel (Bar No. 14722)

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

ORDER

Upon consideration of defendant's Motion to Dismiss, any Opposition thereto, and any hearing of the matter, it is, this _____ day of _____, 200___, by the United States District Court for the District of Maryland,

ORDERED, that the defendant's Motion to Dismiss is, and hereby shall be, GRANTED; and it is further

ORDERED, that the Complaint is, and hereby shall be, DISMISSED, in its entirety, with prejudice.

_____
Judge Peter J. Messitte

AROUND THE WORLD; Peruvian Peasants Say Soldiers Killed 59

AP
Published: October 24, 1985

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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. They said most of the victims were children and elderly people.

Two adults and three children appeared at a news conference in Parliament on Tuesday. One of the adults, Nemesio Gutierrez, said the massacre was carried out by soldiers who arrived Aug. 27 by helicopter in the villages of Bellavista and Umaro high in the Andes and about 425 miles southeast of Lima.

If substantiated, it would be the second massacre of a large number of peasants by soldiers since President Alan Garcia took office July 28 and pledged to halt human rights violations by security forces fighting the Maoist Shining Path rebels.

A military investigation confirmed that at least 49 people were slain by soldiers on Aug. 14 in the hamlet of Accomarca, also in Ayacucho Province.

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EXHIBIT
1

9/19/85 Hous. Chron. 111
1985 WLNR 1266184

September 19, 1985

Section: 1

Peru says army massacred 40 peasants

LIMA, Peru LIMA, Peru - The government revealed that soldiers massacred about 40 peasants in an Andean village last month. The military command removed two generals from their posts, but did not accuse them of direct involvement.

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. He dismissed its chief, Gen. Cesar Enrico Praeli, on Monday, accusing him and former President Fernando Belaunde's government of misinforming the nation about the military's conduct of the war.

Garcia directed the military last week to make an "exhaustive investigation" of reports that soldiers had massacred 69 villagers Aug. 14 in the main guerrilla warfare zone, which is high in the Andes near Ayacucho, about 350 miles southeast of Lima. He gave the military one week to report.

The joint command said military investigators, in a report submitted Tuesday night, determined that soldiers killed peasants in the village of **Accomarca** but put the number at about 40.

Before the investigators brought in their report Tuesday night, air force Lt. Gen. Luis Abram, the joint command's new chief, said: "There has been no massacre."

Belaunde, Garcia's predecessor, gave the military a free hand and largely ignored accusations of human rights abuses. Several mass graves were found during his administration, including one with more than 50 bodies, but no investigations were made.

---- INDEX REFERENCES ----

NEWS SUBJECT: (Military Conflicts (1MI68); Global Politics (1GL73); World Conflicts (1WO07))

INDUSTRY: (Military Forces (1MI37); Aerospace & Defense (1AE96); Defense (1DE43); Ground Forces (1GR94))

REGION: (Peru (1PE60); Americas (1AM92); South America (1SO03); Latin America (1LA15))

Language: EN

OTHER INDEXING: (JOINT ARMED FORCES COMMAND; MAOIST; SHINING PATH) (Alan Garcia;