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

REPLY MEMORANDUM OF DEFENDANT
IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Comes now the defendant, through undersigned counsel, and replies to the plaintiff's Opposition to the defendant's Motion to Dismiss, stating as follows:

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I. Introduction

This lawsuit should be dismissed. Nothing in the 59-page Opposition filed by the plaintiffs changes this fact or significantly impacts any of the analysis in the Motion to Dismiss. If anything, the plaintiff's Opposition reveals the *total lack of any substantive allegations* against the defendant. 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. There is no allegation that the defendant committed any further acts of any type. 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.

Instead of allegations against the defendant, the plaintiffs, in both the Complaint and their Opposition, have provided the Court with page after page of scathing political critiques of the Peruvian executive, the Peruvian military and the policy decisions the plaintiffs allege resulted in a massacre at Accomarca, which was alleged committed by certain individuals who are *not* defendants here. None of these issues are properly before this Court. Instead, o*ne man stands accused here and he is accused of virtually nothing*.

This matter should not survive the present motion as a matter of law for the following reasons, any one of which, standing alone, is sufficient to dismiss the Complaint:

> 1) this case has been filed almost 22 years after the alleged events, and is therefore barred by the ten-year limitations period provided in 28 U.S.C.A. § 1350. The doctrine of equitable tolling is unavailable here for the many reasons discussed below.
>
> 2) United States courts have no subject matter jurisdiction over actions taken by foreign officials in an "official capacity."

3) 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.

4) the Complaint 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.

5) 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.

6) the Complaint fails to state a cause of action due to the almost total lack of any allegations that the defendant did anything for which he might reasonably be held liable.

7) this Court does not have jurisdiction under the Alien Tort Claims Act because the plaintiffs are not aliens.

8) 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 and one plaintiff now admits to having filed this case in a representative capacity despite having no legal right to do so.

9) 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.

III. Analysis

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

The plaintiffs do not attempt to argue that the events at issue, having occurred 22 years ago, fall within any relevant statute of limitations.[1] Instead, they rely entirely on the *disfavored* doctrine of "equitable tolling." The plaintiff's entire case, therefore, relies on a doctrine the Fourth Circuit Court of Appeals has cautioned should apply only sparingly and in the most extreme circumstances:

[1] The plaintiffs claim, at page 12 of their Opposition, that, "Rondon accepts that all Plaintiffs'' claims are subject to a 10-year statute of limitations." Respectfully, this is *not* the position stated in the defendant's papers. Instead, the defendant stated as follows in its initial Motion to Dismiss at pages 7-8 (the very pages cited by the plaintiffs for the contrary statement quoted above): "The Torture Victims Protection Act (TVPA) contains a ten-year statute of limitations. *See* 28 U.S.C.A. § 1350, note.[1] (**"**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).[1] *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 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."** *Id*. This was and remains the defendant's position on the issue.

> **…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).

First, the plaintiffs cite three cases to argue that equitable tolling is "frequently applied" under the Torture Victims Protection Act (TVPA) and further cite some legislative history which suggests that it might apply in certain TVPA cases. Of course, there are also examples of Courts refusing to apply equitable tolling in cases such as this. *See, e.g.*, *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).

The plaintiffs attempt to distinguish *Van* by suggesting that the *Van* "plaintiffs made no allegation to the effect that some official policy or conduct placed them in fear for their lives if they were to pursue their rights or commence litigation, nor did they contend that any other external forces effectively prevented them from protecting their interests." *See* Opposition at 15. In point of fact, the *Van* Court notes that the plaintiffs there argued for equitable tolling "on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel." *Van Tu v. Koster*, 364 F.3d 1196, 1199 -1200 (2004). These reasons are very similar to those asserted by the plaintiffs here. Certainly, there can be no doubt but that the plaintiffs were incorrect to suggest that *Van* did not involve allegations that "external forces effectively prevented [the plaintiffs] from protecting their interests." Clearly, this is exactly what was asserted in *Van* and exactly what the Court rejected in refusing to apply the very doctrine urged by the plaintiffs here.

However, in suggesting that equitable tolling is sometimes applied in cases such as this (while begrudgingly admitting that sometimes it is not), the plaintiffs divert attention from the appropriate analysis. The plaintiffs' argument in this regard is little more than the classic, "straw man" approach in which a litigant sets up an easily-rebutted position not actually asserted by his opponent and then rebuts it. It is certainly the case that equitable tolling might apply in the appropriate case under the statutes at issue here, just as equitable tolling might *not* apply in a given case. The issue which the plaintiffs painstakingly ignore is that there is an analysis applied by Courts to determine whether equitable tolling should apply under the facts and circumstances of a given case.

The question is not whether equitable tolling can ever apply to a case such as this, but whether it applies to the facts and circumstances of this case. In answering this question, there is a multi-part test applied in the defendant's papers, but entirely ignored by the plaintiffs, apparently because the plaintiffs recognize that they cannot meet the standard for equitable tolling applied by the Courts:

> 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). 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). 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 relevant factors from any of these cases are present in this case. Here, it is not alleged that the defendant himself did anything to actively mislead the plaintiffs respecting the plaintiffs' cause of action. Nor is there any allegation here that the plaintiffs have timely asserted their alleged rights mistakenly in the wrong forum. Likewise, the plaintiffs do not assert that any wrongdoing was concealed (in fact, they allege that they were witnesses to the wrongdoing - albeit

wrongdoing committed by others not party to this lawsuit). 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.

This leaves only the argument that the plaintiffs **"in some extraordinary way"** were prevented from asserting their rights. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (C.A.3 Pa. 1994). In order to apply equitable tolling under this prong of the analysis, the plaintiffs bear the heavy burden that **"any resort to equity must be reserved for those rare instances where-due to circumstances external to the party's own conduct-it would be *unconscionable* to enforce the limitation period against the party and *gross injustice* would result."** *See Harris v. Hutchinson*, 209 F.3d 325, 328 - 330 (C.A.4 Md., 2000).

In an attempt to meet this burden, 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" given the allegedly repressive nature of the Fujimori presidency. *See* Complaint, ¶81. First, there are strong echoes in this argument of the position **rejected** in *Van* regarding the plaintiffs there living under a communist regime. If living under the repressive communist government in post-war Vietnam is not sufficient grounds to toll the statute, neither is living in Peru in the 1980's and 1990's.

Second, the admissions in the Complaint demonstrate the total fallacy of the plaintiffs' position. There was no bar to investigating or filing the present claim as a result of the Fujimori presidency because, *according to the Complaint*, the claims asserted here were in fact being investigated and filed in multiple forums while Mr. Fujimori was president. Specifically, the Complaint alleges that during the Fujimori presidency: 1) "In or about October 1985, the Peruvian Senate commission published its report concluding that 69 people were killed in the Accomarca [events]." *see* Complaint, ¶91; 2) "Around the same time [*i.e.*, October 1985], both government prosecutors and military authorities opened their own investigations." *see* Complaint, ¶91; 3) "[T]he

Peruvian Supreme Court eventually ruled that the case was solely within the jurisdiction of the military justice system." *see* Complaint, ¶91; 4) "In or about 1987, two years after the Accomarca [events], a military court absolved Defendant Rivera Rondon and others…." *see* Complaint, ¶93; and 5) "The court's 1987 ruling was thrown out by the Supreme Council for Military Justice. In or about 1989 the lower military court again dismissed the charges against all the defendants [including Rondon] except Hurtado [who is not a party here]." *see* Complaint, ¶94.

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

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

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

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

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).

In response to the foregoing, the plaintiffs shy away from any application of the law or the appropriate tests for equitable tolling and assert *argument unfettered by authority*. First, the plaintiffs suggest that "[t]he opportunities open to citizens…cannot be equated to those available to government officials," and that, "[k]nowledge of the identity of the wrongdoer does not immediately create the circumstances which make the investigation and prosecution of the wrongdoing possible." *See* Opposition at 19. These arguments ignore the reality of how the contemporaneous Peruvian investigations were conducted - by reliance on eyewitnesses. Eyewitnesses came forward and offered testimony during the various investigations. The fact that they did so certainly demonstrates that doing so was possible.

Moreover, the point is not that the plaintiffs might have taken the types of actions taken by the various government entities at issue in Peru or the witnesses appearing before them. Instead, as a result of the government investigations performed, the plaintiffs knew all they needed to know to file this suit in the United States within the statute of limitations.

Next, the plaintiffs asserted that the statute should be tolled because they were minors at the time of the incident in question. However, the plaintiffs note at page 18 of their Opposition that they reached the age of majority in 1991 - *more than ten years before the case was filed*. As a result, even if the statute was tolled until 1991, the claim at issue is *still* untimely. Furthermore, the plaintiff has cited no precedent for the notion that federal courts have accepted the doctrine that TVPA or ATCA claims for minors are equitably tolled until they reach the age of majority.

The plaintiffs further assert that the statute of limitations should be equitably tolled until 1992 or 1993 when Mr. Rondon is alleged to have entered the United States. Again, this argument is entirely unavailing because even if the statute was tolled for this time period, the claim at issue was filled in 2007 - *14 years after Mr. Rondon is alleged to have come to the United States and 4 years after any applicable statute of limitations ran*.

Employing a feeble *non sequitur*, the plaintiffs argue that because abuses continued after the Peruvian Senate Report, that effort was "futile," so the statute of limitations should be tolled. *See* Opposition at 19. Again, the point is not whether the investigations in Peru resulted in an outcome the plaintiffs liked, but whether they provided the plaintiffs with the information necessary to file their claims here within the statute of limitations. Given that these investigations clearly did serve this purpose, as admitted in the Complaint, there are no grounds for equitable tolling.

The Complaint alleges that the events in question took place in 1986. The plaintiffs claim they enjoy the benefit of a 10-year statute of limitations. Therefore, they had until 1996 to file their claims. According to the plaintiffs, prior to the 1996 expiration of the statute of limitations:

1) the plaintiffs were no longer minors and had reached the age of 22;

2) the defendant was living in the United States and subject to suit here;

3) the plaintiffs knew or should have known the details of the events at Accomarca because they claim to have been eyewitnesses *see* Complaint ¶ 8, 10; and

4) the plaintiffs knew or should have known of the defendant's alleged role in the events at Accomarca because it was made public years earlier in a Peruvian Senate Report.

Thus, *these claims were ripe and could have been filed within the statute of limitations*. As a result, this case is not a candidate for equitable tolling. *See Harris v. Hutchinson*, 209 F.3d 325, 328 - 330 (C.A.4 Md. 2000).

In relying entirely on the doctrine of equitable tolling, the plaintiffs ask this Court to apply an "extraordinary" doctrine to be used "sparingly" in only "rare instances" where it would be

"*unconscionable*" to do otherwise and "*gross injustice* would result." The plaintiffs have not met their heavy burden in this regard. This disfavored doctrine should not be applied and the present case should be dismissed.

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

1. The Foreign Sovereign Immunities Act of 1976 applies to former government officials such as the defendant.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 ("FSIA") provides that a defendant acting in an official capacity on behalf of a foreign government is immune from suit for actions taken in his official capacity. *See Yousuf v. Samantar,* 2007 WL 2220579, 8 (E.D.Va. 2007) (FSIA barred plaintiffs' suit under the TVPA and the ATCA against a former First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia "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.")("Samantar is entitled to sovereign immunity under the FSIA for the acts he undertook on behalf of the Somali government."); *Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C. 2006) (FSIA barred a suit brought by citizens of Lebanon against former Israeli General pursuant to the ATCA and the TVPA, alleging that a bombing in Lebanon, by the Israeli military, constituted war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman, or degrading punishment); *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. May 2, 2007) (FSIA barred plaintiffs suit against former director of the Israeli General Security Service under the ATCA and the TVPA alleging that the Director authorized, planned and directed military personnel in the bombing of a residential neighborhood in Gaza City and developed, implemented, and escalated Israel's alleged targeted killing policy); *Republic of Austria v. Altmann*, 541 U.S. 677 (U.S. 2004) (FSIA applies to insulate actions of Nazi government of Austria); *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283 (E.D.N,Y.

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

The plaintiffs contend that the FSIA does not shield the defendant because he was no longer in the Peruvian military at the time this case was filed. In making this argument, the plaintiffs rely on a 2003 case applicable to *corporate* instrumentalities of foreign states and *not natural persons* like the defendant. In doing so, the plaintiffs ask this court to ignore more recent precedent holding that a natural person is protected by the statute *even if he is no longer an agent of the government at the time the suit is filed*. The plaintiffs cite to no case in which any court has ever found that a natural person is not entitled to FSIA protection because he or she is no longer an agent of the government. As a result, they ask this Court to accept a novel position adopted nowhere else and rejected by every Court to have considered it.

Specifically, the plaintiffs cite *Dole Food Co. v Patrickson*, 538 U.S. 468 (2003). In *Dole Food*, the Court interpreted language in a provision of the FSIA *specific to corporations* and concluded that "the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." *Dole Food*, 568 U.S. at 478.

However, as noted in *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005), the Supreme Court in *Dole Food* did not consider "the circumstances under which an *individual* is covered by the FSIA." The court went on to note, as to the immunity of *individuals* under the FSIA:

> **Indeed, numerous other courts that have addressed this issue have held that the relevant inquiry for individuals is simply whether the acts in question were undertaken at a time when the individual was acting in an official**

> **capacity. [Citations omitted.] This Court considers that precedent to be more consistent with the FSIA and unaltered by the decision in *Dole Food*.**

Id. (*citing Velasco v. Government of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Bryks v. Canadian Broadcasting Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995)). The Court ultimately held that FSIA does protect *former* government officials such as the defendant in that case and the defendant in this case.

In response to the clear holding of *In re Terrorist Attacks*, the plaintiffs state flatly, "[w]e believe that was clear error." *See* Opposition at 22. The plaintiffs ignore the fact that the statutory language related to corporate instrumentalities is different from the language related to individuals. Specifically, the FSIA defines corporate instrumentalities of a foreign state as follows:

> (b)An "agency or instrumentality of a foreign state" means any entity--
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C.A. § 1603.

The Court in *Dole Food* held that the statute provides that an "agency or instrumentality of a foreign state" is an entity which, in the language of the statute, "***is***" an entity satisfying all of the requirements of Section 1603. In other words, the Court held, that the use of the present tense indicates that whether a corporation is an instrumentality is to be judged at the time of filing of the suit. **Critically, *there is no comparable provision for individuals*. There is no language in the statute to the effect that individuals must be agents of the government at the time of suit.** As a result, the Court's holding in *Dole Food* does not, and would not logically, apply to individuals.

A distinction in the availability of immunity for prior acts under the FSIA between governmental *entities* and governmental *officials* is also supported by logic and sound public policy.

When the ownership of a governmental entity, such as the defendant in *Dole Food*, changes hands, the new owners, as part of the acquisition transaction, have an opportunity to negotiate indemnification for any liabilities incurred by the entity before the shift from governmental ownership. On the other hand, officials leaving government service, such as Mr. Rondon and the defendant in *In re Terrorist Attacks*, are the same persons before and after their departure and can rely only on the continuation of their internationally-recognized immunity to protect them from claims arising from actions that they took in their official capacities before their departure.

Notably, the Congress itself understood FSIA to apply to former officials when it adopted the Torture Victim Protection Act (the "TVPA"), 28 U.S.C. § 1350 note. The Senate Report explicitly indicated that **a "former official" could "avoid liability [under the TVPA] by invoking the FSIA"** if he or she showed that the acts of which he or she were accused had been undertaken as an agent of the state. S. Rep. No. 249, 102d Cong., 1st Sess. (1991) at 8. The plaintiffs cite to competing language in the same Report to the effect that, "[b]ecause all states are officially opposed to torture and extrajudicial killing, the FSIA *should normally* provide no defense to an action taken under the TVPA." *See* Opposition at 24. Sadly, the premise of this argument - that no government supports torture or extra-judicial torture - is not accurate. This is something even the Senate Report recognizes in using the phrase, "should normally." Moreover, it is important to recall that the defendant in this case is not alleged to have tortured anyone, killed anyone or even to have ordered that these things be done. Instead, the defendant is alleged to have acted entirely within his authority as a low-ranking officer in guarding a road he was ordered to guard and coming into contact with no one.

Finally, in *Velasco*, a Fourth Circuit decision issued more than a year after the decision in *Dole Food*, the Court flatly rejected the proposition advanced by the plaintiffs. *See Velasco v. Government of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004). The Court held that the FSIA accorded immunity to an official of Indonesia for an action taken in his official capacity despite the commencement of the suit, as here, after the official had left office. *Velasco*, 370 F.3d at 398-99.

In a final attempt to suggest that the FSIA does not apply to former government officials, the plaintiffs cite cases in which an individual was found to have been acting outside of his or her authority at the time of the alleged wrongdoing. *See* Opposition at 22 (*citing Filártiga v. Peña-Irala,* 630 F.2nd 876 (2d Cir. 1980); *Xuncan v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Hilao*, 103 F. 3d 767; *Barrueto v. Larios*, 205 F. Supp. 2nd 1325 (N. D. Fla. 2002), aff'd, 402 F.3d 1148 (11th Cir. 2005); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Chavez v. Carranza*, No. 03-2932, 2006 WL 2434934 (W.D. Tenn Aug. 15, 2006); *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005)). *None* of these cases hold that former officials do not ever qualify for the protection of the FSIA, which is the point the plaintiffs attempt to make in citing them. Therefore, these cases are entirely immaterial to the discussion of whether the FSIA protects former officials. Instead, these cases involve foreign officials found to have been acting beyond the scope of their authority. In proper circumstances, such officials lose their immunity. This is not such a case, however. This point is addressed in the following section.

2. The defendant is entitled to FSIA immunity because the Complaint alleges that the defendant acted within his official capacity.

The plaintiffs next argue that the defendant is not entitled to FSIA immunity because he was allegedly acting outside of his official capacity in: 1) attending a meeting he was ordered to attend; 2) guarding a road he was ordered to guard; and 3) submitting a report he was required to submit, *all while on duty in the Peruvian military*. Simply put, the plaintiffs' position is unavailing because none of these alleged activities were outside of the scope of the defendant's official duties.

In arguing that the defendant acted outside of his official capacity, the plaintiffs ignore the allegations of their own complaint and the analysis of those allegations provided in the Motion to Dismiss. There is simply no getting around the fact that the plaintiffs themselves have unequivocally alleged that the actions taken by the defendant were done in his official capacity as an officer in the Peruvian military based on policy set at the highest levels of the Peruvian government:

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

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

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

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

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

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

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

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

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

The allegations against the defendant clearly demonstrate that he was a military officer acting in his official capacity. The plaintiff attempts to mischaracterize the defendant's argument in this regard by calling it an assertion of the Nuremberg Defense and by suggesting that these allegations go only to whether the defendant acted under color of law as opposed to in his official capacity. First, ***the defendant is unequivocally not asserting the Nuremberg Defense and the plaintiffs' suggestion to the contrary is an inflammatory and inaccurate portrayal of the argument***. Instead, the defendant is pointing out that the Complaint alleges that he was acting in his official capacity.

Congress has granted immunity to foreign officials acting in an official capacity. There is no such statute in any of the contexts cited by the plaintiffs (involving Courts Marshall and the Nuremberg Trials). As a result, all of these situations are entirely inapposite. Here, in contrast to the post-World War II and Vietnam-era prosecutions cited by the plaintiffs, there is immunity for actions taken in one's "official capacity." **This is *not* the Nuremberg Defense, it is the FSIA.**

The plaintiffs cite no authority to suggest that an assertion of FSIA immunity should be disallowed because the drafters of the Nuremberg Charter disallowed what was then called the "superior orders" defense. The plaintiffs' position in this regard has never been accepted by any Court. In fact, if the plaintiffs' position were adopted, FSIA could never provide any immunity to any government officials and this Court would be effectively overruling more than a decade of case law to the contrary. This is because every assertion of FSIA immunity by a defendant turns on a finding that the defendant was acting in his or her official capacity. If the defendant could not rely on demonstrating that he or she was acting in an official capacity because such arguments were disallowed according to the plaintiffs' theory, then FSIA could never apply. While this may well be the plaintiffs' intent, it is most certainly not the law.

Next, the plaintiffs suggest that the allegations listed above (showing that the defendant was acting in an official capacity) should be ignored for purposes of whether the defendant acted in an official capacity and should only be read for purposes of demonstrating that the defendant acted under color of law. *See* Opposition at 28. There is no precedent whatsoever for the concept that the Court may only consider these allegations for one purpose and not the other and the plaintiffs have cited none.

In addition to the allegations of their own Complaint, the plaintiffs also ask the Court to ignore the precedents set in this matter by courts across the country. *See, e.g.*, Opposition at 33 (*three courts* allegedly improperly conflated "official capacity" and "color of law"). The plaintiffs have no choice but to take this tact given that the case law runs strongly contrary to their position. *See Yousuf v.*

Samantar, 2007 WL 2220579, 8 (E.D.Va. 2007) (finding, in circumstances identical to this case, that the defendant acted in his "official capacity" and is, therefore, immune from suit); *Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C. 2006)(same); *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. May 2, 2007)(same).

The plaintiffs' position that certain allegations of their Complaint should be ignored for purposes of whether the defendant acted in an official capacity and only read for purposes of demonstrating that the defendant acted under color of law, in addition to being contrary to established precedent, is logically untenable. Having made the allegations, the plaintiffs must now suffer the inexorable consequence - a finding that the defendant was acting in his official capacity at all relevant times and is, therefore, immune from suit.

3. The defendant is not alleged to have violated Peruvian or other Law in a manner which might preclude "official capacity" FSIA immunity and the allegations of the Complaint are not sufficient to establish theories of conspiracy or aiding and abetting.

The plaintiffs argue, attaching an affidavit, that Peruvian and international law at the time of the events at Accomarca precluded torture, homicide, assassination, and assault and battery. *See* Opposition at 25. Therefore, *the argument goes*, the defendant could not have been acting in his official capacity *if he committed these crimes*. The fallacy in the plaintiffs' analysis is that the Complaint does not sufficiently allege that the defendant committed any of these crimes.

What is alleged in the Complaint is that 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 by blocking a road (which is not alleged to have included any contact with the Shining Path, the defendants or the decedents). The

defendant is not alleged to have directly committed torture, homicide, assassination, assault and battery or any other crime.

Instead, the defendant is only alleged to have, "conspired to commit and aided and abetted" these crimes. *See* Opposition at 25. This allegation, coupled with the balance of the Opposition and the attached affidavit, are insufficient to prove that the defendant acted outside of his authority for a number of reasons. First, there is no allegation or affidavit to suggest that, at the time of the events, conspiracy or aiding or abetting were recognized crimes in Peru. Since the defendant's culpability turns on his tangential, rather than direct involvement, the affidavit and arguments in the Opposition are entirely immaterial. Unless and until it is conclusively shown that the theories of conspiracy and aiding and abetting were even recognized in Peru at the time, the allegations that the defendant engaged in conspiracy or aided and abetted are meaningless.

Second, even if Peru recognized aiding and abetting or conspiracy as theories of criminal liability, the Complaint itself does not make allegations sufficient to support these theories because there is no claim that there was a plan to commit these atrocities in advance, that the defendant knew about any such plan or that the defendant acted to knowingly cover up the atrocities.

Critically, there is no allegation in the Complaint that the defendant knew what would occur at Accomarca in advance. There is not even an allegation that any of the allegedly unlawful events at Accomarca were planned in advance. *To the contrary*, the Complaint alleges that a legitimate military operation was planned to "capture and/or destroy terrorist elements." *See* Complaint, ¶ 15, 48. The Complaint does not even allege that it was the defendant who made the plan. Instead, the Complaint alleges that the plan (whatever it was) was made by the General Staff of the Peruvian Army's Second Infantry Division. *See* Complaint, ¶ 15, 48.

Next, the defendant is alleged to have been called to a meeting where the plan to "capture and/or destroy terrorist elements" was announced. Again, there is no allegation that anything unlawful was discussed or announced at this meeting.

Then, the defendant is alleged to have responded to a particular road outside of town to "capture or destroy terrorist elements" who used the road to escape when another unit went searching for them in town. The defendant is alleged to have been within earshot of gunfire, but critically he is not alleged to have seen anything untoward whatsoever. Hearing gunfire coming from a town where a military unit was sent on a mission to "capture or destroy terrorist elements" is in perfect keeping with a belief that the mission was nothing but legitimate. Here again, there is no allegation that the defendant actually knew what was going on in Accomarca.

Finally, the defendant is alleged to have filed a report accurately stating that he had no contact with civilians. It is not alleged that he had any contact with civilians, so nothing in this report is inaccurate or untoward, much less evidence of conspiracy or aiding and abetting.

The allegations in the Complaint against the defendant go no further. He is not alleged to have done anything else and he is not alleged to have had any prior or contemporaneous knowledge of the alleged massacre at Accomarca. As a result, the plaintiffs' case must fail even on the strained and possibly inapplicable theories of conspiracy and aiding and abetting.

Given that the allegations in the Complaint are not sufficient to hold the defendant liable for conspiracy and aiding and abetting, there is no evidence that anything he did exceeded his authority under Peruvian law and, therefore, he is entitled to official capacity immunity under the FSIA.

The third reason why the argument that the defendant exceeded his official capacity must fail is that even assuming, *arguendo*, that the defendant conspired to commit or aided and abetted the commission of acts which would have been crimes if committed by civilians, he was a member of the military who, at the time in Peru was *allegedly privileged* to violate these laws in Peru's struggle against Shining Path guerillas. *It is important to stress that the defendant committed no crimes and only makes this argument in the alternative*. In an attempt to support their equitable tolling argument, the plaintiffs make a good case in the Complaint that the official policy of Peru was to use harsh tactics against the guerillas. The plaintiffs allege that these tactics, including "disappearances" and murders,

were officially sanctioned by the government and that the government went so far as to provide total amnesty for all actions taken in fighting the Shining Path terrorists. If accepted as true, as these allegations must be for purposes of this motion, these allegations certainly demonstrate that members of the military were acting within their official capacities even *if* carrying out alleged atrocities at the direction of the government.

4. The defendant is not required to submit a letter from the government of Peru to qualify for FSIA immunity, particularly where the admissions in the Complaint demonstrate that the defendant is immune.

Next, the plaintiffs claim that in order to be found to have acted within his official capacity, the defendant must submit a letter to the Court from the government of Peru. *See* Opposition at 32. There is no such requirement under the FSIA and the plaintiffs have cited none. While this happened in certain other cases, courts have certainly found the FSIA to apply in the absence of such letters. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677 (U.S. 2004) (FSIA applies to insulate actions of Nazi government of Austria - no letter of interest was provided by any government); *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283 (E.D.N,Y. Feb. 13, 1996)(FSIA barred claims against Israel's Minister of Police and former Prime Minister for allegedly directing the beating of the plaintiff by police - no letter of interest was provided by any government). *Moreover, no letter or other evidence is needed here because the allegations of the Complaint clearly demonstrate that the defendant was acting in his official capacity.*

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 correctly stating that he saw no civilians) were lawfully within the scope of his official duties as a Lieutenant in the Peruvian Army. As a result, he is protected by the FSIA. No letter from the Peruvian government is necessary to demonstrate this fact because the Complaint admits all facts relied on herein.

C. The plaintiffs have failed to exhaust their remedies in Peru.

The plaintiffs concede, as they must, that TVPA claims carry a requirement to exhaust remedies in the local jurisdiction prior to filing suit here. *See* Opposition at 36. The plaintiffs further concede that before this matter can proceed, remedies in Peru must be effectively non-existent. *See* Opposition at 36 (admitting that local remedies must be "unobtainable, ineffective, inadequate, or obviously futile"). A difficult or time-consuming process is insufficient. Instead, the Peruvian process must be followed unless it is "unobtainable, ineffective, inadequate, or obviously futile."

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

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

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

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

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

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

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

The foregoing demonstrates plainly that there are adequate[4] and available remedies in Peru in which the plaintiffs are currently engaged and which the plaintiffs have not exhausted. The plaintiffs aver that the alleged criminal prosecution cannot go forward with the defendant in the United States and that they cannot pursue the civil action to conclusion in Peru until the criminal action is completed there. *See* Opposition at 39. However, 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 and the process is clearly available because it is taking place. As such, the Complaint should be dismissed.

Not only is there a current process in Peru, but there was a process previously. The allegations underlying the Complaint were the subject of extensive investigation and review by Peruvian Courts, where the defendant was initially cleared of all wrongdoing. *See* Complaint, ¶91, 93, 94. In fact, the Center for Justice and Accountability (the group bringing the present lawsuit as co-counsel for the plaintiffs) admits on its website that, **"Rivera Rondón and the others were exonerated."** *See* http://www.cja.org/cases/Peru_Faqs/peru_faqs.shtml (last visited December 20, 2007). The plaintiffs allege that after a new regime came to power in Peru, and despite the prior exoneration of the defendant, *new charges were placed against him*. (a clear violation of his right to dues process of law and double jeopardy if these concepts applied under the new Peruvian regime). The allegation in the Complaint is that he has yet to stand trial and has, therefore, never been convicted of these charges. Nevertheless, there was a process in Peru which had run its course prior to installation of a new regime politically motivated to re-prosecute the defendant if possible. It is not the case that the plaintiffs have no rights in Peru so much as that they do not like the outcome of the process in Peru and would like Rondon retried there, yet again.

[4] 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).

D. This case should be dismissed on political question grounds.

In order to respect the separation of powers into three political branches which is the bedrock of our constitutional democracy, Courts refuse to become entangled in political questions best left to the executive under our tripartite separation of powers. *See, e.g., Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The plaintiffs argue that the disposition of this matter does not offend this notion because there is allegedly "no basis for connecting [the defendant's alleged] role" at Accomarca "to any policy decision of the United States." *See* Opposition at 40. This point, even if true, is irrelevant.

There are six independent tests for the existence of a political question, none of which requires a connection between the exact conduct of the defendant to a specific policy pronouncement:

> [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). None of these factors includes an analysis of the nexus the plaintiffs claim is lacking in this case. As a result, the plaintiffs' initial opposition on this point is immaterial.

Next, the plaintiffs argue that the United States was unaware of the events of Accomarca prior to their occurrence and decried them thereafter, so proceeding here allegedly does not run counter to the interests of the executive branch. *See* Opposition at 41. Again, this argument misses the point and ignores the relevant analysis from *Baker v. Carr*. Regardless of whether the executive would want this suit to go forward or whether it is in keeping with or degradation of the executive's position on

Accomarca, the point is that foreign policy is a matter for the executive, not the courts. As such, this matter should not go forward here under the first of the *Baker* factors.

The plaintiffs next claim, inaccurately, that "[e]ach of the cases" cited by the defense in connection with the political question doctrine "directly called into question the propriety of specific decisions made by U.S. officials." *See* Opposition at 42. First, this is a distinction without a difference. Second, this is simply not true. In his Motion to Dismiss, the defendant cited and discussed *Doe v. Liu Qi*, No. C 02 0672 CW, at 4-5 (N.D. Cal., Sept. 27, 2002). *Doe* is an ATCA case against certain *Chinese* officials for persecuting a religious group called the Falun Gong. The case did not involve any actions of U.S. officials.

In *Doe*, the United States State Department asked the Court "to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy," including suits alleging international law violations against individuals "in carrying out their official functions under the Constitution, laws and programs of the United States." Statement of Interest of the United. Likewise, should the Court now rule that a Peruvian soldier may be sued here for actions taken in his official capacity as a soldier, the Court effectively places its imprimatur on foreign government's permitting the same types of cases against our own members of the armed forces deployed throughout the world.

In response to *Doe*, the plaintiffs suggest that this case should be disregarded because the State Department has not written a similar letter here. *See* Opposition at 42. This argument misses the point. Whether or not a similar letter was written here, the fact remains that there are significant concerns for the safety of our own troops whenever a United States Court is asked to call into questions the actions of foreign soldiers. This was what the plaintiffs asked the Court to do in *Doe* and it is what the plaintiffs are asking this Court to do. Letter or no letter, the very serious concern remains that should courts take such matters up in this country, we are inviting lawsuits against our own

soldiers in foreign lands, including in countries which may not supply our soldiers with the constitutional and other protections available here.

Next, the plaintiffs suggest that there is no record support for the fact that, "this case implicates the relationship between the United States and Peru at a pivotal point in their history together." The events in question took place at a time when the United States was giving significant amounts of aid to Peru to fight the Shining Path terrorists in an effort to stem the flow of cocaine (which the Shining Path used to fund its operations) into the United States. This fact is a matter of public record. The United States was even training Peruvian soldiers, at the "School of the Americas," to carry out the types of raids at issue in this case. *See* 10 U.S.C. § 4415. The plaintiffs do not deny these facts, they only claim there is no record support for them yet.

While this is important background for the Court's decision, the issue of United States aid to Peru or the relationship of the School of the Americas to this case is largely irrelevant at this stage. Again, the relevant query is whether the Court is being asked to resolve a political question best left to the executive branch. This is clearly the case, irrespective of the prior involvement of the United States in the events at issue. As such, the plaintiffs' argument is immaterial.

Finally, in analogous cases, Courts have abstained. In *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997), 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 because the claim arose from a NATO exercise and necessarily 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*. Likewise, 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*.

Similarly, in *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985), British plaintiffs 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."). Here, as well, it would be impossible to proceed further in this matter without an initial policy determination of a kind clearly for nonjudicial discretion, and 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). As a result, this case should be dismissed.

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

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

The plaintiffs argue that no act of state is at issue here. This argument runs entirely counter to the admissions in the plaintiffs' own Complaint. For instance, the plaintiffs allege that the actions taken by the defendant were done pursuant to policy set at the highest levels of the Peruvian

government and handed down directly to the defendant through a strict chain of command outlined in the Complaint:

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

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

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

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

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

6. **the military "operation" was "placed under the control of" a Lieutenant Colonel who was the "Chief of Operations of the General Staff"** *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.

There is simply no escaping the fact that the Complaint alleges that the defendant acted pursuant to official government policy. As a result, an "Act of state" is clearly being called into question here. The plaintiffs' claims that the defendant was acting outside of his authority are unavailing for the

reasons discussed *supra*. As a result, the Complaint should be dismissed under the Act of State doctrine. *See Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981).

Next, the defendants argue that the *Sabbatino* factors weigh against application of the Act of State doctrine because the defendant allegedly committed human rights violations and adjudication is consistent with United States policy. *See* Opposition at 46 - 47 (*citing Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). As noted above, the allegations of the Complaint do not support a finding that the defendant committed human rights abuses. As a result, his persecution by the plaintiffs is not in keeping with any announced policy of the United States.

Finally, for the reasons outlined in the Motion to Dismiss, none of which was addressed by the plaintiffs in their Opposition, the *Sabbatino* factors weigh heavily in favor of abstention here under existing case law.

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

In their Opposition, the plaintiffs abandon any pretence that they are proceeding against the defendant on theories of direct liability. *See* Opposition at 49 (For each claim…liability is based on three distinct theories: conspiracy, aiding and abetting and joint criminal enterprise."). The plaintiffs ground their claims entirely on these three theories of *indirect* liability. For the reasons which follow, the plaintiffs have not stated a claim under any of these theories.

1. The plaintiffs have not and cannot state a claim for conspiracy, aiding and abetting or "joint criminal enterprise" because the defendant is only alleged to have joined with other soldiers in connection with the allegations of the Complaint and the army cannot conspire with itself.

The defendant is only alleged to have conspired with, aided and abetted and joined in a criminal enterprise with other members of the Peruvian Army. It is legally impossible to conspire with oneself or to aid and abet oneself. *United States v. Gisehaltz,* 278 F.Supp. 434, 437 (S.D.N.Y. 1967); *Miller v. Edward Jones & Co.*, 355 F.Supp.2d 629, 644 (D.Conn.,2005) ("it is clear that 'one cannot aid or abet oneself'"); *Iyorbo v. Quest Intern. Food Flavors & Food Ingredients Co.*; 2003 WL

22999547, 3 (D.Minn.) (D.Minn.,2003) ("one cannot aid and abet oneself"); *U.S. v. Verners*, 53 F.3d 291, 295 (C.A.10 (Okl.),1995)("[o]ne cannot aid and abet an aider and abetter, nor can one aid and abet oneself"); *California Int'l Chemical Co. v. Neptune Pool Service, Inc.*, 770 F.Supp. 1530, 1535 (M.D.Fla.,1991)("One can not aid and abet oneself in the performance of an act."); *State v. Pacheco*, 27 Utah 2d 281, 282, 495 P.2d 808, 808 (Utah 1972) ("one cannot aid and abet oneself").

Likewise, a corporation cannot conspire with or aid and abet its officers or agents. *See id*.; *Marmott v. Maryland Lumber Company, et al.,* 807 F.2d 1180, 1184 (4th Cir. 1986); *Rokeach v. Eisenbach*, 1985 WL 4831, 7 (N.D.Ill.) (N.D.Ill. 1985) (stating, in the context of corporate officers alleged to have conspired with the corporation, "[t]here can be no doubt that one cannot conspire with oneself.").

Under the same principles, one Peruvian Army solider cannot 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. *See id*.

The plaintiff cites a few cases which apply the exception to the forgoing rule. Specifically, courts have held that in the appropriate circumstances, one may conspire with another member of the same organization, but those circumstances are not present in this case:

> **The law is well established that a corporation cannot conspire with officers or agents.** *See Marmott v. Maryland Lumber Company, et al.,* 807 F.2d 1180, 1184 (4th Cir.1986). **However, there are two exceptions to this general rule. One exception is "where [the officer or] agent has an 'independent personal stake in achieving the corporation's legal objective.' "** *Yates v. Hagerstown Lodge No. 212 Loyal Order of Moose,* 878 F.Supp. 788, 802 (D.Md.1995). **The other exception is where the acts of the officers were unauthorized by the corporate defendant**. *Id.*
>
> Plaintiff has failed to allege facts under either exception. Plaintiff's complaint does not claim that defendants Gupta or Tawari had an "independent personal stake." Additionally, the complaint contains no charges that defendants Gupta or Tawari acted in a manner unauthorized by defendant EER. Moreover, Plaintiff's lone belief that

> defendants Gupta and Tawari have ownership interests in defendant EER is not enough to show that they had an "independent personal stake."
>
> The Court believes that it is necessary for Defendants to know the nature of the conspiracy alleged against them in order to fully defend themselves. Because Plaintiff has failed to adequately plead a conspiracy claim, the Court must dismiss it.

U.S. v. EER Systems Corp., 950 F.Supp. 130, 132 - 133 (D.Md.,1996). The plaintiffs cite cases either explicitly applying these exceptions or in which these exceptions would apply. Then, the plaintiffs ask the Court to apply these exceptions here without discussing them.

Apparently, the plaintiffs do not discuss the exceptions at issue because they clearly do not apply. Here, as in *EER Systems*, the Complaint does not allege that the defendant had any "independent personal stake" in the events to Accomarca. Nor does the Complaint contain charges that the defendant acted in a manner unauthorized by the government of Peru. In fact, the Complaint alleges that the defendant was following direct orders and acting in accordance with the nationally-adopted public policy of Peru at the time. *See* discussion, *supra*. As a result, these exceptions do not apply and there can be no indirect liability here because, as a matter of law, the defendant cannot have conspired with, aided and abetted and joined in a criminal enterprise with other members of the Peruvian Army.

2. The plaintiffs have not and cannot state a cause of action for conspiracy, aiding and abetting or "joint criminal enterprise" because the defendant is not alleged to have had any knowledge of the events at Accomarca before they occurred; nor are there allegations sufficient to suggest that the defendant was knowingly part of a "cover up."

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

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

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

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

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

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

The pleading standards regarding the defendants' alleged knowledge of the conspiracy and the existence of it are high. *See Fullman v. Graddick,* 739 F.2d 553, 556-57 (11th Cir.1984) ("In

conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed. A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy."). These standards are even higher when the plaintiffs seek to employ theories of indirect liability in an ATCA case such as this:

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

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

Here, the plaintiffs have failed to allege that the defendant knew anything about the atrocities in Accomarca before they were committed. In fact, the plaintiffs have not alleged that anyone knew these atrocities would occur in advance, leaving open the *very real* possibility that a decision made by the unit in the town at the time lead to the events which later unfolded.[5] Likewise, the plaintiffs have failed to allege that the defendant did anything to knowingly cover up the events in Accomarca after the fact. As a result, no theory of indirect liability should survive the present motion.

The plaintiffs' response to the foregoing, at pages 54 and 55 of their Opposition, demonstrates the weakness of the plaintiffs' case. Instead of claiming that the defendant knew about any atrocities in advance, the plaintiffs alleged *only* that the defendant knew about "an operational plan 'to capture and/or destroy' terrorist elements." *See* Opposition at 54. There is nothing illegal now in Peru or at the time in Peru about being a soldier in the Army capturing and/or destroying terrorists. The defendant is not alleged to have had any knowledge of a plan to violate the law or commit atrocities;

[5] It bears repeating that the defendant was not a member of this unit and is not alleged to have been in Accomarca when the alleged atrocities occurred.

nor is there even alleged to have been a plan to commit atrocities that the defendant could have known about.[6] As a result, the defendant has no indirect liability and the Complaint should be dismissed.

Quoting the Complaint, the plaintiffs claim in their Opposition that the defendant's report "failed to 'mention any interaction with civilians…or the fact that dozens of people were killed during the operation.'" *See* Opposition at 55. In the Opposition, *but not in the Complaint*, the defendants allege that this is evidence of a "cover up." *See id*. This claim is preposterous. Neither the defendant, nor his unit is alleged to have had any contact whatsoever with civilians. Neither the defendant, nor his unit is alleged to have seen or been aware of any killings. The defendant's report - regarding his activities and those of unit - does not mention any contact with civilians because he and his unit had no such contact. The plaintiffs' sole evidence of a "cover up" is the allegation that the defendant drafted a correct and accurate report. This is not sufficient to sustain claims of a conspiracy, aiding and abetting or a "joint criminal enterprise" and the Complaint sounding in these theories should be dismissed.

3. There is no such cause of action as civil "joint criminal enterprise."

There is no civil cause of action for "joint criminal enterprise." The phrase "joint criminal enterprise" appears exactly four times in cases reported by the Supreme Court or anywhere in the Fourth Circuit. *See Yousuf v. Samantar*, (E.D.Va.,2007); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2785 (2006); *Fowler v. Com.*, (Va.App.,1998); *U.S. v. Sapperstein*, 312 F.2d 694 (C.A.Md. 1963). *None* of these cases recognizes a civil cause of action for a "joint criminal enterprise." *See Yousuf v. Samantar*, (E.D.Va.,2007)(TVPA claim which was dismissed on other grounds in which the Court did not reach the defendant's argument that, "'joint criminal enterprise' is not a valid theory of liability"); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2785 (2006) (case involving detainees at Guantanamo Bay in which a cause of action for joint criminal enterprise was not pleaded by the plaintiffs or adopted by the Court, but in which the Court noted that, "[t]he International Criminal Tribunal for the former

[6] In point of fact, should discovery become necessary, the defendant avers that the plaintiffs will not be able to show that there was ever a plan to commit atrocities at Accomarca.

Yugoslavia … has adopted a "joint criminal enterprise" theory of liability," but that "United States Military Tribunals…did not recogniz[e] as a separate offence conspiracy to commit war crimes or crimes against humanity"); *Fowler v. Com*., (Va.App.,1998) (criminal case); *U.S. v. Sapperstein*, 312 F.2d 694 (C.A.Md. 1963) (criminal case). Given that there is no civil cause of action for "joint criminal enterprise," this claim should be dismissed.

4. The plaintiffs have not and cannot state a claim for "joint criminal enterprise."

Even if there were a claim for "joint criminal enterprise," certainly one of its elements must be the plaintiffs' awareness of the underlying crime prior to joining the enterprise or acting in furtherance thereof. Here, there is no allegation that the defendant was aware of any wrongdoing at any time. *See* discussion, *supra*. As a result, even if the Court were to adopt this novel theory of recovery, a "joint criminal enterprise" claim cannot survive here.

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

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). The term, "alien" is not defined in the statute, but Black's Law Dictionary defines "alien" as follows: "[a] person who resides within the borders of a country but is not a citizen or subject of that country." *See* Black's Law Dictionary, Seventh Ed. (1999). Thus, only those who are citizens of other countries, *but residing in the United States*, may bring claims under the ATCA. The Complaint alleges that "Plaintiff Teofila Ochoa…is a citizen and *resident of Peru*;" and "Plaintiff Cirila Pulido Baldeon…is a citizen and *resident of Peru*." *See*

Complaint, ¶ 8, 10. Therefore, neither individual is an "alien" and the present ATCA claims should be dismissed.[7]

In response, the plaintiffs cite *Rasul v. Bush*, 542 U.S. 466 (2004), where the Supreme Court held that it has jurisdiction over *habeas corpus* claims brought by detainees at Guantanamo Bay. Rasul is easily distinguishable from the present case. The *Rasul* Court began its analysis by noting that, "for more than two years [the plaintiffs] have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *See Rasul v. Bush*, 542 U.S. 466, 476, 124 S.Ct. 2686, 2693 (U.S. 2004). Next, the *Rasul* Court built its analysis on this point, stating as follows:

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

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

In *Rasul*, the court based its jurisdiction on the fact that the aggrieved individuals were in United States custody at Guantanamo Bay. Here, the plaintiffs are not residents of the United States (and therefore not "aliens" for ATCA purposes) and they are *not* in United States custody.[8] As a result, the limited exception established in *Rasul* does not apply here and this case should be dismissed.

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[7] *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.").

[8] The plaintiffs pull a quote out of its context in *Rasul* and note that the opinion contains the sentence, "The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims." *Rasul* at 485. In the opinion, this quote refers to the Court's holding that, "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United

H. Venue is not proper in this Court.

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

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 fail to allege in their Complaint that they have actually opened estates and been appointed as personal representatives for all of the deceased on whose behalf they assert claims. Unless and until such time as valid estates are open and personal representatives appointed with legal capacities to maintain such an action - *and* these facts are alleged in the Complaint, the decedents have no standing before this Court and their purported cases should be dismissed.

Even if the plaintiffs were permitted to amend and correct this defect, amendment would be futile in at least one case. Despite having filed a claim on his behalf, the plaintiffs now admit that neither is a personal representative of decedent Celestino Ochoa Lizarbe. As a result, this claim should be dismissed with prejudice.

States from the "'privilege of litigation.'" *See id*. In other words, *Rasul* held that the mere fact of being in military custody does not deny one the right to bring a lawsuit. However, the Court did rely heavily on the fact that the defendants were in military custody in resolving their *habeas corpus* claims. Finally, the Court in *Rasul* was neither presented with nor decided the issues here: whether the term "alien" in the ATCA includes all foreigners (those who reside outside of the country) as oppose to "aliens" (those who reside in the country, but lack United States citizenship).

III. Conclusion

For the foregoing reasons, the defendant, 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/

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served pursuant to the electronic filing protocol of this Court this 19th day of February, 2008 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)