No. 09-1376

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JUAN MANUEL RIVERA RONDÓN,

Defendant-Appellant,

v.

TEOFILA OCHOA LIZARBE AND
CIRILA PULIDO BALDEÓN,

Plaintiffs-Appellees.

On Appeal from the United States District Court
For the District of Maryland, No. 8:07-CV-01809
Peter J. Messitte, United States District Judge

BRIEF OF APPELLEES TEOFILA OCHOA LIZARBE AND CIRILA PULIDO BALDEÓN

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. and Local Rule 26.1, Appellees Teofila Ochoa Lizarbe and Cirila Pulido Baldeón state as follows: Appellees are not publicly held corporations or any other corporate entity. No publicly held corporation or any other publicly held entity has a direct financial interest in the outcome of this litigation. No party is a trade association. This case does not arise out of a bankruptcy proceeding.

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STATEMENT OF JURISDICTION

A. District Court Jurisdiction

Appellees Lizarbe and Baldeón brought claims under the Alien Tort Statute ("ATS")[1] and the Torture Victim Protection Act ("TVPA")[2] for themselves and on behalf of the estates of their deceased family members killed in the 1985 Accomarca Massacre ("Decedents"). The district court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1350.

B. Appellate Court Jurisdiction

The district court denied Appellant Juan Miguel Rivera Rondón's ("Rivera Rondón") motion to dismiss, rejecting his claim of immunity under the Foreign Sovereign Immunities Act ("FSIA").[3] The denial of a claim to jurisdictional immunity under the FSIA is subject to interlocutory appeal under the collateral order doctrine. *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006).

Rivera Rondón has asked the Court to exercise its discretionary, pendent appellate jurisdiction to reach two additional grounds for his appeal, equitable tolling of the statute of limitations and exhaustion of local remedies in Peru. The exercise of such discretion is not warranted because

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[1] 28 U.S.C. § 1350 (2007).

[2] 28 U.S.C. § 1350 note (2007).

[3] 28 U.S.C. §§ 1602-1611 (2007).

the additional grounds for appeal are neither (1) "inextricably intertwined" with the FSIA, nor (2) "necessary to ensure meaningful review" of the FSIA issue. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995); *Rux*, 461 F.3d at 476.

STATEMENT OF THE ISSUES

(1) Whether the district court properly held that Appellant Rivera Rondón is not immune from suit because (a) the FSIA does not apply to individual defendants, (b) he was not a Peruvian official at the time of suit, and (c) his participation in the Accomarca Massacre was outside the scope of his lawful, official authority as a Peruvian Army officer.

(2) Whether this Court should refuse to exercise pendent appellate jurisdiction over Rivera Rondón's appeal from the district court's denial of his motion to dismiss on statute of limitations grounds and for failure to exhaust local remedies because those legal issues are not inextricably linked with his claim of FSIA immunity and need not be resolved to ensure meaningful review of the FSIA immunity issue.

(3) Whether the district court properly found that the TVPA's 10-year statute of limitations was equitably tolled, *inter alia*, because of the unremittingly hostile circumstances in Peru following the Accomarca Massacre which continued until the year 2000.

(4) Whether the district court properly found that Rivera Rondón has not shown, as a matter of law, that Lizarbe and Baldeón failed to exhaust available and adequate remedies in Peru before commencing this action.

STATEMENT OF THE CASE

On July 11, 2007, Teofila Ochoa Lizarbe ("Lizarbe") and Cirila Pulido Baldeón ("Baldeón"), for themselves and on behalf of various decedents' estates, filed this action in the United States District Court for the District of Maryland against Rivera Rondón, a former Peruvian Army officer who was then residing in Maryland. He was served in Maryland while residing there as a permanent resident alien. Apx 258 (Docket 8).

Rivera Rondón moved to dismiss the Complaint asserting, among other reasons, that he is immune from suit under the FSIA and the claims against him are barred by the statute of limitations and by the failure of Lizarbe and Baldeón to exhaust local remedies in Peru. (Docket 19 & 20). Lizarbe and Baldeón opposed the motion on all grounds asserted. (Docket 28).

The district court held a hearing on the motion to dismiss on April 14, 2008. (Docket 38). While the motion was still pending, Rivera Rondón was deported from the United States to Peru on August 15, 2008. Apx 334 (Docket 47). Lizarbe and Baldeón subsequently informed the district court

of this Court's intervening decision in *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), on January 12, 2009. (Docket 49). The district court denied Rivera Rondón's motion to dismiss. *See* Mem. Op., Apx 222.

Rivera Rondón noted an interlocutory appeal to this Court on March 27, 2009. (Docket 60). He also moved in the district court to certify for interlocutory appeal all of the defenses raised in his unsuccessful motion to dismiss. (Docket 59). Lizarbe and Baldeón opposed that motion, which remains pending in the district court. (Docket 63).

STATEMENT OF FACTS

A. The August 1985 Accomarca Massacre.

As detailed in the Complaint, Peru was in a state of civil war between 1980 and 2000. Compl. ¶ 35, Apx 16. During this time, elements of the Peruvian Army and other rogue government forces were responsible for widespread and systematic human rights abuses against the civilian population of Peru under the guise of suppressing a rebel group known as the Shining Path. *Id.* In mid-August 1985, one unit of the Peruvian Army carried out a brutal massacre of civilians in Quebrada de Huancayoc, a rural community near Accomarca, Peru, where Lizarbe and Baldeón lived as children. *Id.* ¶¶ 43, 55, 58, Apx 18, 21. Rivera Rondón participated in this massacre, engaging in a joint criminal enterprise with, conspiring with, and

aiding and abetting, other soldiers in a plan to torture and kill villagers in Quebrada de Huancayoc ("Accomarca Massacre").

Approximately 69 unarmed civilians were killed by soldiers working in concert with Rivera Rondón in Quebrada de Huancayoc on the morning of August 14, 1985. *Id.* ¶¶ 54-64, Apx 20-22. Eight of Appellees' immediate family members were tortured and killed, causing Lizarbe and Baldeón severe psychological trauma. *Id*. ¶¶ 1, 54-64, Apx 10, 20-22. Soldiers shot at Lizarbe as she ran from her home. *Id*. ¶ 56, Apx 21. Finding a hiding place, she saw soldiers taking young girls into houses, heard their cries and soldiers' gunshots, and witnessed soldiers setting houses on fire. *Id.* ¶ 57, Apx 21. Baldeón evaded certain death only by fleeing her home and hiding with two siblings. *Id.* ¶ 58, Apx 21.

B. Rivera Rondón's Role in the Accomarca Massacre.

Rivera Rondón seeks to minimize or excuse his role in the events of August 14, 1985. He asserts on appeal that "the Complaint makes no allegations whatsoever that [he] did anything to harm anyone or was involved in any other way in the events with which Lizarbe and Baldeón take issue," other than attending a meeting and being stationed outside the town. Appellant Br. at 5. That is simply incorrect.

As the Complaint details, Rivera Rondón acted in concert with Second Lieutenant Telmo Ricardo Hurtado Hurtado ("Hurtado") and others to plan and commit the atrocities that took place on August 14, 1985, including the torture and execution of Appellees' relatives. Compl. ¶¶ 48-66, Apx 19-23. During the planning of the operation, purportedly to capture and/or destroy terrorist elements in the Quebrada de Huancayoc, Rivera Rondón and Hurtado were told that any villagers appearing in Quebrada de Huancayoc should be considered a terrorist-communist. *Id.* ¶¶ 48-53, Apx 19-20. Rivera Rondón and the soldiers under his command, acting in concert with Hurtado and his troops and pursuant to a common plan, positioned themselves in the upper part of Quebrada de Huancayoc in order to facilitate the detention, rape, torture and execution of the villagers. *Id.* ¶¶ 48-53, 62, Apx 19-20, 22. The soldiers under Rivera Rondón's command fired shots, burned houses and blocked the escape routes of the villagers. Rivera Rondón and his unit thereby facilitated and were involved in the commission of the Accomarca Massacre. *Id.* ¶ 62, Apx 22.

During the entirety of the planned operations, Rivera Rondón knew about the atrocities being committed—indeed, he and the men under his command were close enough to hear the shooting and grenade explosions—but took no steps to end his participation, or to stop other officers or soldiers

from their participation, in the Accomarca Massacre. *Id.* ¶¶ 62, 65, Apx 22-23. Even though his unit had a radio, and the abuses continued for many hours, Rivera Rondón did not contact his superiors to alert them that human rights abuses were being committed and to seek instructions. *Id.* He also failed to report the abuses to his superiors when the operation was over. *Id.* ¶ 66, Apx 23.

In sum, Rivera Rondón was a knowing and willing participant in the common scheme and plan to commit extrajudicial killing, torture, war crimes and crimes against humanity directed against innocent civilian residents of Quebrada de Huancayoc.

C. Rivera Rondón's Avoidance of Prosecution in Peru.

After the events of August 14, 1985, and despite evidence of his role in the Accomarca Massacre, Rivera Rondón avoided being held accountable in Peru. *Id*. ¶ 93, Apx 29. In October 1985, the Peruvian Senate commission concluded that 69 people were killed in the Accomarca Massacre and that the murders were not military crimes but common crimes, over which the Peruvian judiciary has jurisdiction. *Id*. ¶ 91, Apx 29. The Peruvian Supreme Court, however, held that the case was solely within the jurisdiction of the Peruvian military justice system because the killings occurred inside an emergency zone and were perpetrated by members of the

Peruvian Army. *Id.* Two years after the Accomarca Massacre, a military court absolved Rivera Rondón of all charges. The court found, as a matter of Peruvian military law, that the killing of civilians by members of the military could not be charged as homicide in the military justice system. *Id.* ¶ 93, Apx 29.

The Peruvian judiciary's decisions regarding prosecution of the crimes committed by members of the Peruvian military resulted in complete impunity for Rivera Rondón. *Id*.

D. Rivera Rondón's Status as a Civilian and Resident Alien in the United States.

Rivera Rondón resigned from the Peruvian Army, left Peru, and entered the United States in 1992 or 1993. While remaining a citizen of Peru, *id*. ¶¶ 4,7, Apx 12, he resided in Montgomery County, Maryland as a permanent resident alien from at least 1995, *id*. ¶¶ 4, 5, until he was deported to Lima, Peru on August 15, 2008. Apx 334 (Docket 47).

E. Circumstances in Peru Following the Accomarca Massacre.

The circumstances in Peru between 1985 and 2000 made it impossible for Lizarbe and Baldeón to seek Peruvian legal remedies against Rivera Rondón. Compl. ¶ 93, Apx 29. Some survivors of the Accomarca Massacre were brutally murdered in the weeks following the attack. *Id*. ¶¶ 68, 70, Apx

23. Widespread and systematic human rights abuses continued to be committed throughout the area around Accomarca. *Id.*

Alberto Fujimori became Peru's President in July 1990. In 1992, Fujimori closed Peru's Congress, purged the judiciary, and suspended the constitution. *Id.* Fujimori's government then enacted a series of "anti-terrorism" laws that provided virtually no due process protections while granting greater power to the military. *Id.*

Lizarbe and Baldeón reached the age of 18 in 1991, and Rivera Rondón arrived in the United States in 1992 or 1993. Conditions in Peru continued to be repressive and dangerous for large segments of the civilian population. Indeed, throughout the 1990s, death squads continued to commit widespread killings and massacres. *Id.* ¶ 85, Apx 27.

By 1993, both Lizarbe and Baldeón had moved to the Peruvian capital, Lima, where abuses against civilians were concentrated. *Id.* ¶ 86, Apx 28. The killings of civilians with impunity continued into the late 1990s. *Id.* ¶ 88, Apx 28.

Rather than holding Rivera Rondón and his co-conspirators responsible for the Accomarca Massacre, Fujimori's government granted amnesty in 1995 to all members of the military and police for actions taken since 1980 as part of the "fight against terrorism." *Id.* ¶ 87, Apx 28. Under

the amnesty, Rivera Rondón was immune from Peruvian prosecution or civil liability for his part in the Accomarca Massacre. The amnesty law was declared invalid in 2001, at which time it became possible to pursue a Peruvian remedy against Rivera Rondón. By that time, however, Rivera Rondón had left Peru.

Throughout Fujimori's regime, from 1990 to 2000, the National Intelligence Service, headed by Vladimiro Montesinos, carried out further atrocities against innocent civilians. *Id*. ¶ 86, Apx 28.

F. Recent Attempts to Prosecute Rivera Rondón in Peru.

Conditions in Peru began to improve after Fujimori's stranglehold ended. In 2001, the Inter-American Court of Human Rights declared Peru's amnesty law to be invalid. *Id*. ¶ 99, Apx 30. Then, in 2005, five years after the Fujimori government was ousted, Peruvian prosecutors filed murder charges in civilian court against Rivera Rondón, Hurtado and several other officers responsible for the Accomarca Massacre. *Id*. ¶ 100, Apx 30. Soon thereafter, Lizarbe and Baldeón exercised their right to participate in the criminal case as *partes civil* ("civilian parties"), the only avenue available under Peruvian law for a victim to obtain a remedy against a criminal

defendant. *See* Ninaquispe Decl. ¶¶ 14-19,[4] Apx 263-64; Compl. ¶¶ 100-105, Apx 30-31.

Initially, the criminal case against Rivera Rondón was stymied because Peruvian law bars completion of such proceedings while the defendant is outside of Peru. *Id*. ¶ 103, Apx 31. The lack of progress in the Peruvian courts prevented Lizarbe and Baldeón from pursuing their *partes civil* claims for damages against Rivera Rondón in Peru. Under Peruvian law, victims of human rights abuses who are civilian parties to the criminal prosecution are not entitled to civil compensation until the criminal case results in a conviction. *Id*. ¶ 104, Apx 31. Not until criminal liability has been assessed does a civilian party have the right to recover damages. Ninaquispe Decl. ¶ 15, Apx 263.

Rivera Rondón is now in Peru, but the criminal charges against him remain unresolved. Thus, Lizarbe's and Baldeón's civil claims against him in Peru cannot go forward. Compl. ¶¶ 90, 104, Apx 29, 31.

[4] Ms. Ninaquispe is a practicing attorney in Peru with considerable experience in matters involving violations of the Peruvian criminal code and international legal norms. Ninaquispe Decl. ¶¶ 1-7, Apx 259-61. Her unopposed declaration was submitted to the district court, as an exhibit to the opposition to Rivera Rondón's motion to dismiss, to explain certain provisions of Peruvian law.

SUMMARY OF ARGUMENT

The district court properly denied Rivera Rondón's motion to dismiss, among other reasons, because he is not immune from suit under the FSIA, equitable tolling applies to the 10-year statute of limitations under the TVPA, and Lizarbe and Baldeón do not have adequate and available remedies in Peru.

The district court, following this Court's holding in *Yousuf v. Samantar*, found that the FSIA does not apply either to foreign officials or to former government officials. Further, the district court found that the Complaint alleged—and Peru itself confirmed—that Rivera Rondón had acted under "color of law," but outside the scope of his lawful, official authority, during the Accomarca Massacre. For these reasons, the district court correctly held that Rivera Rondón is not immune from suit under the FSIA.

This Court should not exercise pendent appellate jurisdiction to review Rivera Rondón's statute of limitations and exhaustion of local remedies defenses. Rivera Rondón has failed to establish that those defenses are inextricably intertwined with his claim of FSIA immunity. Further, he has failed to show that the resolution of those issues in this interlocutory

appeal is necessary to ensure meaningful review of his FSIA immunity defense.

In any event, the 10-year statute of limitations under the TVPA was equitably tolled for Lizarbe and Baldeón until Peru lifted its amnesty law in 2001. Rivera Rondón has not shown that Lizarbe and Baldeón failed to exhaust available and adequate remedies in Peru. Finally, exhaustion of local remedies is not required under the Alien Tort Statute.

ARGUMENT

STANDARD OF REVIEW

The district court's factual findings with respect to FSIA immunity are subject to review for clear error and its legal conclusions are subject to *de novo* review. *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). The district court concluded as a matter of law that the FSIA does not apply to individuals and former government officials. Furthermore, the district court held that the Complaint alleged sufficiently—and Peru itself confirmed—that Rivera Rondón acted outside the scope of his lawful, official authority.

The district court's finding that the statute of limitations under the TVPA was equitably tolled because, among other things, the unremittingly hostile environment of Peru—from the time of the Massacre until Peru's

amnesty law was repealed in 2001—prevented Lizarbe and Baldeón from bringing suit, is subject to review for abuse of discretion. *See Chao v. Virginia Dep't of Transp.*, 291 F.3d 276, 279-80 (4th Cir. 2002). The district court's decision can be reversed only if it made a clear error in judgment. *Marsh v. W. R. Grace & Co.*, Nos. 98-1943, 98-1944, 98-1945, 2003 WL 22718177, at *3 (4th Cir. Nov. 19, 2003).

The district court's finding that Lizarbe and Baldeón exhausted available and adequate remedies under the TVPA is entitled to substantial deference and is subject to review for clear error. *See Anderson v. Bessemer City*, 470 U.S. 564 (1985).

DISCUSSION OF THE ISSUES

I. RIVERA RONDÓN IS NOT IMMUNE FROM SUIT UNDER THE FSIA.

Rivera Rondón's claim of immunity under the FSIA is foreclosed by *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009). The district court found that this Court's *Yousuf* opinion "puts to rest the entirety of Rivera Rondón's FSIA arguments." Mem. Op. at 13, Apx 234. In *Yousuf*, this Court held that the "FSIA does not apply to individual foreign government agents," and "even if an individual foreign official could be an 'agency or instrumentality under FSIA,'" he would not be categorized as such if he were not acting in that capacity at the time the suit was filed. 552 F.3d at 381, 383. Beyond its

reliance on *Yousuf*, the district court found in this case that "[a]ll the acts complained of here are illegal under Peruvian law and, most importantly, the Peruvian Government has presented a letter to the Court in effect denying the alleged acts were Peruvian acts of state." Mem. Op. at 26, Apx 247. The law of this Court, as established by *Yousuf*, is that an official or former official of a foreign sovereign is not entitled to FSIA immunity from suit in a case alleging personal liability for extrajudicial killings and torture occurring during the individual's prior service as an agent of a foreign state.

A. *Yousuf v. Samantar* Precludes Rivera Rondón's Argument that FSIA Immunity Extends to Former Government Officials.

Yousuf v. Samantar established the law of this Circuit that the FSIA does not provide immunity from suit to officials or former officials of a foreign government. Rivera Rondón's efforts to distinguish or limit *Yousuf* are unavailing. He has failed to demonstrate that this Court can or should reach a different conclusion here.

The *Yousuf* Court held that a former Defense Minister of Somalia was not immune from suit for extrajudicial killings and torture for two separate reasons. First, the FSIA does not confer jurisdictional immunity on individual foreign government agents. 552 F.3d at 381. Second, just as state-owned companies lose FSIA immunity when they are privatized and

cease to be part of the state, individuals who leave the government and are later sued in their individual capacities are not shielded from suit by the FSIA. *Id*. at 383.

1. Individual defendants are not "agencies or instrumentalities of a foreign state."

The *Yousuf* Court considered and rejected the contrary views of some other circuit courts that have held that officials of a foreign state are entitled to immunity from suit because they are included in the FSIA's definition of an "agency or instrumentality of a foreign state" set forth in § 1603(b). *Id*. at 381.[5]

Because the plain language of the statute does not include individuals, the *Yousuf* Court looked to other provisions of the law, and to legislative history, and concluded that "[c]onstruing 'agency or instrumentality' to refer

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[5] FSIA § 1603(b) provides as follows:

> 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.

to a political body or corporate entity, but not an individual, is . . . consistent with the overall statutory schemed of the FSIA." *Id.* at 380.

The Court was particularly persuaded by the Seventh Circuit's interpretation of § 1603(b)(1):

> [I]f it was a natural person Congress intended to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons, which are subject to suit. Given that the phrase "corporate or otherwise" follows on the heels of "separate legal person," we are convinced that the latter phrase refers to a legal fiction—a business entity which is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

552 F.3d at 380 (citing *Enahoro v. Abubakar*, 408 F.3d 877, 881-882 (7th Cir. 2005)).

The *Yousuf* Court analyzed the requirements that the FSIA imposes on an "agency or instrumentality of a foreign state" seeking to establish immunity, concluding that they are requirements that only corporations, political entities, or legal representatives of estates—not natural persons—can fulfill. First, the "agency or instrumentality" must not be "a citizen of a State of the United States as defined in section 1332(c) and (e)" of Title 28. 28 U.S.C. § 1603(b)(3). As this Court had already held, §§ 1332(c) and (e) "govern the citizenship of corporations and legal representatives of estates

[and] are inapplicable to individuals." 552 F.3d at 380. Second, the "agency or instrumentality" must not be "created under the laws of any third country." 28 U.S.C. § 1603(b)(3). It is, in the words of the *Yousuf* Court, "nonsensical to speak of an individual, rather than a corporate entity, being 'created' under the laws of a country." 552 F.3d at 380.

Further, as the *Yousuf* Court reasoned, the FSIA does not contemplate a means for service of process on an individual. Instead, it provides the exclusive means for service of process on a foreign state or its agencies or instrumentalities in language virtually identical to that of the "general procedural rule for service on a corporation or other business entity." *Id.* at 381 (comparing Fed. R. Civ. P. 4(h)(1)(B) and 28 U.S.C. § 1608(b)).

Finally, the *Yousuf* Court found additional confirmation for its holding in the House Committee Report on the FSIA. The Report explains the term "separate legal person" as "intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name." *Id.* (citing H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614, 1976 WL 14078, at *15, Apx 343). The House Committee Report provided some examples of entities that would fulfill the requirements for an "agency or instrumentality"

under § 1603(b) of the FSIA, including "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank," among others. *Id.* at 381 (citing H.R. Rep. No. 94-1487, 1976 WL 14078, at *16, Apx 344). The legislative history confirmed that an "agency or instrumentality" under § 1603(b) was never meant to include individuals. Thus, the *Yousuf* Court concluded that Congress did not intend the FSIA to apply to individual foreign government officials. *Id.*

Rivera Rondón's reliance on the Ninth Circuit's decision in *Chuidian v. Phillipine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), is misplaced. The *Yousuf* Court considered and rejected the reasoning of *Chuidian* concerning the scope of § 1603(b) as unpersuasive. *Yousuf*, 552 F.3d at 380. *Chuidian* provides no basis for challenging the *Yousuf* Court's carefully considered analysis of the language, legislative history, structure and purpose of the FSIA.

Similarly, Rivera Rondón's argument that *Yousuf* is irreconcilable with this Court's decision in *Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004), is unpersuasive. First, the *Yousuf* Court distinguished its holding in *Velasco*, which decided "the wholly separate question of whether, and under what circumstances, the acts of an individual operate to *bind* a

foreign sovereign claiming immunity under the FSIA." 552 F.3d at 379 (citation omitted) (emphasis in original). As the Court observed, *Velasco* was not about whether an individual foreign government official was immune under the FSIA; rather it addressed whether Indonesia "was bound, through *agency principles*, by the unauthorized acts of individual government officials." *Id.* (emphasis in original).[6] Judge Traxler, a member of the unanimous *Velasco* panel, wrote the *Yousuf* opinion; hence there is no basis for Rivera Rondón's contention that *Yousuf* ignored the "role the individual-immunity issue played" in *Velasco*. Appellant Br. at 20. *Velasco* did not settle the question of whether Congress intended to confer foreign sovereign immunity on an individual foreign official. But the *Yousuf* Court did, holding that the FSIA does not apply to individuals like Rivera Rondón. Therefore, Rivera Rondón's alleged "split among panels within this Circuit as to whether the FSIA applies to individuals"[7] is illusory.

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[6] Rivera Rondón insists that a finding that the FSIA applies to individuals was at the very least essential to the holding in *Velasco*. Appellant Br. at 21. That is incorrect. Velasco sued two Indonesian officials, Hartomo and Mawardi, in their official capacities, as opposed to their individual capacities. The Court reasoned that because there was no commercial activity of *a foreign state* that divested Indonesia of sovereign immunity, and Velasco did not sue defendants in their individual capacities, the district court properly dismissed the claims. In this case, Rivera Rondón was sued in his individual capacity, albeit for actions committed under color of law.

[7] *Id.*

Moreover, Rivera Rondón misapplies the standard in *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004) (*en banc*). There, the Court determined that a panel should follow the earlier of two conflicting panel opinions only when the conflicts are *irreconcilable.* An irreconcilable conflict occurs only when "panel opinions are in direct conflict on a given issue." *Id*. at 333. This Court has narrowly interpreted what constitutes an irreconcilable conflict between panel decisions. *See Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 652 (4th Cir. 2005) (differing definitions of "privity" between panel opinions not an irreconcilable conflict where context of underlying case was different); *Am. Arms Int. v. Herbert*, 563 F.3d 78, 83-85 (4th Cir. 2009) (no irreconcilable conflict in variation of panel definitions of "willful" standard, where the facts, outcomes, and propositions of the two panel decisions were nearly identical). As Lizarbe and Baldeón have shown, there is no conflict between *Velasco* and *Yousuf*, much less an irreconcilable conflict.

Furthermore, it is not appropriate for a panel of this Court to overturn *Yousuf*; that is a task best left for *en banc* consideration. *United States v. Brooks*, 524 F.3d 549, 559 (4th Cir. 2008) ("[A]s our court has consistently recognized, 'a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or

this court sitting *en banc* can do that.'") This is true especially because the *Yousuf* Court was unanimous on the essential holding that individuals may not claim immunity under the FSIA, and the defendant in that action requested and was denied *en banc* review by the Fourth Circuit.

Accordingly, the district court properly applied *Yousuf*'s holding that "based on the language and structure of the statute . . . the FSIA does not apply to individual foreign government agents" and held that Rivera Rondón cannot claim FSIA immunity from suit. Mem. Op. at 13-14, Apx 234-35 (citing *Yousuf*, 552 F.3d at 381).

2. The FSIA does not shield former foreign government officials from suit.

Relying on *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the *Yousuf* Court concluded that a defendant's status as an "agency or instrumentality of a foreign state" must be determined at the time the complaint is filed rather than when the underlying conduct occurred. Even if an individual foreign official could be an "agency or instrumentality under the FSIA," the FSIA does not shield *former* government officials from suit. 552 F.3d at 383. As the Court explained, the FSIA was meant to give foreign states "some *present* protection from the inconvenience of suit as a gesture of comity," not to immunize an individual permanently based on

official status at the time of the conduct on which the claim is based. *Id.* (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)) (emphasis in original).

Rivera Rondón does not dispute the fact that he ceased to be an officer of the Peruvian military some fifteen years before the commencement of this action. Compl. ¶ 7, Apx 12. The district court correctly followed *Yousuf* in holding that even if the FSIA applies to individuals, it does not apply to one who was not "functioning in that capacity at the time suit was filed." Mem. Op. at 14, Apx 235 (citing *Yousuf*, 552 F.3d at 383); *see also Dole Food*, 538 U.S. at 478.

In *Dole Food*, the Supreme Court held that immunity under the FSIA is available only to defendants who are agents or instrumentalities of a foreign state *at the time of suit.* The Court looked to the plain text of § 1603(b) of the FSIA and held that its use of the present tense requires that instrumentality status "be determined at the time suit is filed." *Id.* at 478. The Court also relied on the "longstanding principle that 'the jurisdiction of the Court depends on the state of things at the time of the action brought. '" *Id.* (internal citations omitted).

Thus, "the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a

defendant's *conduct* before the suit." *Altmann*, 541 U.S. at 708 (Breyer, J., concurring) (citing *Ex-King Farouk of Egypt v. Christian Dior*, 84 Clunet 717, 24 I.L.R. 228, 229 (CA Paris 1957) ("Thus King Farouk's sovereign status permitted him to ignore Christian Dior's payment demand for 11 'frocks and coats' bought (while king) for his wife; but once the king lost his royal status, Christian Dior could sue and collect (for clothes sold *before* the abdication)") (emphasis in original)); *see also Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61, 64 (2d Cir. 2004) (applying *Dole Food* and *Altmann* to hold that the FSIA immunized a railroad owned by the French government at the time of suit, even though it had been privately owned at the time of the allegedly wrongful conduct). Because Rivera Rondón was not an official of Peru at the time of the filing of this suit, FSIA immunity is unavailable to him.

Rivera Rondón's attempt to circumvent this Court's holding in *Yousuf*, based on an inconsistent district court decision from another circuit, *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005), and on dicta in *Belhas v. Ya'alon*, 515 F.3d 1279, 1285-1286 (D.C. Cir. 2008), makes no sense.[8]

[8] Appellant also relies on *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190 (3d Cir. 2003), but this case has nothing to do with the applicability of the FSIA to former government officials. *USX Corp.* addressed the application of

In re Terrorist Attacks ignored the principle in *Dole Food*, 538 U.S. at 478, that the Court's jurisdiction depends on the state of things at the time the action was brought. In addition, the district court in that case failed to address the substantial body of judicial decisions holding *former* foreign government officials liable for acts of torture and extrajudicial killing. *See, e.g., Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (former Paraguayan police official liable for torture); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (former Guatemalan general held liable for torture and rape of American nun); *Cabello Barrueto v. Fernandez-Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148 (11th Cir. 2005) (former Chilean army officer found liable for torture and extrajudicial killing); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (two former El Salvadoran generals liable for torture); *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005) (former Haitian army colonel held liable for torture and summary execution).

Furthermore, the *Yousuf* Court's application of *Dole Food* to decide that FSIA immunity does not apply to former officials of a foreign state is

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§ 1603(b) to an insurance company, not to former officials. *Id.* at 204. Moreover, the temporal question before the *USX Corp.* court was whether a defective jurisdictional claim could be cured at the trial or appellate levels. *Id.*

fully consistent with the principles of comity that underlie sovereign immunity. The purpose of foreign sovereign immunity is to protect international relations between the United States and foreign sovereigns by providing foreign states some present protection from the inconvenience of suit. *Yousuf*, 552 F.3d at 383 (citing *Altmann*, 541 U.S. at 696). As a principle of comity between acting governments, sovereign immunity is designed to protect current governments and their treasuries, not to guarantee former officials blanket immunity in perpetuity. *See Altmann*, 541 U.S. at 696 (noting that "the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships . . . .").

Rivera Rondón mischaracterizes the *Yousuf* analysis of *Dole Food* as dicta that is "not essential to the holding," reasoning that the holding is limited to the unavailability of FSIA immunity to individuals. Appellant Br. at 36. He is plainly incorrect.[9] The Court's reliance on *Dole Food* to decide

[9] In *Matar v. Dichter*, the court erroneously characterized the *Yousuf* Court's analysis of *Dole Food* as dicta. 563 F.3d 9, 13 n.5 (2d Cir. 2009). This characterization is particularly unpersuasive because the court provides no reasoning for its erroneous assertion that the holding in *Yousuf* is dicta.

that a former government official is not entitled to FSIA immunity falls squarely within the definition of an alternative holding: an independent and separate reason for a decision.

Rivera Rondón ignores the Supreme Court precedent recognizing alternative holdings as binding precedent, rather than as dicta,[10] as well as the decisions of this Court that have followed that precedent.[11] Instead, he contends the Court should apply *Karsten v. Kaiser Found. Health Plan*, 36 F.3d 8 (4th Cir. 1994), and its progeny. *Karsten* explained that where *procedural* considerations are sufficient for a holding, "any treatment *of the matter on its merits* would be nothing more than pure *dicta*." *Id.* at 11.

Moreover, the *Matar* court explicitly declined to decide the question of whether the FSIA applies to former officials or not. *Id*. at 13.

[10] The Supreme Court has long held that "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter* [*dicta*], but each is the judgment of the court and of equal validity with the other." *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 485-486 (1924) (internal quotation marks omitted); *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case *obiter dictum* that it is only one of two reasons for the same conclusion."); *MacDonald v. County of Yolo*, 477 U.S. 340, 346 (1986) ("since the Superior Court did not rest its holding on only one of its two stated reasons, it is appropriate to treat them as alternative bases of decision.").

[11] *United States v. Cook*, No. 99-6700, No. 99-6873, 1999 U.S. App. LEXIS 34248, at *6 (4th Cir. Dec. 29, 1999) ("Rulings on alternative bases are precedent rather than *dicta*"); *United States v. Fulks*, 454 F.3d 410, 435 (4th Cir. 2006) (citing *MacDonald v. County of Yolo*, 477 U.S. at 346 n.4, for the proposition that alternative holdings are not dicta).

Under *Karsten*, where a claim is *procedurally* barred, the court should decline to address the *merits* of the case.[12] *Yousuf* held that the immunity claim was procedurally barred on two alternative grounds and did not reach the merits of the case. *Karsten* is of no help to Rivera Rondón here.

In sum, because Rivera Rondón had long ceased to be an official in the Peruvian military when this action commenced, he is not entitled to protection under the FSIA.

3. Congress did not intend the FSIA to bar TVPA claims against former foreign officials responsible for gross human rights violations.

Rivera Rondón's proposed construction of the FSIA contradicts the Congressional intent behind the TVPA and would eviscerate the statute. He advocates recognizing immunity of former foreign officials in a broad class of cases where none of the narrow exceptions to the FSIA applies. The vast majority of the victims and survivors of atrocities, for whom Congress intended to offer redress under the TVPA, would be denied access to the courts if sovereign immunity were to extend to former foreign officials who commit crimes falling outside the scope of their legal authority.

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[12] *See Shafer v. Preston Mem. Hosp. Corp.*, 107 F.3d 274, 281 (4th Cir. 1997) (relying on *Karsten* to decline to reach the merits of the case given its procedurally-based holding); *Matthews v. Evatt*, 105 F.3d 907, 910 (4th Cir. 1997) (same).

Such a reading of the FSIA would violate two cardinal rules of statutory construction. First, as this Court stated in *Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1143 (4th Cir. 1990), "a court should, if possible, construe statutes harmoniously." The later statute should be given precedence over the earlier statue because it is the later expression of the legislature. *Id.* at n.4. Second, "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *S.C. Dept. of Health & Envtl. Control v. Commerce & Indus. Ins. Co.*, 372 F.3d 245, 258 (4th Cir. 2004). In the event of conflict or ambiguity, the more specific statute should be given precedence over a general one. *See, e.g., United States v. Roper*, 462 F.3d 336, 340 (4th Cir. 2006).

Congress enacted the TVPA in March 1992, 16 years after the FSIA. Because the later-enacted TVPA addresses a far narrower set of circumstances than the FSIA, the FSIA should not be read to preclude TVPA suits against former foreign government officials for acts falling within the TVPA's scope.

Moreover, the legislative history of the TVPA leaves no doubt that Congress did not intend for FSIA immunity to extend to former officials who tortured or killed under color of law. The principal aim of the TVPA was to codify the Second Circuit's decision in *Filártiga v. Peña-Irala*, 630

F.2d 876 (2d Cir. 1980) by providing an explicit statutory basis for suit against those *former* officials of foreign governments who had committed acts of torture and extrajudicial killing under color of law and who are subject to personal jurisdiction in our courts. The TVPA put torturers "on notice that they . . . may be sued under the bill if they seek the protection of our shores." 137 Cong. Rec. H11244 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli), Apx 364. Indeed, the Senate Report on the TVPA states that the FSIA provides no defense to an "an action taken under the TVPA against a former official" because "all states are officially opposed to torture and extrajudicial killing." S. Rep. No. 102-249 (1991), 1991 WL 258662, at *8, Apx 382 [hereinafter "S. Rep."]

In enacting the TVPA, Congress made it clear that former government officials are not entitled to FSIA immunity from suit for their involvement in torture and extrajudicial killing. *See* S. Rep. at *7-8, Apx 381-83; *see also* H.R. Rep. No. 102-367 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87-88, 1991 WL 255964, at *4, Apx 373 [hereinafter "H.R. Rep."] ("Only 'individuals,' not foreign states, can be sued under the bill."). Congress did not intend the TVPA to contravene the purpose of the FSIA, nor did it see the FSIA as a bar to suits under the TVPA:

> The legislation uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued

> under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the [FSIA] of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances. . . . *[T]he committee does not intend these immunities [sovereign, diplomatic, and head of state] to provide former officials with a defense to a lawsuit brought under this legislation. . . . [T]he FSIA should normally provide no defense to an action taken under the TVPA against a former official.*

S. Rep. at *7-8 (emphasis added), Apx 382; *see also* H.R. Rep. at *5, Apx 374 ("[S]overeign immunity would not generally be an available defense" to a claim brought under the TVPA.).

Congress took the view that torture and extrajudicial killing cannot be within the scope of a foreign official's lawful authority. S. Rep. at *8, Apx 382. This is because both crimes "violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law." *Id*. at *3, Apx 379.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court meticulously confirmed that the TVPA provided "a clear mandate . . . that establish[es] an unambiguous and modern basis for federal claims for torture and extrajudicial killing." *Id*. at 728 (internal quotation marks omitted).

Accepting Rivera Rondón's flawed interpretation of the FSIA would mean that in order to bring a case under the TVPA, one of the narrow

enumerated exceptions to the FSIA must apply. In this scenario, the vast majority of victims to whom Congress intended to offer redress would lose TVPA access to the courts.

The TVPA is limited to cases of torture and extrajudicial killing. 28 U.S.C. § 1350 note. Most of the FSIA exceptions—such as waiver,[13] commercial activity, enforcement of certain property rights, enforcement of arbitration agreements, enforcement of maritime liens, or foreclosure of mortgages—have no application at all. *See* 28 U.S.C. §§ 1605(a)(1), (a)(2), (a)(3), (a)(4) and (a)(6); §§ 1605(b)-(d). Similarly, the exception for actions "for personal injury or death, or damage to or loss of property, *occurring in the United States*," 28 U.S.C. § 1605(a)(5) (emphasis added), does not apply because Congress explicitly intended the TVPA to apply to conduct *outside* the United States. S. Rep. at *3-4, Apx 379. The exception to immunity for abuses committed by state sponsors of terrorism would be available only to a very limited number of potential plaintiffs, none of whom include victims

[13] Very few human rights cases have involved a waiver of immunity since such a waiver is unlikely absent regime change. *See, e.g., Paul v. Avril*, 812 F. Supp. 207, 210 (S.D. Fla. 1993) (Haiti's first democratically-elected government waived immunity for the former dictator Prosper Avril); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Trajano v. Marcos* (*In re Estate of Ferdinand Marcos, Human Rights Litigation*), 978 F.2d 493 (9th Cir. 1992) (successor government of Corazon Aquino formally waived immunity of the family of former Filipino President Marcos).

covered by the TVPA. 28 U.S.C. § 1605(a)(7).[14] If TVPA plaintiffs were permitted to sue former foreign officials only upon a showing that one of the enumerated exceptions to immunity under the FSIA applies, the TVPA would be rendered meaningless.

B. FSIA Immunity From Suit Does Not Extend to Actions That Exceed The Scope of Lawful, Official Authority.

This Court may affirm the district court's holding *without* reaching the question of whether (1) an individual, or (2) a former official who acted within his lawful, official authority, is entitled to FSIA immunity. Rivera Rondón erroneously argues that he is immune from suit under the FSIA because he purportedly acted within his lawful, official authority on behalf of a foreign state. Appellant Br. at 15. But Judge Messitte's factual findings establish that Rivera Rondón was not acting within the scope of his lawful, official authority during the Accomarca Massacre. Peru's unequivocal statement that Rivera Rondón's acts were unauthorized and illegal provides further support for the district court's holding that Rivera Rondón is not immune under the FSIA.

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[14] Only four governments are designated by the State Department as state sponsors of terrorism—Cuba, Iran, Sudan and Syria. *See* U.S. Department of State, *State Sponsors of Terrorism*, *available at* http://www.state.gov/s/ct/c14151.htm, Apx 391. Moreover, as noted above, Congress excluded claims against foreign states from the scope of the TVPA.

Even if the FSIA applied to individual foreign government officials, this Court has clearly stated that "[t]he FSIA . . . does *not* immunize an official who acts *beyond* the scope of his authority." *Velasco*, 370 F.3d at 399 (emphasis added). Rivera Rondón is not immune for the acts he committed that were illegal under Peruvian law. *See Chuidian*, 912 F.2d at 1106 (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)) ("'[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign action.'"). No immunity attaches under the FSIA for acts that could not have been legally authorized by the Peruvian government.[15]

Even courts that interpret the FSIA to apply to individuals have distinguished between acts taken in an official capacity, and acts "beyond the scope of…authority" for which there is no applicable immunity. *See*

[15] *See Trajano*, 978 F.2d at 498 (the acts of torture and the extrajudicial killing of Trajano's son "[could not] have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA"); *Hilao*, 25 F.3d at 1472 ("acts of torture, execution, and disappearance were clearly acts outside of [the defendant's] authority as President"); *Jungquist v. Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (finding that although the defendant might have been authorized to make payments, he could not have been authorized to make bribes).

Chuidian, 912 F.2d at 1106;[16] *Byrd v. Corporación Forestal e Indus. de Olancho S.A.*, 182 F.3d 380, 388-389 (5th Cir. 1999) ("The FSIA's protections cease, however, when the individual officer acts beyond his official capacity."). In *Jungquist v. Al Nahyan*, the D.C. Circuit offered a two-part analysis for the inquiry as to whether an act falls within an official's lawful authority: first, the court "focus[es] on the nature of the individual's alleged actions," and then it inquires "whether the [official] was authorized in his official capacity." 115 F.3d 1020, 1028 (D.C. Cir. 1997).

1. Rivera Rondón's actions violated Peruvian and international Law.

The district court found that Rivera Rondón's actions as alleged violated Peruvian and international law. Rivera Rondón's conduct exceeded the powers granted to him by his government and violated customary international law, and therefore, there is no immunity for those acts. *See Xuncax*, 886 F. Supp. at 175-76 (FSIA inapplicable because acts of torture, summary execution, arbitrary detention, disappearances and cruel, inhuman or degrading treatment "exceed anything that might be considered to have been lawfully within the scope of [defendant's] official authority").

[16] Rivera Rondón describes *Chuidian* as the "seminal case on the [FSIA] issue," Appellant Br. at 12, and urges this Court to adopt the reasoning in *Chuidian. Id.* at 26.

The Complaint alleges actions by Rivera Rondón that violated Peruvian law. *See* Ninaquispe Decl. ¶¶ 8-9, Apx 261-62. The district court astutely noted that even within the context of armed conflict against terrorists, "vigorous actions taken pursuant to an official or military policy of relentless pursuit of terrorists do *not* automatically equate to the massacre of women and children, including infants, or the sexual abuse of the women, all matters alleged in the Complaint." Mem. Op. at 14-15, Apx 235-36 (emphasis added). The district court also found that "[a]ll the acts complained of here are illegal under Peruvian law." *Id*. at 26, Apx 247.

Rivera Rondón's unauthorized acts also violated international law. The district court found that

> the acts alleged in the Complaint violate universally agreed upon legal principles, involving, as they do, acts of torture, extrajudicial killing, and crimes against humanity. Such acts, committed in violation of the norms of customary international law, are not deemed official acts for the purposes of the acts of state doctrine.

Id. at 25, Apx 246.[17] Acts that violate established norms of international law are outside the scope of Rivera Rondón's lawful authority. *Cabiri v. Assasie-*

[17] Though he asserted the defense of Act of State in his motion to dismiss, Rivera Rondón has not raised the issue for this interlocutory appeal. His FSIA argument fails for the same reason that the Act of State doctrine is futile here—Rivera Rondón cannot show that his actions were taken on behalf of Peru and were within the scope of his lawful, official authority where, as explained below, Peru explicitly says otherwise.

Gyimah, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (citing *Filártiga*, 630 F.2d at 890) ("the defendant did not argue—'nor could he' argue—that torture fell within the scope of his authority because no government asserts a right to torture"); *Todd v. Panjaitan*, No. 92-12255, 1994 WL 827111 (D. Mass. Oct. 26, 1994) (judgment for $14 million against an Indonesian general in suit by the mother of a man killed in a massacre by Indonesian troops in East Timor). The FSIA does not immunize defendants who commit severe human rights abuses in violation of international law. *Xuncax*, 886 F. Supp. at 175-76; *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination is "clearly contrary to the precepts of humanity as recognized in both national and international law" and thus cannot be within an official's "discretionary" authority).

The acts related to the Accomarca Massacre that Lizarbe and Baldeón have alleged against Rivera Rondón unquestionably violate well-established norms of international law. United States courts have long recognized torture to be such a violation. *Filártiga*, 630 F.2d at 890 (cited with approval in *Sosa*, 542 U.S. at 732). The same applies to extrajudicial killing. *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("*official* torture is prohibited by universally accepted norms of international law, and the Torture Victim Act confirms this holding and extends it to cover summary

execution") (emphasis in original). The allegations that Rivera Rondón committed war crimes and crimes against humanity similarly involve violations of established international law norms. *E.g., Cabello*, 402 F.3d at 1154; *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, *repub. at* 414 F.3d 233, 244 n.18 (2d Cir. 2003); *Kadic*, 70 F.3d at 232. Rivera Rondón, therefore, is not entitled to immunity in this suit. The FSIA does not shield gross human rights violators like Rivera Rondón from suit in our courts.

2. Peru disavows any immunity for Rivera Rondón.

The district court's holding was further supported by the Peruvian government's vigorous opposition to his claim of sovereign immunity. Mem. Op. at 14, 26, Apx 235, 247. Having learned that Rivera Rondón was asserting immunity under the FSIA by arguing that his participation in the Accomarca Massacre was done "in his official capacity on behalf of a foreign government as a member of the Peruvian army," the Government of Peru, through its Ambassador to the United States, wrote to the district court directly, stating "it is an untruthful statement that the actions of Mr. Rivera Rondón were the result of directives or regulations coming from the Government." *Id*. at 45.

The district court properly considered this letter,[18] finding that it further supported the conclusion that Rivera Rondón could not avail himself of FSIA immunity. Mem. Op. at 14, Apx 235. The district court also found that the letter from Peru denied the alleged acts were Peruvian acts of state. *Id*. at 26, Apx 247. Because foreign sovereign immunity attaches to foreign states, the district court correctly held that Peru's express rejection of Rivera Rondón's claim that the government of Peru authorized his acts in Accomarca precluded dismissal of the case on the basis of sovereign immunity. *Cf. In Re Grand Jury Proceedings*, 817 F.2d 1108, 1110-11 (4th Cir. 1987) (upholding waiver by Philippines of any immunity possessed by Ferdinand Marcos). Rivera Rondón cites to no authority for the proposition that foreign sovereign immunity should be granted to a former official even

[18] Rivera Rondón protests the district court's consideration of the letter by the Peruvian Ambassador, but relies on two cases in which the courts gave great weight to just such a letter. *See* Appellant Br. at 32, 33. In *Belhas v. Ya'alon*, 466 F. Supp. 2d 127 (D.D.C. 2006), and *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), a letter from the Israeli Ambassador *supported* the defendants' claims that they acted within lawful, official authority. In neither of these cases was the foreign government a party to the litigation and in each case the Ambassador's letter was made part of the record and was relied upon by the court in resolving the factual dispute over the defendants' claim of foreign sovereign immunity. *See id*. and Apx 219-21. Not only has Rivera Rondón failed to obtain a statement from Peru supporting his claim of immunity, but Peru has taken affirmative steps to inform the district court that Rivera Rondón was not acting within the scope of his lawful, official authority.

when *his own government* asserts that the official's actions were outside his lawful authority.

Rivera Rondón's actions were not sovereign conduct under the FSIA. *See Velasco*, 370 F.3d at 402; *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) ("If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state'" for FSIA purposes). Moreover, any recovery by Lizarbe and Baldeón will be satisfied from Rivera Rondón's personal assets, not from Peru. Because the Peruvian government did not authorize Rivera Rondón's actions alleged in the complaint, he cannot claim the protection of the FSIA.

Rivera Rondón's reliance on *Belhas* and *Matar* is misguided. Appellant Br. at 32 ("*Belhas* is virtually identical to the present case"); *Id.* at 33 ("The exact same [as in *Matar*] is true here"). In both cases, however, Israel claimed that the suits were, in fact, suits against the State of Israel, and submitted a letter to the court supporting immunity. *Belhas*, 466 F. Supp. 2d at 129; *Matar*, 500 F. Supp. 2d at 287; *see supra* n.18. Additionally, in *Matar*, the United States filed a Statement of Interest in support of sovereign immunity. 500 F. Supp. 2d at 287. This stands in stark contrast to this case, in which the United States has not filed a Statement of Interest and Peru has

submitted a letter to the district court flatly rejecting Rivera Rondón's claim that his actions during the Accomarca Massacre were taken within his lawful, official authority.

None of the other cases on which Rivera Rondón relies provide any support for his claim that he acted within the scope of his official authority.[19] Appellant Br. at 34. Those cases are clearly distinguishable because they did not involve allegations of violations of national or international law.

Here Lizarbe and Baldeón have sufficiently pled that the actions of Rivera Rondón included violations of Peruvian and international law that could not have been undertaken within the scope of his lawful, official authority.

3. Rivera Rondón is not entitled to FSIA immunity for actions taken under "color of law" that exceeded the scope of his lawful, official authority.

The TVPA's "color of law" requirement is entirely separate from the issue of whether Rivera Rondón acted outside the scope of his lawful

[19] *See Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283, at *5 (E.D.N.Y. Feb. 13, 1996) (eye injury did not rise to level of violation of international law); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 670 (D.C. Cir. 1996) (no alleged torture under TVPA or ATS); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 370 n.3 (S.D.N.Y. 1996) (claim to private property, with no allegations of violation of international law).

authority.[20] Lizarbe and Baldeón's allegation that Rivera Rondón acted under "color of law," a required element of a TVPA claim, addresses the *role* in which the defendant acted, e.g. soldier or policeman, while the analysis of the scope of lawful, official authority looks to the *actions taken in that role* and whether they conform to the legal, delegated authority of the state.

Rivera Rondón mistakenly relies on various allegations in the Complaint, which establish that he acted under color of law, to argue that his actions were taken under his official authority as a Peruvian military officer, Appellant Br. at 26-35, and that he simply "followed the orders he was given," *id.* at 31.[21] These allegations only relate to actions taken by Rivera

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[20] Contrary to Rivera Rondón's suggestion, this action is *not* an attempt to make an end-run around the immunity of a foreign sovereign by merely suing one of its agents who acted within the scope of his lawful, official authority, which was the Ninth Circuit's concern in *Chuidian*. *See* 912 F.2d at 1102 (expressing concern that allowing unrestricted suits against individual foreign officials *acting* in their official capacity would amount to blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the FSIA barred them from doing directly).

[21] This "superior orders" defense to crimes against humanity, which came to be known as the "Nuremberg defense," has long been repudiated as contrary to international law. *See* International Law Commission, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle IV, *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf, Apx 392; *see also* Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, art. 7(4), *available at*

Rondón while cloaked under the color of law in his military position. They do not support Rivera Rondón's contentions that he acted within his lawful, official authority.

If there was any merit to Rivera Rondón's purposeful and persistent conflation of "color of law" and "official capacity," then every complaint that alleges actions by a foreign official taken under "color of law"—a required element of a TVPA cause of action—would *per se* concede that the defendant acted within the scope of his lawful, official authority. Clearly, that is not the case.

The "color of law" requirement of the TVPA merely reflects that Congress intended to exclude "purely private criminal acts by individuals or

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http://www.icls.de/dokumente/icty_statut.pdf, Apx 395; Statute of the International Tribunal for Rwanda, Nov. 8, 1994, art. 6(4), *available at* http://www.icls.de/dokumente/ictr_statut.pdf, Apx 414; Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, § 5, art. VIII, *available at* http://www.oas.org/juridico/English/Treaties/a-60.html, Apx 405.

This defense was also rejected during the military court-martial of Lieutenant William L. Calley, Jr., the principal military officer prosecuted for the My Lai Massacre. *Calley v. Calloway*, 519 F.2d 184, 193 (5th Cir. 1975); *see also Cabello Barrueto*, 205 F. Supp. 2d 1325, 1332-33 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148 (11th Cir. 2005) ("Article 2(3) of the Torture Convention explicitly provides that, 'an order from a superior official or a public authority may not be invoked as a justification for torture.'") (citing S. Rep. at *9, Apx 383).

nongovernmental organizations" from coverage under the statute. S. Rep. at *8, Apx 383; *see Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998) (quoting H.R. Rep. at *5, Apx 374) ("The [TVPA] does not attempt to deal with torture or killing by purely private groups.").

Rivera Rondón erroneously relies on a line of cases with vastly different factual and procedural circumstances from those present here to support his claim that his actions were taken in an official capacity, and not for personal reasons or motivation. Appellant Br. at 32-33. In *Matar* and *Belhas*, the courts found that FSIA immunity applied to a foreign official without analyzing whether the defendant acted *within the scope of his legal authority*.

Congress directed the courts to look to interpretations of 42 U.S.C. § 1983 when construing "color of law" under the TVPA. H.R. Rep. at *5, Apx 374; S. Rep. at *8-9, Apx 383. By doing so, Congress evinced the legislative intent that our courts treat certain actions—which in most cases could only be committed by government officials—as beyond the powers granted by any sovereign to its officials; hence sovereign immunity does not shield government officials from answering for those actions. *See Williams v. United States*, 341 U.S. 97, 99 (1951) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) ("'Misuse of power, possessed by virtue of state

law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'").

In *Pugh v. Socialist People's Libyan Arab Jamahiriya*, No. 02-02026, 2006 U.S. Dist. LEXIS 58033 (D.D.C. May 11, 2006), *aff'd per curiam*, No. 06-7167, 2007 U.S. App. LEXIS 7830 (D.C. Cir. April 3, 2007), the court refused to dismiss claims against high-ranking Libyan government officials sued in their personal capacity for their roles in the bombing of a commercial airliner, killing all 170 people on board. The district court found that the officials, acting under "color of law," could be held personally liable for actions in violation of international law taken "for the furtherance of the Libyan state." 2006 U.S. Dist. LEXIS 58033, at *21 ("The Supreme Court . . . has recognized that government officials may [be] liable 'for damages in their personal capacities, however, even when the conduct in question relates to their official duties.'") (citation omitted). In affirming, the D.C. Circuit Court of Appeals noted, "[t]he merits of the [plaintiffs'] positions are so clear as to warrant summary action." 2007 U.S. App. LEXIS 7830 at *3. Recently, the district court found the individual Libyan defendants liable and awarded substantial damages against them for wrongful death and pain and suffering. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216 (D.D.C. 2008). The *Pugh* case

demonstrates how Rivera Rondón's actions, taken under color of law, in the course of performing his official duties, nevertheless exceeded his legal, official authority and therefore are not shielded by the FSIA.

For all of these reasons, Rivera Rondón is not immune from suit under the FSIA.

II. THIS COURT SHOULD NOT REVIEW RIVERA RONDÓN'S TWO ALTERNATIVE DEFENSES.

This Court's interlocutory review of Rivera Rondón's two other issues, equitable tolling of the statute of limitations and exhaustion of local remedies, is limited to the exercise of its discretionary, pendent appellate jurisdiction. *Clem v. Corbeau,* 284 F.3d 543, 549 n.2 (4th Cir. 2002). This Court should decline pendent appellate jurisdiction over those issues because they are neither inextricably intertwined with, nor necessary to ensure meaningful review of, his FSIA immunity claim. *Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994) (holding that the collateral order doctrine gives Fourth Circuit jurisdiction to hear an interlocutory appeal for a FSIA claim, but the district court's refusal to certify the additional claims for appeal informed the Court's choice not to exercise pendent jurisdiction).

Pendent appellate jurisdiction is a limited and narrow exception to the final judgment rule and clearly should not be applied in this case. The

Supreme Court has instructed that pendent jurisdiction is only available (1) when a nonappealable decision is "inextricably intertwined" with a decision that is the proper subject of an immediate appeal or (2) when review of a jurisdictionally insufficient issue is "necessary to ensure meaningful review" of an immediately appealable issue. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995). This Court, in accordance with *Swint*, has consistently limited its application of pendent appellate jurisdiction to these two circumstances.[22]

This is not a case where the additional issues overlap with the question of immunity. *Cf. McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007) (exercising pendent appellate jurisdiction over political question claim that overlapped in significant part with sovereign immunity and where both legal issues "operate[] to insulate sensitive military judgments from judicial review").

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[22] *See, e.g.*, *Rux*, 461 F.3d at 476 (declining pendent appellate jurisdiction because standing issue did not need to be resolved for resolution of FSIA issue and involved a distinct legal concept that does not affect analysis of FSIA issue); *Antrican v. Odom*, 290 F.3d 178, 191 (4th Cir. 2002) (declining pendent appellate jurisdiction because the jurisdictional questions raised by the defendants were neither "inextricably intertwined" with nor "necessary to ensure meaningful review of the . . . immunity question") (citations omitted); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996) (declining pendent appellate jurisdiction where state-law causes of action were found to be neither "inextricably intertwined with" nor "necessary to review" a qualified immunity claim).

Rivera Rondón makes *no* effort to satisfy either of the two requirements for pendent appellate jurisdiction. Instead, he simply argues for this Court to exercise pendent appellate jurisdiction because "the exhaustion and limitations issues . . . present clear, alternative grounds for dismissal." Appellate Br. at 45. If this were the standard, every interlocutory appeal under the FSIA would entail the review of numerous legal defenses that are more appropriately reserved for appellate review after the district court has entered a final judgment.

A. Equitable Tolling of the Statute of Limitations and Exhaustion of Remedies Are Issues Neither Inextricably Intertwined with Nor Necessary for Review of the FSIA Immunity Issue Presented Here.

In *Rux*, this Court found that the foreign state's defenses based on plaintiff's lack of standing were not sufficiently intertwined with its FSIA immunity claim to justify the exercise of pendent jurisdiction. 461 F.3d at 475-76. In explaining the controlling standard, this Court said that standing and FSIA immunity involve "distinct legal concept[s] that do[] not affect the analysis of the other." *Id.* The resolution of Sudan's FSIA argument in that case, "neither required [this Court] first to decide nor necessarily decides the

issue of standing." *Id.* As a result, there was no basis for the court to exercise pendent appellate jurisdiction, and it did not do so.[23]

Similarly, in the instant case, neither exhaustion of local remedies nor the statute of limitations defense is so inextricably intertwined with, or necessary to ensure meaningful review of, Rivera Rondón's FSIA immunity as to warrant their consideration. These affirmative defenses, like a failure to state a claim argument, are "manifestly separable from the issue of sovereign immunity." *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762 (2d Cir. 1998) (declining pendent appellate jurisdiction in a FSIA case over a failure to state a claim argument; such a claim warrants pendent appellate jurisdiction only if it asserts that a "necessary ground for deprivation of immunity under the FSIA were lacking"); *Antrican v. Odom*, 290 F.3d at 191 (declining pendent appellate jurisdiction over standing and failure to state a claim arguments).

The core legal questions raised in this appeal are whether an individual, a former government official, or an official who acts outside the scope of his legal, official authority is entitled to immunity from suit under the FSIA. The core factual question is whether the district court properly

[23] In *Rux*, this Court also declined to exercise pendent appellate jurisdiction over the defense of improper venue, stating that it "discern[ed] no reason to do so." *Id.* at 476.

found that Rivera Rondón was *not* acting within the scope of his official authority based on the allegations of his participation in the Massacre and Peru's letter stating that he was not acting within his legal authority. Neither the equitable tolling/statute of limitations issue, nor the exhaustion of local remedies defense share either of these core legal and factual questions. They are not inextricably intertwined with the immunity issue and their resolution will not be determinative in resolving the FSIA appeal. As this Court made clear in *Rux*, in rejecting pendent jurisdiction over a standing issue, "the fact that the Plaintiff's case might eventually succumb to a dispositive defect, such as lack of standing, does not alter the concrete nature of the [FSIA claim] or the propriety of our ruling." 461 F.3d at 476.

Courts should exercise pendent appellate jurisdiction only under the strict standard described above; a more lenient rule "would encourage parties to parlay . . . collateral orders into multi-issue interlocutory appeal tickets." *Swint*, 514 U.S. at 49-50; *see also Rux*, 461 F.3d at 475 (stating that pendent appellate jurisdiction "is an exception of limited and narrow application driven by considerations of need, rather than of efficiency").

Accordingly, this Court should find no basis to exercise pendent appellate jurisdiction over Rivera Rondón's two alternative defenses.

III. THE STATUTE OF LIMITATIONS MUST BE EQUITABLY TOLLED FROM 1985 TO 2001, WHEN LIZARBE AND BALDEÓN COULD NOT PURSUE THEIR RIGHTS.

Even if this Court were to exercise pendent jurisdiction over the interlocutory appeal from the district court's ruling on the equitable tolling of the statute of limitations, it should find that the district court properly applied the doctrine in this extraordinary case. The application of equitable tolling here is largely dependent on an analysis of the alleged facts and circumstances in Peru from the date of the Accomarca Massacre until 2001. In his motion to dismiss, and now in his interlocutory appeal, Rivera Rondón urges rejection of equitable tolling based on his own view that judicial relief was available to Lizarbe and Baldeón more than 10 years prior to the commencement of this action. This argument impermissibly challenges the validity, rather than the sufficiency, of factual allegations detailed in the Complaint.

Throughout the 1980s and 1990s in Peru, as the Complaint alleges, there were widespread and systematic acts of retaliation, torture, summary execution, and other human rights abuses directed against innocent civilians. Lizarbe and Baldeón, as survivors of the Accomarca Massacre, lived in fear for their lives. They had no reasonable opportunity to pursue their claims during the civil war and repressive political period in Peru from 1985 into

2000. Lizarbe and Baldeón could not have safely instituted legal proceedings in the United States against Rivera Rondón or other members of the Peruvian military until the removal of Fujimori as president of Peru in November 2000. Compl. ¶ 81, Apx 26. Prior to that time, Lizarbe and Baldeón feared reprisals against themselves and members of their families residing in Peru. That served as an insurmountable deterrent to legal action and to conducting an investigation in Peru in support of such a case. *Id.* ¶ 89, Apx 28.

The district court, relying on this Court's decision in *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (*en banc*), followed the admonition to apply equitable tolling sparingly and in rare instances. Mem. Op. at 8-9, Apx 229-30. The district court based its ruling on a factual analysis of Lizarbe and Baldeón's well-pleaded allegations regarding the unremittingly hostile circumstances in Peru that precluded them from filing this lawsuit until the year 2000. Mem. Op. at 12, Apx 233.

Equitable tolling delays the running of the limitations clock in those cases where, as here, "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." *Rouse*, 339 F.3d at 246; *accord, Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law

that limitations periods are customarily subject to equitable tolling . . . unless tolling would be inconsistent with the text of the relevant statute") (internal quotation marks omitted).

The legislative history leading to the enactment of the TVPA reveals that the Senate and House committees recognized the critical importance of equitable tolling. S. Rep. at *10-11, Apx 384-85; H.R. Rep. at *5, Apx 374. Not surprisingly, in the years following passage of the TVPA, courts have routinely invoked equitable tolling in circumstances where victims had no reasonable opportunity to pursue ATS or TVPA claims as a consequence of civil war, violence, imprisonment, repressive and brutal acts against society, and refusal by courts or prosecutors to bring criminals to justice. *See, e.g., Jean,* 431 F.3d at 780 ("We note that every court that has considered the question of whether a civil war and a repressive authoritarian regime constitute 'extraordinary circumstances' which toll the statutes of limitations of [ATS] and TVPA has answered in the affirmative.") (citing cases).

Rivera Rondón asks this Court to reject equitable tolling without bringing to the Court's attention the numerous ATS and TVPA cases that undermine his position. *E.g., Arce,* 434 F.3d at 1263-64 (affirming application of equitable tolling from 1979 to 1992 based on "abductions, torture, and murder by the military . . . [and] a judiciary too meek to stand

against the [Salvadoran] regime"); *Cabello v. Fernández-Larios,* 402 F.3d 1148, 1156 (11th Cir. 2005) (tolling limitations period for 17 years, from 1973 to 1990); *Hilao,* 103 F.3d at 773 ("Any action against Marcos for torture, 'disappearance,' or summary execution was tolled [from 1972 to 1986] during the time Marcos was president."); *Chavez v. Carranza,* 407 F. Supp. 2d 925, 929 (W.D. Tenn. 2004) (tolling from 1979 to 1994 where "[p]laintiffs claim they reasonably feared reprisal against themselves and their family members in El Salvador if they complained about the murder, torture and rape that occurred during this civil war"); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1147 (E.D. Cal. 2004) (applying equitable tolling from 1980 to 1994 where "any person who leveled allegations against active or former members of the military risked reprisal, including death"). Rivera Rondón has asked this Court to reject equitable tolling without any explanation as to why these cases are not persuasive authority here.

Rivera Rondón relies on a single, inapposite ruling under the ATS, *Van Tu v. Koster,* 364 F.3d 1196 (10th Cir. 2004). In that case, survivors of the My Lai Massacre in Vietnam brought *Bivens* and ATS actions against former U.S. soldiers, including Lt. William Calley. *Id.* at 1197. The plaintiffs urged equitable tolling of the statute of limitations for 32 years based on the Vietnam War (which ended in 1975) and because they could

neither travel to the United States nor afford the cost of litigation here. *Id.* at 1192-1200. The plaintiffs made *no* allegations of circumstances that placed them in fear for their lives if they pursued their rights, or that otherwise prevented them from commencing litigation decades later. Because the circumstances present here are readily distinguishable, the rejection of equitable tolling in *Van Tu* provides no conceivable basis for this Court to make a similar determination in this case.

A. Lizarbe and Baldeón's Fear of Retribution, Persecution and Death Justifies Equitable Tolling.

The district court was required to accept the facts pled in the Complaint as true for the purposes of a motion to dismiss. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). The allegations of the Complaint provide compelling support for the equitable tolling of plaintiffs' claims from 1985 through November 2000, when the presidency of Fujimori ended.

Immediately after the Accomarca Massacre, survivors who witnessed the actions of the unit led by Rivera Rondón were murdered brutally. Compl. ¶¶ 68, 70, Apx 23.

Between 1985 and 1990, the Peruvian Army "abducted, tortured and disappeared suspected 'subversives' and murdered civilians in military operations," including abuses throughout the Andean region where Lizarbe

and Baldeón resided. Compl. ¶¶ 35, 44-47, 70, 78, 82, Apx 16, 19, 23, 26, 27.

In 1989, after the Accomarca Massacre had become a matter of public knowledge, Rivera Rondón was promoted to Captain in the Peruvian Army. Compl. ¶ 83, Apx 27.

Fujimori assumed office in July 1990, and widespread human rights abuses against Peruvian civilians continued during his presidency. Compl. ¶¶ 84-88, Apx 27-28.

The Peruvian Congress was shut down by Fujimori in 1992, the judiciary was purged, and the constitution suspended. Compl. ¶ 84, Apx 27.

During this time, the government denied virtually all due process protections through "anti-terrorism" laws that placed enormous power in the hands of the military and intelligence services. *Id*.

In 1991 and 1992, "death squads" committed horrific crimes, including atrocities known as the Barrios Altos Massacre and the La Cantuta Massacre. Compl. ¶¶ 85-86, Apx 27-28.

Officials in the Fujimori government, including the head of the National Intelligence Service, ordered the abduction and torture of innocent civilians, causing many to "disappear." Compl. ¶¶ 84-86, 88, Apx 27-28.

In 1995, the Fujimori government granted amnesty to members of the military and police forces who, going back to 1980, had committed atrocities in the name of "fighting terrorism." Compl. ¶ 87, Apx 28. This law subsequently was declared invalid in 2001, when Fujimori's government was no longer in power.[24] *Id*. ¶ 99, Apx 30.

During this entire period, Lizarbe and Baldeón reasonably feared for their lives and the lives of their loved ones because of those conditions. Compl. ¶ 81, Apx 26.

As pled in the Complaint, therefore, Lizarbe and Baldeón could not pursue any claim against Rivera Rondón without fear for their own physical safety and that of their families, and for those who might assist in the investigation or prosecution of any such claim. This is precisely the set of circumstances that led the 11th Circuit to hold, in *Jean v. Dorélien*, that

> [l]itigation will often not be possible until there has been a regime change in the plaintiff's country of origin, after which the plaintiff can investigate and compile evidence without fear of reprisals against him, his family and witnesses.

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[24] After years in exile, Fujimori was extradited to Peru to stand trial for these and other atrocities committed by his government, and he was convicted earlier this year. *See* Simon Romero, *Peru's Ex-President Convicted of Rights Abuses*, N.Y. Times, April 7, 2009, *available at* http://www.nytimes.com/2009/04/08/world/americas/08fujimori.html?_r=1&scp=2&sq=fujimori&st=cse.

431 F.3d at 780. The assassination of witnesses, purging of the judiciary, suspension of the constitution, denial of due process protections, and continuing torture and murder of the civilian population were designed to chill critics and intimidate any Peruvian citizen who would accuse the government or military of war crimes or inhumane treatment. Equitable tolling is plainly warranted under such extraordinary circumstances. *Arce,* 434 F.3d at 1262 (tolling granted for extraordinary circumstances involving witness intimidation, suppression of evidence, commission of additional human rights abuses against those speaking out against regime).

B. Between 1985 and the Early 1990s, Rivera Rondón Was Not Present in the United States and Lizarbe and Baldeón Were Too Young to Assert a Claim.

The limitations period between 1985 and the early 1990s should be tolled for two additional reasons. First, as alleged in the Complaint, Rivera Rondón did not enter the United States until 1992 or 1993, *Compl.* ¶ 7, Apx 12, and only then were United States courts in a position to exercise jurisdiction in claims brought against him. The statute should thus be tolled during the period prior to his arrival in the United States, as Congress intended when it enacted the TVPA. *See Arce,* 434 F.3d at 1262 ("Congress clearly intends that courts toll the statute of limitations so long as the defendants remain outside the reach of the United States courts") (citing S.

Rep. No. at *10-11, Apx 384-85, stating that the "statute of limitations should be tolled during the time the defendant was absent from the United States").

Second, Lizarbe and Baldeón were 12 years old at the time of the Accomarca Massacre, Compl. ¶¶ 8, 10, Apx 12-13, and remained minor children until 1991. It would be grossly unfair, and contrary to the intent of Congress under the TVPA, for the statute of limitations to start before they attained the age of majority. *See* S. Rep. at *11 n.28, Apx 385 (listing "infancy" of the plaintiff among factors to be considered for purposes of equitable tolling).

C. Rivera Rondón's Additional Arguments Impermissibly Rely on Facts He Alleges That Are Contradicted By the Complaint.

Rivera Rondón cites to unpersuasive authority and seizes upon various allegations in the Complaint—irrelevant to the tolling allegations—to argue that Lizarbe and Baldeón should have been able to pursue claims much earlier because certain parts of the Peruvian government attempted a basic investigation of the Accomarca Massacre in 1985 and because Lizarbe and Baldeón knew the identity of Rivera Rondón. Appellant Br. at 52-54.

Rivera Rondón improperly relies on published news accounts to argue that there was no bar to investigating or filing the present claim. *Id*. at 53,

n.5. The gist of this argument is that investigative efforts were made by certain organs of government in 1985 and 1986, thus casting doubt on the validity of Lizarbe and Baldeón's allegations that they had no reasonable means of seeking redress. As a matter of logic, it simply does not follow that Lizarbe and Baldeón were free to protect their interests without fear of retribution merely because certain official bodies in Peru began making inquiries. The opportunities open to Peruvian citizens with well-founded fear of acts of extreme violence and intimidation, in a region the military targeted for such abuses,[25] cannot be equated to those available to government officials initiating inquiries in Lima. Moreover, Lizarbe and Baldeón were minor children during the time when the Peruvian Senate commenced its investigation of the Accomarca Massacre. Further, the events after the preliminary Senate investigation demonstrate the futility of even that effort. As the Complaint alleges in detail, grave human rights abuses continued, and additional constitutional protections were dissolved.

Rivera Rondón mistakenly dates the Fujimori presidency in Peru, which Lizarbe and Baldeón did *not* place in the mid-to-late 1980's. Appellant Br. at 52. He also makes the ludicrous and unfounded assertion that "[t]here was no bar to investigating or filing the present claim [from the

[25] *See, e.g.*, Compl. ¶¶ 8, 10, 35, 37-38, 82, Apx 12, 13, 16, 17, 27.

mid-1980's]." *Id*. Rivera Rondón's argument is that this Court should conclude solely on the basis of his counsel's contentions that Lizarbe and Baldeón, who were *12 years old* at the time of the Accomarca Massacre, could have determined who killed their mothers and siblings while they were hiding nearby. Even assuming that Lizarbe and Baldeón knew exactly who Rivera Rondón was, the allegations of the Complaint establish that they could have done nothing with this information until November 2000 without putting themselves and their remaining family members in grave danger. And until Peru repealed its amnesty law, there was no recourse under Peruvian law.

In sum, Rivera Rondón's equitable tolling argument conspicuously avoids dealing with the relevant ATS/TVPA case law and disregards facts which must be accepted as true at this stage of the proceedings. Accordingly, the district court's denial of the motion to dismiss on statute of limitations grounds should not be disturbed.

IV. RIVERA RONDÓN'S EXHAUSTION OF LOCAL REMEDIES ARGUMENT IS NOT RIPE FOR REVIEW.

Even if this Court exercises pendent jurisdiction over the interlocutory appeal of the issue of exhaustion of remedies under the TVPA, this Court should find that the district court did not err in finding that Lizarbe and Baldeón had exhausted available and adequate remedies as required by the

TVPA. The TVPA only requires plaintiffs to exhaust remedies in the country where the abuses occurred if those remedies are proven to be "adequate and available." 28 U.S.C. § 1350 note. The exhaustion requirement under the TVPA "was not intended to create a prohibitively stringent condition precedent to recovery under the statute." *Xuncax*, 886 F. Supp. at 178. Congressional intent regarding the exhaustion requirement is set forth in the TVPA's legislative history:

> [T]orture victims bring suits in the United States against their alleged torturers only as a last resort. . . . Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.

S. Rep. at *9-10, Apx 384.

Furthermore, exhaustion of remedies in a foreign forum is not required "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile." *Xuncax*, 886 F. Supp. at 178 (citing S. Rep).

A. On the Partially Developed Record Below, Rivera Rondón Has Not Met His Burden to Show That Adequate Remedies Are Available in Peru.

Because Rivera Rondón has failed to establish that adequate remedies have been available to Lizarbe and Baldeón, the district court correctly concluded that plaintiffs have met the pleading requirements under the

TVPA. The district court correctly recognized that Rivera Rondón bears the burden of proof to show that available and adequate remedies exist in Peru. Mem. Op. at 17, Apx 238 (citing *Jean*, 431 F.3d at 781; *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996)).

Rivera Rondón argues that the district court improperly weighed the lack of evidence regarding available and adequate remedies against him and that such evidence should have been weighed against the plaintiffs. Appellant Br. at 47-48. Rivera Rondón's attempt to shift the burden to Lizarbe and Baldeón is unsound and inconsistent with Congressional intent. The legislative history of the TVPA indicates that the "respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense." S. Rep. at *10, Apx 384; *see also Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003) (finding that the plaintiffs "are entitled to a presumption that local remedies have been exhausted"). To meet this burden, as recognized by the district court, Rivera Rondón must show that the remedies in Peru are "effective, obtainable, not unduly prolonged, adequate and not otherwise futile." Mem. Op. at 17, Apx 238. Only then does the burden shift to the plaintiffs. Further, in quoting the Senate Report to the TVPA relied on by the district court, Rivera Rondón omits the crucial final sentence: "The ultimate burden of proof and persuasion on the issue of

exhaustion of remedies, however, lies with the defendant." S. Rep. at *10, Apx 384.

Rivera Rondón has not met his burden. The district court pointed out that "the record is barren of any evidence" from Rivera Rondón that there is a foreseeable date for conclusion of the criminal case. Mem. Op. at 18, Apx 239. On appeal, Rivera Rondón offers no evidence that his criminal case in Peru is moving forward or that Lizarbe or Baldeón will ever be able to seek compensation in Peru for the crimes he committed during the Accomarca Massacre. Rather, Rivera Rondón argues, implicitly, that now that he has been deported to Peru and a criminal case is pending against him there, Lizarbe and Baldeón have not exhausted available and adequate local remedies. Appellant Br. at 46-47. Rivera Rondón does not satisfy his burden "simply by pointing to Lizarbe's and Baldeón's complaint papers." *See Collett v. Socialist Peoples' Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 243 (D.D.C. 2005) ("The defendants allude to the possibility of remedies in Lebanon but provide the court with no details or analysis concerning what those remedies would be.").

B. Lizarbe and Baldeón Have Pursued Remedies in Peru, But The Remedies Proved to Be Inadequate.

Even if this Court finds that Rivera Rondón satisfied his initial burden of raising exhaustion of remedies as an affirmative defense, Lizarbe and

Baldeón have shown that the remedies they have pursued in Peru are "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile," thereby shifting the burden of persuasion back to Rivera Rondón. *See* S. Rep. at *10, Apx 384.

Ruiz v. Martinez, No. EP-07-CV-078-PRM, 2007 WL 1857185, at *6 (W.D. Tex. May 17, 2007), on which Rivera Rondón relies, Appellant Br. at 47, n.3, is distinguishable. In *Ruiz*, the district court held that TVPA plaintiffs are required to *attempt* to seek compensation in the place in which the events occurred prior to suing in the United States. *Ruiz*, 2007 WL 1857185 at *6. Lizarbe and Baldeón have satisfied this requirement. Lizarbe and Baldeón each exercised their right to become a *parte civil*, the only action available to them at the time. Ninaquispe Decl. ¶¶ 14-19, Apx 263-64; Compl. ¶¶ 100-105, Apx 30-31. By doing so, they have done the equivalent of "suing" under Peruvian law. However, their right to civil compensation, if any, depends on the completion of the criminal case and the assessment of criminal liability on Rondón. Ninaquispe Decl. ¶ 18, Apx 263-64. Rivera Rondón has not given this Court any indication that he has pled guilty or that a judicial determination in his criminal case is forthcoming.

Rivera Rondón attempts to minimize the issue by using "process" and "remedy" synonymously, confusing the legislative intent behind the TVPA. An adequate remedy is granted by a process that presumably begins and ends according to the law. If the criminal court process in Peru has not concluded, and there is nothing in the record to suggest that a conclusion is imminent, there currently is no available remedy. Mem Op. at 16-19, Apx 237-40. Over four years have passed since criminal charges were filed against Rivera Rondón, and almost one year has passed since the proceedings could proceed following his deportation to Peru. Yet, there has still not been any resolution of the criminal matter, and Rivera Rondón has not shown that a resolution is expected in the near future. Lizarbe and Baldeón have exhausted their remedies by exercising the only avenue available to them under Peruvian law, which cannot provide a remedy until Rivera Rondón is convicted. *See Xuncax*, 886 F. Supp. at 178 (finding that plaintiff had exhausted remedies available to her because the "criminal case [against defendant] had made no progress for several years; and, under Guatemalan law, a civil action cannot be brought until final judgment has been rendered in the criminal proceedings"). The district court, taking notice of the applicable rules governing the Peruvian courts, agreed. Mem. Op. at 18-19, Apx 239-40.

C. Exhaustion of Local Remedies is Not Required Under the Alien Tort Statute.

Rivera Rondón is incorrect in suggesting in his quote from *Ruiz* that the ATS requires exhaustion of available remedies. It does not. As the district court held, the ATS contains no exhaustion requirement and no cases to date have found one. Mem. Op. at 17, Apx 238 (citing *Sarei v. Rio Tinto PLC*, 2007 WL 1079901, at *14-16 (9th Cir. April 12, 2007), *remanded for further consideration*, 550 F.3d 822 (2008); *Jean*, 431 F.3d at 781.

Even if this Court were to reverse the district court's findings on exhaustion of remedies under the TVPA, Lizarbe and Baldeón would be free to continue to press all of their ATS claims against Rivera Rondón in the district court. This further demonstrates why pendent appellate jurisdiction should not be exercised by this Court.

CONCLUSION

For the foregoing reasons, Appellees Teofila Ochoa Lizarbe and Cirila Pulido Baldeón respectfully request that the Court affirm the district court's denial of Appellant Rivera Rondón's motion to dismiss, and remand this case to the district court for further proceedings.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 15,275 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/
Wade B. Wilson

CERTIFICATE OF SERVICE

I hereby certify on this 16th day of July, 2009 that I electronically filed the foregoing brief for Appellees Teofila Ochoa Lizarbe and Cirila Pulido Baldeón with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to the CM/ECF participants below.

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