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

TEÓFILA OCHOA LIZARBE, in her individual capacity, and in her capacity as the foreign personal representative of the estates of Silvestra Lizarbe Solis, Gerardo Ochoa Lizarbe, Victor Ochoa Lizarbe, Ernestina Ochoa Lizarbe, Celestino Ochoa Lizarbe, and Edwin Ochoa Lizarbe, and	)	
	)	**Civil Action No. 8:07-cv-01809**
CIRILA PULIDO BALDEÓN, in her individual capacity, and in her capacity as the foreign personal representative of the estates of Fortunata Baldeón Gutiérrez and Edgar Pulido Baldeón,	)	**Honorable Peter J. Messitte**
Plaintiffs,	)	
v.	)	
JUAN MANUEL RIVERA RONDÓN	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Wade B. Wilson (Fed. Bar No. 15381)
Mark N. Bravin (Pro Hac Vice granted)
Thomas J. O'Brien (Pro Hac Vice granted)
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202.739.3000

OF COUNSEL
Pamela Merchant
Center for Justice & Accountability

Attorneys for Plaintiffs
TEÓFILA OCHOA LIZARBE and
CIRILA PULIDO BALDEÓN

DATED: February 4, 2008

TABLE OF CONTENTS

Page

INTRODUCTION 1
STATEMENT OF FACTS 5
A. The August 1985 Accomarca Massacre 5
B. Defendant's Role in the Accomarca Massacre 6
C. Defendant's Avoidance of Prosecution in Peru 7
D. Rivera Rondón's Status as a Civilian and Resident Alien in the United States 7
E. Violent Human Rights Abuses in Peru During 1980s and 1990s 8
F. Recent Attempts to Prosecute Rivera Rondón in Peru 10
ARGUMENT 11
I. DEFENDANT'S MOTION TO DISMISS CONTRAVENES APPLICABLE LEGAL STANDARDS 11
II. PLAINTIFFS' CLAIMS ARE TIMELY, AS THE STATUTE OF LIMITATIONS MUST BE EQUITABLY TOLLED FROM 1985 TO 2000, A PERIOD WHEN PLAINTIFFS COULD NOT REASONABLY PURSUE THEIR RIGHTS 12
A. Equitable Tolling is Frequently Applied Under ATCA and the TVPA 13
B. Plaintiffs' Claims Should Be Equitably Tolled Between 1985 and November 2000 Because Of Plaintiffs' Fear Of Retribution, Persecution and Death 15
C. Plaintiffs Claims Should Be Equitably Tolled Between 1985 and the Early 1990s for the Further Reasons That Defendant Was Not Present in the United States and Plaintiffs Were Too Young to Assert a Claim 17
D. Defendant's Additional Arguments Defy Logic and Rely Improperly on His Version of the Facts That Are Contradicted By the Complaint 18
III. RIVERA RONDÓN IS NOT IMMUNE FROM SUIT UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT. 20
A. The FSIA Does Not Apply to Persons Who Are Not Agents or Instrumentalities of the State at the Time of Suit 21
B. The FSIA Does Not Protect Former Officials Who Commit Human Rights Abuses That Are Outside the Legal Scope of Their Authority 23
C. Defendant Rivera Rondón Confuses "Official Capacity" With the Concept of "Color of Law." 28
1. "Following orders" is not a defense 28
2. Defendant acted under "color of law" 30

TABLE OF CONTENTS
(continued)

Page

3. The test is not whether Rivera Rondón acted in his personal or private capacity but rather whether he acted outside the scope of his lawful, official authority. 32
4. Congress did not intend the FSIA to act as a bar to TVPA claims against former officials responsible for human rights abuses 33

IV. PLAINTIFFS HAVE NOT FAILED TO EXHAUST REMEDIES IN PERU 36
A. Defendant Has Not Met His Burden to Show That Remedies Are Currently Available and Adequate in Peru 37
B. Plaintiffs Have Pursued Remedies in Peru But They Proved Neither Available Nor Adequate 38

V. DISMISSAL ON POLITICAL QUESTION GROUNDS IS UNWARRANTED 40

VI. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE ACT OF STATE DOCTRINE 43
A. Defendant Rivera Rondón Has Not Shown That An Act of State Is At Issue in This Case 43
B. Abstention is Unwarranted Under the *Sabbatino* Factors 45
1. The acts alleged in this case have been universally condemned as violations of international law 45
2. Adjudication is consistent with United States foreign policy 45
3. Because the Fujimori era ended seven years ago, and the crimes at issue are the subject of proceedings pending in Peru, a suit against Rivera Rondón does not give rise to act of state concerns. 47

VII. THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER ATCA AND TVPA. 48

VIII. FEDERAL COURTS HAVE JURISDICTION TO ADJUDICATE ATCA CLAIMS BROUGHT BY NONRESIDENT ALIENS, SUCH AS PLAINTIFFS. 55

IX. HAVING BEEN APPOINTED PERSONAL REPRESENTATIVES OF SEVEN DECEDENT ESTATES IN FLORIDA, PLAINTIFFS HAVE STANDING TO BRING THIS ACTION IN MARYLAND ON BEHALF OF THOSE ESTATES 56

X. VENUE IS PROPER 58

CONCLUSION 59

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) 33

Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003) 56

Abrams v. Société Nationale des Chemins de Fer Français, 389 F.3d 61 (2d Cir. 2004)... 21

Aktepe v. United States, 105 F.3d 1400 (11th Cir. 1997).. 42

Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005)........... 49

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976)...................... 43

Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006) 13, 17, 22, 41

Askir v. Boutros-Ghali, 933 F. Supp. 368 (S.D.N.Y. 1996)... 27

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).............................43, 45, 47

Baker v. Carr, 369 U.S. 186 (1962).. 40

Barrueto v. Larios, 205 F. Supp. 2d 1325 (S.D. Fla. 2002)..........................22, 29, 49, 50

Belhas v. Ya'Alon, 466 F. Supp. 2d 127 (D.D.C. 2006)..32, 33

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 11

Benford v. American Broadcasting Cos., 554 F. Supp. 145 (D. Md. 1982) 29-30

Beyond System v. Keynetics, Inc., 422 F. Supp. 2d 523 (D. Md. 2006)........................... 11

Bowoto v. Chevron Corp., No. C-99-02506-SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006) 51

Byrd v. Corporation Forestal y Industrial De Olancho S.A., 182 F.3d 380 (5th Cir. 1999)... 24

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005)................................*passim*

Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996)...............................12, 25

Calley v. Calloway, 519 F.2d 184 (5th Cir. 1975).. 29

TABLE OF AUTHORITIES
(continued)

Page

Chavez v. Carranza, 407 F. Supp. 2d 925 (W.D. Tenn. 2004) 14

Chavez v. Carranza, 413 F. Supp. 2d 891 (W.D. Tenn. 2005) 56

Chavez v. Carranza, No. 03-2932, 2006 WL 2434934
(W.D. Tenn. Aug. 15, 2006).. 22-23

Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990)..................... 23-24

Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908).. 55

Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998) 30, 50

Doe v. Israel, 400 F. Supp. 2d 86 (D.D.C. 2005) 47

Doe v. Liu Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) 24, 37, 42

Doe v. Rafael Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004)..............................*passim*

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)... 21

Dominican Republic v. AES Corp., 466 F. Supp. 2d 680 (D. Va. 2006)........................ 43

Eckert International v. Government of Sovereign Democratic Republic of Fiji,
834 F. Supp. 167 (D. Va. 1993)... 43

Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999)....................................... 11

El-Fadl v. Central Bank of Jordan, 75 F.3d 668 (D.C. Cir. 1996)................................ 27

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005)..23, 36

Erickson v. Pardus, 127 S. Ct. 2197 (2007).. 15

Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)..*passim*

Flores v. S. Peru Copper Corp., 343 F.3d 140, *repub. at* 414 F.3d 233 (2d Cir.
2003).. 26

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) 14, 49

Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (2d Cir. 1985)........ 42

TABLE OF AUTHORITIES
(continued)

Page

Hanoch Telegraph-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981).. 27

Higgins v. Food Lion, Inc., No. 00-CV-2617, 2001 WL 77696 (D. Md. Jan. 23, 2001).. 15

Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) ....*passim*

Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973).. 42

Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)...............................12, 50

Japan Whaling Association v. American Cetacean Social, 478 U.S. 221 (1986)............ 40

Jean v. Dorélien, 431 F.3d 776 (11th Cir. 2005)..13, 17, 23, 36

Jungquist v. Al Nahyan, 115 F.3d 1020 (D.C. Cir. 1997)..24, 25

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) ....*passim*

Keene Corp. v. United States, 508 U.S. 200 (1993) 21, 22

Kensington International Ltd. v. Itoua, 505 F.3d 147 (2d Cir. 2007)............................. 23

Kerby v. Mortgage Funding Corp., 992 F. Supp. 787 (D. Md. 1998)............................ 13

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) 24

Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) 26

Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989) 46

Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007)..32, 33

Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) ....*passim*

Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1180 (C.D. Cal. 2005) 50

National Coalition Government of Union of Burma v. Unocal, 176 F.R.D. 329 (C.D. Cal. 1997)... 46

Neitzke v. Williams, 490 U.S. 319 (1989) 15

TABLE OF AUTHORITIES
(continued)

Page

Origel v. Washtenaw County, 549 F. Supp. 792 (E.D. Mich. 1982) 18

Papa v. United States, 281 F.3d 1004 (9th Cir. 2002) 12

Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993)...35, 50

Phaneuf v. Republic of Indonesia, 106 F.3d 302 (9th Cir. 1997) 24

Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005) 52

Pugh v. Socialist People's Libyan Arab Jamahiriya, No. 02-02026, 2006 WL 134220 (D.D.C. May 11, 2006) 31

Pugh v. Socialist People's Libyan Arab Jamahiriya, No. 02-02026, 2008 WL 134220 (D.D.C. Jan. 23, 2008) 31

Pugh v. Socialist People's Libyan Arab Jamahiriya, No. 06-7167, 2007 U.S. App. LEXIS 7830 (D.C. Cir. April 3, 2007) 31

Rasul v. Bush, 542 U.S. 466 (2004)..55, 56

Republic of Austria v. Altman, 541 U.S. 677 (2004) 21

Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) 37

Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003)... 13

Ruiz v. Martinez, 2007 WL 1857185 (W.D. Tex. May 17, 2007)................................ 39

Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988).. 47

Sanjuan v. America Board of Psychiatry and Neurology, Inc., 40 F.3d 247 (7th Cir. 1994).. 11

Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) 40

Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984) 44

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) 44, 50

Sinaltrainal v. Coca Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003) 37

TABLE OF AUTHORITIES
(continued)

Page

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ....*passim*

Tachiona v. Mugabe, 216 F. Supp. 2d 262 (S.D.N.Y. 2002)... 36

Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004) 23

Tannenbaum v. Rabin, No. CV-95-4357, 1996 WL 75283
(E.D.N.Y. Feb. 13, 1996) 27

In re Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005) 22

Todd v. Panjaitan, No. 92-12255, 1994 WL 827111 (D. Mass. Oct. 26, 1994)............. 25

Torres v. Southern Peru Copper Corp, 965 F. Supp. 899 (S.D. Tex. 1996), *aff'd,*
113 F.3d 540 (5th Cir. 1997) 39

Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992) 24, 35, 44

United States v. Classic, 313 U.S. 299 (1941) 31

VanGrack, Axelson & Williamowsky, P.C. v. Estate of Abbasi, 261 F. Supp. 2d
352 (D. Md. 2003)... 56

Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004) 15

Vargas v. M/V Mini Lama, 709 F. Supp. 117 (E.D. La. 1989)...................................... 39

Velasco v. Government of Indonesia, 370 F.3d 392 (4th Cir. 2004) 21, 22, 23

W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International,
493 U.S. 400 (1990)... 43

Williams v. United States, 341 U.S. 97 (1951).. 31

Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied,*
532 U.S. 941 (2001)... 56

Wiwa v. Royal Dutch Petroleum Co., No. 96-8386, 2002 WL 319887 (S.D.N.Y.
Feb. 28, 2002).. 37

TABLE OF AUTHORITIES
(continued)

Page

In re: World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1153 (N.D. Cal. 2001) 12

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) ..... *passim*

In re Yamashita, 327 U.S. 1 (1946) 50

Young v. United States, 535 U.S. 43 (2002) 13

Yousuf v. Samantar, No. 1:04-01360-LMB, 2007 U.S. Dist. LEXIS 56227 (E.D. Va. Aug. 1, 2007) 32, 33

STATE AND OTHER CASES

Piselli v. 75th Street Medical, 371 Md. 188, 808 A.2d 508 (Md. 2002) 18

United States v. Jaks, 28 M.J. 908 (Army Ct. Mil. Rev. 1989) 54

FEDERAL STATUTES

Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) 57

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) 57

10 U.S.C. § 4415 41

28 U.S.C. § 1331 58

Alien Tort Claim Act, 28 U.S.C. § 1350 (2007) ..... *passim*

Torture Victim Protection Act, 28 U.S.C. § 1350 note ..... *passim*

28 U.S.C. § 1391(b) 58

28 U.S.C. § 1391(b)(1) 58

28 U.S.C. § 1391(d) 58

Foreign Sovereign Immunities Act of 1976, as amended, 28 U.S.C. § 1602, et seq. ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

28 U.S.C. § 1603(a) 20
28 U.S.C. § 1603(b)(1).. 20
28 U.S.C. § 1605(a)(1).. 35
28 U.S.C. § 1605(a)(2).. 35
28 U.S.C. § 1605(a)(3).. 35
28 U.S.C. § 1605(a)(4).. 35
28 U.S.C. § 1605(a)(5).. 35
28 U.S.C. § 1605(a)(6).. 35
28 U.S.C. § 1605(a)(7).. 35
28 U.S.C. § 1605(b) 35
28 U.S.C. § 1605(c) 35
28 U.S.C. § 1605(d) 35
42 U.S.C. § 1983.. 31

STATE STATUTES

Md. Code Ann., Est. & Trusts § 5-501 57
Md. Code Ann., Est. & Trusts § 5-502(a).. 56-57

LEGISLATIVE MATERIALS

137 Cong. Rec. H11244 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli) 33

H.R. Rep. No. 102-367(I) (1992) *reprinted in* 1992 U.S.C.C.A.N. 84 ....*passim*

S. Rep. No. 102-249, 1991 WL 258662 (Leg. Hist.) (1991)....................................*passim*

FOREIGN LEGAL AUTHORITIES

Code of Military Justice of Peru, Law No. 23214 (July 24, 1980)................................. 25

Peruvian Criminal Code, Vol. 2, Title XIV-A 44

Peruvian Rules of Criminal Procedure, Preliminary Title, Art. IV, Legislative Decree No. 957 (July 29, 2004).. 38

TABLE OF AUTHORITIES
(continued)

Page

Prosecutor v. Bradjanin, Case No. IT-99-36-T, ¶ 258 at 111 (ICTY Trial Chamber, Sept. 1, 2004) 52

Prosecutor v. Milutinović, Decision on Dragolijub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise,* Case No. IT-99-37-AR72, ¶ 26 at 12 (ICTY App. Chamber, May 21, 2003) *available at* http://ww.un.org/icty/supplement/supp41-e/multinovic-a.htm 53-54

Statute of the International Tribunal for the former Yugoslavia, May 25, 1993, art. 7(4), *available at* http://www.icls.de/dokumente/icty_statut.pdf 29

Statute of the International Tribunal for Rwanda, art. 6(4), *available at* http://www.un.org/ictr/statute.html.......... 29

MISCELLANEOUS

Restatement (Third) of the Foreign Relations Law of the United States § 443 cmts. b, c (1987).......... 45

Dan Collyns, "Peru Struggles With its Dark Past," BBC News (Dec. 10, 2007), *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7132375.stm 48

Simon Romero, *Ex-President Stands Trial in Edgy Peru*, N.Y. Times, Dec. 10, 2007, *available at* http://www.nytimes.com/2007/12/10/ world/americas/10fujimori.html?_r=1&oref=slogin 16

U.S. Department of State, *State Sponsors of Terrorism*, *available at* http://www.state.gov\s\ct\c14151.htm 35

U.S. Department of State, *Country Report on Human Rights Practices for 1985*, 99th Cong. 2d Sess., Report Submitted to the Comm. on Foreign Affairs, U.S. House of Representatives, and the Comm. on Foreign Relations, U.S. Senate, (Jt. Comm. Print, Feb. 1986).......... 41, 46

U.S. Department of State, 1999 C*ountry Reports on Human Rights Practices*: Peru, *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/peru.html 46

INTRODUCTION

Plaintiffs bring claims under the Alien Tort Claim Act ("ATCA")[1] and the Torture Victim Protection Act (the "TVPA")[2] for themselves and on behalf of the estates of their deceased family members ("Decedents") killed in the 1985 Accomarca Massacre, a military operation carried out by Defendant Juan Miguel Rivera Rondón ("Defendant" or "Rivera Rondón") acting in concert with other soldiers in the Peruvian Army. Defendant has moved to dismiss this action under numerous theories. In part, he relies on a superficial reading of the Complaint that simply overlooks some of Plaintiffs' well-pleaded allegations. He also disputes the validity of well-pleaded allegations of the Complaint, a course not open to him in a motion to dismiss. His principal legal defenses have been rejected repeatedly by courts in similar cases, where victims of atrocities have successfully sued foreign military personnel and others acting under the color of law. His remaining legal arguments fail to recognize established requirements or exceptions to the various doctrines he invokes.

In the end, Defendant's "kitchen sink" approach to challenging the sufficiency of the Complaint is doomed to fail. As demonstrated more fully in the sections that follow and summarized briefly below, none of the grounds for dismissal presented in Defendant's motion has merit. Accordingly, Plaintiffs ask the Court to deny the motion to dismiss.

First, Rivera Rondón urges the Court to reject equitable tolling and find the action is time-barred, based on his own view that judicial relief was available to Plaintiffs 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

---

[1] 28 U.S.C. § 1350 (2007)

[2] 28 U.S.C. § 1350 note (2007)

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. Plaintiffs, 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 policies in Peru from 1985 to 2000. Defendant's contrary argument ignores a formidable body of judicial precedent developed under ATCA and the TVPA, in which courts have invoked equitable tolling routinely and without exception where, as here, civil war and repressive regimes created the "extraordinary circumstances" required for tolling. Based on equitable tolling through November 2000, Plaintiffs' claims, filed in 2007, are timely under the applicable 10-year statute of limitations.

Second, Rivera Rondón seeks dismissal on the theory that he was an agent of the Peruvian government at the time of the Accomarca Massacre and thus is immune from suit under the Foreign Sovereign Immunities Act. This theory fails because foreign sovereign immunity attaches, if at all, only to persons who are agents of a foreign state *at the time of the filing of the Complaint.* Rivera Rondón, a civilian who has resided in the United States for more than a decade, is not an agent of Peru and is therefore ineligible to claim sovereign immunity. He is not immune from suit for the additional reason that the inhumane abuses at issue in this case are not within the scope of any authority given to him as a military officer under Peruvian law and violated established norms of international law, as well. The extrajudicial killings, torture, and other abuses carried out under "the color of law" – but outside the scope of lawful authority – do not confer immunity from suit under the TVPA and ATCA. Rivera Rondón's contention that he is entitled to immunity because he was merely was "following orders" has been flatly rejected in numerous cases.

Next, Rivera Rondón maintains that Plaintiffs failed to exhaust the remedies available to them under Peruvian law, as required under the TVPA. Relying on his unsupported assertion that relief in Peru is and always has been available, his argument challenges Plaintiffs' allegation that no remedy is available to them in Peru as long as Rivera Rondón is not present to face criminal charges there. Under Peruvian law, however, a criminal conviction is required before Plaintiffs can pursue a claim for civil damages in that country. Rivera Rondón's absence from Peru during the last 15 years, and his ongoing efforts to avoid deportation to Peru, exposes a cynical, "Catch-22" side of his argument.

Fourth, Defendant submits that the Complaint raises nonjusticiable "political questions" because the United States allegedly provided training to the Peruvian Army in the period leading up to the Accomarca Massacre. He fails to establish any factual predicate for this argument and nowhere alleges that the United States directed or in any way supported the killing and torture of innocent civilians that took place in that operation. He provides no basis for connecting any policy or decision of the United States to the events that are the subject of this lawsuit. Because the political question doctrine arises only where decisions of the political branches are challenged directly, the doctrine is not implicated here and provides no reason to dismiss this action.

The fifth ground for dismissal is the "act of state" abstention doctrine, which cautions against the adjudication of claims that would require U.S. courts to declare invalid the official acts of a foreign sovereign. No such issue is presented in this case. Rivera Rondón is unable to establish that the Accomarca Massacre was authorized by Peruvian law, and the Complaint alleges it was not. In any event, the Peruvian Senate's efforts to hold accountable those responsible for the massacre, and Peru's criminal prosecution of Rivera Rondón, demonstrate

that the atrocities committed in Accomarca are not official acts of Peru for which the doctrine is intended.

Next, Rivera Rondón asserts that the Complaint fails to state a claim under ATCA and the TVPA because there is no allegation that he killed, tortured or abused anyone during the Accomarca Massacre, or that he ordered others to perform such acts. This argument is off the mark. The Complaint alleges that Rivera Rondón helped plan the Accomarca operation; knew it was designed to capture, torture, and kill civilians; accepted his mission of blocking off escape routes Accomarca villagers might take; carried out that mission; could hear the shots and grenade explosions from his vantage point; and afterward covered up the massacre. The Complaint clearly states a claim for indirect accomplice liability for conspiracy, aiding and abetting, and joint criminal enterprise. Such claims have been accepted by U.S. courts under ATCA and the TVPA and by international tribunals applying international law.

Defendant's remaining theories are similarly unavailing. The seventh argument – that only aliens resident in the United States are authorized to bring ATCA claims – has been rejected by the Supreme Court. The eighth argument assumes, incorrectly, that Plaintiffs lack standing because they have not been appointed as foreign personal representatives for Decedents' estates. In fact, they have been appointed personal representatives for all but one estate, and proceedings are pending in state court in Florida with regard to the remaining estate. Finally, Defendant's venue argument conflicts with the statutory scheme, which expressly authorizes suit in this judicial district, where Rivera Rondón resides and was served with the summons and Complaint, and for the additional reason that Defendant is an alien.

STATEMENT OF FACTS

A. The August 1985 Accomarca Massacre.

As detailed in Plaintiffs' prior submissions to this Court, Peru was in a state of civil war between 1980 and 2000.[3] Compl. ¶ 35, Paper No. 1. During this time, the Peruvian Army and other government forces were responsible for widespread and systematic human rights abuses against the civilian population of Peru under the guise of suppression of the Shining Path. *Id.* The Peruvian Army engaged in one such bloody campaign in Quebrada de Huancayoc, a rural community near Accomarca, Peru, where Plaintiffs lived as children. *Id.* ¶¶ 43, 55, 58. In mid-August 1985, Defendant Rivera Rondón participated in this campaign, 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.

Approximately 69 unarmed civilians were killed by the Peruvian Army in Plaintiffs' village on the morning of August 14, 1985. *Id.* ¶¶ 54-64. Eight of Plaintiffs' immediate family members were tortured and killed, causing Plaintiffs severe psychological trauma. *Id.* ¶¶ 1, 54-64. Soldiers shot at Plaintiff Teófila Ochoa Lizarbe ("Teófila Ochoa") as she ran from her home. *Id.* ¶ 56. Finding a hiding place, she saw soldiers taking young girls into houses, heard their cries and gunshots, and witnessed soldiers setting houses on fire. *Id.* ¶ 57. Plaintiff Cirila Pulido Baldeon ("Cirila Pulido") evaded certain death only by fleeing her home and hiding with two siblings. *Id.* ¶ 58.

---

[3] Plaintiffs hereby incorporate by reference Plaintiffs' Complaint (Paper No. 1), Plaintiffs' Memorandum in Support of Their Motion for a Default Judgment and Trial on Damages (Paper No. 16-2), and Plaintiffs' Memorandum in Support of Their Motion for Reconsideration Regarding Order on Motion for Default Judgment (Paper No. 21-2).

B. Defendant's Role in the Accomarca Massacre.

Defendant seeks to minimize or excuse his role in the events of August 14, 1985. He asserts that "the Complaint makes no allegations whatsoever that the defendant did anything to harm anyone or was involved in any other way in the events with which the plaintiffs take issue." Mem. at 4. That is simply incorrect.

As the Complaint details, Defendant 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 Plaintiffs' relatives. Compl. ¶¶ 48-66. Defendant Rivera Rondón and the Lince 6 soldiers under his command, acting in concert with Hurtado and his troops of Lince 7 and pursuant to a common plan, positioned themselves in the upper part of Quebrada de Huancayoc in order to facilitate the common goal of the two units – the detention, rape, torture and execution of the villagers. *Id.* ¶¶ 48-53, 62. The Lince 6 soldiers under Defendant Rivera Rondón's command fired shots, burned houses and blocked the escape routes of the villagers to facilitate the human rights abuses in question. *Id.* ¶ 62.

During the entirety of the planned operations, Defendant 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. Even though his unit had a radio, and the abuses continued for many hours, Defendant 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.

In sum, Defendant 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. Defendant's Avoidance of Prosecution in Peru.

After the events of August 14, 1985, and despite evidence showing his role in the Accomarca Massacre, Defendant Rivera Rondón has thus far avoided being held accountable in Peru. *Id.* ¶ 93. 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. However, despite this conclusion, the Peruvian Supreme Court eventually held that the case was solely within the jurisdiction of the military justice system because the killings occurred inside an emergency zone and were perpetrated by members of the Peruvian Army. *Id.* In or about 1987, two years after the Accomarca Massacre, a military court absolved Defendant Rivera Rondón of all charges because the court found, as a matter of 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.

The Peruvian judiciary's decisions regarding prosecution of the crimes committed by members of the Peruvian military resulted in complete impunity for Defendant Rivera Rondón. *Id*. Even after information about the Accomarca Massacre became public, Defendant Rivera Rondón was promoted to Captain within the Peruvian Army in or about 1989. *Id.* ¶ 95.

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

By the early 1990s, Rivera Rondón resigned from the Peruvian Army and left Peru. He entered the United States in 1992 or 1993, Compl. ¶ 7, while remaining a citizen of Peru. *Id.* ¶ 4. Defendant has resided in Montgomery County, Maryland since at least 1995. Id. ¶¶ 4, 5.

At some point, he became a U.S. permanent resident. However, that status is in jeopardy because he was arrested by Immigration and Customs Enforcement in March 2007 and is currently in removal (deportation) proceedings. Tr. of Coram Nobis Hearing, July 12, 2007, at 31 lines 7-10, and Notice to Appear in removal proceedings under the Immigration and Nationality Act, (Exhibits 7 and 8 to Plaintiffs' pending Motion for Reconsideration).

E. Violent Human Rights Abuses in Peru During 1980s and 1990s.

The military and political circumstances in Peru between 1985 and 1993 made it impossible for Plaintiffs to seek redress or exhaust any domestic Peruvian remedies while Defendant Rivera Rondón was still living there. Compl. ¶ 93. Some survivors of the Accomarca Massacre were brutally murdered in the weeks following the attack. Compl. ¶¶ 68, 70. At the time of the Accomarca Massacre and until 1990, Alan García served as President of Peru. *Id.* ¶ 82. Throughout his presidency, Peruvian government forces, and in particular the Peruvian Army, continued to commit widespread and systematic human rights abuses against the civilian population of Peru. *Id.* Government forces abducted, tortured and "disappeared" suspected "subversives" and murdered civilians in military operations. *Id.* These abuses continued to be committed throughout the Department of Ayacucho. *Id.*

Alberto Fujimori became Peru's President in July 1990. In 1992, Fujimori declared a "self-coup," closing down Congress, purging the judiciary, and suspending 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.*

Plaintiffs reached the age of 18 years in 1991, and Defendant Rivera Rondón arrived in the United States in 1992 or 1993. By then, the conditions in Peru continued to be repressive and dangerous for large segments of the civilian population. Indeed, throughout the 1990s, government forces and death squads continued to commit widespread killings. Compl. ¶ 85. For

example, in November 1991, death squads made up of members of the Peruvian Army Intelligence Service ("SIE") killed some 15 innocent civilians in the Barrios Altos Massacre and in July 1992 SIE and another Peruvian Army intelligence service, DINTE, murdered another ten people at the La Cantutta Massacre. *Id.* Rather than holding Rivera Rondón and other Peruvian military personnel responsible for the Accomarca Massacre and the other crimes waged against the civilian populace, Fujimori's government, in 1995, granted amnesty to all members of the military and police for actions taken as part of the "fight against terrorism" dating back to 1980. *Id.* ¶ 87. Defendant Rivera Rondón thus was immune from Peruvian prosecution or civil liability for his part in the Accomarca Massacre until sometime after the amnesty law was declared invalid in 2001.

By 1993, both Plaintiffs had moved to the Peruvian capital, Lima, where abuses against civilians were concentrated at the time. Compl. ¶ 86. Government forces continued to abduct, torture and "disappear" civilians. *Id.* The military's killings of civilians with impunity continued into the late 1990s. *Id.* ¶ 88. In 1998, the Peruvian military commander who directed Defendant and his co-conspirators in carrying out the Accomarca Massacre was promoted to Brigadier General, even though the military unit under his command had carried out additional executions of civilians the previous year. *Id.* Throughout Fujimori's regime, from 1990 to 2000, the National Intelligence Service ("SIN"), which was headed by Vladimiro Montesinos, carried out further atrocities against innocent civilians. *Id.* ¶ 86.

Plaintiffs could not have safely instituted legal proceedings in the United States against Defendant Rivera Rondón or other members of the Peruvian military until the removal of Fujimori as president of Peru in November 2000. Compl. ¶ 81. Prior to that time, Plaintiffs 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 and discovery in Peru in support of such a case. *Id.* ¶ 89.

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. Compl. ¶ 99. Then, in 2005, five years after the Fujimori government was ousted, Peruvian prosecutors filed murder charges in civilian court against Defendant Rivera Rondón, Hurtado and several other officers responsible for the Accomarca Massacre. Compl. ¶ 100. Later that year, the Third Supraprovincial Criminal Court in Peru opened an investigation against 29 Peruvian Army officers, including Defendant Rivera Rondón, Hurtado, and others. *Id*. ¶ 101.

The criminal case against Defendant Rondón has been stymied because Peruvian law bars completion of such proceedings while he remains outside of Peru. Compl. ¶ 103. The lack of progress in the Peruvian courts also has prevented Plaintiffs from pursuing claims for damages against Rivera Rondón in Peru. That is because, under Peruvian law, victims of human rights abuses, including Plaintiffs, are not entitled to civil compensation until a criminal case results in a conviction. Compl. ¶ 104.

Plaintiffs thus cannot seek compensation in Peru while Rivera Rondón continues to reside in the United States. *Id*. Therefore, with the criminal charges still unresolved, Plaintiffs' civil claim in Peru cannot go forward. That obstacle stands in the way of relief as long as Rivera Rondón remains outside Peru. *Id*. ¶ 105.

ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS CONTRAVENES APPLICABLE LEGAL STANDARDS.

"Importantly," the Fourth Circuit instructs, "[a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (alterations in original) (internal quotation marks omitted). It is settled law, moreover, that "after accepting all well-pleaded allegations in the plaintiff's complaint as true," courts must "draw[] all reasonable factual inferences from those facts in the plaintiff's favor." *Id.* at 244. Courts also must view the allegations of the Complaint in the light most favorable to the plaintiff. *Beyond Sys. v. Keynetics, Inc.,* 422 F. Supp. 2d 523, 530 (D. Md. 2006). Indeed, "once a claim for relief has been stated, 'a plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.'" *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1969 (2007) (quoting *Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc.,* 40 F.3d 247, 251 (7th Cir. 1994)).

By not acknowledging these governing principles, Defendant's discussion of the applicable legal standards falls far short. Mem. at 6-7. Many of Rivera Rondón's arguments ignore and attempt to circumvent these governing principles, giving the Court ample legal grounds for denying the motion to dismiss.

II. PLAINTIFFS' CLAIMS ARE TIMELY, AS THE STATUTE OF LIMITATIONS MUST BE EQUITABLY TOLLED FROM 1985 TO 2000, A PERIOD WHEN PLAINTIFFS COULD NOT REASONABLY PURSUE THEIR RIGHTS.

Rivera Rondón accepts that all Plaintiffs' claims are subject to a 10-year statute of limitations, Mem. at 7-8[4], but contends that those claims should not be equitably tolled. In doing so, Defendant ignores the well-developed law on the subject and the well-pled allegations in the Complaint. Although the events that gave rise to Plaintiffs' ATCA and TVPA claims took place on or about August 14, 1985, Compl. ¶ 1, those claims did not accrue for limitations purposes until November 2000. As the Complaint specifically alleges, from the date of the Accomarca Massacre until the regime change of November 2000, the government of Peru carried out a ruthless policy of persecution, torture, and murder directed against broad segments of the Peruvian civilian population, especially indigenous people like the villagers in the District of Accomarca. As a result, Plaintiffs were deprived of any reasonable opportunity to investigate and seek redress for their claims. It is well-established law that political repression and fear of reprisal are proper grounds for equitable tolling under the ATCA and TVPA. Moreover, from the date of the massacre until the early 1990s, the limitations period on the claims should be tolled for the additional reasons that Defendant was not in the United States and thus was not subject to the personal jurisdiction of this or any other U.S. court, and because Plaintiffs were minors.

4 The TVPA expressly establishes a 10-year limitations period. TVPA § 2(c), 28 U.S.C. § 1350 note, and courts routinely apply the same 10-year limitations period to ATCA claims, especially claims arising out of the same facts that form the basis of an action under the TVPA. *E.g., Papa v. United States,* 281 F.3d 1004, 1011-13 (9th Cir. 2002); *In re: World War II Era Japanese Forced Labor Litig.,* 164 F. Supp. 2d 1153, 1180-81 (N.D. Cal. 2001); *Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 462-63 (D.N.J. 1999) (dismissed on other grounds, 67 F. Supp. 2d at 491); *Cabiri v. Assasie-Gyimah,* 921 F. Supp. 1189, 1194 (S.D.N.Y. 1996); *Xuncax v. Gramajo,* 886 F. Supp. 162, 192-93 (D. Mass. 1994).

A. Equitable Tolling is Frequently Applied Under ATCA and the TVPA.

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 v. Lee,* 339 F.3d 238, 246 (4th Cir. 2003) (*en banc*); *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); *Kerby v. Mortgage Funding Corp.*, 992 F. Supp. 787, 793 (D. Md. 1998) ("As a general rule, equitable tolling is read into every federal statute of limitations . . . unless Congress expressly provides to the contrary in clear and unambiguous language.") (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. No. 102-249, 1991 WL 258662 at *10-11 (attached as Exhibit 1); H. R. Rep. No. 102-367(I) at 5 (1991) (*reprinted in* 1992 U.S.C.C.A.N. 84) (attached as Exhibit 2). Not surprisingly, therefore, in the years following the passage of the TVPA, courts have routinely invoked equitable tolling in circumstances where plaintiffs had no reasonable opportunity to pursue ATCA 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 v. Dorélien,* 431 F.3d 776, 780 (11th Cir. 2005) ("We note that every court that has considered the question of whether a civil war and a repressive regime constitute 'extraordinary circumstances' which toll the statutes of limitations of ATCA and TVPA has answered in the affirmative.") (citing cases).

Numerous ATCA and TVPA courts have tolled the limitations period for a decade or more under such circumstances. *E.g., Arce v. Garcia,* 434 F.3d 1254, 1263-64 (11th Cir. 2006)

(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 v. Estate of Marcos,* 103 F.3d 767, 773 (9th Cir. 1996) ("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 "Plaintiffs 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. Rafael Saravia,* 348 F. Supp. 2d 1112, 1147 (E.D. Cal. 2004) (applying equitable tolling where "from 1980 to 1994 . . . any person who leveled allegations against active or former members of the military risked reprisal, including death").[5] Rivera Rondón has asked this Court to reject equitable tolling without bringing any of these cases to the Court's attention.

Perhaps realizing that the weight of precedent in ATCA/TVPA cases is contrary to his position, Rivera Rondón relies on several inapposite court rulings that examine more conventional grounds for the equitable tolling of claims that arise in the United States (where no allegation of government atrocities is made). Such grounds include defendants engaging in fraudulent concealment or duping plaintiffs through trickery, and plaintiffs filing timely but in the wrong forum. Mem. at 10, 12-15. Plaintiffs here ground none of their equitable tolling arguments on such circumstances and the cited cases in no way support Rivera Rondón's position.

[5] *Accord, Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1550-51 (N.D. Cal. 1987) (applying equitable tolling over a 10-year period, denying motion to dismiss claims under ATCA).

Defendant's reliance on one ATCA case, *Van Tu v. Koster,* 364 F.3d 1196 (10th Cir. 2004), Mem. at 13-14, is entirely misplaced. There, survivors of the My Lai Massacre in Vietnam brought *Bivens* and ATCA actions against former U.S. soldiers, including Lt. William Calley. *Id.* at 1197. The plaintiffs sought to toll the statute of limitations for 32 years based on the Vietnam War (which ended in 1975) and because they could not afford the cost of litigation or of traveling to the United States. *Id.* at 1192-1200. The plaintiffs made no allegation to the effect that some official policy or conduct placed them in fear for their lives if they were to pursue their rights or commence litigation, nor did they contend that any other external forces effectively prevented them from protecting their interests. 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.

B. Plaintiffs' Claims Should Be Equitably Tolled Between 1985 and November 2000 Because of Plaintiffs' Fear of Retribution, Persecution and Death.

The facts pled in Plaintiffs' Complaint must be accepted as true for the purposes of this motion. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) ("when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint"); *Neitzke v. Williams,* 490 U.S. 319, 327 (1989); *Higgins v. Food Lion, Inc.,* No. 00-CV-2617, 2001 WL 77696 at *2 (D. Md. Jan. 23, 2001). The allegations of the Complaint provide compelling support for the equitable tolling of the claims from 1985 through November 2000, when the presidency of Alberto Fujimori ended.

- Immediately after the Accomarca Massacre, survivors who witnessed the actions of the unit led by Defendant were murdered brutally. Compl. ¶¶ 68, 70.

- Between 1985 and 1990, the García government in Peru "abducted, tortured and disappeared suspected 'subversives' and murdered civilians in military operations," including abuses throughout the Andean region where Plaintiffs

resided. Compl. ¶¶ 35, 44-47, 70, 78, 82.

- 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.
- Fujimori assumed office in July 1990 and continued his predecessor's policy of widespread human rights abuses against Peruvian citizens. Compl. ¶¶ 84-88.
- The Peruvian Congress was shut down by Fujimori in a presidential "self-coup" in 1992, the judiciary was purged, and the constitution suspended. Compl. ¶ 84.
- 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. Compl. ¶ 84.
- In 1991 and 1992, government-backed "death squads" committed horrific crimes and carried forward the policy of civilian killings, including atrocities known as the Barrios Altos Massacre and the La Cantuta Massacre.[6] Compl. ¶¶ 85-86.
- 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.
- Major Williams Zapata, the commander of the company that carried out the Accomarca Massacre, was promoted and given successively greater responsibility, attaining the rank of Brigadier General in 1998 after ordering the execution of countless other civilians as recently as 1997. Compl. ¶ 88.
- 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."[7] Compl. ¶ 87.
- During this entire period, Plaintiffs reasonably feared for their lives and the lives of their loved ones because of those conditions. Compl. ¶ 81.

As pled in the Complaint, therefore, Plaintiffs could not pursue any claim against Rivera Rondón without fear for their own physical safety and that of their families or those who might

---

[6] After years in exile, Fujimori was extradited to Peru last fall to stand trial for these and other atrocities committed by his government. *See* Simon Romero, *Ex-President Stands Trial in Edgy Peru*, N.Y. Times, Dec. 10, 2007, *available at* http://www.nytimes.com/2007/12/10/world/americas/10fujimori.html?_r=1&oref=slogin

[7] This law subsequently was declared invalid in 2001, when Fujimori's government was no longer in power. Compl. ¶ 99.

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.

431 F.3d at 780. The assassination of witnesses, purging of the judiciary, suspension of the constitution, and denial of due process protections, and continuing torture and murder of the civilian population, were designed to chill critics and intimidate any 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).

C. Plaintiffs Claims Should Be Equitably Tolled Between 1985 and the Early 1990s for the Further Reasons That Defendant Was Not Present in the United States and Plaintiffs 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, *id.* ¶ 7, and only then were U.S. 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. 102-249, 1991 WL 258662 at *10-11) (stating that the "statute of limitations should be tolled during the time the defendant was absent from the United States").

Second, Plaintiffs were 12 years old at the time of the Accomarca Massacre (Compl. ¶¶ 8, 10), 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 Plaintiffs attained the age of majority. S. Rep. No. 102-249, 1991 WL 258662 at *11 n.28 (listing "infancy" of the plaintiff among factors to be considered for purposes of equitable tolling) (citing *Origel v. Washtenaw Cty.,* 549 F. Supp. 792, 796 (E.D. Mich. 1982) (holding that minor's "cause of action cannot be barred since he has until his eighteenth birthday to file").[8]

D. Defendant's Additional Arguments Defy Logic and Rely Improperly on His Version of Facts 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 Plaintiffs should have been able to pursue claims because certain parts of the Peruvian government attempted a basic investigation of the Accomarca Massacre in 1985 and because Plaintiffs knew the identity of Defendant. Mem. at 10-11.

In the first argument, Defendant improperly cites news accounts from sources outside the four corners of the Complaint to "rebut[] plaintiffs' claim that they were unable to investigate or file a claim for another fifteen years." *Id.* at 11. 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 Plaintiffs' allegations that they had no reasonable means of seeking redress. As a matter of logic, it simply does not follow that Plaintiffs were free to protect their interests

[8] Although Maryland law is not applicable here, it is noteworthy that the Court of Appeals recently struck down a Maryland limitations statute in part because "the principle that statutory time limits for a minor to bring an action do not begin running until the age of majority has been firmly established in our law for a long time." *Piselli v. 75th Street Medical,* 371 Md. 188, 212, 808 A.2d 508, 522 (Md. 2002) (on certification from the U.S. Court of Appeals for the Fourth Circuit).

without fear of retribution merely because certain official bodies began making inquiries that ultimately failed to curb repressive governmental conduct. The opportunities open to citizens subjected to acts of extreme violence and intimidation in a region the military targeted for such abuses[9] cannot be equated to those available to government officials. Moreover, Plaintiffs were minor children during the time when the Peruvian Senate attempted its investigation of the claims. Further, the events after the preliminary Senate investigation demonstrate the futility of even that effort. As the Complaint alleges in detail, the perpetrators of the massacre were awarded military promotions, grave human rights abuses continued, and additional constitutional protections were dissolved.

Second, Rivera Rondón maintains that tolling is unwarranted because Plaintiffs, as eyewitnesses to the Accomarca Massacre, "knew or should have known" not only what happened there, but also "the identities of the alleged participants" in the operation. Mem. at 10. Setting aside the ludicrous and unfounded presumption that the Plaintiffs, who were 12 years old at the time of the massacre, could have immediately deduced who exactly it was who killed their mothers and siblings while they were hiding nearby, this argument is apropos of nothing. Even assuming that Plaintiffs knew exactly who Defendant Rivera Rondón was, the allegations of the Complaint establish that Plaintiffs could have done precisely nothing with this information until November 2000 without putting themselves and their remaining family members in grave danger. Knowledge of the identity of the wrongdoer does not immediately create the circumstances which make the investigation and prosecution of the wrongdoing possible. There is a crucial distinction between actual or constructive knowledge of an actionable wrong, on the one hand, and the capacity (or lack thereof) to make effective use of such knowledge. The

---

[9] *See, e.g.,* Compl. ¶¶ 8, 10, 35, 37-38, 82.

Complaint alleges that Plaintiffs were minors, that they feared retaliation, and that the political and social circumstances in Peru made that fear more than reasonable.

In sum, Rivera Rondón's equitable tolling analysis conspicuously avoids any judicial treatment of the principle under the relevant ATCA/TVPA case law and disregards facts which must be accepted as true at this stage of the proceedings. Accordingly, the motion to dismiss based on the statute of limitations should be denied.

III. RIVERA RONDÓN IS NOT IMMUNE FROM SUIT UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Defendant erroneously argues that he is immune from suit under the Foreign Sovereign Immunities Act (the "FSIA") because he purportedly acted within his official capacity on behalf of a foreign state. Mem. at 15. The FSIA confers jurisdictional immunities on "foreign states" which are defined to include "a political subdivision of a foreign state or an agency of instrumentality of a foreign state," and the term "agency or instrumentality of a foreign state" includes "separate legal person[s], corporate or otherwise." 28 U.S.C. §§ 1603(a) and (b)(1). Thus, a natural person, in certain circumstances, could be immune from suit pursuant to the FSIA. This, however, is not one of those circumstances.

While an individual serving as an officer, employee or agent of a foreign state may be entitled to immunity from suit under the FSIA, immunity is not available to an individual who, at the time the suit is commenced, is no longer serving as an officer, employee or agent of a foreign state. Further, the FSIA does not confer immunity from suit on an officer, employee or agent of a foreign state for actions taken outside the scope of the individual's office, employment or agency. In this case, Rivera Rondón is not entitled to immunity because he ceased to be a member of the Peruvian Army many years before this action commenced. Moreover, FSIA immunity would not shield him from suit in this case because the actions he took, on which

Plaintiffs' claims are based, were outside the scope of his legal authority under Peruvian and international law.

A. The FSIA Does Not Apply to Persons Who Are Not Agents or Instrumentalities of the State at the Time of Suit.

In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003), the Supreme Court held that the FSIA only confers immunity on defendants who are agents or instrumentalities of the foreign state ***at the time that the suit is filed***. The Court looked to the plain text of the statute, holding that the use of the present tense in the definitions of "foreign state" in section 1603(b) 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.* (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)).

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." *Republic of Austria v. Altman*, 541 U.S. 677, 708 (2004) (Breyer, J., concurring) (emphasis added). *See also Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61, 64 (2d Cir. 2004) (applying *Patrickson* and *Altman* to hold that the FSIA immunizes 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). Unless a defendant is currently affiliated with the government of a foreign state at the time of suit, he has no sovereign immunity. The FSIA does not apply to Defendant Rivera Rondón because he was not an agent or instrumentality of Peru at the time the Plaintiffs filed the Complaint in this case.

Rivera Rondón cites to *Velasco v. Government of Indonesia*, 370 F.3d 392 (4th Cir. 2004), for the principle that a defendant acting in an official capacity on behalf of a foreign

government is immune from suit. Mem. at 15. However, *Velasco* did not hold that a *former* governmental official may be considered an "agency or instrumentality" for the purposes of the FSIA. The issue was never raised in *Velasco* but it was conclusively resolved by *Patrickson*.

In the case of *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005), also cited by Defendant, Mem. at 17, the district court concluded that former Saudi government officials who were sued under ATCA and the TVPA *could* assert immunity from suit for actions taken within the scope of their official duties despite the fact that they were no longer government officials when the suit was brought. The only basis for the court's decision was a strained reading of *Patrickson* as applying only to corporations, but not to former government officials, based on the fact that the *Patrickson* court did not explicitly reference individuals. *Terrorist Attacks*, 349 F. Supp. 2d at 789. We believe that was clear error.

First, that decision ignored the principle that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Patrickson,* 538 U.S. at 478 (*quoting Keene,* 508 U.S. at 207). Second, the district court failed to address a substantial body of judicial decisions under the TVPA holding ***former*** foreign government officials liable for acts of torture and extrajudicial killing despite (or indeed because of) the fact that the defendants abused their governmental positions. *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); *Hilao,* 103 F.3d 767 (former Philippines dictator); *Barrueto v. Larios*, 205 F. Supp. 2d 1325 (N.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); *Chavez v. Carranza*, No. 03-2932, 2006 WL 2434934

(W.D. Tenn. Aug. 15, 2006) (federal jury holds former Salvadoran colonel and Vice-Minister of Defense liable for human rights abuses); *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005) (former Haitian army colonel held liable for torture and summary execution).

The principal aim of the TVPA was to codify the decision of the Second Circuit in *Filártiga*, by providing an explicit statutory basis for suits against ***former*** officials of foreign governments, over whom U.S. courts have obtained personal jurisdiction, for acts of torture and extrajudicial killing committed in an official capacity. Indeed, the Senate Report on the TVPA states that "[b]ecause all states are officially opposed to torture and extrajudicial killing . . . the FSIA should normally provide no defense to an action taken under the TVPA against a ***former*** official" (emphasis supplied). S. Rep. No. 102-249, 1991 WL 258662 at *8 (Exhibit 1 attached).

When Plaintiffs filed suit in July 2007, Rivera Rondón had not been an official in the Peruvian military for nearly 15 years. Compl. at ¶ 7. Since he was not an agent or instrumentality of the state of Peru at the time of filing, he is not entitled to protection under the FSIA.

B. The FSIA Does Not Protect Former Officials Who Commit Human Rights Abuses That Are Outside the Legal Scope of Their Authority.

"The FSIA . . . does not immunize an official who acts beyond the scope of his authority." *Velasco*, 370 F.3d at 399.[10] The Fourth Circuit's decision in *Velasco* follows the well-established precedent of the Ninth Circuit's decision in *Chuidian* that distinguishes between

[10] *Velasco* extended FSIA protection to individuals. 370 F.3d at 399. In the time since the Fourth Circuit decided *Velasco*, a circuit split on the issue of whether the FSIA applies to individuals has emerged. *See Enahoro v. Abubakar*, 408 F.3d 877, 881-882 (7th Cir. 2005) (the FSIA does not apply to individuals even if they are acting within the scope of their authority); *see also Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007); *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004) (the FSIA defines agencies and instrumentalities in terms not usually used to describe natural persons). This Court need not reach this issue as the FSIA does not protect *former* officials in any event, nor officials accused of committing serious human rights violations that fall outside the scope of their lawful authority.

acts taken in an official capacity, for which there may be immunity, and acts "beyond the scope of . . . authority," for which immunity does not apply. 370 F.3d at 399, citing *Chuidian v. Philippine Nat'l Bank,* 912 F.2d 1095, 1101 (9th Cir. 1990). Other circuits have applied the same reasoning when determining whether the FSIA provides immunity. *See Jungquist v. Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (whether an act falls within an official's lawful authority depends on the nature of the alleged actions and on whether the official was authorized in his official capacity); *Byrd v. Corporation Forestal y 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.")

The scope of Defendant Rivera Rondón's authority was limited to the powers granted to him by his government. He is not immune for the acts he committed that were illegal under Peruvian law. *See 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); *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.'"); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (no immunity where China "appears to have covertly authorized but publicly disclaimed the alleged human rights violations"). No immunity attaches under the FSIA for acts that could not have been legally authorized by the Peruvian government. *See Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493, 498 (9th Cir. 1992) (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 v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994) ("acts of torture, execution, and disappearance were clearly acts outside of [the defendant's] authority as President."); *Jungquist*, 115 F.3d at 1028 (finding that although the defendant might have been authorized to make payments, he could not have been authorized to make bribes).

Peruvian law in effect during the 1985 Accomarca Massacre clearly prohibited the acts Rivera Rondón is alleged to have conspired to commit and aided and abetted. First, Article 94 *et seq*., Code of Military Justice of Peru, Law No. 23214 (July 24, 1980) (the use of torture on an enemy is outlawed); *see* Declaration of Karim Ninaquispe)[11] ("Ninaquispe Decl.") at ¶ 13 (attached as Exhibit 3). Second, the Penal Code of Peru adopted in 1924 and applicable in 1985 specifies homicide or assassination and assault and battery as crimes. *Id.* ¶ 8. Third, Peru has been a party to the Geneva Conventions since 1955 and a signatory to the Convention Against Torture since May 29, 1985. *Id.* ¶¶ 10, 11.

Furthermore, acts that are in violation of established norms of international law are outside the scope of Rivera Rondón's lawful authority. *Cabiri v. Assasie-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

---

[11] Ms. Ninaquispe is a practicing attorney in Peru with considerable experience in matters involving violations of the Peruvian criminal code and international legal norms, on behalf of these Plaintiffs and other victims in Peru, as her declaration explains. Ninaquispe Decl. ¶¶ 1-7. Her declaration is submitted herewith to assist in setting forth matters of Peruvian law relevant to Defendant's motion as to which the Court may not be familiar.

defendants who commit severe human rights abuses in violation of international law. *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 Gramajo's official authority"); *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 Plaintiffs have alleged against Rivera Rondón qualify as violations of 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 v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)). The same status 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). Courts have also afforded such recognition to the other allegations against Rivera Rondón for war crimes and crimes against humanity. *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.[12] Rivera Rondón's actions, and the actions of those with whom he conspired and whom he aided and abetted in carrying out the Accomarca Massacre, were beyond the authority of both Peruvian law and international law. Rivera Rondón, therefore, is not entitled to immunity in this suit.

[12] Indeed Justice Breyer's concurring opinion in *Sosa* acknowledges that crimes against humanity are among the offenses that are both "universally condemned" and for which there is "agreement that universal jurisdiction exists to prosecute" such conduct, therefore supporting the exercise of jurisdiction under the ATCA. *Sosa*, 542 U.S. at 762.

The cases cited by Rivera Rondón to support his claim of foreign sovereign immunity are readily distinguishable because they do not involve allegations of violations of national or international law. In *Tannenbaum v. Rabin*, the court held that the named defendants were agents or instrumentalities of a foreign state. It also held, however, that the plaintiff's allegations that he was attacked by Israeli police while worshiping at the Western Wall and injured in the eye did not rise to the level of a violation of international law that would have provided for jurisdiction under the ATCA in any event. No. CV-95-4357, 1996 WL 75283 at *5 (E.D.N.Y. Feb. 13, 1996) (citing *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp 542 (D.D.C. 1981)). Also, Rivera Rondón's characterization of the holding in *El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 670 (D.C. Cir. 1996) is misleading. Mem. at 16. Based on the facts of that case, the court in *El-Fadl* found, that the plaintiff had failed to present evidence that the defendant was acting outside his official capacity. *El-Fadl*, 75 F.3d at 670. The plaintiff in *El-Fadl* did not allege torture under the TVPA or the ATCA for actions in violation of customary international law or the laws of Jordan.

Rivera Rondón also cites *Askir v. Boutros-Ghali*, 933 F. Supp. 368 (S.D.N.Y. 1996). Mem. at 16. However, *Askir* is distinguishable because it does not include allegations of abuses in violation of national or international law, but instead involves the unauthorized use of the plaintiff's private property by U.N. peacekeeping forces during their occupation of Somalia. The court held that the U.N. Secretary General had immunity under article 5, § 18 of the U.N. Convention, not the FSIA. *Id.* at 370 n.3.

Unlike the above cases, here the Plaintiffs have properly and 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 authority.

C. Defendant Rivera Rondón Confuses "Official Capacity" With the Concept of "Color of Law."

Defendant mistakenly cites to a list of allegations from the Complaint to argue that his actions were taken in his official capacity as an officer in the Peruvian military who was simply "following orders." Mem. at 17. These allegations, however, show only that Rivera Rondón operated under the "color of law" as required for a valid claim under the TVPA. The Complaint does not allege that Rivera Rondon acted in an "official capacity." Rather, it alleges that Rivera Rondón violated national and international law while cloaked under the color of law in his military position. Rivera Rondón erroneously relies on a line of cases with vastly different factual and procedural circumstances from those present here to support his immunity argument premised on actions he supposedly took "pursuant to the directives of the then-Peruvian government in an official capacity, and not for personal reasons or motivation." Mem. at 20. These cases misconstrue the congressional intent behind the TVPA and its relationship to the FSIA and should not be relied on by this Court.

1. "Following orders" is not a defense.

Rivera Rondón raises a long-rejected defense by saying that he was simply following orders. Mem. at 18 ("At all times, the defendant was obviously acting pursuant to the policy traced in the Complaint from the highest levels of government, through the chain of command and directly to the defendant who, *in his uniform and acting in his capacity as an officer, followed the orders he was given*"). The drafters of the Nuremberg Charter, the legal basis for prosecutions of Nazi war criminals after World War II, anticipated such a defense to allegations of war crimes. They therefore included Nuremberg Principle IV, which reads, "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

International Law Commission, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle IV.

The disapproval of the "superior orders" defense at Nuremberg holds true today under international law. The United Nations Security Council rejected "superior orders" as a defense when chartering both the tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Statute of the International Tribunal for the former Yugoslavia, May 25, 1993, art. 7(4), *available at* http://www.icls.de/dokumente/icty_statut.pdf (last visited January 23, 2008); Statute of the International Tribunal for Rwanda, art. 6(4), *available at* http://www.un.org/ictr/statute.html (last visited January 23, 2008). *See also* Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, §5, art. VIII (establishing that "the defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted").

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. As the appellate court held, "[t]he military judge properly instructed that an order to kill unresisting Vietnamese would be an illegal order, and that if Calley knew the order was illegal or should have known it was illegal, [his] obedience to [that] order was not a valid defense." *Calley v. Calloway*, 519 F.2d 184, 193 (5th Cir. 1975). United States courts have held that officials cannot escape liability by claiming they were acting under orders of superiors. *Barrueto,* 205 F. Supp. 2d at 1332-1333 ("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. No. 102-249, 1991 WL 258662 at *9); *Benford v. American Broadcasting Cos.*, 554 F.

Supp. 145 (D. Md. 1982) ("it is not enough that an official's immediate supervisor approved his actions when the supervisor himself lacked authority to sanction the unlawful event").

Rivera Rondón cannot invoke a defense that he was only following orders as a basis for immunity under the FSIA. Following an illegal order – such as an order to kill defenseless civilians or to block their escape from a massacre committed by fellow troops – does not alter the scope of an official's lawful authority. This defense has been rejected by U.S. courts and under international law, and it must be rejected here.

2. Defendant acted under "color of law".

Rivera Rondón's contention that he was acting in his official capacity, Mem. at 16-17, is fully consistent with Plaintiffs' allegation that he acted under "color of law" as required by the TVPA.[13]

The "color of law" requirement of the TVPA shows that Congress wanted to exclude "purely private criminal acts by individuals or nongovernmental organizations" from coverage under the statute. S. Rep. No. 102-249, 1991 WL 258662 at *8; *see Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998) (quoting H.R. Rep. No. 102-367, at 5) ("[T]he TVPA contains explicit language requiring state action. The legislative history clearly indicates that 'The bill does not attempt to deal with torture or killing by purely private groups.'") (*reprinted in* 1992 U.S.C.C.A.N. 84).

Congress directed the courts to look to interpretations of 42 U.S.C. § 1983 when construing "color of law." H.R. Rep. No. 102-367, at 5 (*reprinted in* 1992 U.S.C.C.A.N. 84); S.

[13] TVPA § 2(a) provides that: "An individual who, under *actual or apparent authority, or color of law*, of any foreign nation--(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350 note (emphasis added).

Rep. No. 102-249, 1991 WL 258662 at *8-9. By doing so, Congress agreed with the courts' analysis that certain actions—of the kind that could only be committed by government officials—are nonetheless outside the powers granted by any sovereign, and therefore 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.'"). Congress clearly viewed acts performed under "color of law" as distinct from, and not equivalent to, the acts within official authority that confer immunity.

In *Pugh v. Socialist People's Libyan Arab Jamahiriya,* No. 02-02026, 2006 WL 2384915 (D.D.C., May 11, 2006), *aff'd per curiam* , No. 06-7167, U.S.App. LEXIS 7830 (D.C. Cir., April 3, 2007) (attached as Exhibit 4) 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 WL 2384915. at *6 ("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.'") *Id.* at *7. (*citation omitted).* In affirming, the D.C. Circuit Court of Appeals noted, "The merits of the parties' positions are so clear as to warrant summary action." 2007 U.S. App. LEXIS 7830 at *3. Very 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***,** 2008 WL 134220 (D.D.C., Jan. 23, 2008).

3. The test is not whether Rivera Rondón acted in his personal or private capacity but rather whether he acted outside the scope of his lawful, official authority.

The FSIA only grants immunity to individuals who act within the scope of their lawful, official authority. *See* section III.B, *supra*. Rivera Rondón erroneously relies on a recent line of cases that focused only on whether the defendants' actions were taken in a public (rather than private) capacity without conducting a further analysis of the scope of the individual's lawful authority. Mem. at 19-20, citing *Yousuf v. Samantar*, No. 1:04-01360-LMB, 2007 U.S. Dist. LEXIS 56227 (E.D. Va. Aug. 1, 2007) (attached as Exhibit 5); *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). While the defendant in *Yousuf* faced similar allegations of human rights abuses and war crimes, the court in *Yousuf* focused on a letter submitted by the defendant and authored by a purported representative of the government of Somalia to which the judge assigned "great weight." 2007 U.S. Dist. LEXIS 56227 at *35 (quoting *Matar v. Dichter,* 500 F. Supp. 2d at 291). The letter stated that the defendant, former Somali General Ali Mohammed Samantar, should be entitled to sovereign immunity because his actions "'would have been taken by Mr. Samantar in his official capacities.'" *Id*. The defendants in both *Belhas* and *Matar* submitted similar letters from the government of Israel. *Belhas*, 466 F. Supp. 2d at 129; *Matar*, 500 F. Supp. 2d at 287. As no such letter exists here from the government of Peru, this line of cases provides no support for Rivera Rondón's motion to dismiss. *See* S. Rep. No. 102-249, 1991 WL 258662 at *8 (requiring that the foreign state "admit some knowledge or authorization" of the acts in question).

The courts in the above cases assumed, improperly, that the question of FSIA immunity depended solely on whether the defendant acted in his personal, private capacity, or instead in a public, official capacity. For example, the court in *Yousuf* stated, "As in the *Belhas* and *Matar* complaints, the complaint at issue does not allege that Samantar was acting on behalf of a

personal motive or for private reasons." *Yousuf*, 2007 U.S. Dist. LEXIS 56227 at *33. All three courts failed to consider whether the underlying actions fell within the scope of the defendant's lawful authority. In applying the incorrect test, those courts improperly conflated "official capacity" and "color of law." The courts thus never reached the question of whether actions taken under color of law by uniformed officers and soldiers, in violation of national and international law, are not within their official capacity and thus are not covered by FSIA immunity. The results in *Yousuf*, *Matar* and *Belhas* would extend sovereign immunity to every single person who had ever acted under color of law of a foreign government. Clearly, that is not a valid rule for cases such as this.[14]

4. Congress did not intend the FSIA to act as a bar to TVPA claims against former officials responsible for human rights abuses.

Congress enacted the TVPA to prevent former foreign government officials who committed torture and extrajudicial killing from finding refuge and comfort in the United States. The TVPA "puts torturers on notice that they will find no safe haven in the United States. Torturers 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). Extending broad immunity to shield these individuals from the reach of the judicial system contravenes this explicit congressional purpose.

When it enacted the TVPA in 1992, Congress made it crystal clear that former government officials are not entitled to FSIA immunity from suit for their involvement in torture and extrajudicial killing. *See* S. Rep. No. 102-249, 1991 WL 258662 at *7-8; *see also* H.R. Rep.

---

[14] Such a rule would have prevented many survivors of torture and other human rights violations from successfully holding abusive former officials to account under ATCA and TVPA. *See* cases cited in Section III.A, *supra* at 22-23. *See also Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (high ranking Ethipoian official held liable for the torture of three women).

No. 102-367, at 4-5, *reprinted in* 1992 U.S.C.C.A.N. 84, 87-88 ("Only 'individuals,' not foreign states, can be sued under the bill."). Congress did not intend the TVPA to abrogate 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 under the TVPA against a former official.***

S. Rep. No. 102-249, 1991 WL 258662 at *7-8 (emphasis added). *See also* H.R. Rep. No. 102-367, at 5 ("[S]overeign immunity would not generally be an available defense" to a claim brought under the TVPA) (*reprinted in* 1992 U.S.C.C.A.N. 84) (attached as Exhibit 2).

As the Senate Report on the TVPA noted, "no state officially condones torture or extrajudicial killings," and therefore "few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties." S. Rep. 102-249, 1991 WL 258662 at *8. In enacting the TVPA, Congress took the view that torture and extrajudicial killing cannot be within the scope of a foreign official's authority. 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." S. Rep. 102-249, 1991 WL 258662 at *3.

An overly broad application of the FSIA to former foreign officials who operate under color of law, yet commit acts outside the scope of their legal authority, would result in the evisceration of the TVPA. If, to bring a case under the TVPA, one of the narrow enumerated

exceptions to the FSIA must apply, 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,[15] 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. 102-249, 1991 WL 258662 at *3-4. The exception to immunity for abuses committed by state sponsors of terrorism would be available to a very limited number of potential plaintiffs. 28 U.S.C. § 1605(a)(7).[16] The enumerated exceptions under the FSIA are so narrow that if courts analyzing TVPA claims are required to find one, the TVPA is rendered a practical nullity.

Accordingly, Rivera Rondón's assertion that the FSIA protects him against allegations under the TVPA must be rejected.

---

[15] Very few human rights cases have involved a waiver of immunity since such a waiver is unlikely absent regime change. *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*, 25 F.3d at 1472, and *Trajano*, 978 F.2d 493 (successor government of Corazon Aquino formally waived immunity of the family of former Filipino President Marcos).

[16] Only five governments have been designated by the State Department as state sponsors of terrorism – Cuba, Iran, North Korea, Sudan and Syria. *See* U.S. State Department, State Sponsors of Terrorism, *available at* http:\\www.state.gov\s\ct\c14151.htm (last visited January 23, 2008).

IV. PLAINTIFFS HAVE NOT FAILED TO EXHAUST REMEDIES IN PERU.

Defendant Rivera Rondón wrongly argues that Plaintiffs' claims should be dismissed for failure to exhaust local remedies as required by the TVPA. Mem. at 21-23.

Plaintiffs bring torture and extrajudicial killing claims under the ATCA and the TVPA, and war crimes and crimes against humanity claims under the ATCA. The ATCA does not require plaintiffs to exhaust local remedies. *Jean,* 431 F.3d at 781; *Enahoro v. Abubakar*, 408 F.3d at 889-90 (7th Cir. 2005) (Cudahy, J., dissenting in part); *Kadic*, 70 F.3d at 243-44; *see also Saravia*, 348 F. Supp. 2d at 1157 ("plaintiffs asserting claims under the ATCA are not required to exhaust their remedies in the state in which the alleged violations of customary international law occurred"). Plaintiffs' ATCA claims, therefore, are not subject to dismissal on this ground.

The TVPA does require Plaintiffs to exhaust remedies in the country where the abuses occurred, but only if those remedies are "adequate and available." 28 U.S.C § 1350 note. The exhaustion requirement under the TVPA "was not intended to create a prohibitively stringent 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. No. 102-249, 1991 WL 258662 at *9-10.

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. No. 102-249. *See also Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1347 n.30 (N.D. Ga. 2002); *Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 275 (S.D.N.Y. 2002)

("plaintiffs have fulfilled the exhaustion requirement of the TVPA by demonstrating that the Zimbabwean judicial system is sufficiently under the control of President Mugabe . . . so as to render it inaccessible to the plaintiffs"). Claims brought under the TVPA can go forward if remedies in the country where the alleged abuses occurred are unattainable. *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1319-20 (N.D. Cal. 2004) (accepting that Falun Gong practitioners in China seeking legal redress are subject to retaliation); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1267-68 (N.D. Ala. 2003) (where plaintiffs allege that seeking legal redress in Colombia puts them at great risk of retaliation).

As explained below, because Rivera Rondón has failed to establish that remedies are currently available in Peru, Plaintiffs have met their obligations under the TVPA.

A. Defendant Has Not Met His Burden to Show That Remedies Are Currently Available and Adequate in Peru.

Defendant has the burden to show that available and adequate remedies currently exist in Peru. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-8386, 2002 WL 319887 *17 (S.D.N.Y. Feb. 28, 2002); *Sinaltrainal v. Coca Cola Co.,* 256 F. Supp. 2d 1345 (S.D. Fla. 2003), *Hilao*, 103 F.3d at 778 n.5. That burden has not been met, nor can it be met under the circumstances of this case.

Here, Defendant argues unconvincingly that remedies in Peru are available and adequate even if they "might take some time or that it might be difficult [to obtain them]." Mem. at 22. Under Peruvian Law, criminal proceedings can be initiated *in absentia* but cannot be completed – nor can an opinion acquitting or condemning any defendant be rendered – until the defendant is physically present in the country. Compl. at ¶ 103. Rivera Rondón is currently fighting deportation to Peru, and it is clear that he has no intention to return to face a criminal trial there.

Under Peru's civil law system, Plaintiffs cannot obtain a civil remedy until after the adjudication of criminal charges against Defendant. Compl. ¶ 104. The power to initiate

criminal proceedings in Peru belongs solely to government prosecutors. Ninaquispe Decl. ¶ 14; *see also* Peruvian Rules of Criminal Procedure, Preliminary Title, Art. IV, Legislative Decree No. 957 (July 29, 2004).[17] Even when the victims or offended party makes the facts available to the prosecutor, the criminal matter is actionable *exclusively* by the prosecutor. To obtain a remedy against a defendant in a criminal matter, victims can participate as *parte civil* ("civilian parties"). Ninaquispe Decl. ¶ 15. This requires the government prosecutor to complete the criminal case, and only after criminal liability has been assessed does a *parte civil* have a right to recover damages. *Id*.

Therefore, full redress for Plaintiffs has been unattainable in Peru. Attempts to seek an adequate civil remedy in Peru are futile so long as the defendant is not physically present in the country. Defendant attempts to minimize the issue by using "process" and "remedy" as synonymous, 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 concluding the process in Peru at this time is impossible, there is no currently available remedy.

B. Plaintiffs Have Pursued Remedies in Peru But They Proved Neither Available Nor Adequate.

In or about 2005, Peruvian prosecutors filed murder charges against Defendant. Compl. ¶ 101; Ninaquispe Decl. ¶19. Soon thereafter, Plaintiffs each exercised their right to become a *parte civil,* the only action available to them at the time. Ninaquispe Decl. ¶19; Compl. ¶¶ 100-105. By doing so, Plaintiffs have done the equivalent to "suing" under United States law. However, their right to civil compensation depends on the completion of the criminal case. The criminal case cannot proceed when the defendant is not physically in Peru. *Id*. Rivera Rondón

[17] The cited provision of Peruvian law are attached as Attachment G to Ninaquispe Declaration (attached as Exhibit 3).

remains in the United States, thus the criminal case against him cannot proceed in Peru. Plaintiffs have exercised the only avenue available to them under Peruvian law, which cannot provide a remedy while Rivera Rondón is absent from Peru.

Defendant cites to *Torres v. Southern Peru Copper Corp*, 965 F. Supp. 899 (S.D. Tex. 1996), *aff'd,* 113 F.3d 540 (5th Cir. 1997), to support his argument that adequate remedies exist in Peru. Mem. at 22. In *Torres,* the court found Peru to be an adequate alternative forum for purposes of *forum non conveniens* in a case alleging ordinary state law tort violations. 965 F. Supp. at 904. Regardless of whether Peruvian courts might provide an adequate and fair forum for hearing an ordinary tort dispute, Plaintiffs cannot achieve a remedy in this case due to Rivera Rondón's absence from Peru. The quality and abilities of Peruvian courts is irrelevant to this inquiry.[18] *Vargas v. M/V Mini Lama*, 709 F. Supp. 117, 118 (E.D. La. 1989).

Finally, Defendant cites *Ruiz v. Martinez*, 2007 WL 1857185, at *6 (W.D. Tex. May 17, 2007). Mem. at 22. In *Ruiz,* the 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. *Id.* Plaintiffs do not take issue with the purposes behind such a requirement. Rather, it is their position that the requirement has been fully satisfied here. As noted above, Plaintiffs have attempted, to no avail, to exhaust their Peruvian remedies by joining the complaint in the criminal case brought in Peru against Rivera Rondón. It is currently impossible for that case to lead to compensation for the Plaintiffs due to Defendant's absence from Peru. Plaintiffs have

[18] Regardless of the accuracy of the *Torres* court's characterization of the Peruvian judicial system, which Plaintiffs do not concede here, the fact that the court found Peru to be a better forum in that case is irrelevant to this case. In *Torres*, the plaintiffs argued only that remedies were not available to them in Peru because the Peruvian court system is corrupt and the costs of such litigation would be prohibitive. 965 F. Supp. at 903-904. These concerns are entirely different from the issues in the present case. Here, the criminal case in Peru is statutorily barred from advancing because the defendant is not in Peru, and without a criminal penalty, Plaintiffs are unable to pursue any civil remedies. Ninaquispe Decl. ¶¶ 14-18.

exhausted all available local remedies in Peru and can therefore bring this suit in the United States.

V. DISMISSAL ON POLITICAL QUESTION GROUNDS IS UNWARRANTED.

There is no merit to Defendant's contention that this case is nonjusticiable under the political question doctrine. Under that doctrine, courts must abstain in cases whose resolution would require the judiciary to involve itself in policy decisions constitutionally committed to the political branches. *Baker v. Carr,* 369 U.S. 186, 210 (1962); *Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."). The political question doctrine is a principle of intra-governmental comity that bars the judicial branch from interfering in matters left exclusively under the Constitution to the political branches. *Id.* The burden of establishing the presence of political questions falls on Defendant. *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1206 (9th Cir. 2007) (holding that party urging the defense "must carry the primary burden of establishing a political question").

Rivera Rondón has failed to meet his heavy burden in this case. He relies entirely on unsupported and irrelevant allegations, such as: the "United States was providing significant military aid to Peru to fight [Shining Path] terrorists;" and an "example of this aid is what was then known as the 'School of the Americas.'" Mem. at 24. This defense should be rejected for several reasons.

First, Rivera Rondón provides no basis for connecting his role in the crimes committed in the Accomarca Massacre to any policy decision of the United States or to any conduct by members of the U.S. armed forces, whether in conjunction with the "School of the Americas" or otherwise. Nor does he offer any evidence to support these assertions or the claim that "the

events at Accomarca occurred" as a consequence of training the U.S. provided to the Peruvian military. Mem. at 24. The failure to support these sweeping allegations with anything but a solitary citation to 10 U.S.C. § 4415, which merely authorizes the School of the Americas, is reason enough to reject this argument.

Second, assuming for the sake of argument that the United States did provide financial aid and training to the Peruvian military during the relevant time, that circumstance would not create a nonjusticiable political question here. Rivera Rondón does not contend that the planned killing of civilians during the Accomarca Massacre was carried out at the direction of the U.S. military or with the knowledge and support of the U.S. government. Nor can he. Shortly after the massacre, the U.S. Department of State condemned the killings, calling the Peruvian military's campaign against the Shining Path an illegal use of force involving "extrajudicial killings, disappearances, torture, and arbitrary detention." U.S. Department of State, *Country Report on Human Rights Practices for 1985*, 99th Cong. 2d Sess., Report Submitted to the Comm. on Foreign Affairs, U.S. House of Representatives, and the Comm. on Foreign Relations, U.S. Senate, (Jt. Comm. Print, Feb. 1986), at 669 (attached as Exhibit 6). No political question arises merely from alleged assistance provided by the United States. Indeed, courts have found no difficulty adjudicating ATCA and TVPA claims brought against military personnel whose units received similar support from U.S. government sources.[19]

[19] *E.g., Cabello*, 402 F.3d at 1153 (defendant Lt. Fernandez Larios entered the United States under protection of U.S. government; he attended combat arms orientation at the School of Americas (School of Americas Watch, *available at* http://www.soaw.org/article.php?id=234) (last visited Jan. 28, 2008); *Arce,* 434 F.3d 1254 (defendant Gen. Garcia attended the counter insurgency course at the School of Americas) (School of Americas Watch, *available at* http://www.soaw.org/article.php?id=238) (last visited Jan. 28, 2008); *Xuncax,* 886 F. Supp. 169 (defendant Gen. Gramajo attended the Kennedy School at Harvard; in 1991, he was a guest speaker at the School of Americas) (School of Americas Watch, *available at* http://www.soaw.org/article.php?id=239) (last visited Jan. 28, 2008); *Chavez v. Carranza,* No.

This case is thus a far cry from the direct challenges to U.S. military policies and actions made by the plaintiffs in the cases on which Defendant principally relies. Mem. at 25-26. Each of those cases directly called into question the propriety of specific decisions made by U.S. officials in conducting defense operations – issues committed to the Executive Branch under the U.S. Constitution.[20] Nothing of the kind is at issue here. Accordingly, those decisions are inapposite and provide no support for the nonjusticiability argument made by Defendant.

Next, the suggestion that "this case implicates the relationship between the United States and Peru at a pivotal point in their history," Mem. at 25, lacks both case support and a factual predicate. Neither government has approached this Court to state any interest in this action. In fact, the Peruvian government is attempting to prosecute Rivera Rondón and others involved in the Accomarca Massacre. Compl. ¶¶ 100-101.

Finally, Rivera Rondón's reliance on the State Department's Statement of Interest in *Doe v. Liu Qi* is misplaced. Mem. at 26-27. No such statement has been made in this case, and thus Defendant is unable to show the United States has any concern that a ruling against Defendant here somehow will subject U.S. officials to liability abroad. In enacting the TVPA, moreover, Congress and the President had to be mindful of the potential for retaliation. That possibility did not dissuade them, however, from establishing a right of action for brutal acts of torture and extrajudicial killing of the kind committed here.

03-2932 (W.D. Tenn. filed Dec. 10, 2003) (defendant Carranza was trained by U.S. military at Fort Sill and later served as a paid informant for the United States) (Trial direct examination of N. Carranza, Nov. 10, 2005, Vol. IX; Tr. at 1390-91, 1469-72; *available at* http://cja.org/cases/carranza/transcripts/carranza09.txt) (last visited Jan. 28, 2008).

[20] *Aktepe v. United States*, 105 F.3d 1400, 1401-02 (11th Cir. 1997) (claiming for injuries caused when a U.S. naval warship fired two missiles during a training exercise); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985) (British citizens challenging the deployment of U.S. missiles in the United Kingdom); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1308 (2d Cir. 1973) (Member of Congress suing the Secretary of Defense over the conduct of U.S. military operations in Cambodia).

VI. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE ACT OF STATE DOCTRINE.

Rivera Rondón incorrectly argues that the act of state doctrine bars Plaintiffs' claims. Mem. at 27-29. The act of state doctrine precludes judicial inquiry into the validity of official acts of a recognized foreign sovereign power. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). "Act of state issues only arise when a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Intern.*, 493 U.S. 400, 406 (1990). The doctrine does not call for judicial abstention merely because a case may call for acts of a former foreign government official to be judged. "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments . . . ." *Id*. at 409. "[T]he act of state doctrine is not an 'inflexible' rule, but rather requires case-by-case analysis to ensure that none of the underlying principles are violated." *Dominican Republic v. AES Corp.*, 466 F. Supp. 2d 680, 695 (D. Va. 2006) (quoting *Eckert Int'l v. Government of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 171 (D. Va. 1993)).

A. Defendant Rivera Rondón Has Not Shown That An Act of State Is At Issue in This Case.

As a threshold matter, Defendant has the burden to prove that an act of state is at issue in the case. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976). Rivera Rondón has not produced evidence of any official act here that would trigger the act of state doctrine.

Plaintiffs' claims call on this Court to find Defendant liable for his role in acts of torture, extrajudicial killing, war crimes and crimes against humanity. Those are not official, public acts

of the government of Peru. Actions taken by government officials in violation of norms of customary international law, such as the abuses alleged here, are not "official" acts for the purposes of the act of state doctrine. *See Trajano,* 978 F.2d at 498 n.10, *Hilao*, 25 F.3d at 1471-72; *Filártiga,* 630 F.2d at 889; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984) (actions taken by an official implicated in the massacre of noncombatants "acting outside the scope of his authority as an agent of the state are simply not acts of state"). In *Kadic*, the Second Circuit stated, in dicta, "[A]ppellee has not had the temerity to assert in this Court that the acts he allegedly committed [murder, rape, torture, and arbitrary detention of civilians] are the officially approved policy of a state. . . . We think it would be a rare case in which the act of state doctrine precluded suit under section 1350." 70 F.3d at 250.

Plaintiffs' allegations of atrocities concern acts illegal under Peruvian law.[21] *See* Section III.B., *supra.* The Senate report of the TVPA confirms that torture and similar human rights abuses can never be "public acts" for the purposes of the act of state doctrine. S. Rep. No. 102-249, 1991 WL 258662 at *8 (Exhibit 1 attached). The abuses alleged here are violations of international law and the national laws of Peru, thus cannot be "public acts" of a foreign official for act of state purposes. Rivera Rondón has offered no contrary analysis and no evidence that the Accomarca Massacre was an official public act of the Peruvian government, authorized under Peruvian law. Clearly, the act of state doctrine does not apply here.

[21] Peruvian Criminal Code, Vol. 2, Title XIV-A, "Crimes Against Humanity," Arts. 319-324; Chap. 3 "Torture," Arts. 321-324, Vol. 2, Title I, "Crimes Against Life, Physical Integrity and Health," Chap 1, "Murder," Arts. 106-113 (1991) (Attachment A to Ninaquispe Declaration); Ninaquispe Decl. ¶ 8, 9.

B. Abstention is Unwarranted Under the *Sabbatino* Factors.

Even if the acts alleged are considered official acts, a balancing of the factors as required by *Sabbatino* still weighs against dismissal. Defendant lists the three factors as: "(a) 'the degree of codification or consensus concerning a particular area of international law,' (b) the extent to which the issue 'touch[es] . . . sharply on national nerves,' with greater justification for 'exclusivity in the political branches' the more 'important the implications of an issue are for our foreign relations,' and (c) whether 'the government which perpetrated the challenged act of state is no longer in existence.'" Mem. at 27 (quoting *Sabbatino*, 376 U.S. at 428).

1. The acts alleged in this case have been universally condemned as violations of international law.

This first factor under *Sabbatino* weighs in favor of adjudication. "[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . ." *Sabbatino*, 376 U.S. at 428. The acts alleged in the Complaint violate universally agreed upon legal principles (see discussion of specific claims *infra*). Courts "can decide claims arising out of alleged violations of fundamental human rights." Restatement (Third) of the Foreign Relations Law of the United States § 443 cmts. b, c (1987). They have done so in dozens of cases. *See* Section III.A., *supra* at 22-23 and 33 n.14. Indeed, Congress explicitly called on the courts to adjudicate human rights cases like these when it passed the TVPA.

2. Adjudication is consistent with United States foreign policy.

The second *Sabbatino* factor weighs against dismissal when a case does not touch sharply on our own national nerves. *Sabbatino*, 376 U.S. at 428 ("[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches"). Human rights abuses, which are acts outside the scope of an official's

authority, do not implicate strong foreign policy concerns. *Hilao*, 25 F.3d at 1472 ("A lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concern involved in bringing suit against another government in United States courts"). The acts committed by Defendant and other soldiers in carrying out the Accomarca Massacre clearly falls outside the scope of his lawful authority. See section III.B, *supra*. Adjudication of this suit, therefore, does not require the court to pass on the validity of sovereign acts of a foreign government.

Furthermore, the United States government has condemned the Accomarca Massacre and expressed concern about human rights abuses occurring in Peru during that period. *See* State Dept., 1985 country report on human rights: Peru at 663-664 (attached as Exhibit 6); U.S. State Department, 1999 country reports on human rights practices: Peru, *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/peru.html (Peruvian armed forces refuse to explain why Hurtado has been promoted to rank of major despite his role in the 1985 Accomarca Massacre of over 60 civilians). In light of the United States' consistent condemnation of the Accomarca Massacre, this is not "the sort of case that is likely to hinder the Executive Branch in its formulation of foreign policy, or result in differing pronouncements on the same subject." *Liu v. Republic of China,* 892 F.2d 1419, 1433 (9th Cir. 1989). *See also Nat'l Coalition Gov't Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 354 (C.D. Cal. 1997) (noting, in examining the foreign policy factor, that "the coordinate branches of government have already denounced the foreign state's human rights abuses and imposed sanctions"). Adjudication of this case is consistent with United States foreign policy toward Peru.

Unlike *Doe v. Israel*, cited by Defendant, Mem. at 28, the present case does not represent the type of sensitive foreign policy issues implicated in a case involving the Israeli-Palestinian

conflict. 400 F. Supp. 2d 86 (D.D.C. 2005). In that case, the court focused on the second *Sabbatino* factor and dismissed the case on act of state grounds, holding, "Plaintiffs' claims would require the Court to adjudicate sensitive issues of a political nature that would offend notions of international comity." *Id*. at 113. Defendant does not offer any evidence that such sensitive foreign policy issues are implicated in the present case. Indeed, as noted above, the Peruvian government itself is attempting to prosecute Rivera Rondón and the others who participated in the Accomarca Massacre. Compl. ¶¶ 100-101.

Additionally, the facts here do not give rise to the same foreign policy concerns in *Saltany v. Reagan*, 702 F. Supp 319, 321 (D.D.C. 1988). *Saltany* involved "[p]ermission given by the head of government of one sovereign nation, speaking from its seat of government, to allow its territory to be utilized by an ally, at the ally's express request, to mount a military operation against a third power could not possibly be otherwise characterized." *Id.* at 321. The fact that the party facing suit, or the "ally," in *Saltany,* refers to an ally of the United States, sued in United States court for actions taken in furtherance of its alliance with the United States, weighed heavily in favor of dismissal in that case. *Id*. However, no analogous foreign policy implications exist in the present suit that may jeopardize the relationship between the United States and Peru.

3. Because the Fujimori era ended seven years ago, and the crimes at issue are the subject of proceedings pending in Peru, a suit against Rivera Rondón does not give rise to act of state concerns.

Finally, the *Sabbatino* Court held that "[t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . ." 376 U.S. at 428. This factor weighs in favor of adjudication as today's Peru does not resemble that of 1985.

Rivera Rondón misrepresents the situation in Peru. Peru has not been a "stable democracy, with continuity of government" as Rivera Rondón states. Mem. at 27. After the election of Fujimori in 1990, Peru underwent a period of significant upheaval and severe repression. Compl. ¶ 84. In 1992, Fujimori declared a "self-coup," in which he closed Congress, purged the judiciary and suspended the Constitution. *Id*. His despotic rule lasted until 2000.

The situation in Peru has improved in recent years. President Alan García, who was president from 1985-1990 during a period marked by widespread human rights abuses committed by government forces, has been recently re-elected to office. Compl. ¶¶ 82, 102. Recent developments show that the current government is taking steps toward accountability. Peru's amnesty law was declared invalid in 2001 and authorities in Peru have initiated judicial proceedings to prosecute the perpetrators of the Accomarca Massacre. *Id.* ¶¶ 99-101. Following his extradition to Peru last September, Fujimori is being tried in televised proceedings in a Peruvian court for ordering human rights abuses relating to two massacres committed during his regime.[22]

As Plaintiffs point out in the Complaint, Peruvian officials filed criminal charges against Rivera Rondón in 2005 for his role in the Accomarca Massacre. *Id.* ¶¶ 90, 101. However, the case cannot move forward while he remains outside of Peru. *Id.* at ¶ 103.

VII. THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER ATCA AND THE TVPA.

Rivera Rondón seeks dismissal on the mistaken ground that Plaintiffs have not alleged that he did anything to cause the atrocities that were committed during the Accomarca Massacre. Mem. at 29-30. This argument disregards Plaintiffs' detailed allegations of Defendant's role in

---

[22] Dan Collyns, "Peru Struggles With Its Dark Past," BBC News, Dec. 10, 2007, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7132375.stm

the operation. It also ignores numerous decisions by U.S. courts and international bodies that establish liability for accomplices who participate in such heinous violations of international law norms. His arguments should be rejected.

The Complaint alleges seven counts against Defendant Rivera Rondón. It invokes jurisdiction under ATCA for violations of international law based on extrajudicial killing, torture, war crimes, and crimes against humanity. Compl. ¶¶ 107, 115, 125, 135, 142, 149, 154. It also makes claims directly under the TVPA for extrajudicial killing and torture. *Id.* ¶¶ 107, 115, 125. For each claim, Rivera Rondón's liability is based on three distinct theories: conspiracy, aiding and abetting, and joint criminal enterprise ("JCE"). There is no question that the claims asserted in the Complaint are actionable pursuant to ATCA's grant of subject matter jurisdiction and directly under the remedial scheme adopted by Congress in the TVPA.

ATCA, enacted as part of the Judiciary Act of 1789, establishes federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Sosa,* 542 U.S. at 712, 713 n.10 (quoting 28 U.S.C. § 1350). Each claim asserted here constitutes a violation of international law and the TVPA:

- **Extrajudicial killing** is actionable under TVPA § 2(a)(2) and is a violation of international law. *Saravia*, 348 F. Supp. 2d at 1148-49, 1153-54 (finding liability under TVPA and ATCA); *Xuncax*, 886 F. Supp. at 184; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) *reconsid. granted in part on other grounds*, 694 F. Supp. 101 (N.D. Cal. 1988).

- **Torture** is actionable under TVPA § 2(a)(1) because it contravenes universally accepted norms of international law. *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005); *Barrueto*, 205 F. Supp. 2d at 1331-33, *aff'd on other grounds sub. nom. Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Kadic*, 70 F.3d at 243 ("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").

- Courts have repeatedly recognized that torture also is actionable under the ATCA. *See, e.g., Filártiga,* 630 F.2d at 884-85; *Sosa*, 542 U.S. at 732 ("[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.") (quoting *Filártiga*, 630 F.2d at 890); *Hilao,* 25 F.3d at 1474-75; *Siderman de Blake*, 965 F.2d at 717; *Mehinovic,* 198 F. Supp. 2d at 1347; *Paul,* 901 F. Supp. at 335; *Xuncax*, 886 F. Supp. at 178, 184-85; *Barrueto*, 205 F. Supp. 2d at 1331 n.5.

- **War crimes,** carrying out "a deliberate plan . . . to massacre and exterminate . . . all unarmed noncombatant civilians . . . without cause or trial" directed against the civilian population "are recognized in international law as violations of the law of war." *In re Yamashita,* 327 U.S. 1, 14 (1946); *Kadic*, 70 F.3d at 242-43; *Iwanowa*, 67 F. Supp. 2d at 439-41 (forced labor during World War II constituted a war crime); *Mehinovic*, 198 F. Supp. 2d at 1350-51 (pattern of torture, inhumane treatment and arbitrary detention of civilians during war in Bosnia constituted violation of Common Article 3 of the Geneva Convention and customary international humanitarian norms); *Doe v. Islamic Salvation Front*, 993 F. Supp. at 8 (allegations of violence against women in Algeria stated a claim of war crimes under Common Article 3).

  Grave breaches of the Geneva Conventions and violations of Common Article 3 meet the *Sosa* requirements of widely accepted, clearly defined violations of the law of nations. Prior to *Sosa*, lower courts recognized ATCA jurisdiction over war crimes under a three-prong test: universal, definable, obligatory. Since the *Sosa* standard is virtually identical to this test, war crimes continue post-*Sosa* to support ATCA jurisdiction.

- **Crimes against humanity** can be pursued under international law for widespread and systematic attacks against a civilian population. Justice Breyer's concurring opinion in *Sosa* acknowledges that crimes against humanity are among the offenses that are both "universally condemned" and for which there is "agreement that universal jurisdiction exists to prosecute" such conduct, therefore supporting the exercise of jurisdiction under ATCA. *Sosa*, 542 U.S. at 762; *see also Mujica v. Occidental Petroleum Corp.,* 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005); *Saravia*, 348 F. Supp. 2d at 1156-57. Other courts, while not expressly ruling on the actionability of the norm, have implicitly accepted claims of crimes against humanity. *See, e.g., Cabello*, 402 F.3d at 1154 ("[C]rimes against humanity … have been a part of the United States and international law long before Fernandez's alleged actions.") (citation omitted).

The TVPA claims for extrajudicial killing and torture are well-pleaded, based on detailed factual allegations. Compl. ¶¶ 54-72, 107-33. The statute requires that the defendant act under

the authority, or color of law, of a foreign nation, § 2(a)(1), a requirement the Complaint amply satisfies, again with detailed factual allegations. *Id.* ¶¶ 43, 45, 48-53. *See* Section III.C, *supra.*

Liability for torts in violation of international law under ATCA, and for killings and torture in violation of the TVPA, is not limited to direct liability alone. By their express terms, neither ATCA nor the TVPA limits its scope to claims imposing direct liability. Rather, as demonstrated below, both statutes recognize indirect accomplice liability a sufficient ground for maintaining a right of action. Thus, Plaintiffs have a valid cause of action against Rivera Rondón for the acts or omissions of others to whom he gave assistance, or with whom he conspired, in carrying out the Accomarca Massacre.

Numerous courts have held defendants liable under ATCA and the TVPA for conspiracy and aiding and abetting, two of the theories of liability asserted here. *Cabello,* 402 F.3d at 1157 ("ATCA reaches conspiracies and accomplice liability" and "the TVPA was intended to reach beyond the person who actually committed the acts to those ordering, abetting or assisting in the violation"). *Accord, Mehinovic*, 198 F. Supp. 2d at 1355 (holding that ATCA extends liability to those who aid and abet others in the commission of torts that violate international law); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (former captain in El Salvadoran Air Force found liable for conspiracy and aiding and abetting in the assassination of Archbishop Romero).

JCE, the final theory of accomplice liability asserted by Plaintiffs, also has been accepted as a basis for liability under international law. *Bowoto v. Chevron Corp.*, No. C-99-02506-SI, 2006 WL 2455752, at *8 n.13 (N.D. Cal. Aug. 22, 2006) (recognizing joint criminal enterprise liability as one type of liability applicable in TVPA and ATCA cases); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since

1991 ("ICTY"), art. 7(1), *available at* http://www.icls.de/dokumente/icty_statut.pdf (last visited January 23, 2008).[23] Jurisprudence from the ICTY and other international criminal tribunals are important sources of authority for determining liability under the ATCA and TVPA. *Mehinovic*, 198 F. Supp. 2d at 1344 (noting that statutes and opinions of the ICTY are "particularly relevant" for determining liability under the TVPA and ATCA); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 374 F. Supp. 2d 331, 338 (S.D.N.Y. 2005) (recognizing ICTY and other international criminal tribunals as "occupy[ing] a special role in enunciating the current context of customary international law norms").

Rivera Rondón misses the mark when he insists that the Complaint fails to state a claim because it does not allege that he personally tortured or killed anyone in Plaintiffs' village, that he personally had any villager in his custody or physical control, that he personally fired a weapon or ordered anyone else to do so, or that he even saw anyone being killed or tortured. Mem. at 30-31. As demonstrated above, authoritative rulings from U.S. courts and international tribunals contradict Rivera Rondón's assumption that liability under ATCA and the TVPA is limited to wrongful acts specifically committed by Rivera Rondón himself. In the end, his bare contention that "[t]here is simply no such cause of action" for conspiracy, aiding and abetting, and JCE under the TVPA, Mem. at 32, betrays a fundamental misunderstanding of the governing law.

---

[23] As the ICTY Tribunal explained in *Prosecutor v. Bradjanin*, Case No. IT-99-36-T, ¶ 258 at 111 (ICTY Trial Chamber, Sept. 1, 2004), "[t]here are three distinct categories of JCE set out in the jurisprudence of this Tribunal." (attached as Exhibit B to Plaintiffs' Motion for Default motion and Trial on Damages) (filed separately in paper form as lengthy exhibit). The elements of JCE under the ICTY Statute are as follows: "1. a plurality of persons; 2. the existence of a common plan, design or purpose that amounts to or involves the commission of a crime provided by the Statute; and 3. the participation of the accused in the common plan involving the perpetration of on of the crimes provided for in the Statute." *Id.* ¶ 260 at 112. These elements are fully pleaded in Plaintiffs' Complaint. Compl. ¶¶ 48-53, 78.

Rivera Rondón also misapprehends the law in arguing that conspiracy, aiding and abetting, and JCE do not give rise to liability independent of the illegal or wrongful acts on which liability is premised. Mem. at 32-33. This argument misses the entire point of indirect liability, effectively urging that only those who commit the underlying crimes are subject to liability. That proposition, of course, is squarely at odds with the authorities cited above and misconstrues the concept of independent liability. It is one thing to suggest that one is not liable indirectly in the absence of any unlawful acts being committed (that is to say, there is no basis for imposing conspiracy liability where conspirators have malicious intentions that are never carried out). It is quite another thing to suggest, as Defendant does here, that a co-conspirator is immune from conspiracy liability for acts actually carried out by other co-conspirators in furtherance of the conspiracy. The law is otherwise, as demonstrated above. Indeed, the ICTY's appellate decision in the *Milutinović* case cited in support of Defendant's position, Mem. at 33, when read without the ellipses he inserts, makes the very distinction noted above and thus reveals the fatal defect in Rivera Rondón's argument.[24]

Next, Rivera Rondón erroneously maintains that he cannot be liable for allegedly conspiring with other members of the military because "it is legally impossible to conspire with oneself." Mem. at 33. No ATCA or TVPA case so holds. There is no bar against holding members of an organization, including members of a military unit, liable individually under a

---

[24] "Criminal liability pursuant to a [JCE] is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a [JCE], a different matter. The Prosecution in the present case made that point clear when it said that [the defendant] was being charged not for his membership in a [JCE] but for his part in carrying it out." *Prosecutor v. Milutinović,* Decision on Dragolijub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise,* Case No. IT-99-37-AR72, ¶ 26 at 12 (ICTY App. Chamber, May 21, 2003) *available at* http://ww.un.org/icty/supplement/supp41-e/multinovic-a.htm (last visited Feb. 1, 2008). Plaintiffs' allegations against Rivera Rondón here fully meet this legal standard.

conspiracy theory for acts in violation of governing law. *See Cabello*, 402 F.3d at 1159-60 (affirming soldier's liability under ATCA and TVPA for conspiring with the Chilean government and other members of his squad to kill civilian prisoners without legal authority and in violation of law); *Mehinovic*, 198 F. Supp 2d at 1358 (granting default judgment and damages under ATCA and TVPA for conspiracy, among other claims, where defendant soldier in Bosnian Serb Army "acted with other guards and soldiers to detain, torture and abuse plaintiffs"). *Cf. United States v. Jaks,* 28 M.J. 908, 909-910 (Army Ct. Mil. Rev. 1989) (upholding criminal conviction of U.S. Army soldier for conspiring with other soldiers to convert goods).

Finally, Rivera Rondón makes several claims that severely undermine his credibility. He contends, for example, that the Complaint fails to allege a "common scheme or plan to commit atrocities." Mem. at 33. He evidently missed the allegation that the Accomarca Massacre "was carried out pursuant to a common plan, design, and scheme . . . to commit human rights abuses against civilians." Compl. ¶ 76. He then takes the argument a step farther, criticizing the Complaint because "no facts [are] alleged which might suggest [a common scheme or plan]." Mem. at 33. This contention likewise skips over the allegations that follow, which describe the factual basis for the "common scheme or plan" element of Plaintiffs' claims:

- There was an "operational plan 'to capture and/or destroy' terrorist elements in Quebrada de Huancayoc"(Compl. ¶ 48);
- The plan had a secret military codename: "Operation Huancayoc" (*Id.* ¶ 49);
- Rivera Rondón's unit was one of the two patrols given responsibility under the plan "for going into Quebrada de Huancayoc" (*Id.* ¶ 52);
- Numerous atrocities were committed in Operation Huancayoc against innocent civilians, including women and children (*Id.* ¶ 54-61);
- To support the objectives of Operation Huancayoc, Rivera Rondón positioned his unit "in the upper part of Quebrada de Huancayoc" to "block[] possible escape routes for the villagers" (*Id.* ¶ 62);

- To cover up the atrocities committed during the operation, Rivera Rondón's written report failed to "mention any interaction with civilians in Quebrada de Huancayoc or the fact that dozens of people were killed during the operation" (*Id.* ¶ 66);

- The operation was "part of a pattern and practice of widespread and systematic human rights violations committed against the civilian population" (*Id.* ¶ 75);

- The killing continued; "less than two weeks [later], Peruvian soldiers murdered approximately 59 civilians in . . . nearby towns" (*Id.* ¶ 68); and

- "On or about September 8, 1985, Peruvian Army soldiers returned to Accomarca and murdered at least two eyewitnesses to the Accomarca Massacre." (*Id.* ¶ 70).

Rivera Rondón has asserted no legitimate defense here. The Complaint states a claim upon which relief can be granted. It is amply supported with nonconclusory assertions of fact and a substantial body of law. The motion to dismiss on Rule 12(b)(6) grounds should therefore be denied.

VIII. FEDERAL COURTS HAVE JURISDICTION TO ADJUDICATE ATCA CLAIMS BROUGHT BY NONRESIDENT ALIENS, SUCH AS PLAINTIFFS.

Defendant Rivera Rondón insists that, by its use of the word "aliens" in ATCA, Congress intended only *resident* aliens (i.e., citizens of another country who reside in the U.S.) may bring ATCA claims. Because Plaintiffs are *nonresident* aliens, Rivera Rondón reasons, this Court lacks subject matter jurisdiction under ATCA. Mem. at 34-35. The Supreme Court has ruled otherwise, however, thus eviscerating Defendant's theory.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that nonresident aliens were entitled to invoke the jurisdiction of the district court under ATCA, as well as under other federal statutes. Rejecting the lower courts' dismissal of ATCA claims for lack of jurisdiction, Justice Stevens, writing for the Court's majority, explained as follows:

> The courts of the United States have traditionally been open to nonresident aliens. *Cf. Disconto Gesellschaft v. Umbreit,* 208 U.S. 570, 578 (1908)

> ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights"). And indeed, 28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone.

Id. at 484-85 (that petitioners were being held in military custody outside of the U.S. was immaterial to the question of jurisdiction over their non-habeas statutory claims). *Accord, Sosa,* 542 U.S. at 698-99 (decided one day after *Rasul*) (exercising subject matter jurisdiction of ATCA claim brought by alien residing in Mexico when complaint filed). *See also Chavez*, 413 F. Supp. 2d at 896-97; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 94 (2d Cir. 2000), *cert. denied,* 532 U.S. 941 (2001); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 909 (N.D. Ill. 2003).

Rasul establishes unequivocally that ATCA creates federal subject matter jurisdiction generally over claims of "aliens alone," without distinguishing between resident and nonresident aliens. Defendant Rivera Rondón's reliance on Plaintiffs' residence abroad to challenge this Court's jurisdiction is clearly without merit and must be rejected.[25]

IX. HAVING BEEN APPOINTED PERSONAL REPRESENTATIVES OF SEVEN DECEDENT ESTATES IN FLORIDA, PLAINTIFFS HAVE STANDING TO BRING THIS ACTION IN MARYLAND ON BEHALF OF THOSE ESTATES.

In Maryland courts, a foreign personal representative may exercise all powers of her office, including suing on behalf of the estate. Md. Code Ann., Est. & Trusts § 5-502(a). *VanGrack, Axelson & Williamowsky, P.C. v. Estate of Abbasi*, 261 F. Supp. 2d 352, 358 (D. Md. 2003) (holding that Estate established in Pakistan and its Personal Representative are subject to

---

[25] In response to *Rasul,* Congress enacted certain legislation stripping federal courts of jurisdiction over a limited class of claims by certain nonresident aliens pursuing habeas corpus relief from their detention at Guantánamo. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). That legislation, however, does not limit the statutory right of nonresident aliens to avail themselves of the jurisdiction of federal courts to seek damages for wrongful death and personal injuries resulting from the commission of torts in violation of international law.

the provisions of Md. Code Ann., Est. & Trusts § 5-502(a) relating to ability to sue or be sued in Maryland). A foreign personal representative is not required to take out local letters testamentary in Maryland before exercising her powers here on behalf of the estate. *Id.* § 5-501; 5-102; s*ee also VanGrack,* 261 F. Supp. 2d at 358.

On January 28, 2008, the 11th Judicial Circuit Court in Miami-Dade County, Florida ("Probate Court") appointed Plaintiffs as the personal representatives for each respective Decedent's estate and issued the Plaintiffs Letters of Administration. (Attached as Exhibit 7 Declaration of Robert M. Brochin and Attachment A thereto). The only Decedent for which the Probate Court has not, as yet, opened an estate is that for Plaintiff Teófila Ochoa's brother, Celestino Ochoa Lizarbe. The Letters of Administration issued by the Probate Court give Plaintiffs "full power to administer the estate according to law" including the power to sue on behalf of the estate. *Id*.

These recent decisions by the Probate Court obviously had not taken place when the Complaint was filed, although Plaintiffs by then had filed Petitions for Administration for the estates of their Decedents, all victims of torture and killing in the Accomarca Massacre. Compl. ¶¶ 9, 11. Plaintiffs also filed requests for appointment as personal representatives of the respective estates. *Id*. The attached declaration of attorney Brochin describes post-Complaint proceedings in the Probate Court relating to opening of the estates and appointment of Plaintiffs as personal representatives.

Rivera Rondón concedes that the decedent estates have standing before this Court if valid estates are opened and a personal representative is appointed with legal capacity to maintain this action. Mem. at 35. For seven of the eight decedent estates, those conditions now have been

satisfied, and the Plaintiffs have standing to prosecute this action on behalf of those estates. Defendant's motion to dismiss must be denied as to them.

For the estate of Celestino Ochoa Lizarbe, the necessary documentation is being gathered from Peru and will be submitted to the Florida Probate Court in due course. We have every expectation that, upon submission of the evidence to the Probate Court, Plaintiff Teófila Ochoa will seek to be named Personal Representative of the estate. Accordingly it makes little sense to dismiss the claims for that estate at this time. If the Court is not inclined to keep the claims pending until the Florida Probate Court finally decides the matter, dismissal should be without prejudice.

X. VENUE IS PROPER.

This Court has subject matter jurisdiction under ATCA and the TVPA, and neither statute has a venue provision. *See* 28 U.S.C. § 1350 and 28 U.S.C. § 1331. Further, this Court has personal jurisdiction over Defendant because he resides in Maryland and received personal service of process. Mem. in Support of Plaintiffs' Motion for Reconsideration, Dec. 21, 2007, at 4, 7-9, Paper No. 21-2; Affidavit of Service, Paper No. 8. Accordingly, venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1).[26] Furthermore**,** Defendant Rivera Rondón, a citizen of Peru, is an alien and a permanent resident of Maryland. Compl. ¶ 5. Venue is therefore proper in any district of Plaintiffs' choosing. 28 U.S.C. § 1391(d) ("An alien may be sued in any district."); *Xuncax,* 886 F. Supp. at 193) (venue for claims brought under the ATCA was properly in the United States District Court for the District of Massachusetts because defendant,

---

[26] Section 1391(b)(1) of the venue statute provides in pertinent part as follows:

> (b) A civil action where jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where the defendant resides . . . .

an alien, was served with process while he was present in Massachusetts on a visit from Guatemala).

CONCLUSION

For all of the foregoing reasons, Plaintiffs request that the Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

/s/

Wade B. Wilson (No. 15381)
Mark N. Bravin (Pro Hac Vice granted)
Thomas J. O'Brien (Pro Hac Vice granted)
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202.739.3000
202.739.3001 Facsimile
wwilson@morganlewis.com
mbravin@morganlewis.com
to'brien@morganlewis.com

OF COUNSEL

Pamela Merchant
Center for Justice & Accountability
870 Market Street, Suite 688
San Francisco, CA 94102
415.544.0444
415.544.0456 Facsimile
pmerchant@cja.org

Attorneys for Plaintiffs
TEÓFILA OCHOA LIZARBE and
CIRILA PULIDO BALDEÓN

Dated: February 4, 2008