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

TEÓFILA OCHOA LIZARBE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	**Civil Action No.: 8:07-cv-01809**
v.	)	**Honorable Peter J. Messitte**
	)	
JUAN MANUEL RIVERA RONDÓN	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR CERTIFICATION OF THE COURT'S FEBRUARY 26, 2009 ORDER DENYING DEFENDANT'S MOTION TO DISMISS

After failing to prevail on any of his many legal theories for dismissal, Juan Manuel Rivera Rondón asks this Court to certify every one of those issues for immediate, interlocutory appeal to the Fourth Circuit. But he fails to show that any of those various theories "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," as required for certification. 28 U.S.C. § 1292(b). Instead, he merely rehashes the same contentions which were addressed and rejected in the Court's Memorandum Opinion. He does not provide the Court with new legal authorities that establish a substantial ground for difference of opinion. Nor does he meet the heavy burden of demonstrating that an immediate appeal is likely to avoid the need for discovery, trial, and entry of a final judgment. Moreover, he does not even acknowledge the Fourth Circuit's recent holding in *Yousuf v. Samantar*, which derails his appeal from this Court's denial of his jurisdictional immunity claim under the Foreign

Sovereign Immunities Act (FSIA). Accordingly, the Court should deny Rivera Rondon's motion for certification.

ARGUMENT

This Court is well aware of the Plaintiffs' claims under the Alien Tort Statute (ATS)[1] and the Torture Victim Protection Act (TVPA)[2] for themselves and on behalf of the estates of their deceased family members brutally 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 moved to dismiss this action under numerous theories.[3] In part, he relied on a superficial reading of the Complaint that simply overlooked well-pleaded allegations. He also disputed the validity of some of Plaintiffs' factual allegations, 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 failed to recognize established requirements or exceptions to the various doctrines he invoked. And, on February 26, 2009, this Court issued a 34-page Memorandum Opinion and accompanying Order (Opinion) rejecting all of Rivera Rondón's arguments. Unbowed, he now requests that this Court certify for immediate, interlocutory appeal the very same issues based on the same arguments that the Court found unpersuasive.

---

1 28 U.S.C. § 1350 (2007).

2 28 U.S.C. § 1350 note (2007).

3 The claims presented by the Defendant were Statute of Limitations, Exhaustion of Remedies under the TVPA, Political Question Doctrine, Act of State Doctrine, Failure to State a Claim, Standing (based on Alienage under the ATS), and Venue.

This Court should not endorse the piecemeal and seriatim appeal process proposed by Rivera Rondón. *See Beck v. Commc'ns Workers of Am.*, 468 F. Supp. 93, 95-96 (D. Md. 1979) (28 U.S.C. § 1292(b) provides a "narrow exception to the longstanding rule against piecemeal appeals"). None of the issues for which Rivera Rondón seeks certification meets that narrow exception. Many of his defenses will require development of the factual record before they can be finally resolved and thus are not suitable for certification under 28 U.S.C. § 1292(b). As for the remainder of his defenses, they are based on legal issues that have repeatedly been addressed by appellate courts *after* final judgment. There is nothing to suggest that they should not be reserved for appeal after judgment in this case, as well.

I. RIVERA RONDON'S MOTION TO CERTIFY DOES NOT ADDRESS QUESTIONS OF LAW AS TO WHICH THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION.

The Court's reasoning in denying Rivera Rondon's Motion to Dismiss involved both factually-dependent analyses, addressed below in Section II, and questions of law for which there are no substantial grounds for difference of opinion in this Circuit.

A. FSIA Immunity

Rivera Rondón sought dismissal of this civil lawsuit 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 FSIA. This theory fails because foreign sovereign immunity does not apply to individual foreign government agents and does not shield former government officials from suit, as the Fourth Circuit ruled in *Yousuf v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009).[4] In three pages of argument attempting to establish a basis for certification of this issue, Rivera Rondón

[4] Plaintiffs filed the Fourth Circuit's January 8, 2009 Opinion in *Yousuf v. Samantar* with the Court on January 12, 2009.

does not mention the controlling authority of *Yousuf*.[5] As this Court has already noted, however, the *Yousuf* opinion "put to rest the entirety of Rivera Rondón's FSIA arguments."[6] Therefore, there is no substantial ground for a difference of opinion in this Circuit with respect to Rivera Rondón's FSIA arguments.

B. Political Question

Rivera Rondón raised the issue of a non-justiciable, political question based on his allegation that the United States provided training to the Peruvian Army in the period leading up to the Accomarca Massacre. Yet he failed to establish any factual predicate for this argument and never contended that the United States directed or in any way supported the killing and torture of innocent civilians that took place in the Accomarca Massacre. Because the political question doctrine arises only where decisions of the political branches are challenged directly, the doctrine is not implicated here. Accordingly, the Court found no basis to dismiss the action on political question grounds.[7] Rivera Rondón's speculation about whether the Executive Branch would want this case to go forward offers no substantial ground for a difference of opinion in interpreting the *Baker v. Carr* factors addressed in this Court's Opinion.

Furthermore, Rivera Rondón cites no authority to support certification of this issue for immediate interlocutory appeal. Indeed, other district courts have refused to do so even where, as here, the defendant has pursued a separate appeal from the denial of FSIA immunity under the collateral order doctrine. *See Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994). Rivera Rondón provides no basis for a different result here.

---

5 Mot. to Certify at 8-10.

6 Mem. Op. at 13.

7 Mem. Op. at 23.

C. Act of State

In his Motion to Dismiss, Rivera Rondón failed to demonstrate any basis for applying the act of state doctrine which cautions against the adjudication of claims that would require U.S. courts to declare invalid the official acts of a foreign sovereign. Under *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976), it was Rivera Rondón's burden to prove that an act of state is at issue in the case. *Accord, Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008) ("The burden of proving act of state rests on the party asserting the defense."). Unremarkably, Rivera Rondón has been 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, Peru's pending criminal prosecution of Rivera Rondón, and the letter from the Peruvian Ambassador to this Court demonstrate that the atrocities committed in Accomarca are not official acts of Peru for which the doctrine is intended.

Rivera Rondón asserts that his "persecution by the plaintiffs is not in keeping with any announced policy of the United States."[8] One cannot help but note the extreme irony of his claim of persecution, considering the crimes against humanity for which Plaintiffs seek to hold Rivera Rondón liable. Moreover, he conveniently overlooks the fact that the United States government has condemned the Accomarca Massacre and expressed concern about human rights abuses occurring in Peru during that period.[9] In any event, his assertion casts no doubt whatsoever on the Court's determination that there was no act of state and that the doctrine is therefore inapplicable.

---

[8] Mot. to Certify at 16.

[9] Opp. to Mot. to Dismiss at 46.

In *Eckert*, the Fourth Circuit noted that the district court had denied a motion to certify the denial of a motion to dismiss on act of state grounds where the movant was the foreign state. 32 F.3d at 79 (4th Cir. 1994). Rivera Rondón's Motion to Certify cites no case reaching a contrary result and no authority demonstrating a substantial ground for difference of opinion on the inapplicability of the act of state doctrine in this case.

D. Alien Status

As this Court noted,[10] Rivera Rondón's argument that only aliens residing in the United States can bring ATS claims was rejected by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that nonresident aliens were entitled to invoke the jurisdiction of the district court under ATS, as well as under other federal statutes).[11] Clearly, this is not an issue on which there is a substantial ground for difference of opinion.

E. Venue

Rivera Rondón's venue argument conflicts with the statutory scheme, which expressly authorizes suit in this judicial district, where Rivera Rondón resided at the time the Complaint was filed and was served with a summons. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (venue for claims brought under the ATS against Guatemalan general for torture and rape of nun was properly in the United States District Court for the District of Massachusetts because defendant, an alien, was served with process while he was present in Massachusetts on a visit from Guatemala). Additionally, because Defendant is an alien, venue is proper in any

---

[10] Mem. Op. at 32.

[11] *Accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 698-99 (2004) (decided one day after *Rasul*) (exercising subject matter jurisdiction of ATS claim brought by alien residing in Mexico when complaint filed). Lower courts reached the same conclusion both before and after *Rasul* and *Sosa*. *See, e.g.*, *Chavez v. Carranza*, 413 F. Supp. 2d 891, 896-97 (W. D. Tenn. 2005); *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).

district of Plaintiffs' choosing. 28 U.S.C. § 1391(d) ("An alien may be sued in any district."). Accordingly, there can be no ground for difference of opinion about the Court's rejection of Rivera Rondón's venue argument.

II. THE REMAINING ISSUES ADDRESSED BY RIVERA RONDÓN'S MOTION ARE FACT-INTENSIVE AND THEREFORE INAPPROPRIATE FOR CERTIFICATION FOR IMMEDIATE, INTERLOCUTORY APPEAL.

A "controlling question of law" for purposes of 28 U.S.C. § 1292(b) is "one which would result in reversal of a judgment after a final hearing." *Hirsch v. Blue Cross and Blue Shield of Maryland, Inc*., No. MJG-90-3049, 1991 WL 502004, at *5 (D. Md. Dec. 26, 1991) (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir. 1974)). A discretionary decision by the district court to allow a case to proceed does not satisfy the statutory test for a controlling question of law. *See Beck v. Commc'ns Workers of Am.*, 468 F. Supp. 93, 96 (D. Md. 1979) (citing *J. C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F.2d 65, 66-67 (5th Cir. 1964)) (Where the decision being appealed was discretionary and more of a question of fact than one of law, it did not call into issue a 'controlling question of law as to which there is substantial ground for difference of opinion' as required by 28 U.S.C. § 1292(b)."); *see also Tenneco Resins, Inc., v. Reeves Bros., Inc*., 583 F. Supp. 1534, 1535 (D. Md. 1984).

A. Statute of Limitations and Equitable Tolling

The issue of equitable tolling in this case is largely dependent on the analysis of facts relating to circumstances in Peru from the date of the massacre until 2000. In his Motion to Dismiss, Rivera Rondón urged the Court to reject equitable tolling and find that 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 challenged the validity, rather than the sufficiency, of factual allegations detailed in the Complaint. Throughout

the 1980s and 1990s in Peru, as the Complaint alleges, there were widespread and systematic acts of retaliation, torture, summary execution, and other human rights abuses directed against innocent civilians. 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 political period in Peru from 1985 to 2000.

This Court, relying on the Fourth Circuit standard for equitable tolling stated in *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003), followed the Supreme Court's admonition to apply equitable tolling sparingly and in rare instances.[12] Thus, this Court did not apply equitable tolling in a manner that implicates a controlling question of law as to which there is substantial ground for difference of opinion. Rather, it based its ruling on a largely factual analysis of Plaintiffs' well-pleaded allegations regarding the unremittingly hostile circumstances in Peru that precluded them from filing this lawsuit until the year 2000.[13]

Rivera Rondón's contention that there is a difference of opinion about the application of equitable tolling in this case is unpersuasive. He rehashes his arguments regarding the inapposite *Van Tu* case,[14] and once again, he mischaracterizes the equitable tolling argument as a discovery rule argument.[15] Rivera Rondón asked this Court to reject equitable tolling without bringing to the Court's attention the numerous cases cited by Plaintiffs in their Opposition to the Motion to

---

[12] Mem. Op. at 8-9.

[13] In *Jean v. Dorélien*, 431 F.3d 776, 780-81 (11th Cir. 2005), the court stated "[w]e note that every court that has considered the question of whether a civil war and a repressive authoritarian regime constitute 'extraordinary circumstances' which toll the statutes of limitations of the ATS and TVPA has answered in the affirmative." (citing cases).

[14] In *Van Tu v. Koster*, 364 F.3d 1196 (10th Cir. 2004), plaintiffs made no allegation to the effect that 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.

[15] Mot. to Certify at 4-7.

Dismiss,[16] and he continues to ignore those cases. Rivera Rondón's Motion to Certify cites to no precedent that would create a substantial ground for difference of opinion about the applicability of equitable tolling based on the allegations of the Complaint.

B. Exhaustion of Remedies

In his Motion to Dismiss, Rivera Rondón maintained 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 assumed that an adequate remedy is available to them in Peru because Rivera Rondón faces criminal charges there and Plaintiffs are participating as "*partes civiles*." The Court, in the exercise of discretion, took judicial notice of background information on the criminal and civil process in Peru. It found that Rivera Rondón had not met his burden of showing that the remedies available to Plaintiffs in Peru were "effective, obtainable, not unduly prolonged, adequate and not otherwise futile,"[17] notwithstanding his deportation while the Motion to Dismiss was pending.

The record for any interlocutory appeal is set, and this issue presents yet another fact-intensive inquiry that is inappropriate for appellate review at this stage of the case. Rivera Rondón cites to no court that has certified such an issue for immediate interlocutory appeal. Other district courts, however, have held that interlocutory findings with respect to exhaustion of remedies are not proper issues for certification for interlocutory appeal. *See, e.g., Abiola v. Abubakar*, No. 02 C 6093, 2006 WL 2714831, at *4 (N.D. Ill. Sept. 20, 2006). Rivera Rondón's Motion to Certify cites to no precedent that would create a substantial ground for difference of opinion about this Court's rejection of the exhaustion of remedies defense at this stage of the case.

---

16 Opp. to Mot. to Dismiss at 13-14.

17 Mem. Op. at 17-18 nn.5 & 7.

C. Failure to State a Claim

In his Motion to Dismiss, Rivera Rondón asserted that the Complaint fails to state a claim under the ATS and 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. 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 the ATS and the TVPA and by international tribunals applying international law.

Relying in part on the 11th Circuit's holding in *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1175-60 (11th Cir. 2005), the Court rejected Rivera Rondón's argument that a military actor cannot be liable for conspiracy or aiding and abetting when acting in conjunction with fellow members of the military.[18] Yet Rivera Rondón, in his Motion to Certify, again relies on the same inapposite cases he cited previously to argue that one cannot aid or abet oneself.[19] Those cases have nothing to do with military actors or the ATS or TVPA. Rivera Rondón has failed to present any contrary law to create a difference of opinion on the issue. Furthermore, he cites to no court that has certified such an issue for immediate interlocutory appeal.

When this Court considered these issues, it accepted the material facts alleged in Plaintiffs' Complaint as true.[20] Discovery has not begun, and the parties will have an

---

[18] Mem. Op. at 32.

[19] Mot. to Certify at 17-18.

[20] Mem. Op. at 5, citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

opportunity to present evidence on these issues at trial.[21] Other district courts have declined to certify for interlocutory appeal legal questions surrounding aiding and abetting liability. *See, e.g., Bowoto v. Chevron Corp*., No. C 99-02506 SI, 2007 WL 4224593, at *3 (N.D. Cal. Nov. 28, 2007) (denying request to certify for interlocutory appeal legal questions surrounding the aiding and abetting liability of private actors, reasoning "[t]he Court does not believe that interlocutory appeal of the aiding and abetting issue is appropriate at this time because it would not materially advance the termination of the litigation."); *accord Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2005 WL 2082847, at *4 (S.D.N.Y. Aug. 30, 2005).

Furthermore, the denial of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is not ordinarily subject to interlocutory appeal because it is neither a final decision nor a proper subject for pendent appellate jurisdiction. *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 199 (D.C. Cir. 2004) (affirming dismissal of FSIA immunity and rejecting pendent jurisdiction over other issues and stating "[t]he exercise of pendent appellate jurisdiction is often suggested, occasionally tempting, but only rarely appropriate. Because 'a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay . . . collateral orders into multi-issue interlocutory appeal tickets.'" (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995))) .

Finally, with regard to Plaintiffs' joint criminal enterprise claim, simply because an issue is of first impression does not mean that there are substantial grounds for a difference of opinion

[21] A Rule 12(b)(6) dismissal motion tests the sufficiency of a complaint; it does not resolve contests surrounding the facts, the merit of a claim, or the applicability of defenses. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992).

on that issue. *See Brooks v. Circuit City Stores, Inc.*, No. DKC 95-3296, 1997 WL 679899, at *1 (D. Md. Sept. 16, 1997) (citing *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)).

III. RIVERA RONDÓN'S DIRECT APPEAL OF FSIA IMMUNITY IS WITHOUT MERIT AND, NEVERTHELESS, THE FOURTH CIRCUIT WILL LIKELY NOT EXERCISE PENDENT JURISDICTION OVER THE ISSUES PRESENTED TO THIS COURT BY RIVERA RONDÓN FOR CERTIFICATION

Even if certification is granted by this Court, precedent shows that the Fourth Circuit is not inclined to extend pendent appellate jurisdiction in such circumstances. It is well established that pendent appellate jurisdiction is a limited and narrow exception based on need, not on efficiency. *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). Following the Supreme Court's opinion in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), the Fourth Circuit held that the exercise of pendent appellate jurisdiction is appropriate only where the issues are "inextricably intertwined" with or "necessary to ensure meaningful review" of the core appealable issue. *Rux*, 461 F.3d at 476 (citing *Swint*, 514 U.S. at 50-51). None of the issues present in this Court's Opinion are so inextricably intertwined with the FSIA issue as to require them to be considered simultaneously to ensure the FSIA claim's validity.

In *Rux*, the Fourth Circuit found that standing was not sufficiently intertwined with an FSIA claim to justify the exercise of pendent jurisdiction. 461 F.3d at 476. Rivera Rondón's reliance on *Rux* in his Motion to Certify[22] is unavailing because the case does not support the result he seeks. Further in *Eckert*, a case that states the standard for FSIA appeal under the collateral order doctrine in the Fourth Circuit, the court denied pendent jurisdiction over other claims that the district court declined to certify under 28 U.S.C. § 1292(b). *Eckert*, 32 F.3d at 79. In his Motion for Certification, Rivera Rondón seeks to rely on Fifth and Ninth Circuit case law,

[22] Mot. to Certify at n.1.

downplaying the direct precedents and standards of *Eckert* and *Rux*.[23] The Fourth Circuit is unwilling to extend jurisdiction to additional claims where the core appeal is brought under the collateral order doctrine unless those issues are unusually intertwined with or necessary for the resolution of the FSIA claim. *See, e.g., Rux*, 461 F.3d at 476; *accord Price*, 389 F.3d 199-200 (D.C. Cir. 2004). Rivera Rondón has not made such a showing.

CONCLUSION

For all of the foregoing reasons, Plaintiffs request that the Court deny Defendant's Motion for Certification of the Court's February 26, 2009 Order Denying Defendant's Motion to Dismiss.

Respectfully submitted,

/s/

Wade B. Wilson (No. 15381)
Mark N. Bravin (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

Natasha Fain (Pro Hac Vice granted)
Center for Justice & Accountability
870 Market Street, Suite 688
San Francisco, CA 94102
415.544.0444
415.544.0456 Facsimile
nfain@cja.org

Attorneys for Plaintiffs
TEÓFILA OCHOA LIZARBE and
CIRILA PULIDO BALDEÓN

Dated: April 13, 2009

[23] Mot. to Certify at 8.