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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KARUNAMUNIGE CHAMILA KRISHANTHI, *et al.*,

Plaintiffs,

v.

RAJAKUMARA RAJARATNAM, *et al.*,

Defendants.

Civil Action No. 2:09-cv-05395-DMC-MF

BRIEF IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND ALL CLAIMS AGAINST DEFENDANTS RAJAKUMARA RAJARATNAM AND JESUTHASAN M. RAJARATNAM

Motion Date: March 15, 2010

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INTRODUCTION

Donations by American citizens of their own money to organizations granted tax-exempt 501(c)(3) charitable status by the Internal Revenue Service do not violate the "law of nations," 28 U.S.C. § 1350, or New Jersey tort law. Yet that is precisely what this Court would have to hold to permit the claims against the Rajaratnams to go forward. Such a holding would defy not only logic and experience, but also controlling precedent, given the Supreme Court's decisions in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)—which strictly limited claims under the Alien Tort Statute to transgressions of universally recognized, obligatory, carefully defined, and rights-creating rules of international law—and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)—which mandates dismissal of claims resting on conclusory allegations of knowledge and intent. Beyond that, this case is a Sri Lankan dispute about injuries suffered in Sri Lanka by Sri Lankan citizens at the hands of other Sri Lankan citizens. It should be litigated, if anywhere, in Sri Lanka, not New Jersey. Accordingly, the case must be dismissed. Fed. R. Civ. P. 12(b)(1), (3) & (6).

BACKGROUND

I. STATUTORY FRAMEWORK

A. The Alien Tort Statute, 28 U.S.C. § 1350, provides that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort

only, committed in violation of the law of nations or a treaty of the United States." The statute is purely jurisdictional; it does not create a cause of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-714 (2004).

To proceed under the Alien Tort Statute, Plaintiffs must identify a cause of action either rooted in a treaty, which is not alleged here, or created by federal common law to enforce the "law of nations." *Sosa*, 542 U.S. at 714. Federal common law, however, only recognizes "a handful of" "international law norm[s]" that give rise to implied causes of action, and they are limited to those legal "obligat[ions]" that have "definite content" and "universal" "acceptance among civilized nations." *Id*. at 732; *see Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009) (jurisdiction limited to "specific, universal, and obligatory" laws that "courts 'have long albeit cautiously, recognized'") (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

Finally, the plain text of the Alien Tort Statute hinges jurisdiction on a showing that the defendants' conduct actually "violat[ed]" the law of nations, 28 U.S.C. § 1350. It is not sufficient to allege just that the claim "arises under" international law. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-888 (2d Cir. 1980)

B. Under Section 501(c)(3) of the Internal Revenue Code, the federal government accords tax-exempt status to corporations, funds, and foundations "organized and operated exclusively for religious, charitable, scientific, testing for

public safety, literary, or educational purposes," as long as "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." 26 U.S.C. § 501(c)(3). An institution granted tax-exempt status under Section 501(c)(3) thus "must serve a public purpose and not be contrary to established public policy" of the United States government. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

II. FACTUAL AND PROCEDURAL HISTORY[1]

A. Defendant Raj Rajaratnam was born in Sri Lanka, but holds dual United States/Sri Lankan citizenship.[2] Defendant Jesuthasan Rajaratnam is Raj's father and is a United States citizen. In 2000, they incorporated the Rajaratnam Family Foundation, Inc., a charitable foundation granted Section 501(c)(3) tax-exempt status by the IRS. *See* Exhibit A to Request for Judicial Notice ("RJN"). Raj Rajaratnam served as the treasurer of the Foundation, while his father served as its president. Complaint ¶¶ 51-52.

In 2004, following the devastating tsunami that left hundreds of thousands dead in southern Asia, including over 30,000 deaths in Sri Lanka, Raj Rajaratnam

[1] In determining subject matter jurisdiction, the "allegations of the complaint are not accepted as true, and the court may consider evidence outside the pleadings." *In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 459-60 (D.N.J. 2005). The Court also may take judicial notice of governmental documents and matters of public record. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

[2] Rajakumar Rajaratnam's name was legally changed in 1983 or 1984 to "Raj."

established Tsunami Relief, Inc., a Section 501(c)(3) foundation dedicated to providing funds for tsunami relief in Sri Lanka. *See* RJN Ex. B.

The Tamil Rehabilitation Organization (the "TRO") "is a Sri Lankan based non-governmental organization," Complaint ¶ 53, that was authorized by the Sri Lankan government to conduct relief efforts in that Country from at least 1985 until 2007. *Id.* at ¶¶ 75-76; Declaration of Mohamed Shibly Aziz ("Aziz Decl.") ¶ 6. Although the complaint alleges (¶ 53) that, at some point in time, the TRO "maintained and advertised offices" in Maryland and New Jersey, it does not allege that the TRO was a United States, a citizen of any State, or an entity that resided, conducted business, or was physically present in the United States at the time of the complaint's filing. From November 1997 until December 16, 2007, the TRO enjoyed tax-exempt status conferred by the federal government under 26 U.S.C. § 501(c)(3). *See* RJN Exs. C, D.

B. The complaint alleges that, from 2000 to 2006—the timeframe during which the federal government conferred tax-exempt charitable status on the TRO—the Rajaratnams donated millions of dollars to the TRO both directly and through their charitable foundations. Complaint ¶¶ 96-104. The donation period identified in the complaint overlaps with a February 2002 to December 2005 ceasefire between the Sri Lankan government and a rebel group in northern Sri Lanka, the Liberation Tigers of Tamil Elan ("LTTE"). *Id.* at ¶ 64. The donation

timeframe also includes the devastating December 26, 2004 tsunami that struck southern Asia, including Sri Lanka, and prompted a universal outpouring of charitable contributions to Sri Lanka and the rest of the region. *See* USAID, *Tsunami Reconstruction, Three Years Later*, Jan. 18, 2008, *available at* http://www.usaid.gov/press/releases/2008/pr080118_r.html.

During that same timeframe, multiple international organizations and leaders recognized the TRO for its relief work, including the United Nations Secretary General and former Presidents Clinton and George H.W. Bush, who each met with TRO officials and praised their relief work.[3] In 2006, UNICEF listed the TRO as one of its main partners in sanitation and early childhood development projects in Trincomalee, Sri Lanka.[4] The Sri Lankan government itself authorized the TRO to coordinate tsunami relief in northeastern Sri Lanka and the President later honored the TRO for building 3240 shelters for tsunami victims. Aziz Decl. ¶ 6.[5]

The year after the Rajaratnams' last donation to the TRO, Complaint ¶ 107, the U.S. Treasury Department froze the TRO's assets, prohibited U.S. persons

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[3] *See, e.g., Tamil Tigers Defunct, Should Be Taken Off Terrorist List*, Colombo Times (June 7, 2009) ("After the tsunami of 2004, former presidents Bill Clinton and George H.W. Bush worked with the TRO and praised the organization's efforts."), *available at* http://www.thecolombotimes.com/component/content/article/5341--tamil-tigers-defunct-should-be-taken-off-terrorist-list-tamils-for-obama-.html; RJN Ex. E.

[4] RJN Ex. F (UNICEF, *UNICEF Trincomalee Zone Office Fact Sheet* (Apr. 2006)).

[5] *See* RJN Exs. G, H.

from engaging in activities with the TRO, and terminated the TRO's tax-exempt status on the ground that the TRO was determined to be an entity that supported terrorism by providing funding to the LTTE. RJN Ex. D; Complaint ¶ 70.

C. Plaintiffs are individuals who allegedly were injured or represent the estates of individuals who were killed during terrorist bombings by the LTTE that occurred between November 2007 and April 2008. Complaint ¶¶ 16-50. The complaint does not allege any Rajaratnam donations to the TRO in 2007 or 2008.

On October 22, 2009, Plaintiffs filed a complaint against the TRO and the Rajaratnams. The complaint alleges that the Rajaratnams' charitable donations to the TRO rendered the Rajaratnams liable under both international law and New Jersey tort law for injuries that Plaintiffs allegedly incurred at the hands of the LTTE one to eight years later. Count One of the complaint alleges that the donations constituted "aiding and abetting, intentionally facilitating, and/or recklessly disregarding crimes against humanity." Complaint ¶ 45. Count Two alleges that the donations constituted "aiding and abetting acts of terrorism." *Id*. at ¶ 49. The remaining counts are brought under New Jersey tort law.

ARGUMENT

While the legal barriers to this suit are manifold, they have a single common denominator: U.S. citizens cannot be held liable in federal court for the actions of foreign terrorists against foreign citizens committed on foreign soil simply

because, years before those attacks, those same citizens made charitable donations to an organization accorded Section 501(c)(3) tax-exempt status by the United States government *and* permitted to provide humanitarian relief by the foreign government. Indeed, the legal and practical implications of the plaintiffs' claims are breathtaking. In 2008 alone, Americans donated more than $13 billion to relief organizations working overseas.[6] Following the December 2004 tsunami, in particular, Americans like the Rajaratnams opened their hearts and wallets wide, donating more than $3 billion to numerous organizations (including the TRO) that were authorized by foreign governments to administer tsunami relief.[7]

In Plaintiffs' view, however, each one of those donations rendered the American donors subject to crippling claims for money damages potentially brought by foreign citizens for injuries inflicted by foreign terrorists on foreign soil on the sole ground that the donors gave money to a group that—unbeknownst even to the *United States government* at the time—gave money to another group that years later committed tortious acts. That makes no sense legally or logically. The saying that "no good deed goes unpunished" is not a principle of tort liability under

[6] Giving USA Foundation, *U.S. Charitable Giving Estimated to Be $307.65 Billion in 2008*, June 10, 2009, *available at* http://www.philanthropy.iupui.edu/News/2009/docs/GivingReaches300billion_06102009.pdf.

[7] *See* USAID, *Tsunami Reconstruction, Three Years Later*, Jan. 18, 2008, *available at* http://www.usaid.gov/press/releases/2008/pr080118_r.html.

universally adopted international law or New Jersey law. And Plaintiffs cannot evade that legal barrier to relief simply by labeling the donations "knowing" or "purposeful" without providing any factual substantiation for those aspersive allegations. Controlling Supreme Court and Third Circuit precedent requires more.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION

A. The Alien Tort Statute Does Not Provide Jurisdiction

At the heart of Plaintiffs' complaint against the Rajaratnams is the allegation that their donations to the TRO violated international norms allegedly reflected in a list of United Nations Security Council resolutions addressing terrorism funding. But that falls far short of establishing jurisdiction under the Alien Tort Statute. The Supreme Court requires the plaintiffs to identify a cause of action created by federal common law. *Sosa*, 542 U.S. at 714. Such causes of action are few and far between, confined to "a very limited set of claims" based on "definable, universal and obligatory norms" of the "law of nations" that, by widespread custom and usage, give rise to rights directly enforceable by individuals (as opposed to Nations). *Id*. at 720, 732. Moreover, because jurisdiction only exists under the Alien Tort Statute if a complaint shows that the alleged conduct amounts to an actual "violation of the law of nations," *id.* at 715, the statute's jurisdictional and

cause-of-action inquiries overlap. *See, e.g.*, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1265 (11th Cir. 2009); *Abdullahi*, 562 F.3d at 172.[8]

Here, Plaintiffs' jurisdictional attempt to allege that the Rajaratnams committed a "violation of the law of nations" within the meaning of the Alien Tort Statute fails for five reasons: donations to U.S. government approved charities do not violate the law of nations; there is no applicable civil aiding and abetting liability; the donations to the TRO had no substantial effect on the alleged acts by the LTTE years later; no specific intent is shown; and no state action is involved.

1. Donations to Lawful Charities Do Not Violate the Law of Nations

Nothing—absolutely nothing—in international law prohibits private individuals from donating their own funds to charities that have been approved to receive such donations by the donors' (and, here, the Plaintiffs') own government. Plaintiffs cite no treaties, conventions, laws, or a single decision of an international court or body banning such private donations. They cite no long-established and universally accepted custom or usage against them. They, in short, make no showing that the Rajaratnams' donations meet *Sosa*'s exacting test for a "violation of the law of nations."

[8] *See also Cisneros v. Aragon*, 485 F.3d 1226, 1228 (10th Cir. 2007) (jurisdiction turns "exclusively on whether [plaintiff] has sufficiently alleged a violation" of the Alien Tort Statute); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375, 378-380 (E.D.N.Y. 2008) (jurisdictional analysis under Section 1350 parallels *Twombly* and *Iqbal* analysis of whether a claim was stated).

Instead, Plaintiffs resort to generalized labels, declaring that the donations transgressed general condemnations against the "financing of terrorism," Complaint ¶ 42, and then accuse the Rajaratnams of "aiding and abetting" the LTTE's crimes against humanity and terrorism. But *Sosa* made clear that the Alien Tort Statute's strict limitations cannot be so easily circumvented. Indeed, when the *Sosa* plaintiff similarly attempted to invoke "broad" international principles against "arbitrary detention," 542 U.S. at 736, he was soundly rebuffed by the Supreme Court. The Court insisted that a violation of the law of nations must be established with such universal acceptance and "specificity" as to fit the actual facts of the case before the Court, *id*. at 738. The Court thus ignored the proffered labels and demanded that the *Sosa* plaintiff establish a binding international law prohibition against "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment." *Id*. The failure to establish a violation of the law of nations in those precise terms doomed the case. *Id*.

Likewise here, Plaintiffs' allegations that international law condemns the financing of terrorism fail because they are asserted at the same "high level of generality" and international "aspiration" that *Sosa* condemned. 542 U.S. at 736 n.27, 738. Plaintiffs' burden under *Sosa*, instead, is to show that (i) widespread, specific, and settled international law (ii) *obligates* the United States to provide

(iii) a private "judicial remedy," *id*. at 715, (iv) for donations to a charity that was, at the time of the donations, approved to receive them by the United States, and (v) authorized to provide humanitarian relief by the government in which the donee operated, when (vi) years later the *donee* organization—not the individuals—gave money to a terrorist group.

There is no such obligation under the "law of nations." Indeed, the very sources of international law that Plaintiffs cite, Complaint ¶ 133, confess the absence of the very universal, specific, definite, individual-protecting, and judicial-remedy-generating rule of law that the Alien Tort Statute requires. Plaintiffs cite 16 United Nations Security Council Resolutions and one international convention that they describe as condemning the financing of terrorism.[9] But not a single one of those resolutions purports to regulate financial donations by individuals *at all*, let alone obligates the United States to provide a private judicial remedy for indirect individual donations to third-party groups. The resolutions address exclusively the obligations of Nations *qua* Nations with respect to the financing of terrorism.[10] *Sosa* made clear that such international norms "prescrib[ing] the duties of nations[] in their intercourse with each other * * * occup[y] the executive and

[9] Plaintiffs cite one of the Security Council Resolutions twice. Complaint ¶ 133.

[10] *See*, *e.g.*, S.C. Res. 1269, ¶ 4, U.N. Doc. S/RES/1269 (Oct. 19, 1999) (calling upon "all States" to "prevent and suppress * * * financing" of terrorism); S.C. Res. 1333, ¶ 8, U.N. Doc. S/RES/1333 (Dec. 19, 2000) ("all States").

legislative domains, not the judicial," and thus do not give rise to a federal common law claim under the Alien Tort Statute. 542 U.S. at 714.

The problems for Plaintiffs do not stop there: (i) seven of the Resolutions do not obligate the Nations or even invoke the Security Council's binding powers—they merely "[c]all[] upon" member States to halt terrorism financing, *see, e.g.*, S.C. Res. 1269, ¶ 4, U.N. Doc. S/RES/1269 (Oct. 19, 1999); (ii) eight Resolutions censure only governmental financing of the Taliban; and (iii) seven Resolutions deal only with Al Qaeda or Osama Bin Laden. *See* Complaint ¶ 133.

The International Convention for the Suppression of the Financing of Terrorism (Complaint ¶ 133) is no help either. That Convention is not self-executing and nothing in its text creates individually enforceable rights. To the extent Congress has chosen to give it effect as a criminal prohibition in 18 U.S.C. § 2339C, that statute *does not* allow for a private right of action. *See Sosa*, 542 U.S. at 735 (Convention that was not self-executing and did not "itself create obligations enforceable in the federal courts" did not give rise to claim).[11]

Finally, even if those documents evidenced a universal, specific, and binding obligation of some sort, that still would not be enough. Under *Sosa*, Plaintiffs must go further and demonstrate that the rule universally "admit[s] of a judicial remedy"

[11] Further, Congress has expressly limited claims brought under 18 U.S.C. § 2333 (which authorizes suits by terrorism victims) to United States nationals. *See, e.g., Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005).

for *private individuals* harmed by the rule's transgression. 542 U.S. at 715. Only rules of international law that "bind[] individuals for the benefit of other individuals" fall within the Alien Tort Statute's jurisdictional grant. *Id*. Indeed, elsewhere the Supreme Court has stressed that federal courts cannot imply a private right of action unless the law's text is "phrased in terms of the person benefited" and it "manifests an intent to create not just a private *right* but also a private remedy." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). No matter how broadly or aspirationally Plaintiffs' cited resolutions are read, they come nowhere close to satisfying *Sosa*'s and *Gonzaga*'s requirements for distilling out of international norms a private cause of action under federal common law.

2. There Is No Relevant Civil Aiding and Abetting Liability

Relabeling their claims as "aiding and abetting" liability does nothing to salvage Plaintiffs' case. To begin with, aiding and abetting liability is fundamentally a criminal law concept. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) ("Aiding and abetting is an ancient criminal law doctrine."). Plaintiffs, however, simply *presume* that international bans on crimes against humanity and "terrorism" (assuming *arguendo* that those categories have the universal specificity required by *Sosa*) also

automatically obligated the United States to create corresponding private causes of action for *civil* aiding and abetting liability under federal common law.[12]

But that is not the law. As the Supreme Court explained in *Central Bank*, Congress has never enacted a "general civil aiding and abetting statute," 511 U.S. at 182, and courts are not free to imply such a cause of action as a matter of federal common law without congressional direction, *id*. at 181-185. The Supreme Court stressed that judicial implication of a civil cause of action for primary liability does not license courts to take the next step and also imply a cause of action for civil aiding and abetting liability. *Id.* (finding no "deeply rooted background of aiding and abetting tort liability"; the "doctrine has been at best uncertain in application").

Accordingly, under *Central Bank*, this Court should not create a federal common law claim for civil aiding and abetting liability under the "law of nations," within the meaning of the Alien Tort Statute. *See Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (*Central Bank* forecloses an Alien Tort Statute claim for aiding and abetting).[13]

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[12] *See* John Moore & Robert Turner, *National Security Law* 458 (2d ed. 2005) ("there is at present no generally accepted definition of 'international terrorism'").

[13] While some courts have upheld claims for aiding and abetting liability in certain contexts as an adjunct to well-recognized substantive violations of the law of nations, no court has found universal recognition of aiding and abetting liability for indirect monetary donations. *See, e.g.*, *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752, at *4 (N.D. Cal. Aug. 22, 2006).

3. The Donations Did Not Have a "Substantial Effect" on the Commission of the Five Specific Terrorist Attacks Alleged

Even if a private remedy for aiding and abetting were generally available, jurisdiction would still be lacking because the complaint does not allege that the Rajaratnams' donations themselves had a "substantial effect on the perpetration of the" specific crimes or torts that allegedly injured Plaintiffs, *viz.* the five LTTE bombings. That is an essential component of a civil aiding and abetting claim. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258-259 (2d Cir. 2009).[14] As a result, it is *not* enough to allege, as the complaint does, that the donations contributed substantially or materially to the work of the TRO, as the TRO did not commit the substantive torts alleged here. *See, e.g.*, Complaint ¶¶ 96-107. Nor is it enough to allege that the donations contributed generally to the terrorist activities of the LTTE. *See id.* at ¶¶ 96, 102. Instead, the complaint must show that the specific Rajaratnam dollars themselves contributed substantially, materially, and specifically to the LTTE's commission of the five bombings. That the complaint does not and could not plausibly do.

First, courts have held that providing general commodities, like money, does not satisfy the "substantial effect" prong. Indeed, the Nuremberg Tribunal

[14] *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 666-668 (S.D.N.Y. 2006); *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 257-259 (S.D.N.Y. 2009) (citing *United States v. Von Weizsacker*, 14 *Trials of War Criminals Before the Nuremberg Military Tribunals*, at 478 (1950) (criminal aiding and abetting requires assistance in "substantial manner")).

specifically found that a banker who provided large loans directly to a fund under the control of Heinrich Himmler, head of the Nazi Gestapo, was not guilty of aiding and abetting liability. Providing commodities that are susceptible of both lawful and unlawful purposes, the Tribunal explained, "can hardly be said to be a crime." *United States v. Von Weizsacker*, 14 *Trials of War Criminals Before the Nuremberg Military Tribunals*, at 621 (1950).

Likewise, the *Apartheid Litigation* court explained that aiding and abetting liability hinges on the "quality of the assistance provided to the primary violator," so that the provision of a fungible resource capable of legitimate uses like money or building materials would not support liability, but the provision of poison gas would. 617 F. Supp. 2d at 258. "[S]upplying a violator of the law of nations with funds—even funds that could not have been obtained but for [that contribution]," the court explained, "is not sufficiently connected to the primary violation to fulfill the *actus reus* requirement of aiding and abetting a violation of the law of nations." *Id.* at 269.

Even more so, the Rajaratnams' donations of money to the TRO at a time when both the United States and Sri Lankan governments recognized the relief work being done by the TRO "can hardly be said to be a crime" or a tort. *Von Weizsacker*, *supra*, at 621. And because Plaintiffs' critical factual allegations show

(at most) conduct that "could just as well be" innocent as culpable, the claims must be dismissed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Second, accepting the facts as Plaintiffs allege them, the donations at issue here are too far removed both in time and the funding chain to plausibly have contributed in a material way to the five bombings. Plaintiffs seek to hold the Rajaratnams liable for donations that preceded by as much as *eight years* and no less than one year the alleged torts. *Compare* Complaint ¶¶ 96-107 (donations from 2000-2006), *with id.* at ¶¶ 16-50 (earliest bombing in November 2007). Moreover, the donations were at least two steps removed from the tortious acts alleged, in that they were provided to a group that, in turn, later allegedly provided funds to a different group that, in turn, later committed terrorist acts.

Whatever support exists in the law of nations for holding those who provide weapons or similar instrumentalities *directly* to a terrorist group liable, the significant passage of time and the circuitous route any funds would have taken here before receipt by the LTTE render implausible any contention that the Rajaratnams contributed directly and substantially to the specific acts that allegedly injured Plaintiffs. *Cf. Sosa*, 542 U.S. at 730 (in international tort cases, alleged actions in U.S. must be "sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back" to the defendant).

4. The Complaint Fails to Allege the Requisite Specific Intent

To establish aiding and abetting liability, Plaintiffs must show that the Rajaratnams (i) "knew of the specific violation"; (ii) "acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation"; and (iii) were "aware that the acts assisted the specific violation." *Presbyterian Church*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).[15] That is because "[o]nly a purpose standard * * * [would] ha[ve] the requisite 'acceptance among civilized nations' for application in an action under the [Alien Tort Statute]," while allowing a mere knowledge *mens rea* would "violate *Sosa*'s command that we limit liability to 'violations of * * * international law * * * with * * * definite content and acceptance among civilized nations.'" *Presbyterian Church*, 582 F.3d at 259 (quoting *Sosa*, 542 U.S. at 732). Plaintiffs' complaint fails to show the requisite specific intent.

First, the required allegations are altogether absent. The complaint's repeated allegations of "knowing" conduct, *see* Complaint ¶¶ 9-13, 15, 59, 88-89, 91-92, 95-96, 102, 107, 115, 121-122, 124, 145-148, 167-169, certainly do not suffice. *Presbyterian Church*, 582 F.3d at 259. Likewise, the allegations that the

[15] *See also Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005) ("One who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture.").

Rajaratnams acted "intentionally * * * and/or recklessly," *see* Complaint ¶¶ 145, 148, 167-169, fail because the "and/or recklessly" confesses the absence of specific intent. Finally, the 23 references to "purposeful" donations (Complaint ¶¶ 9-13, 15, 59, 88, 90-92, 95-96, 102, 107, 115, 124, 145-146, 148, 167-169) fail because they allege, at most, only a general intent to promote the LTTE or its "terror campaign," *id*. at ¶ 12. Plaintiffs do not even try to show that the Rajaratnams "knew" at the time of their donations "of the specific violation[s]" that allegedly injured Plaintiffs years later, let alone that the Rajaratnams "directed [their] acts to assist in" those specific bombings, or were even "aware that [their] acts assisted" those acts. *Presbyterian Church*, 453 F. Supp. 2d at 668. Indeed, nowhere does the complaint allege that any one of the donations was made with the advance knowledge, intent, and specific direction that it finance one of the five bombing attacks. That omission is fatal.[16]

[16] The complaint's fleeting reference (Complaint ¶ 140) to "joint venture" liability fails because Plaintiffs have pled neither the legal elements of such liability nor substantiating facts. *See Presbyterian Church*, 582 F.3d at 268 (dismissing joint venture claim for failure to make requisite showing); *Presbyterian Church*, 453 F. Supp. 2d at 684-686 (same). Nor have Plaintiffs demonstrated an international consensus recognizing such liability and agreeing on its terms. As a matter of New Jersey law, the complaint would have to show, *inter alia*, that the Rajaratnams and the LTTE (i) explicitly agreed to create a joint venture in which they had (ii) a joint property interest, (iii) a right of mutual control over the venture (whatever it is), and (iv) an agreement to share the profits or losses of the venture. *See, e.g.*, *United States v. USX Corp.*, 68 F.3d 811, 826 (3d Cir. 1995); *Inter-City Tire & Auto Ctr., Inc. v. Uniroyal, Inc.*, 701 F. Supp. 1120, 1126 (D.N.J. 1988). It does not do that.

Second, even if the complaint had alleged specific intent, that would not suffice because the formulaic recitations of legal standards will not prevent dismissal. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Twombly*, *supra*; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (*Twombly*'s "facial plausibility" standard "applies to all civil suits in the federal courts"); *McTernan v. City of York*, 564 F.3d 636, 646 (3d Cir. 2009); *Umland v. PLANCO Fin. Servs. Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). Only the complaint's "well-pleaded facts" will be presumed true; the court will "disregard any legal conclusions." *Fowler*, 578 F.3d at 210-211 (citing *Iqbal*, 129 S. Ct. at 1949). Requiring plaintiffs to provide "factual enhancement" that moves the claim from "possibility" to "plausibility," *Twombly*, 550 U.S. at 557, is particularly critical for *mens rea* allegations because "state of mind is easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998); *see Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) ("bald allegation of impermissible motive" was "just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate").

"Whether [P]laintiffs have validly stated claims therefore depends on the factual content of the complaints, and not these conclusory statements." *In re XE Servs. Alien Tort Litig.*, --- F. Supp. 2d ----, 2009 WL 3415129, at *13 (E.D. Va. Oct. 21, 2009). Specifically, plaintiffs must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Iqbal*, 129 S. Ct. at 1949; *accord Gross v. German Found. Indus. Initiative*, 549 F.3d 605, 610 (3d Cir. 2008) (valid claim requires "enough factual matter (taken as true) to suggest the required element"). Moreover, where the complaint pleads facts that are "merely consistent with a defendant's liability," *Iqbal*, 129 S. Ct. at 1949, it falls short of the Rule 8 task of "'showing,' rather than [just making] a blanket assertion[] of entitlement to relief." *McTernan*, 564 F.3d at 646; *accord Umland*, 542 F.3d at 64 ("factual allegations must be enough to raise a right to relief above the speculative level"). Importantly, it is Plaintiffs' burden to "show that the allegations of [their] complaint[] are plausible," not the Rajaratnams' burden to foreclose it. *Fowler*, 578 F.3d at 210 (citing *Iqbal*, 129 S. Ct. at 1949-1950; *Twombly*, 550 U.S. at 555 & n.3).

The few factual allegations supposedly bearing on the Rajaratnams' *mens rea* are, at best, "merely consistent with liability" and thus "stop[] short of the line between possibility and plausibility of entitlement to relief" that Rule 8 enforces. *Iqbal*, 129 S. Ct. at 1949. For the most part, Plaintiffs suggest that actions by other Nations (such as the United Kingdom, Complaint ¶ 77) or the TRO's ability to operate in LTTE-controlled territories put the Rajaratnams on notice that their donations might be misdirected to terrorists. Putting aside the fact that international relief organizations commonly have to operate in war-torn areas, general knowledge is *not* specific intent. And it is the latter that must be shown.

Moreover, the complaint ignores that the United States government, the Sri Lankan government, and the United Nations all recognized the TRO as a humanitarian relief organization operating in LTTE territory from 2000 through 2006. *See* Background Section II.B, *supra*. With specific respect to the TRO's Section 501(c)(3) tax-exempt status, courts have long recognized that the federal government's conferral of that status signals that the entity "serve[s] a public purpose" and is "not * * * contrary to established public policy." *Bob Jones*, 461 U.S. at 586, a fact on which donating members of the public can reasonably rely.[17]

The allegations of liability also ignore that the relevant donation time period spans both a ceasefire between the Sri Lankan government and the LTTE, Complaint ¶ 64, and the extraordinary need for international financial assistance caused by the devastating 2004 tsunami. Indeed, the theory of Plaintiffs' complaint necessarily means that the United States government, which afforded the TRO critically valuable tax-exempt status throughout the time that the Rajaratnams made their donations and longer, also aided and abetted the LTTE's subsequent terrorist attacks, because "[a] tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."

[17] *See also, e.g.*, *Geisinger Health Plan v. C.I.R.*, 985 F.2d 1210, 1215 (3d Cir. 1993) ("charitable exemptions from income taxation constitute a *quid pro quo*: the public is willing to relieve an organization from paying income taxes because the organization is providing a benefit to the public"); *IHC Health Plans, Inc. v. C.I.R.*, 325 F.3d 1188, 1195 (10th Cir. 2003) ("[c]haritable exemptions are justified on the basis that the exempt entity confers a *public benefit*").

Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983). That "is not a plausible conclusion," particularly given the "obvious alternative explanation," *Iqbal*, 129 S. Ct. at 1951-1952, for both the United States' conferral of tax-exempt status and the Rajaratnams' donations: to address widely acknowledged humanitarian crises.

Beyond that, the complaint alleges only that Jesuthasan Rajaratnam exercised his First Amendment right to support Tamil independence and to criticize the Sri Lankan government and military for the harm inflicted on Tamil civilians.[18] Nothing in his writing even hints at supporting, let alone specifically advocates, the harming of civilians. *See id.* at ¶¶ 110-111 (describing LTTE attacks on civilians as minimal and confined to paramilitaries and other government operatives).

And the reference to Raj Rajaratnam's public comments at the Ilanka Tamil Sangam USA meeting (Complaint ¶ 113) simply underscores the extent to which the complaint strains reality. Describing oneself publicly as a "terrorist" for supporting the Tamil separatist cause and for marrying an Indian Punjabi woman is not even "consistent with" tort liability, *Twombly*, 550 U.S. at 555, let alone justification for accusing the Rajaratnams of the heinous acts and intentions "naked[ly] assert[ed]" without any substantiating factual basis in the complaint, *id.* at 557. *See, e.g., In re XE Servs.*, 2009 WL 3415129, at *13 (disregarding

[18] He was not alone in doing so. *See* RJN Exs. I, J.

allegations that defendants' actions were "'deliberate, willful, intentional, wanton, malicious and oppressive'" because they "merely recite the elements, as plaintiffs understood them, for claims of war crimes under the [Alien Tort Statute]").

If *Iqbal*, *Twombly* and *Fowler* mean anything, they mean that accusations of co-plotting the murder and maiming of innocent civilians must rest on something more concrete than Section 501(c)(3) donations and the defendants' sympathy for the displaced members of a minority ethnic group.

5. The Complaint Fails to Allege the Requisite State Action

Finally, the complaint fails to show a violation of the law of nations because no state action or governmental affiliation is alleged. The "law of nations" to which the Alien Tort Statute refers generally regulates the "the rights subsisting between nations or states, and the obligations correspondent to those rights." *Sosa*, 542 U.S. at 714; *see Sinaltrainal*, 578 F.3d at 1265 ("the law of nations are the rules of conduct that govern the affairs of a nation, acting in its national capacity, in relations with another nation").

Consequently, individuals generally are liable under the law of nations only when they act as governmental officers or employees, "under color of law," or otherwise "in concert with the state." *Abdullahi*, 562 F.3d at 188; *see Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008) (dismissing claim against corporation because of lack of state action); *Corrie*, 403 F. Supp. 2d at 1026 ("only

individuals who have acted under official authority or under color of such authority may violate international law"). The requirement of state action is particularly critical here because the only sources of international norms that Plaintiffs cite (Complaint ¶ 133) regulate exclusively the conduct of state actors. There is, however, no plausible argument that the Rajaratnams are state actors or committed the alleged actions under color of law.[19]

B. Diversity Jurisdiction Is Absent Because the TRO Is An Alien

Plaintiffs' invocation of diversity jurisdiction over cases between "citizens of a State" and "citizens and subjects of a foreign state," 28 U.S.C. § 1332(a)(2), also fails. The requisite diversity does not exist when "aliens [are] on both sides of the case," *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 569 (2004), regardless of whether the plaintiffs or defendants also include some non-aliens, *Singh v. Daimler-Benz AG*, 9 F.3d 303, 305 (3d Cir. 1993). Moreover, the existence of diversity is tested at the time the suit is filed. *See Grupo Dataflux*, 540 U.S. at 570-571 (it is "hornbook law" that "the jurisdiction of the court depends on

[19] Two courts have rejected liability for private individuals altogether under the Alien Tort Statute. *See Al Shimari v. CACI Premier Tech., Inc.*, --- F. Supp. 2d ---, 2009 WL 3065102, at *25 (E.D. Va. Mar. 19, 2009); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 14 (D.D.C. 2005), *aff'd in relevant part sub nom. Saleh v. Titan Corp.*, 580 F.3d 1, 15-16 (D.C. Cir. 2009). The Supreme Court has reserved the question. *See Sosa*, 542 U.S. at 732 n.20. In this case, dismissal is warranted under either approach.

the state of things at the time of the action brought," including alien status). The burden is on Plaintiffs to establish the basis for diversity jurisdiction.[20]

In this case, diversity is both insufficiently pled and factually lacking. There is no dispute that all of the plaintiffs are non-resident aliens and citizens of Sri Lanka. Complaint ¶ 15. But the defendant TRO also appears to be an alien. Indeed, Plaintiffs did not plead that the TRO was a citizen or even a resident of any U.S. State at the time they filed their complaint. The most they offer are past-tense allegations that at some time *prior to* the filing of suit, the TRO had offices in New Jersey and Maryland. *See id.* at ¶¶ 51-53. That is not enough.[21]

II. THE CASE SHOULD BE DISMISSED FOR FAILURE TO EXHAUST AND ON *FORUM NON CONVENIENS* GROUNDS

A. Plaintiffs Have Not Exhausted Available Remedies In Sri Lanka

As the European Commission correctly argued in *Sosa*, "basic principles of international law require that, before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal

[20] *See Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n.3 (3d Cir. 2006); *see also CNA v. United States*, 535 F.3d 132, 145 (3d Cir. 2009) (where defendant "made a factual attack on the existence of subject matter jurisdiction," the "burden of persuasion" fell on the party asserting the existence of such jurisdiction).

[21] Plaintiffs' separate invocation of 28 U.S.C. § 1331 is of no jurisdictional help. The only possible source of federal law arguably referenced in the complaint would be the same federal common law of the "law of nations" on which Alien Tort Statute jurisdiction is predicated. Thus, for the same reason that the complaint fails to state a violation of the "law of nations" under Section 1350, it fails to allege a claim arising under federal common law for purposes of Section 1331.

system." 542 U.S. at 733 n.21 (citing European Commission brief); *see Interhandel (Switz. v. United States)*, 1959 I.C.J. 6, 27 (Mar. 21) (Preliminary Objections) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.").[22] Exhaustion enforces comity by ensuring that the Nation with the greater connection to the litigation has the opportunity to address the dispute and to exercise its sovereign authority over the matter. *Sarei v. Rio Tinto*, 550 F.3d 822, 828-29 (9th Cir. 2008) (en banc). It also ensures that United States law is not applied in an extraterritorial manner beyond congressional anticipation. *See* Restatement (Third) Foreign Relations Law §§ 402, 403 (1987).

The Supreme Court in *Sosa* explicitly acknowledged that an exhaustion requirement might well be appropriate in Alien Tort Statute cases, 542 U.S. at 733 n.21, and Justice Breyer endorsed it as "important," *id*. at 761 (Breyer, J., concurring in part and concurring in the judgment). Based on *Sosa*, the en banc Ninth Circuit has imposed a prudential exhaustion requirement in Alien Tort Statute cases. *Sarei*, 550 F.3d at 827. This Court should do the same and dismiss for lack of exhaustion because Sri Lanka provides an appropriate forum and this case's nexus to the United States is weak.

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[22] *See also* Ian Brownlie, *Principles of Public International Law* 472-73 (6th ed., Oxford Univ. Press 2003) ("A claim will not be admissible on the international plane unless the individual alien or corporation has exhausted the legal remedies available to him in the state which is alleged to be the author of injury").

1. Sri Lanka Provides an Available and Effective Forum

Sri Lanka's judiciary consists of a Supreme Court, Court of Appeal, High Court, District Courts, and a number of subordinate courts. Aziz Decl. ¶¶ 9-10; Aquinas V. Tambimuttu, Sri Lanka: Legal Research and Legal System at § 4 (Jan. 2009), http://www.nyulawglobal.org/globalex/Sri_Lanka.htm. The District Courts have original jurisdiction over all civil matters, including claims for tort injuries. Aziz Decl. ¶ 11; Sri Lanka: Legal Research, *supra*, at § 4.4. Sri Lanka's legal system provides remedies for individuals with tort claims based on intentional and negligent acts. Aziz Decl. ¶¶ 11-12. Accordingly, the Sri Lankan District Court has jurisdiction over Plaintiffs' claims. *Id*. at ¶ 12. The Sri Lankan District Court may also exercise jurisdiction over the Rajaratnams and the TRO. *Id*. at ¶ 14. There is no evidence that Plaintiffs have exhausted available local remedies.

2. The United States Nexus to the Litigation Is Minimal

Plaintiffs seek relief for injuries suffered in Sri Lanka by Sri Lankan citizens at the hands of a Sri Lankan rebel group. The defendant TRO is a Sri Lankan-registered nongovernmental organization headquartered in Kilinochchi, Sri Lanka, Complaint ¶ 75-76, and Raj Rajaratnam holds Sri Lankan citizenship. The *only* alleged connection to the United States is certain donations allegedly made by the Rajaratnams and sent either directly to the TRO's headquarters in Sri Lanka or through United States bank accounts to Sri Lanka. Complaint ¶¶ 16, 26, 31, 39,

41, 96, 100, 104, 107, 125. That is not enough. *Cf. N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996) (despite money transfers from U.S., "the district court was without jurisdiction over a controversy involving foreign victims who sold a foreign entity to foreign defrauders in a foreign transaction lacking significant and material contact with the United States") (RICO case).

B. *Forum Non Conveniens* Principles Mandate Dismissal

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). Dismissal is appropriate if "trial in the chosen forum would result in oppression or vexation to the defendant out of all proportion to the plaintiff's convenience." *Windt v. Qwest Commc'n. Int'l., Inc.*, 529 F.3d 183, 190 (3d Cir. 2008). When, as here, an adequate alternative forum is available in the plaintiffs' home country, the court balances the private and public interests bearing on the convenience of the forum. *See id.*; *Gulf Oil*, 330 U.S. at 507-508. That balance dictates dismissal of all the claims against the Rajaratnams.

1. The Parties' Convenience Favors Sri Lankan Adjudication

Central to Plaintiffs' asserted claims against the Rajaratnams are the allegations that they donated money to a Sri Lankan organization, which allegedly gave money to a Sri Lankan rebel group in Sri Lanka that used it to commit

tortious acts in Sri Lanka against Sri Lankan citizens. Those injuries are alleged to include physical and psychiatric disorders and ongoing expenses for medical treatment and long-term care in Sri Lanka, pecuniary losses including loss of earnings and services in Sri Lanka, and medical and funeral expenses incurred in Sri Lanka. Complaint ¶¶ 182, 188, 190, 204.

The parties' interest in litigating those claims overwhelmingly favors the Sri Lankan forum. Litigation of those claims will implicate almost exclusively witnesses and evidence located in Sri Lanka, including all Plaintiffs; the defendant TRO and its employees, volunteers, agents, and accountants; witnesses to the TRO's activities over the years in question; witnesses and records attesting to the TRO's dispersal and expenditure of donated funds; witnesses and records pertaining to the TRO's witnesses and evidence documenting the TRO's prior lawful status and operations within Sri Lanka; witnesses present before, during, and after the alleged attacks; Plaintiffs' physicians or therapists; Plaintiffs' medical, psychological, personal, and employment records and evidence about anticipated future earnings; and documents pertaining to each deceased's earnings, services, and medical and funeral expenses. None of that is in the United States.

Further, this Court will have little ability to compel the attendance of unwilling witnesses because Sri Lanka is beyond this Court's subpoena power. That will force the parties to resort to the complex and often time- and resource-

consuming procedures of the Hague Convention. *Gulf Oil*, 330 U.S. at 508. The "cost of obtaining attendance of willing witnesses" will also be astronomical. *Id*. "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Id*. at 511.

Finally, only 10% of the Sri Lankan population speaks English. *See* RJN Ex. K. And even if witnesses are willing and able to participate, the time and expense of transporting them and documents to and from the forum and the need for translation services throughout the discovery and trial stages—not to mention the practical difficulties the language barrier would entail for the decision-maker—warrant dismissal on *forum non conveniens* grounds. *See Gulf Oil*, 330 U.S. at 508; *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1290-98 (11th Cir. 2009) (private interest favored dismissal of Alien Tort Statute case where witnesses and evidence were primarily located in Guatemala and language barriers were present); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 526-43 (S.D.N.Y. 2002) (same, where principal fact witnesses were non-English speakers in Peru and pertinent documents were in Spanish).

To be sure, Plaintiffs chose to litigate here rather than at home where their injuries occurred. But that choice cannot outweigh the other countervailing considerations "'because the central purpose of any *forum non conveniens* inquiry

is to ensure that the trial is convenient'" notwithstanding Plaintiffs' choice of forum. *See Windt*, 529 F.3d at 190 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 237 (1981)).

2. The Public Interest Favors the Sri Lankan Forum

The local interest in having local controversies decided at home and the unfairness of burdening New Jersey citizens with jury duty to apply Sri Lankan law to resolve Sri Lankan torts to which they have no practical relation weigh strongly in favor of dismissal. *Aldana*, 578 F.3d at 1299-1300 (public interest factors favor dismissal where "the underlying events took place in Guatemala, all of the individuals involved were * * * Guatemalan citizens, and Guatemalan political and economic tensions form the essential backdrop to the entire dispute"); *Flores*, 253 F. Supp. 2d at 543 ("Southern District jurors come from a community which has no relation to the litigation."). Moreover, the United States' interest in retaining jurisdiction of this matter, if any, is far outweighed by Sri Lanka's interest in the alleged killing and injuring of Sri Lankan civilians in Sri Lanka by a Sri Lankan military group. *See Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 527 (S.D.N.Y. 2006) ("effects in Turkey [were likely] far greater than any effects felt in this country from such actions").

Finally, in tort cases in New Jersey, "the law of the state of the injury is applicable unless another state has a more significant relationship to the parties and

issues." *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 459-60 (N.J. 2008) (citing Restatement (Second) of Conflict of Laws §§ 145, 146); *see generally Sosa*, 542 U.S. at 709 (discussing the Restatement (Second) rule). Accordingly, Sri Lankan law will apply to this case, as it is both the state in which Plaintiffs suffered their alleged injuries and the state bearing the most significant relationship to this suit. And Sri Lankan courts are far better equipped than American courts to apply Sri Lankan law generally, and to navigate its application to donations made to a governmentally authorized Sri Lankan charity in particular (especially given the language barrier), which favors dismissal on *forum non conveniens* grounds. *See Windt*, 529 F.3d at 189 (problems attendant "application of foreign law" is one of public factors) (citing *Gulf Oil*, 330 U.S. at 508-09); *see also Piper Aircraft*, 454 U.S. at 260 n.29 ("the need to apply foreign law favors dismissal").

In short, the epicenter of this litigation is Sri Lanka—that is where all 26 Plaintiffs, all 24 plaintiff Estates, the plaintiff minor children, one of the defendants, and almost all of the relevant documents, evidence, and witnesses are located, and it is the source of the governing law. It makes no sense to require United States courts and jurors to adjudicate this Sri Lankan dispute under Sri Lankan law when an adequate forum exists in Sri Lanka and that Nation has far more at stake in finding a just resolution to the harms alleged here.

III. THE COMPLAINT FAILS TO STATE A CLAIM

A. Plaintiffs' Alien Tort Statute Claims Fail As A Matter Of Law

For the same reason this Court lacks jurisdiction under the Alien Tort Statute, the complaint fails to state a violation of the law of nations under the Alien Tort Statute and federal common law and thus should be dismissed on the merits.

B. The Intentional Infliction Of Emotional Distress Claim Fails

To establish a cause of action for intentional infliction of emotional distress under New Jersey law, Plaintiffs must establish that, *inter alia*, the Rajaratnams' conduct (i) caused Plaintiffs' distress; and (ii) was extreme and outrageous. *See Buckley v. Trenton Sav. Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988). The complaint shows neither.

First, the complaint fails to bridge the causation gap between the LTTE's actions and the Rajaratnams' donations to the TRO one to eight years earlier. In *Linde v. Arab Bank, PLC.*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005), the court held that the provision of financial assistance—even the provision of a death and dismemberment benefit plan that encouraged suicide attacks—"is too removed" to support a claim for emotional distress. *Id.* at 590-591. And if the *concurrent* provision of financial support directly to the terrorists themselves is not sufficient to establish causation, even less so are Plaintiffs' allegations of temporally and physically remote donations. *See* Section III.C.2, *infra*.

Second, there is nothing "extreme and outrageous," *Buckley*, 544 A.2d at 863, about making donations to a 501(c)(3) charitable organization in the wake of a refugee crisis and tsunami.

C. The Claims For Negligence, Reckless Disregard, And Negligent Infliction Of Emotional Distress (Counts Three, Four And Seven) Fail For Lack Of Duty And Proximate Cause

1. No Legal Duty

Duty is an indispensable element of negligence, reckless disregard, and negligent infliction of emotional distress claims under New Jersey law. *See Ivins v. Town Tavern*, 762 A.2d 232, 235 (N.J. Super. Ct. App. Div. 2000); *Schick v. Ferolito*, 767 A.2d 962, 969 (N.J. 2001); *Cole v. Laughrey Funeral Home*, 869 A.2d 457, 465 (N.J. Super. Ct. App. Div. 2005). The existence of the requisite duty, moreover, is properly resolved on a motion to dismiss. *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 991 F. Supp. 390, 401 (D.N.J. 1997).

Here, no duty exists for four reasons. First, the "most significant factor in determining the scope of a party's duty" is foreseeability. *Taylor by Taylor v. Cutler*, 703 A.2d 294, 297 (N.J. Super. Ct. App. Div. 1997). "[F]oreseeability embodies an element of awareness or knowledge on the part of the tortfeasor that the class of persons represented by the plaintiff were at risk as a result of the tortfeasor's conduct." *Id.* at 299. Moreover, "[f]oreseeability of harm is the crucial factor in determining whether a duty exists to take reasonable measures to

guard against the criminal activity of others." *Blunt v. Klapproth*, 707 A.2d 1021, 1030 (N.J. Super. Ct. App. Div. 1998). The Rajaratnams, however, could not reasonably have foreseen that Plaintiffs would be injured by their donations one to eight years earlier to a Section 501(c)(3) organization that was also authorized to operate as a humanitarian organization in Sri Lanka.

Second, no court has recognized a duty of care under New Jersey law based solely on the provision of money to a tortfeasor who months or years later causes a plaintiff's injuries. Quite the opposite, New Jersey courts have held that merely supplying a resource or instrumentality that contributes to plaintiffs' unforeseeable injuries does not create a duty of care. *See Griesenbeck v. Walker*, 488 A.2d 1038, 1042 (N.J. Super. Ct. App. Div. 1985) (provision of alcohol to intoxicated adult who later caused a death does not create duty because of the physical and temporal distance between the acts and the injuries).

Third, each of Plaintiffs' negligence-based claims fails because the Rajaratnams had no duty to prevent the criminal acts of another. *See Sacci v. Metaxas*, 810 A.2d 1119, 1124 (N.J. Super. Ct. App. Div. 2002) ("[a]s a general rule, there is no duty to control the conduct of another, absent a special relationship or special circumstances among the parties"). The court in *Sacci* specifically held that knowledge of an individual's violent propensities was insufficient where the

defendant—like the Rajaratnams—had no knowledge of the tortfeasor's specific plan to murder the decedent. *Id.* at 1126, 1129.[23]

Finally, fairness and public policy militate against imposition of a legal duty constraining charitable donations. *See Port Auth.*, 991 F. Supp. at 403 (considering fairness); *Griesenbeck*, 488 A.2d at 1042 (considering fairness and notice to defendant). American citizens should be able to rely on the federal government's designation of a charitable group as a Section 501(c)(3) organization that "serve[s] a public purpose" consistent with "established public policy." *Bob Jones Univ.*, 461 U.S. at 586. That is particularly true when, as here, the humanitarian need to which the donations responded was a matter of acknowledged public record and any alleged tortious activity did not occur until one to eight years after the donations occurred. A policy imposing liability on charitable donors for the charity's abuse of the public trust would significantly chill charitable giving and confound the public interest in supporting charitable giving and mutual support.

2. No Proximate Causation

Proximate cause is a necessary element of negligence, reckless disregard, and both intentional and negligent infliction of emotional distress claims, *Ivins*, 762 A.2d at 235; *Schick*, 767 A.2d at 969; *Cole*, 869 A.2d at 467, and its existence

[23] This case is even easier than *Griesenbeck* and *Sacci* because, unlike the defendants there, the plaintiffs do not contend that the Rajaratnams directly supplied the actual instrumentalities used by the third party tortfeasors to inflict harm. *Griesenbeck*, 488 A.3d at 1041-1042; *Sacci*, 810 A.2d at 1124.

is appropriately decided on a motion to dismiss, *Port Auth.*, 991 F. Supp. at 405-406; *see Griesenbeck*, 488 A.2d at 1043. The determination of proximate cause is based on "mixed considerations of logic, common sense, justice, policy, and precedent." *Caputzal v. Lindsay Co.*, 222 A.2d 513, 517 (N.J. 1966).

Here, as in *Port Authority*, the independent decisions of the TRO to violate its Section 501(c)(3) status and funnel funds to the LTTE, and then of the LTTE to commit terrorist acts one to eight years later were superseding and intervening events that broke the chain of causation between the Rajaratnams' donations and Plaintiffs' injuries. *Port Auth.*, 991 F. Supp. at 408. Just as the defendants' production of fertilizer used in World Trade Center bombs did not "logically compel or induce th[at] bombing," the alleged LTTE attacks were not the "natural or probable consequence" of the Rajaratnams' donations to the TRO one to eight years earlier. *Id.*; *see Sacci*, 810 A.2d at 1126 (no third-party causation where killer's acts "were the result of a systematic and deliberative process, including the purchasing of a gun, before the injury was inflicted"); *see also Sosa*, 542 U.S. at 703 ("proximate causation * * * is necessary to connect the domestic breach of duty * * * with the action in the foreign country (in a case like this) producing the foreign harm or injury").

Finally, Plaintiffs' remaining claims for survival and wrongful death are derivative causes of action that fall with their predicate negligence, reckless

disregard, and emotional distress torts. N.J. Stat. Ann. § 2A:31-1 (2009) (wrongful death action lies if decedent could have brought an action for damages resulting from injury causing death); N.J. Stat. Ann. § 2A:15-3 (2009) (executors and administrators can recover damages as the decedent would have had if he was living); *Tharp v. Shannon*, 230 A.2d 902, 905 (N.J. Super. Ct. Law Div. 1967) (both Survivor's Act and Wrongful Death Act are "derivative in nature").

IV. THE ESTATE CLAIMS FAIL ON STANDING AND ON THE LAW

A. Standing

Plaintiffs have prudential standing under the Alien Tort Statute to bring claims on behalf of an estate only if they would have standing under New Jersey law. *See Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1145 (E.D. Cal. 2004). Under New Jersey law, an administrator *ad prosequendum* is the proper party to bring a wrongful death action. N.J. Stat. Ann. § 2A:31-1; *Holloway v. Whaley*, 116 F.R.D. 675, 676 n.2 (D.N.J. 1987). Plaintiffs, however, have not alleged that they have been given letters of administration by a New Jersey court to serve as administrators *ad prosequendum* of the estates of decedents killed by the attacks. N.J. Stat. Ann. § 2A:31-1. Similarly, under New Jersey law, a general administrator of a decedent's estate is the proper party to bring a survival action, N.J. Stat. Ann. § 2A:15-3; *Holloway*, 116 F.R.D. at 676 n.2, but Plaintiffs have not

alleged that they are lawful administrators of the decedents' estates. Accordingly, the claims brought on behalf of the estates must be dismissed.

B. Failure To State A Claim

With respect to the negligent infliction of emotional distress claim, a claim can be brought based on injury to another—the decedent—only if (i) the plaintiff was within the "zone of risk" created by defendant's negligence, *Dello Russo v. Nagel*, 817 A.2d 426, 435 (N.J. Super. Ct. App. Div. 2003), or (ii) the plaintiff observed the death or severe injury of a spouse or close family member and suffered resulting severe emotional distress, *Portee v. Jaffee*, 417 A.2d 521, 528 (N.J. 1980); *Tosado v. Middlesex County Dep't of Corr.*, Civ. No. 05-5112 (DRD), 2009 WL 1562238, *8 (D.N.J. May 29, 2009). The Plaintiffs on behalf of estates, however, have not pled either of those necessary predicates.

CONCLUSION

For the foregoing reasons, the complaint and all claims against the Rajaratnams should be dismissed.

December 15, 2009

Respectfully submitted,

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