UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ELOY ROJAS MAMANI, et al., Plaintiffs, vs. GONZALO DANIEL SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE, Defendant.	**Case No. 08-21063-Civ-(JORDAN)**
ELOY ROJAS MAMANI, et al., Plaintiffs, vs. JOSÉ CARLOS SÁNCHEZ BERZAÍN, Defendant.	**Case No. 07-22459-Civ-(JORDAN/MCALILEY)**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS

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Plaintiffs seek to hold Defendants Gonzalo Sánchez de Lozada ("Lozada"), former president of Bolivia, and Jose Carlos Sánchez Berzaín ("Sánchez Berzaín"), former defense minister of Bolivia, liable for the intentional, targeted killings of nine peaceful, unarmed Bolivian civilians in September and October 2003. Defendants' motion to dismiss is based on their fanciful rendition of the facts, which is disconnected from the actual allegations of Plaintiffs' Amended Consolidated Complaint ("Complaint" or "Compl."), and their version of the law, which disregards binding precedent of the U.S. Supreme Court and the Eleventh Circuit.

Contrary to Defendants' assertion, resolution of this case does not require this Court to sit in judgment on unintended collateral killings or a government's legitimate use of force to restore order. Rather, Plaintiffs allege that, in a month-long spree, sharpshooters under the command of the Defendants intentionally targeted and killed a child in her home, a teenager on the terrace outside her house, and other villagers far from any threat that might have justified the lawful use of deadly force. Plaintiffs seek to hold Defendants accountable for the actions that took the lives of their wives, children, siblings and parents. The Eleventh Circuit has held repeatedly that claims for the intentional killings of civilians by government security forces -- paradigmatic human rights claims -- are cognizable under both the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note) ("TVPA").

Defendants' political question and act of state arguments are based on a flawed characterization of the U.S. government's response to allegations of human rights abuses by forces under the Defendants' command. Far from ratifying those abuses, both the executive branch and Congress recognized the importance of holding accountable those responsible. Plaintiffs' lawsuit thus does not conflict with U.S. foreign policy. Nor does the central issue in this lawsuit -- whether forces under the Defendants' command used deadly force to intentionally target and kill peaceful unarmed civilians, with no justification and in violation of international law -- implicate the complex policy questions that Defendants maintain are raised by the case.

Rather than respond to Plaintiffs' allegations, Defendants attempt to rewrite the Complaint, submitting over 300 pages of documents, almost all irrelevant, inappropriate at this stage of the proceeding, and/or inadmissible at any point under the rules of evidence. In a separate motion filed with this brief, Plaintiffs ask the Court to strike 38 of the 41 exhibits.

Defendants' self-aggrandizing effort to cloak themselves in the banner of a U.S. political hero is misguided. To put it bluntly, Defendants bear no resemblance to President John F. Kennedy. *See* Defendants' Joint Motion to Dismiss ("Joint Motion" or "Joint Mot.") at 1.

I. COUNTERSTATEMENT OF FACTS

The Killings of Plaintiffs' Relatives Were Part of a Widespread and Systematic Plan

Plaintiffs are the surviving family members of Bolivian citizens killed by military personnel under the command of Defendants as part of their campaign to terrorize and intimidate the poor, indigenous Aymara population during a period of widespread demonstrations against government policies. The killings of Plaintiffs' relatives were part of a widespread and systematic attack against the Aymara that led to 67 deaths and over 400 injuries. Compl. ¶ 75.[1]

Defendant Lozada served as Bolivia's President at the time of these killings. Defendant Sánchez Berzaín, the Minister of Defense under Lozada, possessed and exercised command and control over the Bolivian Armed Forces. Compl. ¶¶ 5, 7, 19, 25. The two Defendants devised, directed and/or carried out a plan to target and deliberately intimidate Bolivian citizens from protesting against the Lozada government. Compl. ¶¶ 30, 34, 36, 47, 48. Defendants ordered sharpshooters into the outskirts of La Paz to kill civilians in order to deter others from participating in public protests. Compl. ¶¶ 1, 23, 26-28, 39. Military helicopters hovered over the scenes of bloodshed in El Alto and Apaña, including the helicopter in which Defendant Sánchez Berzaín oversaw the execution of the Defendants' military operation. Gunshots were fired from Defendant Sánchez Berzaín's helicopter. Compl. ¶¶ 52, 69; Def. Ex. 10 at FOIA-027. Farmers tending their crops in distant hills and men, women and children standing in windows or on terraces of homes many blocks from the protests were killed with single shots. *See, e.g.*, Compl. ¶¶ 39, 40, 46, 55, 57, 58, 70-72. The deadly campaign continued for four weeks.

On October 13, 2003, **Arturo Mamani Mamani** was tending his potato field in the hills of Apaña when he went to the crest of a hill to see military troops gathering below. After witnessing the military shoot and kill his unarmed brother, Arturo himself was shot, sustaining a fatal wound to his leg. Compl. ¶¶ 71, 72. **Jacinto Bernabé Roque**, a sixty-one-year old man, was also shot and killed as he was walking through the hills to his lettuce patch. Compl. ¶ 70.

Three weeks earlier, **Marlene Nancy Rojas Ramos** of Warisata, one of the first victims, was killed. Marlene was an eight-year old girl caring for her mother who had just given birth. She was killed by a single bullet as she stepped in front of her mother's bedroom window. The

[1] The Complaint includes details about many of the deaths as background and to support the claim of crimes against humanity. *See, infra,* III.C.3. The nine Plaintiffs seek damages only for the deaths of their own family members.

shooter is believed to have been a sharpshooter. Compl. ¶ 40.

On October 12, 2003, nineteen-year old **Roxana Apaza Cutipa** was on the fourth floor terrace of her house in El Alto when she was shot with a single bullet to the head. Gunshots had been heard in the distance, but there were no protestors near her home at the time. Compl. ¶ 55. That same day, **Teodosia Morales Mamani**, mother of seven and pregnant with her eighth child, was eating with her family when she was shot through the abdomen by the military. Both she and her unborn child died as a result. Compl. ¶ 57. **Marcelino Carvajal Lucero** was also shot by the military when he went to close a window in his home in El Alto. Compl. ¶ 58.

Military personnel deliberately targeted and killed unarmed civilians who tried to avoid their gunfire. As they passed through the village of Ovejuyo firing at civilians, they killed **Raúl Ramón Huanca Márquez** as he crawled on the ground to avoid their gunfire. Compl. ¶ 73. In El Alto, **Luico Santo Gandarillas Ayala** is believed to have been killed by a military officer and **Constantino Quispe Mamani** was fatally wounded by a shot in the back. Compl. ¶¶ 54, 56.[2]

Defendants justify their month-long campaign on a single event that they concede was resolved by September 21, 2003. *See* Joint Mot. at 6-8. In mid-September 2003, Aymaran villagers congregated in and around the El Alto suburb of La Paz in peaceful protest against the policies of the Lozada government, blocking traffic in and out of the capital city. Compl. ¶¶ 26-28.[3] When the protests first began, travelers in Sorata, a village north of La Paz, were unable to return to the capital because of the blockaded roads. Compl. ¶ 29. Military personnel sent to "rescue" the travelers shot and killed an elderly man outside of Sorata. Compl. ¶¶ 30, 34, 35. When the residents of Warisata, a town between Sorata and La Paz, heard about the killing, they

[2] Lucio Santos Gandarillas Ayala and Constantino Quispe Mamani were both unarmed and posing no threat to security forces when they were targeted, although it is unclear from the Complaint whether they were near the scene of protests when they were killed.

[3] In the Joint Motion, Defendants imply that the protestors were part of a militant opposition by suggesting that the Aymarans who protested against Lozada's policies in September/October 2003 were responsible for events that had turned violent in January/February of the same year. That is not what was alleged in the Complaint. Moreover, Defendants' version of events is not supported by the documents submitted with their motion. As the State Department reported, the January killings concerned farmers in the Chapare region and the February demonstrations concerned a conflict between Lozada's military and members of the police. Def. Ex. 8 at 4 of 6; Def. Ex. 5 at 8 of 15. These two events were separate and distinct from each other and the events of September/October 2003. Each event arose from opposition by a different sector of the populace against a different policy put forth by Lozada's government. To the extent the farmers

took to the streets to protest the killing. Compl. ¶ 37. Defendant Lozada disingenuously characterized the protest as a "guerilla attack," mobilized the military, and gave Defendant Sánchez Berzaín carte blanche to use "necessary force" to put an end to the protests. Compl. ¶ 36; Def. Ex. 14. The killings of Plaintiffs' family members resulted from that command.

Three weeks after the travelers in Sorata returned to La Paz, innocent men, women and children continued to be targeted by the military whether they engaged in peaceful protest or returned to their homes. On October 9, 2003, a Catholic Priest dressed in his vestments, approached the security forces in order to bring an end to the abuses. In response, the police fired at him with rubber bullets, injuring his leg. Compl. ¶ 45. On October 11, 2003, a five-year old boy was shot on the terrace of his home, far from where the demonstrations took place. It is believed that he, like several of the Plaintiffs' relatives, was shot by a sharpshooter. Compl. ¶ 46.

Defendants knew of these killing and were in a position to stop further slaughter, but continued to order the use of deadly force against peaceful civilians despite increasing public outcry and the withdrawal of support by Vice President Carlos Mesa Gisbert. Compl. ¶¶ 39, 42, 59, 60.[4] Vice President Mesa twice distanced himself from the government because of the killings and "publicly broke with [] Sánchez de Lozada precisely over the [government's] handling of human rights while Mesa was still Vice President." Pl. Ex. A at FOIA-070, 072. In the final days before the Defendants fled the country, they targeted Aymaran villagers far from the epicenter of the scenes on which the Defendants had based their actions. In addition to the killings described above, on October 13, 2003, military sharpshooters killed seven more civilians in the outlying hills of Apaña. Compl. ¶¶ 63-72. Up until the day Defendant Lozada resigned and fled the country with Defendant Sánchez Berzaín, the military continued to terrorize Aymaran villagers with senseless violence. Compl. ¶¶ 73, 74.

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in the Chapare were Aymara, the events of January 2003 only further demonstrate that Defendants were targeting this distinct cultural group.

[4] While Plaintiffs contend that Defendants' submission of cables between the U.S. Embassy in La Paz and the State Department during the conflict of September and October 2003 should be stricken as improper extrinsic evidence, to the extent that the Court denies Plaintiffs' motion to strike and considers these documents, Plaintiffs submit and cite to certain cables omitted by Defendants. Pl. Ex. A. One cable, for example, provides support for these allegations in the Complaint, stating that during Lozada's government "there were credible reports of abuses by security forces, including excessive force, extortion, and improper arrests" and that because of "cases of alleged human rights abuses, such as torture and extra-judicial killings [during

The Response of the United States to Events in Bolivia

In April 2004, the U.S. Department of State issued a Report on Bolivian Security Forces and Respect for Human Rights. Contrary to Defendants' description of the report, the State Department did not "ratify" Defendants' actions. In fact, the State Department acknowledged and gave credence to the investigations of Defendants' human rights abuses. *See* Def. Ex. 2 at FOIA-011 ("In response to the events surrounding the loss of life [from September 20 to October 17, 2003], the Public Ministry, the Human Rights Ombudsman's office, and the congressional Human Rights Commission opened a series of investigations, which are still pending."). The State Department found that the government that replaced Defendants Lozada and Sánchez Berzaín, the "new government [of Carlos Mesa,] [was] living up to its promise of respecting the human rights and fundamental freedoms of its citizens." *Id*. Moreover, the State Department noted that "Mesa presided over the change of the military high command in November 2003 and has supported efforts to try former officials accused of human rights abuses." *Id*. The State Department further recognized that "[i]n those instances where human rights violations may have occurred in response to large-scale unrest, both the Bolivian military and police opened investigations or cooperated with civilian authorities investigating the incidents." *Id*. at FOIA-012. Since that report was issued, those investigations and prosecutions have broadened to include the actions of both Defendants. Compl. ¶¶ 75-77.

From the Lozada presidency to the current administration of Juan Evo Morales Ayma, the United States has consistently expressed its support for the Bolivian constitutional form of government no matter who has been elected its president, and to this date the United States has not withdrawn its financial aid to that country. *See, e.g.*, Pl. Ex. A at FOIA-072, 089, 139. Current President Evo Morales did not usurp the presidency, as Defendants suggest. In December of 2005, more than two years *after* the Defendants fled the country, Morales was democratically elected President. *See* Def. Ex. 6 at p. 5 of 12.

In October 2004, President Carlos Mesa, who was Vice President under former President Lozada, initiated a criminal proceeding under Bolivian law, called a Trial of Responsibilities, to determine the criminal liability of Defendants Lozada and Sánchez Berzaín and other ministers for the deaths of 67 Bolivian citizens and injuries to over 400 others by the military. Declaration

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Lozada's administration], Embassy has hired a Bolivian lawyer devoted exclusively to human rights." Pl. Ex. A at FOIA-072-073.

of Jeremy F. Bollinger, Plaintiffs' Exhibit ("Pl. Ex.") A (Authorization of Trial of Responsibilities against Defendants). Twelve other ministers have testified in those proceedings, but the two Defendants have refused to return to Bolivia to face trial. Compl. ¶ 76. [5]

In 2005, the Mesa government sent a request to the U.S. government to notify Defendants of the charges against them. Pl. Ex. C. The next year, in his application for asylum in the United States, Sánchez Berzaín answered "No" to the government's question whether he had "ever been accused, charged … in any country other than the United States." Def. Ex. 25, Part B(2) at 6. The application provides space to explain the circumstances and reasons for the action, if the applicant had replied "Yes."

On June 19, 2008, the Republic of Bolivia waived any immunity from suit for former President Lozada and the former defense minister Sánchez Berzaín. Pl. Ex. D.

II. LEGAL STANDARDS

Plaintiffs assert subject matter jurisdiction under 28 U.S.C. § 1331 and the ATS. Under § 1331, the district court has federal question jurisdiction unless the claim is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). The court has subject matter jurisdiction over an ATS claim if the plaintiff's allegation of a violation of international law is not "immaterial" or "wholly insubstantial and frivolous," even if the court later determines that the complaint does not state a claim for relief. *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1194 (D.C. Cir. 2004); *see also Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 264-68 (2d Cir. 2007) (Katzmann, J., conc.) (noting that the ATS grants subject matter jurisdiction over offenses that violate customary international law even if the court declines to recognize a cause of action for the violation), *aff'd for absence of a quorum sub nom. American Isuzu Motors, Inc. v. Ntsebeza*, -- S. Ct. --, 2008 WL 117862 (May 12, 2008).[6]

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[5] Defendants' claim that the U.S. government has found that Sánchez Berzaín would be "persecuted at home" if he returned to Bolivia to face criminal charges arising from the 2003 killings (Joint Mot. at 17), and that the executive branch has "publicly denounced those charges" (*id*. at 16), also rests upon a gross distortion of the document he cites, his Exhibit 27. That document merely quotes a State Dept. spokesman as saying that "in the past, US officials have raised with the Bolivian officials our concern that the charges appear to be politically motivated."

[6] Defendants provide no citation to support their erroneous assertion that the standard applied to this motion "differs markedly" from the standard applied to "more common-place motions to dismiss." Joint Mot. at 13.

On a Rule 12(b)(1) motion to dismiss for lack of subjection matter jurisdiction, only those facts underlying the jurisdictional allegations may be challenged. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). The remaining facts alleged in the complaint must be accepted as true. *Lawrence*, 919 F.2d at 1529. Moreover, a court may properly consider matters outside the record on the subject matter jurisdiction issue *only* when it does not reach the merits of the underlying claims. *Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6. (11th Cir. 2001).[7] Finally, if the court does consider factual matters outside the Complaint, the court should defer decision and provide Plaintiffs an opportunity to take discovery and respond with their own factual submissions. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1360 n.28 (11th Cir. 2007) ("[Plaintiffs] should have an opportunity to have discovery to rebut any such extraneous evidence, before such evidence is used to dismiss the case on political question grounds.").

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must accept plaintiffs' allegations as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and construe the complaint in plaintiffs' favor, *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993). To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but must "give the Defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (internal quotation marks omitted). Ultimately, the complaint is required to contain "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974.

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court may consider additional documents or evidence *only* where such evidence is referenced in the plaintiff's complaint and central or integral to the plaintiff's claim. *Brooks v. Blue Cross and Blue Shield of Florida, Inc*., 116 F.3d 1364, 1369 (11th Cir. 1997). "When considering a motion to dismiss, all facts set forth in the plaintiff's complaint are to be accepted as true and *the court limits its consideration to the pleadings and exhibits attached thereto*." *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000) (emphasis added, internal quotations omitted). Defendants offer no proper justification for their submission of over 300 pages of news articles, press

[7] Defendants erroneously cite *Goodman* in support of their submission of extraneous evidence. *Goodman* was decided on a motion for summary judgment after "extensive discovery." *Id*. at 1331. Moreover, *Goodman* addressed the *Rooker-Feldman* doctrine, and the determination of subject matter jurisdiction therefore required the court to consider evidence outside of the pleadings. *Id.* at 1331 n.6.

briefings, country reports, U.S. executive orders, and briefs from *other* cases. As discussed in Plaintiffs' Motion to Strike, filed concurrently with this Opposition, only 3 of the 41 exhibits are properly before the Court. Exhibit 14 (Letter from Defendant Lozada enclosing Directive 27/03, Sept. 20, 2003), Exhibit 15 (Directive 27/03), and Exhibit 22 (Bolivian Supreme Decree 27209, Oct. 11, 2003) are referenced in the Complaint, and may properly be attached to the Joint Motion. The remaining exhibits are irrelevant or inadmissible. *See* Plaintiffs' Motion to Strike. If the Court considers those exhibits, it should defer decision and provide Plaintiffs an opportunity to take discovery and respond with their own factual submissions. Plaintiffs address the irrelevancy of specific exhibits in the substantive sections of this brief.

III. ARGUMENT

A. Plaintiffs' Claims Are Not Barred by the Political Question Doctrine or the Act of State Doctrine

Plaintiffs allege that Defendants bear legal responsibility for egregious human rights abuses that were condemned, not condoned, by the U.S. government and illegal under the laws of Bolivia, as well as U.S. and international law. These claims are not barred by the political question doctrine or the act of state doctrine. Defendants' argument on these issues relies on distortion of the allegations of the Complaint and the U.S. policy towards those abuses.

1. Plaintiffs' Claims Do Not Present Non-Justiciable Political Questions

Plaintiffs in this lawsuit seek damages for the targeted killings of their peaceful, unarmed family members by sharpshooters under the command of the Defendants. The U.S. government most certainly did not ratify the targeted killings of peaceful, unarmed civilians, as Defendants claim. Joint Mot. at 15, 16, 18. To the contrary, the executive branch repeatedly recognized the importance of holding accountable those responsible for human rights abuses in Bolivia. A lawsuit seeking damages for those abuses is not barred by the political question doctrine.

Separation of powers principles require that the political question doctrine be applied narrowly, to avoid dismissal of cases that are constitutionally assigned to the judicial branch. The Supreme Court has indicated that the political question doctrine necessitates a "discriminating inquiry into the precise facts ... of the particular case," emphasizing that the doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr,* 369 U.S. 186, 217 (1962); *McMahon*, 502 F.3d at 1365 n.36.

In the first modern ATS case, the executive branch explained that human rights litigation based on widely accepted, clearly defined international norms is consistent with U.S. foreign

policy and thus does not call for dismissal under the political question doctrine:

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. [Citation.] When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.

Brief for the United States as Amici Curiae, *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980), at 46 (No. 79-6090), 1980 WL 340146. Although acknowledging that such cases are likely to implicate foreign policy considerations, the brief concluded that "the protection of fundamental human rights is not committed exclusively to the political branches of government." *Id*. at 45.

The political question analysis focuses on six factors, Joint Mot. at 15-16 (citing *Baker*, 369 U.S. at 217), which are listed in decreasing order of importance. *McMahon*, 502 F.3d at 1365 n.35, citing *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.).

The first *Baker* factor requires "a textually demonstrable constitutional commitment of the issue to a coordinate political department." As the Second Circuit recognized, damage claims for human rights abuses do not implicate this factor because "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own -- the Judiciary." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (rejecting political question challenge to claim arising during an ongoing war in Bosnia-Herzegovina); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (rejecting political question challenge to ATS claims against Ethiopian official).

This factor does not require dismissal of "cases in which the Executive's foreign policy was questioned," as Defendants' claim. Joint Mot. at 17. "[N]ot all issues that could potentially have consequences to our foreign relations are political questions." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004). Indeed, the Eleventh Circuit has held that the first *Baker* factor is implicated only if it would require "reexamination of a decision" taken by "a coordinate branch of the United States government." *McMahon*, 502 F.3d at 1359-60. In *McMahon*, the Eleventh Circuit concluded that the political question doctrine did not require dismissal of claims against civilian contractors working with the Department of Defense, brought by survivors of U.S. soldiers who were killed in an airplane crash in Afghanistan. The *McMahon* standard makes clear that this case does not trigger the first *Baker* factor. Plaintiffs seek damages for human rights abuses committed by two Bolivian individuals, not a "coordinate branch" of the U.S. government. They do not challenge actions or decisions taken by the U.S. government.

The fact that the executive branch has expressed approval, disapproval or remained neutral about facts underlying a lawsuit does not transform those facts into the actions of the executive branch or render them immune from suit under the political question doctrine. As detailed in Plaintiffs' counterstatement of facts, the executive branch acknowledged concern about the human rights abuses committed by Defendants' forces and emphasized that those responsible for any abuses should be held accountable. But even an expression of executive branch support for Defendants' actions would not transform this tort suit into a nonjusticiable political question. In *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992), for example, plaintiffs sought damages from the leaders of the Nicaraguan "contras" for the targeted killing of a U.S. citizen. The court held that the lawsuit was not barred by the political question doctrine despite the fact that the contras had been armed, financed, and directed by the U.S. government: "Under the allegations of tort liability that we have explicated, the complaint challenges neither the legitimacy of the United States foreign policy toward the contras, nor does it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war." *Id*. at 337; *see id*. at 336 ("[t]he fact that the issues . . . arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.").

The second *Baker* factor does not apply because this case does not present "a lack of judicially discoverable and manageable standards for resolving" the dispute. Under far more politically sensitive circumstances, the Eleventh Circuit in *Linder* found clear standards to govern the treatment of civilians during armed civil conflict, concluding that "[c]ontrary to the district court's conclusion, there is no foreign civil war exception to the right to sue for tortious conduct that violates the fundamental norms of the customary laws of war." *Linder*, 963 F.2d at 336. Quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991), the *Linder* court held that "the common law of tort provides clear and well-settled rules on which the district court can easily rely….'" *Id*.[8] Here as well, the TVPA and international law provide clear, manageable standards by which to evaluate Defendants' targeting of civilians. *See*, *infra*, III.C.2.; *see also McMahon*, 502 F.3d at 1364 (citing *Linder*, 963 F.2d at 337, and recognizing that federal courts are competent to develop standards to evaluate wrongs even when committed

[8]The *Linder* plaintiffs filed tort claims, not international law claims, because as U.S. citizens they did not fall within the jurisdiction of the ATS. The TVPA, which authorizes U.S. citizens to file claims for torture or extrajudicial killing, had not yet been enacted.

during wartime). *McMahon* also notes that damage claims "are particularly judicially manageable." *Id*. at 1364 n.34.

Third, this case does not require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Congress has already made the key policy decision by enacting the ATS. "[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Kadic*, 70 F.3d at 249.

Defendants rely most heavily on *Baker* factors four, five and six, arguing that judicial resolution of this lawsuit would indicate lack of respect for or undermine a decision of a coordinate branch of government or embarrass the federal government because of "multifarious pronouncements by various departments on one question." However, neither the executive branch nor Congress has expressed approval for -- much less ratified or endorsed -- the actions at issue in this case. Defendants' reliance on these *Baker* factors is based on two fundamental errors. First, Defendants mischaracterize Plaintiffs' allegations, wrongly claiming that Plaintiffs mount a general challenge to the Bolivian military's response to social unrest in September and October 2003. Second, Defendants misstate the U.S. executive branch's stance towards the incidents underlying this case, wrongly asserting that general expressions of support for the Bolivian government constituted "endorsement and ratification" of its human rights abuses. Joint Mot. at 15; *see also id*. at 16, 18. The startling claim that the U.S. executive branch ratified the acts at issue in this case is based on Defendants' refusal to acknowledge the allegations of the Complaint. Plaintiffs do not assert that their family members were killed as the unintended consequences of a lawful response to civil unrest. To the contrary, Plaintiffs allege that military sharpshooters under the command of the Defendants intentionally targeted peaceful, unarmed civilians, resulting in dozens of deaths. The executive branch most certainly did not ratify these illegal acts. In fact, the U.S. government praised the successor government's commitment to investigate human rights violations which occurred in the September/October period. Def. Ex. 2 at FOIA-011-012.

Defendants repeatedly quote an April 2004 memo from the Department of State transmitting a report to Congress on the human rights record of the Bolivian military. Def. Ex. 2. Plaintiffs have moved to strike this exhibit, *see* Plaintiffs' Motion to Strike at 4-5. But to the extent that the Court does consider the memo, Defendants' quotation of two sentences from this

lengthy memo distorts both the State Department's mixed assessment of the actions of Defendants' forces and its views of the proper response to those actions. Def. Ex. 2 at FOIA-002, 013. The April 2004 memo was written in response to a congressional mandate that the Secretary of State determine whether "the Bolivian military and police are respecting human rights *and cooperating with investigations and prosecutions of alleged violations of human rights*." *Id*. at FOIA-002 (emphasis added). Thus, the articulated policy of the legislative branch of our government was to hold accountable those responsible for the human rights abuses in Bolivia. Moreover, the memo does not express support for all of the actions of the Bolivian military, as the Defendants claim, much less constitute an "endorsement and ratification" of the killings alleged in the Complaint. To the contrary, the memo highlights the fact that human rights abuses had occurred and that investigation into those alleged abuses "are continuing." *Id*. at FOIA-005. The State Department did not condone the Defendants' actions; it simply acknowledged the subsequent Bolivian administration's efforts to investigate and punish those responsible:

> -- [O]n October 17, 2003, Carlos Mesa Gisbert assumed the Presidency of Bolivia. Mesa publicly broke with the former President over the [Government of Bolivia's] handling of the civil turmoil that lead to the latter's resignation. The new government is living up to its promise of respecting the human rights and fundamental freedoms of its citizens. Mesa presided over the change of the military high command in November 2003 and has supported efforts to try former officials accused of human rights abuses. *Id*. at FOIA-011.
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> -- In 2003 . . . Bolivian security forces . . . took steps to ensure respect for human rights by cooperating with independent offices dedicated to monitoring alleged cases of human rights abuse . . . . In those instances where human rights violations may have occurred in response to large-scale unrest, both the Bolivian military and police opened investigations or cooperated with civilian authorities investigating the incidents. . . . With respect to October, both institutions are involved with their own investigations and are cooperating with the Attorney General. *Id*. at FOIA-0012.

Defendants' Exhibit 2 thus makes clear that the U.S. executive branch recognized credible allegations of human rights abuses committed by forces under the Defendants' command, and cited with approval efforts to hold accountable those responsible.

Finally, the political question doctrine would not bar judicial consideration of Plaintiffs' claims *even if* the administration had expressed support for Defendants' actions in 2003. The "fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249. These factors have no relevance where a decision in an individual case will have "no

consequences concerning 'political decisions already made' and will raise only the question of Defendants' alleged liability regarding [a single incident]." *Biton v. Palestinian Interim Self-Government Authority*, 412 F. Supp. 2d 1, 6 (D.D.C. 2005).

Defendants fled Bolivia in 2003 and have since refused to return to face criminal charges stemming from those events. This lawsuit, in which Plaintiffs seek to hold them accountable in the forum in which they are presently located, is entirely consistent with the policies of the Bolivian government and with U.S. executive and legislative foreign policy: investigation and punishment of those responsible for egregious human rights abuses.

Cases in which the courts have dismissed claims on political question grounds involve strikingly different facts. For example, several cases cited by Defendants posed direct challenges to the conduct of the U.S. government and its highest ranking officials. *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (U.S. involvement with military coup in Chile); *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988) (U.S. efforts to recover servicemen missing in Vietnam); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (U.S. bombing of Cambodia during Vietnam war). The other cases Defendants cite are plainly distinguishable because they involved challenges to U.S. support for actions taken by the State of Israel where the current Israeli government had filed strong objections with the courts and which would have required the courts to "adjudicate the rights and liabilities of the Palestinian and Israeli people, making determinations on such issues as to whom the land in the West Bank actually belongs" and whether Israeli settlement activities are illegal or tortious. *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005); *see also Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (weapons sales to Israel approved and financed by the U.S. government). This case does not seek to hold the U.S. government or its officials liable. It does not challenge sales of munitions to an ally approved by the executive branch pursuant to a congressionally mandated procedure. And it does not ask the court to determine the legality of the ongoing activities of a foreign government that is a close U.S. ally, over the objections of that government. In short, none of the political question cases cited by the Defendants is relevant.

Although Plaintiffs move to strike most of the exhibits proffered by the Defendants, *see* Plaintiffs' Motion to Strike, none of those exhibits impacts this analysis. First, the internal communications detailing unverified, contemporaneous accounts of events in Bolivia, with no indication of their reliability, do not purport to be official positions of the U.S. executive branch. *See* Def. Ex. 10. Second, some of those early reports are inconsistent with later statements by

U.S. government officials. *See, e.g.*, Pl. Ex. E (*Associated Press*, June 9, 2008: U.S. Ambassador to Bolivia commenting that U.S. case against Defendants is "not a political matter, it's a judicial matter, and we have to respect the independent judicial branch in the United States."). Third, some of that information actually undermines Defendants' arguments. *See* discussion of State Department memo, *supra*. Finally, if any information outside the Complaint is admitted, Plaintiffs should have an opportunity to take discovery to rebut that extraneous evidence. *McMahon*, 502 F.3d at 1360 n.28.

2. The Act of State Doctrine Does Not Bar Consideration of Plaintiffs' Claims

The act of state doctrine does not bar consideration of this lawsuit because the violations committed by Defendants were not the official acts of a foreign state and were prohibited by unambiguous international law norms. In addition, adjudication of Plaintiffs' claims would not interfere with the sovereignty of Bolivia because the government that perpetrated the acts at issue is no longer in power and the current government has not objected to this litigation.

The act of state doctrine precludes a court "from inquiring into the validity of the public acts [of] a recognized foreign sovereign power," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 428 (1964), where the relief sought would require the court to declare invalid such officials act. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990); *Ampac Group Inc. v. Republic of Honduras*, 797 F. Supp. 973, 978 (S.D. Fla. 1992) (citing *Kirkpatrick*, 493 U.S. at 409-10). Moreover, the doctrine applies only in "the absence of a treaty or other unambiguous agreement regarding *controlling legal principles*[.]" *Sabbatino*, 376 U.S. at 401, 428 (emphasis added). The doctrine is to be applied sparingly. *Ampac Group*, 797 F. Supp. at 978; s*ee also* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1425 (1999) ("In [*Kirkpatrick*], the Supreme Court significantly curtailed the relevance of inquiries into the foreign relations implications of judicial decisions"); *Kadic*, 70 F.3d at 250 ("it would be a rare case in which the act of state doctrine precluded suit under section 1350.").

The burden of proving that a case should be dismissed on act of state grounds rests with the Defendants. *Honduras Aircraft Registry, Ltd. v. Government of Honduras*, 129 F.3d 543, 550 (11th Cir. 1997); *Ampac*, 797 F. Supp. at 550. Defendants have failed to meet this burden.

First, this case does not involve the official act of a foreign sovereign. Actions by an official "acting outside the scope of his authority as an agent of the state are simply not acts of

state." *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984). Here, the Bolivian government condemned the abuses at issue in this case, filed criminal charges against those responsible, Pl. Ex. B, and stated that Defendants were acting outside their authority, Pl. Exs. D. These acts are not the "public acts" of the Bolivian government. Acts constituting "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it . . . are as far from being an act of state as rape." *Jimenez v. Aristeguieta*, 311 F.2d 547, 558 (5th Cir. 1962); *see Filártiga*, at 890 (suggesting that acts in violation of a nation's laws, "wholly unratified by that nation's government," could never be considered acts of state).[9] Simply put, human rights violations are not "public acts" for purposes of the act of state doctrine. *See Kadic*, 70 F.3d at 350; *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1471-72 (9th Cir. 1994) (former Philippine president's acts of torture, execution, and disappearance were outside of his authority and could not be the official, public acts of the state); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713, 718 (9th Cir. 1992) (violations of jus cogens norms cannot constitute official acts because they are norms from which no state can derogate); *see Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (*en banc*) ("The [act-of-state] doctrine is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity to a deposed leader.").

As stated in the TVPA Senate Report, torture and similar violations of human rights can *never* be considered "public acts" that preclude liability under the TVPA: "Since [the act of state] doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation." Sen. Rep. No. 102-249, at 8 (1992) (citing *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989)). Human rights violations are always violations of international law and will almost always violate a nation's own laws; they can never be the "public acts" of a foreign official. The fact that a foreign military or other security force is involved in a human rights violation does not alter this analysis. *See In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 496 (9th Cir. 1992) (murders "by military intelligence personnel who were acting under direction [of the head of military intelligence], pursuant to martial law declared by" the Defendant were not

[9]As the Second Circuit noted in *Kadic*, a case involving allegations of genocide and war crimes, "[T]he appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state." *Kadic,* 70 F.3d at 250.

acts of state); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (beatings and torture did not constitute official public acts, in suit against former head of state).

As in *Marcos*, *Siderman* and *Avril*, Plaintiffs here allege that forces under Defendants' command intentionally targeted unarmed, peaceful civilians. These violations of fundamental human rights norms cannot be official acts protected by the act of state doctrine.

Second, the act of state doctrine does not apply because "controlling legal principles" prohibit the summary killings of civilians alleged by the Plaintiffs. *Sabbatino*, 376 U.S. at 410, 428; *see, e.g.*, TVPA Sen. Rep. No. 102-249 at 3 (discussing the "universal consensus condemning" torture and extrajudicial killings); sources cited *infra* III.C (discussing the widely accepted norms against extrajudicial killing, crimes against humanity and violations of the right to life); Pl. Ex. F, Declaration of International Law Scholars ("Scholars Decl.") at ¶¶ 15-28; Restatement (Third) of the Foreign Relations Law of the United States § 443 cmts. b, c (1987) ("Restatement (Third)") (act of state doctrine does not preclude review of an act of a foreign state challenged under principles of international law not in dispute, emphasizing that courts "can decide claims arising out of alleged violations of fundamental human rights. . . .").

Third, adjudication of Plaintiffs' claims would not raise the sensitive issues of sovereignty that the act of state doctrine is designed to avoid. *See Sabbatino*, 376 U.S. at 428 (noting that some issues "touch much more sharply on national nerves than do others . . ."). Significantly, the government in which the Defendants served is no longer in power. *See id.* ("[I]if the government which perpetrated the challenged act of state is no longer in existence . . . the political interest of [the United States] may . . . be measurably altered . . . "). The current Bolivian government, which is recognized by the U.S. government, has expressed no objection to adjudication of these claims against its former officials. *See* Pl. Ex. D. Indeed, that government sought to prosecute Defendants for these crimes.[10]

Finally, this litigation will not negatively impact U.S. foreign relations, but instead will further the U.S. interest in combating human rights violations in Bolivia and elsewhere. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000) (the ATS and TVPA

[10]Defendants suggest that the position of the current Bolivian government, a government which is recognized by the U.S. government, is somehow entitled to less weight because of the circumstances surrounding Defendants' departure from power. Joint Mot. at 24. However, such an assessment entails an inquiry would require the court to examine exactly the kind of sensitive foreign political and diplomatic issues that the act of state doctrine is designed to avoid.

"express a policy favoring receptivity by our courts to such suits"). The State Department expressed its support for Bolivian efforts to investigate and prosecute the human rights abuses of September/October 2003 after Defendants resigned, in response to a request for such an assessment from Congress. *See* Def. Ex. 2 at FOIA-011 (stating that "the new government is living up to its promise of respecting the human rights and fundamental freedoms of it citizens. [New President] Mesa . . . has supported efforts to try former officials accused of human rights abuses"). Holding accountable those responsible for abuses such as those at issue in this case is consistent with U.S. foreign policy, as expressed by both the executive and legislative branches.

Defendants' extrinsic evidence in support of the act of state argument is both irrelevant and inadmissible. Exhibit 28 is simply an address by a legal adviser to the State Department expressing his hostility to laws enacted by Congress. His opinions are irrelevant to the Court's analysis of the doctrine as applied to this case. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) (declining to defer to the executive branch on the Foreign Sovereign Immunities Act ("FSIA") because issues of statutory interpretation are "well within the province of the Judiciary" and the views of the executive branch "merit no special deference.") (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)). The use of two newspaper articles, Exhibits 29 and 31, to prove the truth of the matters asserted is inadmissible hearsay. *U.S. v. Baker*, 432 F.3d 1189, 1211-12 (11th Cir. 2005). Defendants' description of the content of several documents is distorted and is irrelevant to the issue. *See*, *supra,* at III.A.1. Each of these documents should be stricken. Finally, reliance on extrinsic evidence to support an act of state argument would convert this motion to dismiss into a motion for summary judgment, and Plaintiffs would be entitled to discovery to rebut that evidence. *Envtl. Tectonics Corp. Int'l. v. W.S. Kirkpatrick & Co.*, 659 F. Supp. 1381, 1399 (D.N.J. 1987), *aff'd in part, rev'd in part*, 847 F.2d 1052 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990).

B. Defendants Are Not Immune from Suit Under the ATS and TVPA

Plaintiffs allege that Defendants are responsible for targeted killings of civilians that are illegal under both Bolivian law and international law and outside the scope their lawful authority. The Republic of Bolivia has clearly waived any immunity to which defendants might be entitled under U.S. law, international law, or any other source. *See* Pl. Ex. D ("if there were any possible immunity, that one or both defendants, may claim with respect to the actions filed in this case, … the Republic of Bolivia hereby expressly waives any immunity asserted or attempted by the defendants…."). "Because it is the state that gives the power to lead and the ensuing trappings

of power -- including immunity -- the state may therefore take back that which it bestowed upon its erstwhile leaders." *Doe v. U.S. (In re Doe)*, 860 F.2d 40, 44 (2d Cir. 1988).[11] Defendants' claims of immunity fail in the face of Bolivia's waiver.

Even without the waiver, Defendants -- former foreign officials who are alleged to have participated in extrajudicial killings and crimes against humanity -- are not entitled to head of state immunity or immunity under the FSIA.

1. The Republic of Bolivia Has Waived Any Immunity to Which Either Defendant Might Otherwise Be Entitled

A sovereign state's authority to waive the immunity of its former officials is well-settled. *Doe*, 860 F.2d at 44. *Doe* explained that permitting waivers promotes the policy underlying all forms of immunity, each of which is founded on the need for mutual respect and comity among foreign states. Refusing to give effect to a waiver would undermine, not advance, that objective. *Id*. at 45-46. The FSIA provides a specific exception for waivers in section 1605(a)(1): "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case (1) in which the foreign state has waived its immunity either explicitly or by implication . . . ." *See also Howland v. Resteiner*, No. 07-CV-2332, 2007 WL 4299176 (E.D.N.Y. Dec. 5, 2007) (head of state immunity may be waived at any time by present head of a foreign sovereign or by any subsequent administration thereof). Defendants' claim that the Court should ignore Bolivia's waiver of any immunity Defendants might claim has no support in law.

First, Defendants argue that a U.S. president cannot waive the immunity of a former president and, therefore, the present government of Bolivia cannot waive the immunity of its former officials. Joint Mot. at 24. Immunities for foreign officials, however, are based upon doctrines distinct from those applicable to U.S. officials, and the clear language of both the FSIA and the cases interpreting head of state immunity make clear that both can be waived.

Second, the fact that Defendant Sánchez Berzaín was granted asylum is irrelevant to the Bolivian government's authority to waive his immunity under the FSIA. § 1605(a)(1).

Next, Defendants baldly assert that "whether a foreign head-of-state or cabinet official's immunity is waived is within the sole province of the State Department." Joint Mot. at 24. Defendants cite no case to support this novel claim, which is inconsistent with principles of

[11] All variations of immunity are waivable, including foreign sovereign immunity, diplomatic immunity and head-of-state immunity. *Doe*, 860 F.2d at 44-45.

comity and contravenes a primary reason for enacting the FSIA: to de-politicize immunity cases by creating statutory immunity rules applied by the judiciary. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983); *see also* H.R. Rep. No. 94-1487, at 7 (1976) ("A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby . . . assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.").

Defendants also disregard this court's recognition of waiver in *Paul v. Avril*, 812 F. Supp. 207, 210-11 (S.D. Fla. 1993) (upholding Government of Haiti's waiver of all immunities).[12] In *Paul*, Haiti's Minister of Justice wrote a letter waiving the immunity of the defendant, who was the ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti. The court concluded that the "waiver of immunity by the Haitian government is complete" and found that the defendant was not immune. As in *Paul*, Bolivia has clearly waived any immunity to which Defendants would be entitled as former officials even if they were acting under governmental authority.

2. Defendants Are Not Entitled to Immunity

a. Defendants, as Former Officials, Are Not Immune From Suit

Sovereign immunity protects the interests of current foreign governments; it is determined by a defendant's status at the time of suit, not at the time of the events at issue. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). Although *Dole Food* concerned the FSIA, Justice Breyer explained in a concurring opinion the following year that the same reasoning applies to claims of head of state immunity: "[S]overeign 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. Altmann*, 541 U.S. 677, 708 (2004) (Breyer, J., concur.). Federal courts have repeatedly recognized this basic limitation on official immunity. *See In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1111 (4th Cir. 1987) (as an "attribute of state sovereignty, not an individual right," immunity attaches to the head of state only while he or she occupies that office); *Republic of Philippines v. Marcos,* 806 F.2d 344, 360 (2d Cir. 1986). As one court explained:

[12] Defendants admit that the *Marcos* cases involved a waiver of immunity, but argue that waiver there based entirely on an agreement between Philippines and the United States. Joint Mot. at 24-25, n.15. However, *Doe* analyzed the waiver of Marcos' immunity without reference to any agreement, holding that "all variations of immunity are waivable." 860 F.2d at 44-45.

> Since the purpose of head of state immunity is to avoid the disruption of foreign relations, the original reason for immunizing the Marcoses -- protecting the relations between the United States and the Marcos' regime -- is no longer present. Head of state immunity serves to safeguard the relations among foreign governments and their leaders, not as the Marcoses assert, to protect former heads of state regardless of their lack of official status….

Estate of Domingo v. Republic of the Philippines, 694 F. Supp. 782, 786 (W.D. Wash. 1988). Like Marcos, Defendant Lozada "'is now an alien with no official status who has chosen to take up residence in this country.'" *Id*. (quoting *Domingo v. Republic of the Philippines*, 808 F.2d 1349, 1351 (9th Cir. 1987)).

b. Defendant Lozada Is Not Protected by Head-of-State Immunity

Even assuming that a former head of state were entitled to immunity in any context, such immunity would not be available for the conduct alleged here, including extrajudicial killing and crimes against humanity. As the Bolivian criminal indictment against Defendants makes clear, Defendant Lozada's conduct violated Bolivian domestic law just as it violated international law. In *Hilao v. Marcos*, 25 F.3d 1467, the Court concluded that Marcos was not entitled to immunity because "acts of torture, execution, and disappearance were clearly acts outside of his authority as President.... Marcos' acts were not taken within any official mandate[.]" *Id*. at 1472.

Defendants' policy arguments in support of blanket immunity for former heads of state are seriously misplaced. First, the argument that permitting suit against former foreign officials creates a risk of reciprocal prosecutions of former U.S. officials traveling abroad has been rejected by Congress. In enacting the TVPA, Congress provided no exception for former government officials. *See* TVPA Senate Report No. 102-249, at 8 (noting that *current* heads of state and diplomats would be protected by traditional immunities, but stating that "the committee does not intend these immunities to provide *former officials* with a defense to a lawsuit brought under this legislation.") (emphasis added). Second, Defendants imply that the Court should afford them the same protections afforded U.S. presidents. However, any parallel between the immunities afforded U.S. and foreign officials was firmly rejected by the Supreme Court in *Dole Food* (noting that foreign sovereign immunity is intended only "as a gesture of comity."). *Dole Food*, 538 U.S. at 479.

Defendants rely on two district court cases from the Seventh Circuit that were decided before *Altmann*: *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003), *aff'd on other grounds sub nom. Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005); *Plaintiffs A, B, C, D, E, F v. Zemin,* 282 F. Supp. 2d 875 (N.D. Ill. 2003), *aff'd sub nom. Ye v. Zemin*, 383 F.3d 620 (7th Cir.

2004), and on a third case, *Doe v. Roman Catholic Diocese of Galveston-Houston ("Doe")*, in which the State Department provided a suggestion of immunity in support of the Pope in response to plaintiff's attempt to sue him for conduct occurring prior to his assumption of office. 408 F. Supp. 2d 272, 278 (S.D. Tex. 2005). The *Abiola* court recognized that the immunity to be afforded a former head of state was an unsettled issue, citing the Second Circuit's comment that "there is respectable authority for denying head-of-state immunity to former heads-of-state." *Abiola*, 267 F. Supp. 2d at 916 (quoting *In re Doe,* 860 F.2d 40, 45 (2d Cir. 1988)). Its decision pre-dated both *Altmann* and *Dole Food*, and the issue of common law immunity was not raised or considered when the Seventh Circuit affirmed *Abiola* in *Enahoro*, 408 F.3d at 879. Neither *Zemin* nor *Doe* supports Defendants' contention that former heads of state are automatically entitled to immunity. In each case the courts deferred to the "suggestion of immunity" provided by the State Department. *Zemin*, 282 F. Supp. 2d at 881-82; *Doe*, 408 F. Supp. 2d at 277. Extending common law immunity to former heads of state is clearly inconsistent with the Supreme Court's conclusion that "sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit…." *Altmann*, 541 U.S. at 708.

c. Defendant Sánchez Berzaín Is not Immune Under the FSIA

The Eleventh Circuit has repeatedly recognized that former officials of foreign governments may be held liable for extrajudicial killings and other human rights violations. *See Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996). Without reference to these decisions, Defendants contend that Sánchez Berzaín has immunity under the FSIA. Joint Mot. at 24-25. Defendants are wrong.

First, Defendants begin by assuming that the FSIA applies to individuals, although the Eleventh Circuit has declined to decide that issue. *Guevara v. Republic of Peru*, 468 F.3d 1289, 1305 (11th Cir. 2006). Indeed, two cases on which Defendants rely for their head of state immunity argument held that the FSIA does *not* immunize individual officials. *Enahoro*, 408 F.3d at 881-82; *Zemin*, 383 F.3d at 625.

Second, even if the FSIA did apply to *current* officials, it does not immunize *former* officials. As noted above, in *Dole Food* the Supreme Court held that under the FSIA agency or "instrumentality status [is] determined at the time suit is filed." 538 U.S. at 478. *Dole* relied in part on the "longstanding principle that the jurisdiction of the Court depends on the state of things at the time of the action brought." *Id*. (citing *Keene Corp. v. United States*, 508 U.S. 200,

207 (1993)); *see also Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61 (2d Cir. 2004) (applying *Dole Food* and *Altmann* to hold that FSIA immunity depends on status at time of suit, not at time of wrongful conduct). Thus, *Dole Food* precludes the application of FSIA to Sánchez Berzaín, who was not an official of a foreign state at the time of suit.

Third, Sánchez Berzaín's conduct was neither authorized by Bolivian law nor ratified by the Bolivian government. Defendants rely on two cases holding that FSIA immunity may be available to former officials in certain specific situations, *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2004), and *Velasco v. Government of Indonesia*, 370 F.3d 392 (4th Cir. 2004).[13] However, both cases clearly distinguished between the authorized and unauthorized acts of government officials. In *Belhas,* Israel asserted that the defendant was acting within the scope of his authority. 515 F.3d at 1282. In *Velasco*, the court held that unauthorized acts, even if taken under color of law, cannot be imputed to the foreign state. 370 F.3d at 398-402; *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995) (FSIA immunity is "unavailable in suits against an official arising from acts that were beyond the scope of the official's authority"); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (defendant does not and cannot claim that acts of torture fall within the scope of his authority or are permitted under the laws of Ghana; such acts fall beyond the scope of his authority); *see also Jimenez-Ramos v. U.S.,* No. 8:06-cr-384, 2008 WL 227975, *2 (M.D. Fla. Jan. 25, 2008) (recognizing that the FSIA immunity does not extend to individuals who act outside the scope of their authority).

Here, Defendant Sánchez Berzaín's actions were not authorized by Bolivian law. He is under indictment for the same acts which form the basis of this suit and has refused to appear for trial. Compl. ¶¶ 76, 77. Bolivia does not object to his being subject to civil suit in the United States. Pl. Exs. D. Defendants have failed to cite a single case in which a U.S. court granted immunity to former government officials when their government denies that they are immune, waives any immunity that they might have, and states that their actions were not only outside their authority but also constituted crimes under domestic law. This Court should reject their claim to immunity in this proceeding.

[13] Defendants also rely on the reversed district court decision in *Guevera* in support of their position, despite the fact that the Eleventh Circuit specifically declined to reach that question. *Guevara*, 468 F.3d at 1305; *see* Joint Mot. at 24, citing *Guevara v. Republic of Peru*, No. 04-23223, 2005 WL 6106147 (S.D. Fla. Oct. 14, 2005).

C. Plaintiffs Allege Violations of International Law Cognizable Under the ATS and TVPA

The ATS grants jurisdiction over claims "by an alien for a tort only, committed in violation of the law of nations . . . ." 28 U.S.C. § 1350. Interpreting this language in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that the statute authorizes federal courts to use their common law powers to recognize causes of action for international law violations that have no less "definite content" and "acceptance among civilized nations" than the claims familiar to Congress at the time the statute was enacted. *Id*. at 724-25, 732. *Sosa* emphasized that the federal courts' common law powers should be used to recognize a limited set of claims falling within ATS jurisdiction, citing with approval prior lower court decisions that had carefully applied international law to permit claims for only the most egregious human rights abuses. *See id*. at 732. The Eleventh Circuit since *Sosa* has upheld ATS claims based on widely accepted, clearly defined international law norms. *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1246 (11th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1156-57 (11th Cir. 2005) (affirming jury verdict holding Defendant liable for extrajudicial killing, torture and crimes against humanity).

Defendants fail to distinguish between the requirements for ATS subject matter jurisdiction and the standard governing whether the allegations of a complaint are sufficient to state a claim.[14] This Court clearly has subject matter jurisdiction over this lawsuit because Defendants have not and cannot claim that Plaintiffs' international law claims are "immaterial" or "wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. at 682-83; *Herero People's Reparations Corp.*, 370 F.3d at 1194.[15] Plaintiffs' allegations state violations of international law that fall squarely within the *Sosa* standard and the ATS precedents in this Circuit.

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[14] *See Khulumani v. Barclay Nat. Bank Ltd*., 504 F.3d at 266:

> A federal court faced with a suit alleging a tort in violation of international law must undertake two distinct analytical inquiries. One is whether jurisdiction lies under the ATCA. The other is whether to recognize a common-law cause of action to provide a remedy for the alleged violation of international law. Requiring this analytical separation in ATCA litigation comports with the general principle that whether jurisdiction exists and whether a cause of action exists are two distinct inquiries.

[15] None of the extraneous documents submitted by Defendants is relevant to the subject matter jurisdiction issue before the Court: whether the Complaint states nonfrivolous claims of violations of widely accepted, clearly defined international law norms. *See* Plaintiffs' Motion to Strike. Likewise, none of the extrinsic evidence is admissible in the motion under Rule 12(b)(6).

Plaintiffs also state a claim of extrajudicial killing under the TVPA, with subject matter jurisdiction pursuant to either the ATS or § 1331.

Defendants' additional arguments are also without merit. *Sosa* and this Circuit's precedents support application of the ATS and TVPA to extraterritorial claims; aiding and abetting liability; and claims based on command responsibility. Finally, this Circuit does not require exhaustion of domestic remedies before filing an ATS claim, and Defendants have not met their burden of showing that adequate domestic remedies are available as required by the TVPA.

1. Plaintiffs Have Stated Claims for Extrajudicial Killing, Crimes Against Humanity, and Violations of the Rights to Life, Liberty and Security of Person and Freedom of Assembly and Association That are Actionable Under the ATS

The Eleventh Circuit has stated that principles of customary international law may be ascertained by reference to a number of sources, including "international conventions, international customs, treatises, and judicial decisions rendered in this and other countries." *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (citing Malcolm N. Shaw, *International Law* 59 (1991) (citing article 38(1) of the Statute of the International Court of Justice)). The Supreme Court in *Sosa* quoted and affirmed the classic statement of the sources relevant to determining the content of customary international law:

> "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

Sosa, 542 U.S. at 734 (*quoting The Paquete Habana*, 175 U.S. 677, 700 (1900)). Reference to these well-accepted sources of international law demonstrates that Plaintiffs' claims of extrajudicial killings, crimes against humanity, and violations of the right to life, liberty and security of person satisfy the *Sosa* standard.[16]

[16] Since the content of customary international law is one of the issues raised by Defendants' motion to dismiss, Plaintiffs have submitted a Declaration of International Law Scholars discussing the content of the norms relevant to this motion. *See* Pl. Ex. F. As instructed by *Paquete Habana*, courts deciding whether a complaint states an international law violation often consider the views of international law scholars. *See, e.g.*, *Filártiga*, 630 F.2d at 879 (relying in

2. Plaintiffs State a Claim for Extrajudicial Killings

a. Claims for Extrajudicial Killing Are Actionable Under Both the ATS and the TVPA

Defendant does not deny that claims for extrajudicial killings trigger ATS jurisdiction; such an argument is foreclosed by Eleventh Circuit precedents recognizing such claims. *Cabello*, 402 F.3d at 1157–58; *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002). Moreover, the TVPA explicitly incorporates a cause of action for extrajudicial killing. Section 3(a) of that law defines an extrajudicial killing as:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

The international law definition of an extrajudicial killing applicable to the ATS claims[17] similarly establishes a nonderogable prohibition of the arbitrary deprivation of life, including intentional or "willful" killings by state actors in the absence of judicial process. Pl. Ex. F, Scholars Decl. ¶¶ 15-28.

b. Plaintiffs State Claims for Extrajudicial Killings Under Both the ATS and TVPA

Plaintiffs' allegations of intentional, targeted killings of unarmed, peaceful civilians fall within the international law and TVPA definitions of extrajudicial killings. Defendants' motion to dismiss these claims is premised on a mischaracterization of the allegations of the Complaint. Plaintiffs do not contend that federal courts should sit in judgment over every death that results from a government's use of force, Joint Mot. at 30-32, but simply that this Court should, as Congress has directed, grant relief where a government has targeted and killed civilians in violation of well-defined, universal principles of international law. As federal courts have acknowledged, international law has long recognized a prohibition on the targeted killing of

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part at the pleading stage on "the affidavits of a number of distinguished international legal scholars, who stated unanimously that the law of nations prohibits absolutely the use of torture as alleged in the complaint."); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 272 n.17 (E.D.N.Y. 2007) (noting that at the pleading stage, "[i]n accordance with *Paquete Habana*, both parties have submitted affidavits by various commentators regarding current international law," and summarizing the views expressed in those affidavits).

[17] The ATS is not limited to the definition incorporated by the TVPA. *See Aldana*, 416 F.3d at 1250 (holding that the TVPA's express definition of torture was not necessarily the same as the international law definition).

innocent civilians by state agents. *See, e.g.*, *Cabello,* 402 F.3d at 1154; *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 278 (E.D.N.Y. 2007); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153-54 (E.D. Cal. 2004). The European Convention on Human Rights, whose definition of extrajudicial killings Congress relied upon in enacting the TVPA, Sen. Rep. No. 102-249, at 6 nn. 8-9, similarly embodies this proscription. *See, e.g.*, *Estamirov v. Russia*, 46 Eur. Ct. H.R. 33, ¶¶ 111-14 (2006), *available at* 2006 WL 4852111 (holding that security forces violated international law by shooting civilians "with machine-guns in their houses or in the courtyards"). The Inter-American Court of Human Rights has also affirmed the basic principle that state agents violate international law when they target and kill civilians. *Barrios Altos Case*, Judgment of March 14, 2001, Inter-Am. C.H.R. (Ser. C) No. 75, *available at* http://www.worldlii.org/int/cases/IACHR/2001/5.html.

Indeed, as Defendants are compelled to acknowledge, this Court recently assessed compensatory and punitive damages for extrajudicial killings that included targeted killings of civilians. *Lizabre v. Hurtado*, No. CA 07-21783 (S.D. Fla. Mar. 4, 2008). Defendants' efforts to distinguish the extrajudicial killings in that case and those alleged here are unpersuasive, particularly at this early stage of the proceedings.

Defendants' primary response to the allegations of extrajudicial killings in violation of international law is the unremarkable – and unresponsive – point that extrajudicial killings are actionable only if they violate international law. Joint Mot. at 32, citing the TVPA's exclusion of killings that are lawful under international law. TVPA § 3(a). Plaintiffs have alleged that Defendants are responsible for targeting and killing unarmed, innocent civilians, in violation of the most basic and universal standards of international law. These paradigmatic examples of extrajudicial killings are not lawful under international law.

Defendants' additional defense of their actions as those of a "democratically-elected government protecting the public welfare" is based on a fundamental misconception of international law. Although Defendants might prefer a rule permitting the targeting of innocent civilians so long as the broader mission is a legitimate one, the international proscription of extrajudicial killings, incorporated by Congress into both the ATS and the TVPA, imposes limits on permissible responses to demonstrations and other political protest. *See, e.g.*, State Dep't Reports on Human Rights Practices: Iran (2000), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/nea/786.htm (reporting that "security forces killed at least 20 persons while violently suppressing demonstrations by Kurds" and condemning these actions as extrajudicial killings).

c. Defendants' Actions Were "Deliberated" Under the TVPA

The TVPA, in defining extrajudicial killings as "deliberated," sought to exclude deaths which are the "the unforeseen or unavoidable incident of some legitimate end." *Cf. Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002) (discussing deliberateness in the context of the FSIA's incorporation of the TVPA's definition of torture). The Complaint alleges that forces under the command of Defendants intentionally targeted and killed peaceful, unarmed civilians; the deaths were the intended and foreseeable result of those actions and were clearly avoidable. *See, e.g.*, Compl. ¶ 40 (alleging that 8-year-old Marlene Nancy Rojas Ramos, standing at a window in her home, was targeted from several hundred yards away by a sharpshooter). As described below, Defendants had command responsibility for the troops acting under their direction. As the Complaint alleges, the killing of innocent civilians occurred over a period of more than a month and was widely known to be taking place; Defendants not only failed to stop the practice after it became known, but also continued to send the military to target civilians far from any protests. Moreover, Defendant Berzaín was in a helicopter from which shots were fired at civilians. Compl. ¶ 69. The only case Defendants cite as failing the deliberativeness requirement involved injuries caused by herbicides intended only to "kill or harm plants." *In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 112 (E.D.N.Y. 2005).

d. Neither the ATS nor TVPA Requires "Custody"

Neither the ATS nor the TVPA limit extrajudicial killings to cases in which the victim was in "custody." *See, e.g.*, *Doe v. Saravia*, 348 F. Supp. 2d at 1122, 1153-54 (holding that the assassination of a priest as he presided over Mass in a church constituted an extrajudicial killing under the TVPA and ATS); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 420-21 (S.D.N.Y. 2002) (Zimbabwe opposition member killed when car he was hiding in was doused with gasoline and ignited). No court has held that either statute is so limited. In fact, in *Hurtado*, where this Court recently granted relief, the plaintiffs alleged extrajudicial killings of individuals not in government custody. *See* Pl. Ex. G, *Hurtado* Complaint ¶ 36 (alleging that decedent was shot by soldiers while fleeing his house).[18] Defendants' claim that an extrajudicial killing would only be

[18] The FSIA adopts the definition of extrajudicial killing from the TVPA. *See Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1248 (S.D. Fla. 1997). Many decisions applying that definition have found extrajudicial killings outside of custody. *See, e.g., Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 495 F.3d

actionable under the ATS or TVPA if the victim were in the perpetrator's custody or control, Joint Mot. at 34, stems from a misreading of *In re Agent Orange*, 373 F. Supp. 2d at 112. That decision addressed the TVPA definition of "torture," which specifically requires that the victim be "in the offender's custody or physical control." TVPA § 3(b)(1). The definition of "extrajudicial killing" contains no such requirement. *Id*., § 3(b)(2).

e. Plaintiffs Do Not Premise Their Case on a Theory of Proportionality or Excessive Use of Force

Defendants and their amici mischaracterize Plaintiffs' allegations as resting on a theory of excessive use of force or a violation of international humanitarian law's "proportionality" requirement. Joint Mot. at 3, 29; Amended Brief of Amici Curiae in Support of Defendants at 3, 7. This standard is drawn from the laws of war, which are applicable only if an armed conflict is underway. However, even if the laws of war governed this case, the appropriate standard is the rule of distinction, not proportionality.

The laws of war apply only in times of armed conflict. An internal armed conflict does not include "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Pl. Ex. F, Scholars Decl. ¶ 13**.** Defendants cite no authority indicating that the internal protests in Bolivia in September and October 2003 rose to the level of internal armed conflict. When the standard for armed conflict is not met, human rights norms apply. *Id*. at ¶ 8. Defendants' reliance on the TVPA's incorporation of Common Article 3 of the Geneva Conventions, Joint Mot. at 32 (citing H. R. Rep. No. 102-367(I), at 87 (1991)), is thus misplaced.

However, even if the norms governing armed conflict did apply, Defendants confuse two norms: the principle of proportionality, which they attack as insufficiently defined under *Sosa*, Joint Mot. at 29-31, and the principle of distinction, which they ignore. The principle of proportionality speaks to the permissible level of collateral damage in the course of striking a legitimate military target. By contrast, the principle of distinction -- a centuries-old, universal norm -- is the fundamental rule that governments, even in an armed conflict, may not *intentionally* target and kill peaceful, unarmed civilians. *See Almog*, 471 F. Supp. 2d at 278

1024, 1027, 1036 (9th Cir. 2007) (assassination of Cyrus Elahi as he left his apartment building in Paris); *Alejandre*, 996 F. Supp. at 1248 (holding that the "firing of deadly rockets at defenseless, unarmed civilian aircraft undoubtedly comes within the [FSIA's] meaning of 'extrajudicial killing' . . . . defined in reference to its use in the Torture Victim Protection Act").

(discussing the fundamentality and pedigree of the principle of distinction in international law). This norm protects civilians from being directly targeted regardless of the legitimacy of the overall mission. *See, e.g.*, Judge Advocate Gen.'s Legal Ctr. & School, Int'l and Operational Law Dep't, Law of War Handbook 165 (Keith E. Puls ed., 2005) (noting that military necessity does not justify violating laws of war and referring to the principle of distinction as "the grandfather of all principles"). The TVPA incorporates the doctrine of distinction, providing an exception that is limited in the military context to "deaths resulting from *lawful* acts of war." Sen. Rep. No. 102-249, at 6 n.8 (1991) (emphasis added). Common Article 3 forbids the "murder" of "persons taking no active part in the hostilities."[19] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Common Article 3 embodies the "principle of distinction," the "long-established norm of the customary law of armed conflict" that prohibits "attacks on innocent civilians." *Almog,* 471 F. Supp. 2d at 278.

To the extent that the laws of war apply to the facts alleged by Plaintiffs, it is the principle of distinction that was violated, not proportionality. Plaintiffs allege that unarmed civilians were the *targets* and were killed *intentionally*. Intentional killings of civilians during armed conflict violate the principle of distinction and constitute extrajudicial executions under both the TVPA and the ATS.

3. Plaintiffs State a Claim for Crimes Against Humanity

a. Claims for Crimes Against Humanity Are Actionable Under ATS

A crime against humanity under international law is any one of a list of violent acts, including murder, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Statute of the International Criminal Court, § 7(1)(a); *see Cabello*, 402 F.3d at 1161 ("To prove the claim of crimes against humanity, the Cabello survivors had to prove a widespread or systematic attack directed against any civilian population."). Plaintiffs' claims for crimes against humanity clearly trigger this Court's subject matter jurisdiction under the ATS. Defendants do not argue that crimes against humanity are beyond the scope of the ATS as interpreted by the Supreme Court in *Sosa*. That argument is

[19] As *Almog* recognized in applying this principle to suicide bombings, this provision of Common Article 3 is not limited to individuals in custody. *See* 6 U.S.T. at 3318 (defining "persons taking no active part in the hostilities" as "*including*" persons who are in detention (emphasis added)).

foreclosed by post-*Sosa* Eleventh Circuit precedent holding that claims of crimes against humanity are actionable under the ATS. *Cabello*, 402 F.3d at 1154, 1158; *see also Aldana*, 416 F.3d at 1247 (dismissing crimes against humanity claim because it was not expressly pled and because facts alleged did not meet the definition set forth in *Cabello*). These holdings are firmly grounded in international law. As the *Aldana* district court observed, "[c]rimes against humanity have been recognized as a violation of a customary international law since the Nuremberg Trials in 1944." *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003); *see also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179-80 (C.D. Cal. 2005).

b. Plaintiffs' Allegations Are Sufficient to Show a Widespread or Systematic Attack Against a Civilian Population

The allegations in the Complaint fall within the international law definition of crimes against humanity and thus state a claim for relief actionable under the ATS. Defendants concede that to prove that a violation constituted a crime against humanity, a plaintiff need only show that the violation was committed as part of an attack against a civilian population that was *either* widespread *or* systematic -- the attack need not be both. *Aldana*, 416 F.3d at 1247; *see also Prosecutor v. Kordic/Cerkez*, Case No. IT-95-14-2-T, Judgment, ¶ 178 (Feb. 26, 2001), *available at* 2001 WL 34712270 ("The requirement that the occurrence of crimes be widespread or systematic is a disjunctive one"). Here, however, the attacks giving rise to the claim of crimes against humanity were both widespread *and* systematic.

First, Plaintiffs' allegations meet the test for a widespread attack, which has been defined as an attack "conducted on a large scale against many people." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479-80 (S.D.N.Y. 2005); *Aldana*, 305 F. Supp. 2d at 1300 (defining a widespread attack as a "frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims"). An attack is widespread if it reflects the "cumulative effect of a series of inhumane acts." *Kordic/Cerkez*, at ¶ 179. An aggregation of a few crimes can suffice to constitute a widespread attack; indeed, a single act may qualify as a widespread attack if it is linked to other widespread attacks. *See Almog*, 471 F. Supp. 2d at 275; *Prosecutor v. Tadic*, Case No.IT-94-1-T, Judgment, ¶ 248 n.311 (May 7, 1997), *available at* 1997 WL 33774656. Plaintiffs' allegation of dozens of killings committed as part of a large-scale attack satisfies the definition of "widespread." Defendants cite no authority that supports their claim a widespread attack must involve "thousands of deaths," Joint Mot. at 38, because there is none. In *Cabello*, the Eleventh Circuit upheld a finding of

crimes against humanity involving the killing of approximately 72 people. 402 F.3d at 1152, 1161. In *Hurtado*, this court issued a default judgment for crimes against humanity for an attack in which 60 people were killed. *Hurtado*, No. CA 07-21783, at 2; *see also Mujica*, 381 F. Supp. 2d at 1169, 1183 (crimes against humanity involving 17 deaths). Although *Prosecutor v. Musema*, Case No. ICTR-96-13-A, ¶ 362, *available at* 2000 WL33348765 (Jan. 27, 2000) involved thousands of deaths, and *Almog*, 471 F. Supp. 2d at 276, involved hundreds of deaths, neither decision suggests that those numbers represent a minimum requirement for widespread attacks.

Second, Plaintiffs' allegations also meet the test for a systematic attack, which courts have defined as an attack of an organized nature that is unlikely to have occurred randomly. *Kordic/Cerkez*, ¶ 94; *see also Bowoto v. Chevron Corp.*, No. 99-02506, 2007 WL 2349343, at *3 (N.D. Cal. Aug. 14, 2007) (citing *Prosecutor v. Limaj,* No. ICTY-03-66-T, Judgment, ¶ 183 (Nov. 30, 2005) [*available at* 2005 WL 3746053] (a systematic attack reflects "a high degree of orchestration and methodical planning")). The ICTY *Limaj* decision states that "patterns of crimes, namely the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence." *Limaj*, ¶ 183.

Defendants focus on one paragraph in the Complaint asserting that Defendants met with military leaders, Joint Mot. at 39, and argue that, by itself, that allegation is insufficient to show a systematic plan. However, they ignore Plaintiffs' detailed allegations that Defendants planned and ordered the use of deadly force and mobilized military sharpshooters and officers with machine guns to kill dozens of civilians over a four-week period in 2003. Compl. ¶¶ 30-34, 36, 38-42, 45-52, 54-74, 78-81, 84, 87, 89, 91. The Complaint explains in great detail that these were not random acts of violence by rogue troops, but rather were methodically orchestrated by the Defendants and carried out by officers acting under their direction. Defendants' insistence that the military was merely seeking to free tourists and a city that had been trapped by protests, Joint Mot. at 39, once again ignores the allegations of the Complaint and is belied by their own exhibits. The military returned the stranded travelers on September 20, but the killings continued through October 13. Compl. ¶¶ 34, 35, 40, 41, 46, 54-58, 65-67, 70-73. Moreover, Defendants' knowledge of the government violence and their failure to arrest, mitigate, or investigate it further substantiate the systematic nature of the violence. Compl. ¶¶ 82, 83, 86, 87, 88, 89.

Defendants also focus on the requirement of a "policy" underlying crimes against humanity, a factor alluded to by the district court in *Aldana*, 305 F. Supp. 2d at 1300, when it

stated that a "systematic" attack must involve "some preconceived policy *or plan.*" (Emphasis added.) Here, Plaintiffs allege that the attacks were conducted pursuant to a policy to target civilians as a way to punish and deter others from participating in political protests. Compl. ¶¶ 30-34, 36, 38-42, 45-52, 54-74, 78-81, 84, 87, 89, 91. It is not necessary that such a policy be formal. *See* Darryl Robinson, *Developments in Int'l Criminal Law: Defining "Crimes Against Humanity" at the Rome Conference*, 93 A.J.I.L. 43, 50-56 (1999); *Prosecutor v. Nikolic*, Case No. IT-94-2-R61, Review of the Indictment Pursuant to Rule 61, ¶ 26 (Oct. 20, 1995), *available at* 1995 WL 17212476. Indeed, the existence of a policy may be deduced from the manner in which the acts take place. *Tadic*, ¶ 653.

Third, a widespread or systematic attack directed against *any* civilian population is a crime against humanity. *Cabello*, 402 F.3d at 1161. Individuals within the targeted population are the victims of a crime against humanity if they are attacked because of their membership in that population. *See Almog*, 471 F. Supp. 2d at 275-76. Here, Plaintiffs have alleged that the attacks were directed against the Aymara civilian population residing in the area of Bolivia that was identified as a locus of anti-government protests. Individuals thus were targeted because of their membership of that population.

Finally, Defendants' suggestion that a crime against humanity requires a finding of animus against the targeted group, Joint Mot. at 37, blurs the distinction between two types of crimes against humanity. While persecution of a civilian population on ethnic, racial, religious, or political grounds requires discriminatory intent, other abuses directed at a civilian population, such as murder, require no such discriminatory intent. *See Tadic*, ¶¶ 283, 292, 305; *Kordic/Cerkez*, ¶ 186; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶¶ 244, 260 (Mar. 3, 2000), *available at* 2000 WL 34467832; *Prosecutor v. Todorovic*, Case No. IT-95-9/1, Judgment, ¶ 113 (July 31, 2001), *available at* 2001 WL 34712275. Here, discriminatory intent is not a required element because murder is the underlying crime. The argument that discriminatory intent is missing from the Complaint is misguided for the additional (if legally superfluous) reason that the Plaintiffs do allege that the attacks on the civilian population were motivated by political animus towards the Aymara population residing in the area where the protests were taking place. Compl. ¶ 23; *see* ¶ 98 (alleging "an intent to terrorize" the Aymara).

4. Plaintiffs State Claims for Violation of the Rights to Life, Liberty and Security and Freedom of Association and Assembly

Plaintiffs allege that Defendants are responsible for the targeted killings of peaceful,

unarmed civilians as part of a campaign designed to punish people perceived as supporting protests against their government's policies and to deter others from participating in those protests. These allegations fall within the jurisdiction of the ATS and state claims for a violation of the rights to life, liberty and security of persons and freedom of association and assembly. Whether or not the full extent of those norms is sufficiently defined for the purposes of the ATS, the core principle alleged in this case is clearly defined and widely accepted, and thus triggers ATS jurisdiction: targeted assassinations of civilians in order to deter others from participating in lawful protest is a violation of international law.[20]

The right to life, liberty, and personal security is so fundamental that it is a feature of every major treaty on civil and political human rights. *See* Pl. Ex. F, Scholars Decl. ¶ 41.[21] The Restatement (Third) § 702(c) also recognizes the right to life as customary international law, stating that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones … the murder or causing the disappearance of individuals." Similarly, the right to participate in peaceful protests resides within the core principles of freedom of association and assembly protected by customary international law norms and included in all of the major international law instruments. *Id*. ¶¶ 52-58. Although the Plaintiffs' murdered relatives were not themselves participating in protests, Plaintiffs allege that the Defendants targeted and killed them as part of a campaign to punish those who had protested and to deter others from joining those protests. Compl. ¶ 97, 98. Defendant thereby violated the right to

[20] In order to meet the *Sosa* requirement of a clearly defined, widely accepted international law norm, it is not necessary that the full scope of the violation be clearly defined, as long as the conduct challenged falls within a widely accepted core of the definition. *See Sosa*, 542 U.S. at 732 (using as a model the definition of piracy developed in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 163-180 (1820), which noted that there is agreement about the core of piracy, despite a "diversity of definitions" as to its full scope); *see Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995) ("It is not necessary that every aspect of what might comprise [an international tort] be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law."); *Presbyterian Church of Sudan v Talisman Energy,* 374 F. Supp. 2d 331, 340-41 (S.D.N.Y. 2005) (same); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004) (same).

[21] The Defendants state that "the Supreme Court has expressly held" that the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights -- two of the documents cited by the Scholars Declaration -- "cannot ground causes of action under the ATS." Joint Mot. at n.22 (citing *Sosa*, 542 U.S. at 734–35). But the Supreme Court did not hold that a cause of action cannot be defined in part by reference to these treaties, but rather that the

freedom of association and assembly. *See Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV 8386, 2002 WL 319887, *11 (S.D.N.Y. Feb. 28, 2002) ("the use of arbitrary force against individuals, or violently dispersing peaceful protestors (even when such protest violates local law) violates [the] well-articulated international norms [of the right to personal security and the right to peaceable assembly]."). At the intersection of these two norms is the core principle violated by Defendants: international law prohibits the killing of civilians in order to punish and deter the exercise of the right to association by them or others.

ATS decisions both within and outside this Circuit have held that actions such as those alleged by Plaintiffs state ATS claims for violations of the right to life, liberty and security of persons and freedom of association and assembly.[22] The cases cited by defendants, Joint Mot. at 39, are not on point. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 254, 258 (2d Cir. 2003), alleged violations of the right to life caused by environmental pollution; the court held that any norm governing environmental harm was too "boundless and indeterminate" and "infinitely malleable" to state an ATS claim. The unpublished decision in *Saperstein v. Palestinian Authority*, No. 1:04-cv-20225, 2006 WL 3804718 (S.D. Fla. Dec. 22, 2006), does not address a "right to life" claim, but instead examines allegations of war crimes and terrorism.

Defendants claim that their actions were lawful because they were "necessary under exigent circumstances." Joint Mot. at 40. Their claim rests once again on a refusal to acknowledge that the Complaint alleges that Plaintiffs' family members were killed under circumstances in which the use of deadly force was not "necessary," in a clear violation of international law. *See* Pl. Ex. F, Scholars Decl. ¶¶ 42-52 (discussing international law limits on the lawful use of deadly force by law enforcement officials).

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treaties did not "themselves establish the relevant and applicable rule of international law." *Sosa*, 542 U.S. at 735.

[22] *See Estate of Cabello v. Fernández-Larios*, 157 F. Supp. 2d 1345, 1349, 1366, 1368 (S.D. Fla. 2001) (execution of a Chilean general's political opponent violated the right to life); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1260, 1262-64 (N.D. Ala. 2003) (finding violation of "the rights to associate and organize"); *Xuncax*, 886 F. Supp. at 185 (recognizing the "right to life coupled with a right to due process to protect that right."); *Wiwa*, 2002 WL 319887, at *8. *But see Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 468-69 (S.D.N.Y. 2006) (finding that rights to life, liberty, security and association are not actionable under the ATS but certifying the decision for interlocutory appeal; appeal is currently pending).

5. The TVPA and the ATS Have Extraterritorial Reach

Both the ATS and the TVPA authorize claims against foreign officials for human rights violations that occurred abroad. Indeed, Defendants do not contend that the "presumption against extraterritoriality" applies to Plaintiffs' claims under the TVPA. *See* Joint Mot. at 41-43. They could hardly do so, given that the TVPA specifically provides for claims against individuals acting under the authority or color of law of a "foreign nation." TVPA § 2(a). Moreover, as the Supreme Court in *Sosa* acknowledged, the TVPA provides a "clear mandate" for federal courts to hear claims arising abroad, such as those brought in *Filártiga*. *Sosa*, 542 U.S. at 727.

No court interpreting the ATS has accepted the argument that it applies only to acts that occurred within the United States. The Eleventh Circuit -- in decisions that the Defendants ignore -- has repeatedly applied the ATS to claims against foreign government officials for claims arising in their home countries. *See Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Jean v. Dorelien*, 431 F.3d 775 (11th Cir. 2005); *Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242 (11th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

Defendants' claim that the ATS does not have extraterritorial reach is likewise contrary to the Supreme Court holding in *Sosa*. Although this position was presented to the Supreme Court by the Department of State in an *amicus* brief in *Sosa*, the Court's decision pointedly ignored the government's reasoning. *See* Brief for the United States as Respondent Supporting Petitioner, at 46-50, *Sosa v. Alvarez*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581. Instead, *Sosa* explicitly endorsed several lower court decisions that exercised jurisdiction over ATS claims brought by foreign nationals against officials of their own governments for abuses committed within their own states. *Id*. at 731-32 (citing *Filártiga*, 630 F.2d at 890, *Hilao v. Marcos*, 25 F.3d at 1475). Furthermore, *Sosa*'s statement that "modern international law is very much concerned with" limits on foreign government's treatment of its own citizens cannot be squared with the argument that the ATS is not intended to apply to extraterritorial claims. 542 U.S. at 727.[23]

Rather than address these precedents, Defendants look to a variety of cases that considered the extraterritorial application of U.S. domestic law in the absence of clear

[23] A territorial limit would also be inconsistent with *Sosa*'s discussion in *dicta* of exhaustion of domestic remedies and also of the possible need for case-specific deference to the political branches in cases like the *Apartheid* litigation (a human rights case arising abroad) that might raise foreign policy concerns. *Id.* at 733 n.21.

instructions from Congress. *See* Joint Mot. at 41, citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (addressing application of U.S. employment discrimination law abroad); *F. Hoffman-La Roche Ltd. v. Empagram, S.A.*, 542 U.S. 155, 164 (2004) (addressing application of U.S. domestic antitrust legislation to foreign corporations that caused injury abroad); *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126 (11th Cir. 1999) (addressing the extraterritorial application of Federal Trade Commission regulations).[24] In ATS cases, Congress explicitly instructed the federal courts to recognize claims for violations of international law. Defendants argue erroneously that the Court can and should disregard the clear intent of Congress in enacting the TVPA and the ATS because it has been criticized abroad. Joint Mot. at 43. Defendants' policy arguments should be directed to Congress, which enacted these statutes.

Defendants' argument that lawsuits like Plaintiffs' might lead to claims against former U.S. officials and an avalanche of lawsuits against foreign officials is a misguided product of their distorted depiction of this case as involving proportionality and a lawful response to a riot. The actual allegations of the Complaint concern the intentional targeting of unarmed, peaceful civilians. Such human rights violations, fortunately, are not common occurrences, and clearly fall within the reach of both the TVPA and the ATS.[25] Moreover, since *Filártiga* was decided in 1980, the ATS has been used to bring claims against former foreign officials without triggering either an endless number of claims against foreign officials or a rash of lawsuits against U.S. officials.[26]

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[24]Defendant misstates the holding in *Amerada Hess.*, Joint Mot. at 36-37, which did not address the extraterritorial application of the ATS was not addressed. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

[25] Defendants' argument that the suit violates the *Charming Betsy* principle is misplaced. *See* Joint Mot. at n.23. As the court in *Bowoto* recently noted, in rejecting the same argument:

> [P]laintiffs are not attempting to apply U.S. domestic law to events that took place in Nigeria but instead seek to apply the law of nations, which is in accordance with the principle of prescriptive comity and cannot violate the *Charming Betsy* doctrine. In other words, this Court's use of the ATS cannot violate the law of nations because it derives its source of law from the law of nations . . . .

Bowoto v. Chevron Corp., No. 99-02506, -- F. Supp. 2d --, 2008 WL 2271600, at *15 (N.D. Cal. May 30, 2008).

[26] Indeed, the two unsuccessful efforts to file criminal prosecutions against former Secretary of Defense Rumsfeld in Europe -- incidents that so concern Defendants, *see* Joint Mot. at 21, 23 -- were inspired by *criminal* prosecutions in Europe, such as that of the ex-Chilean President Augusto Pinochet, rather than by *civil l*awsuits in the United States.

6. Both the ATS and the TVPA Encompass Claims Based on Secondary Liability

The Eleventh Circuit explicitly recognized that liability for claims under the ATS and the TVPA may be based on principles of secondary liability in *Cabello*, 402 F.3d at 1158 (aiding and abetting liability and conspiracy); *Ford,* 289 F.3d at 1286 (command responsibility); and *Aldana*, 416 F. 3d at 1248 (conspiracy). As discussed more fully below, these Eleventh Circuit decisions on secondary liability are supported by the weight of decisions from other circuits and govern Plaintiffs' claims against Defendants. Defendants either ignore these precedents or argue without basis that this Court should disregard them.

a. Defendants May Be Held Liable for Aiding and Abetting

Defendants recognize that *Cabello* upheld secondary liability based on principles of aiding and abetting. Joint Mot. at 44.[27] In *Cabello*, the Eleventh Circuit affirmed the district court's jury instruction, which provided that a Chilean military officer could be held liable for aiding and abetting torture and extrajudicial killing if he "substantially assisted some person or persons who personally committed or caused the wrongful acts" and "knew that his actions would assist in the legal or wrongful activity at the time he provided the assistance." 402 F.3d at 1158. In a situation comparable to *Cabello*, Defendant Sánchez Berzaín was present in a helicopter when sharpshooters fired from the helicopter, deliberately targeting peaceful, unarmed civilians. The helicopter which carried Defendant also brought ammunition to soldiers engaged in attacks on civilians. Compl. ¶ 69. Both Defendants participated in the planning and implementation of the unlawful campaign of killings. Compl. ¶¶ 36, 38, 47, 48, 69. After the early morning killing of civilians on September 20, Defendant Lozada ordered the Bolivian military to use "necessary force" to reestablish public order, knowing that those forces had already killed peaceful, unarmed civilians. Compl. ¶¶ 36, 42. Defendant Sánchez Berzaín, as Minister of Defense, was responsible for the implementation of this Directive. Compl. ¶ 36. The

[27]Defendants wrongly suggest that *Cabello* is no longer binding precedent because of the Supreme Court *Sosa* decision. Joint Mot. at 44-45. However, *Cabello* was decided after *Sosa*. Moreover, there is nothing in *Sosa* which is inconsistent with *Cabello*. An extrapolation from the implications of a Supreme Court decision holding on an issue that was not before the Supreme Court does not "upend settled circuit law." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007). Further, the Eleventh Circuit reaffirmed *Cabello* in *Aldana,* 416 F.3d at 1247-48. In sum, *Cabello* remains binding precedent.

subsequent killings appear to have been carried out by officers trained as sharpshooters. Compl. ¶ 39.

On October 11, Defendants issued an executive decree which claimed to establish a state of emergency and, anticipating that the government forces would use deadly force and indiscriminate violence, offered indemnification for damages to persons and property resulting from the government's actions. In an effort to give legitimacy to the decree, Defendants falsely claimed that it had been presented to a meeting of the full Council of Ministers and signed by the members of the Council. Compl. ¶¶ 47-50. Despite the numerous civilian deaths on October 12, on October 13, 2003, Defendant Lozada again did not order an end to the violence, but instead used the occasion to accuse protesters of being traitors and subversives and of attempting a coup funded by international financiers. Compl. ¶ 59. After his address, the targeted killings on civilians continued. Compl. ¶¶ 63-74. Defendants possessed and exercised command and control of the military forces and met with military leaders and other ministers in the Lozada government to plan widespread attacks involving the use of high-caliber weapons against protesters. Compl. ¶¶ 78-81. Defendants' conclusion that Plaintiffs have not sufficiently alleged that they "knowingly" and "substantially" aided in the violation simply ignores the pleadings.

Aiding and abetting liability is firmly grounded in domestic and international authority on which courts have relied both before and after *Sosa*. A 1795 Opinion issued by Attorney General Bradford, interpreting the ATS, stated that the statute covered liability for "committing, aiding, or abetting" violations of the laws of war. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795); *see also Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795) (holding that a French citizen who aided a U.S. citizen in illegally capturing a Dutch ship could be held civilly liable); William Blackstone, 4 Commentaries *68 (recognizing that those who aided and abetted piracy were liable as pirates).

Modern ATS jurisprudence also overwhelmingly supports aiding and abetting liability.[28] Defendants rely on a single district court decision, *Doe v. Exxon Corp,* 393 F. Supp. 2d 20

[28] *See Khulamani v. Barclay Bank,* 504 F.3d 254, 268-70, 287, 291 (2d Cir. 2007); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463-64 (S.D.N.Y. 2006); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1172-74 n.6 (C.D. Cal. 2005)*; Doe v. Qi*, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004)*; Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004)*; Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289, 321 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *Bodner v.*

(D.D.C. 2005). But *Doe*'s rejection of aiding and abetting liability rested entirely on the district court's analysis in *In re South African Apartheid Litigation,* 346 F. Supp. 2d 538 (S.D.N.Y. 2004), a decision overturned by the Second Circuit in *Khulamani*.[29]

b. Defendants May Be Held Liable on a Theory of Command Responsibility

Command responsibility extends liability beyond the individuals who personally commit human rights violations to superiors who bear responsibility for the actions of their subordinates. *Estate of Ford*, 289 F.3d at 1289. Applying this doctrine, Plaintiffs have properly alleged that Defendants are responsible for the killings of Plaintiffs' relatives because Defendants knew or should have known that persons under their command had committed or were about to commit extrajudicial killings and other abuses, and failed to take necessary and reasonable measures within their power to prevent those abuses and/or to investigate the events in an effort to punish the perpetrators. *See id*. at 1287 n.3.

Defendants err in asserting that command responsibility applies only to violations of the laws of war. Joint Mot. at 45. Congress incorporated the international law doctrine of command responsibility into the TVPA, *Ford*, 289 F.3d at 1289, which applies to claims of both torture and extrajudicial killing, with no restriction to violations of the laws of war. TVPA §2(a).[30] *Ford* itself dealt with torture, not violations of the laws of war. The case clearly holds that command responsibility applies to violations such as torture and extrajudicial execution. *Ford* cites with approval the trial court jury instructions in that case, which applied command responsibility to

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Banque Paribas, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997).

[29] Defendants' attempt to bolster their argument that the Court should ignore *Cabello* and depart from this consensus relyies on *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), a case interpreting the Securities and Exchange Act. Joint Mot. at 44. Courts have overwhelmingly rejected *Central Bank* as a basis for precluding aiding and abetting liability under the ATS or the TVPA. *See Almog*, 471 F. Supp. 2d at 287-88; *Bowoto v. Chevron Corp.*, No. 99-02506, 2006 WL 2455752, at *4 (N.D. Cal. Aug. 22, 2006); *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 374 F. Supp. 2d 331 (S.D.N.Y. 2005); *Mujica*, 381 F. Supp. 2d at 1172. Furthermore, *Central Bank*'s analysis of securities legislation provides no basis to disregard the later-decided Eleventh Circuit decisions in *Cabello* and *Aldana*.

[30] *Ford* explained that the jurisprudence of the international criminal tribunals "provide[s] insight" into the application of command responsibility in U.S. human rights cases. 289 F.3d at 1290. The major international tribunals apply command responsibility to violations within their jurisdiction regardless of whether they constitute war crimes. *See, e.g*., Statute of the Int'l

torture and extrajudicial execution -- the claims at issue in the case. 289 F.3d at 1287 n.3. The opinion's inclusion of "war crimes" in its statement of the elements of command responsibility, *id*. at 1288, is *dicta* and clearly contradicted by the holding of the case.

No court to consider command responsibility in a TVPA or ATS case has limited the doctrine to war crimes. *See, e.g*., *Arce v. Garcia*, 434 F.3d at 1259 (holding defendants liable for torture carried out by soldiers under their command); *Hilao v. Marcos*, 103 F.3d at 777-78 (holding the former Philippine president liable for torture, extrajudicial killings and disappearances committed by forces under his command); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005) (holding former Vice-Minister of Defense of El Salvador liable for torture and extrajudicial killings committed by forces under his command); *Doe v. Qi*, 349 F. Supp. 2d at 1328 (applying command responsibility to hold the mayor of Beijing liable for abuses committed against Falun Gong practitioners); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994) (holding former military ruler of Haiti liable for human rights abuses in Haiti during his military rule); *Abebe-Jira v. Negewo*, No. 1:90-cv-2010, 1993 WL 814304, at *4 (N.D. Ga. Aug. 20, 1993) (conclusions of law) ("Defendant is responsible under international law for his own acts, for acts which he directed, ordered, aided, abetted or participated in, and for acts committed by forces under his command which he authorized."), *aff'd* 72 F.3d 844 (11th Cir. 1996).

c. Plaintiffs Have Adequately Alleged Defendants' Conspiracy Liability

Liability for conspiracy to commit human rights violations is well-established in the Eleventh Circuit. *See Cabello*, 402 F.3d at 1158 (holding that Defendant could be held "indirectly liable . . . on two different theories: (1) aiding and abetting or (2) conspiracy"); *Aldana*, 416 F.3d at 1248 (ATS liability extends to conspiracies). *Bell Atlantic Corp v. Twombly* "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." 127 S. Ct. 1955, 1965 (2007). Here the allegations of the Complaint are sufficient to "suggest that an agreement was made" and thus meet the requirements of *Twombly*.[31]

Criminal Court, art. 28 (applying command responsibility to crimes within the jurisdiction of the court, including crimes against humanity).

[31] The Complaint alleges that Defendants: had command and control over the Armed Forces of Bolivia and acquiesced in and permitted persons under their control to commit human rights abuses, Compl. ¶¶ 79-80; met with military leaders and other ministers to plan widespread attacks involving the use of high-caliber weapons against protesters, *id*. ¶ 81; ordered the

Defendants mistakenly rely on *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), to argue that conspiracy will not give rise to civil liability in this context.[32] Joint Mot. at 46. *Hamdan* held that the offense of conspiracy was not triable by a military commission by reference to the very specific requirements governing such commissions. *Hamdan*, 126 S. Ct. at 2779-82. By contrast, both *Aldana* and *Cabello* upheld conspiracy as a basis for liability under the ATS by reference to requirements of that statute.[33] Defendants erroneously extrapolate from the Supreme Court decision on conspiracy liability in the context of military commissions to "upend settled circuit law." *Main Drug, Inc.,* 475 F.3d at 1230. *Aldana* and *Cabello* remain binding precedent on conspiracy liability under the ATS and the TVPA.[34]

Defendants next argue that liability for conspiracy is not available except for conspiracy to commit genocide and plan acts of aggressive war. Joint Mot. at 46. Again, Defendants ignore binding precedent: *Aldana* and *Cabello* both held that the ATS encompasses conspiracy liability, and *Cabello* specifically applied that doctrine to claims of extrajudicial killing and crimes against humanity. 416 F.3d at 1248.

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mobilization of a joint police and military operation to "rescue" travelers in Sorata, *id*. ¶¶ 30, 36; authorized and executed military operations; *id*. ¶¶ 47-50; were aware of violence against civilians, but nevertheless escalated attacks and failed or refused to take necessary measures to investigate, punish and prevent these abuses, *id*. ¶¶ 87-89; and that Defendant Sánchez Berzaín was personally present during attacks on civilians, *id*. ¶¶ 34, 38, 69.

[32] Defendants also mistakenly rely on *Central Bank*. As set forth in the discussion of aiding and abetting liability, *supra*, III.C.6.a., *Central Bank* has no bearing on ATS claims. No connection may be drawn between the Supreme Court's discussion of whether aiding and abetting liability can be read into the federal securities laws and the whether conspiracy liability is actionable under the ATS.

[33] *Hamdan*'s holding that the crime of conspiracy does not violate the laws of war is irrelevant to this case because (1) plaintiffs do not allege a violation of the laws of war and (2) plaintiffs refer to conspiracy as a form of secondary liability for the substantive torts, not as an independent violation of international law.

[34] *Hamdan* recognized that there is a "species of liability for the substantive offense under international law" referred to as "joint criminal enterprise." 126 S. Ct. at 2785 n.40. Consistent with *Hamdan*, the International Criminal Tribunal for the former Yugoslavia, drawing on the Nuremberg precedents, has adopted a "joint criminal enterprise" theory of liability that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own. *See Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (July 15, 1999), *available at* 1999 WL 33918295; *see also Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise (May, 21 2003), *available at* 2003 WL 24014138. Thus, even if the Court were to accept Defendants' argument that liability for conspiracy was not available under the ATS, Defendants could be held liable, consistent with international law, for their participation in a joint criminal enterprise.

Defendants also argue that norms arising out of international criminal law may not be the basis for ATS liability. Joint Mot. at 46. This position is simply at odds with the fundamental analysis of *Sosa*, which held that the ATS provided a civil remedy in tort for violations of the law of nations. 542 U.S. at 724-25. The paradigm norms to be vindicated through the ATS were international criminal law norms. *Id.* at 714.

7. Defendant Has Failed to Establish That an Adequate Local Remedy is Available to Plaintiffs

The Eleventh Circuit has clearly ruled that the ATS does not include an exhaustion requirement. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005). Thus, Defendants do not claim that Plaintiffs must exhaust local remedies in order to proceed under the ATS. With regard to the TVPA, Defendants have not met their burden to prove that an adequate remedy is available against Defendants in Bolivia.

Contrary to Defendants' suggestion, Joint Mot. at 35, a plaintiffs need not plead exhaustion of remedies under the TVPA. The exhaustion requirement is an affirmative defense, and Defendants bear the "substantial" burden of demonstrating that "alternative and adequate" remedies are available in the country in which the claim arose. *Jean,* 431 F.3d at 781; *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003) ("Plaintiffs correctly argue . . . that they are entitled to a presumption that local remedies have been exhausted, which Defendants must overcome before Plaintiffs are required to prove exhaustion or, presumably, the futility of exhausting local remedies."). After the defendant makes a showing that there are remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut. *Jean,* 431 F.3d at 781. However, the ultimate burden remains with the defendant. *Id*. Defendants here have not met their burden of demonstrating that an alternative and adequate remedy exists.

Defendants point first to Supreme Decree 27209, an edict issued by Defendants in October 2003, promising compensation to those who suffered damages to property or person. Def. Exh. 22; Compl. ¶¶ 48-50. Bolivia's Vice Minister of Justice and Human Rights has clearly stated that the Supreme Decree is "in no way related" to any humanitarian assistance provided to those injured. Pl. Ex. H (June 17, 2008 Letter from Dr. Wilfredo Chávez Serrano). Defendants present no evidence that the decree applied to the losses suffered by Plaintiffs or that it led to the creation of a procedure by which any of them could obtain a remedy, and the language of the decree shows the purpose of this order was to provide compensation to persons involved in enforcing the state of emergency, not to compensate victims of government violence; the decree

did not offer compensation to civilians injured by government forces. *Id*.; Def. Exh. 22. Thus, Defendants have failed to meet their burden of showing that Decree 27209 provided an adequate, alternative remedy under the TVPA.

Defendants next cite to three Humanitarian Assistance Agreements, Exhibits 36-38, according to which the government that replaced the Defendants offered humanitarian assistance to some of those injured or the family members of those killed by Defendants' forces.[35] However, the humanitarian assistance provided by the Bolivian government was offered as emergency relief to respond to the immediate short-term needs of the victims, in the same way that a government offers emergency relief to the victims of natural disasters. The assistance did not constitute compensation for the injuries suffered by the recipients. The payments in no way foreclosed the recipients from seeking compensation through any other available remedies. *See* Pl. Ex. H. The Federal Rules of Evidence clearly distinguish between humanitarian assistance and issues of liability. For example, under Rule 409, evidence of payment of medical and similar expenses occasioned by an injury is not admissible to prove liability for an injury. The Advisory Committee Notes state that "the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability…." Fed. R. Evid. 409 advisory committee note, Annot. 20 A.L.R.2d 291, 293.

The legislative history of the TVPA also suggests that a remedy that would preclude a claim under TVPA requires a court judgment: "If a *final judgment* has been rendered against the plaintiff abroad, the court will have to determine whether to recognize that judgment and dismiss the case." Sen. Rep. No. 102-249, at 10 (1991) (emphasis added). *Corrie v. Caterpillar, Inc.*, on which Defendants rely, supports the understanding that a remedy must result from a judicial process. 403 F. Supp. 2d 1019, 1025-26 (W.D. Wash. 2005) ("Israeli tort law provides adequate remedies for plaintiffs injured as a result of tortious conduct…It has been recognized in other cases that Israel's *courts* are generally considered to provide an adequate alternative forum for civil matters.").[36] *Id*. at 1026 (emphasis added). In addition, as the court stated in *Sinaltrainal*,

[35] Defendants also cite to Def. Ex. 39, but the newspaper article is not admissible. *See* Pl. Motion to Strike at 12, 13-14.

[36] Defendants' reliance on *Harbury* and *Friedman* is misplaced because the allocation of the burden on the issue of alternative adequate remedy is inconsistent with Eleventh Circuit precedents set forth above. Further, neither of these cases provides any analysis of the exhaustion standard; both misstate the actual standard and are inconsistent with cases in their jurisdictions that do analyze and correctly state the standard. *Compare Harbury v. Hayden*, 444

the Defendant must demonstrate that the foreign forum respects certain rights, such as the right to a speedy and fair trial, none of which are provided by an offer of a flat sum for emergency expenses. 256 F. Supp. 2d. at 1358 (citing *Wiwa,* 2002 WL 319887, at *17).

The determination of whether a remedy is adequate must be evaluated by reference to international law principles. *See Jean,* 431 F.3d at 782 (the exhaustion requirement should be informed by general principles of international law); *see also* TVPA Sen. Rep. No. 102-249, at 10 n.19 (1991) (looking to the American Convention of Human Rights and the European Convention on Human Rights for practice of international tribunals on nonexhaustion). International law supports the requirement that adequate remedies be judicial. In the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights found an obligation to provide effective *judicial* remedies to victims of human rights violations and held that remedies must be afforded in proceedings that afford due process. *Velásquez Rodríguez*, Judgment of July 29, 1988, Inter-Am C.H.R. (Ser. C) No. 4, at ¶ 62, *available at* http://www.worldlii.org//cgi-bin/disp.pl/int/cases/IACHR/ 1988/1.html?query=velasquez%20rodriguez. Similarly, in *Fairén Garbi and Solís Corrales*, Judgment of March 15, 1989, Inter-Am. C.H.R. (Ser. C) No. 6, *available at* www.corteidh.or.cr/docs/casos/articulos/seriec_06_ing.doc, the Court emphasized that *judicial* remedies were necessary for serious human rights violations. *Id.* at ¶¶ 88, 111.

Finally, the Humanitarian Assistance grants do not purport to address Defendants' liability for their wrongful conduct, also a requirement of international law. In *Akdivar v. Turkey*, Turkish citizens accused Turkish gendarmes of setting fire to their homes in south-eastern Turkey forcing them to flee. The European Court of Human Rights rejected Turkey's argument that the complainants had failed to exhaust domestic remedies, holding that administrative remedies available in Turkey were neither adequate nor sufficient because they could not impose liability against the gendarmerie. *Akdivar v. Turkey*, 23 Eur. Ct. H.R. 143, ¶¶ 57, 60, 67, 72 (1996). As in that case, the Humanitarian Assistance Agreements here provided no adequate and effective remedy for the Plaintiffs.

F. Supp. 2d 19, 41 (D.D.C. 2006) *with Collett v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 243 (D.D.C. 2005); *compare Friedman v Bayer Corp.*, No. 99-cv-3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999) *with Wiwa*, 2002 WL 319887, at *17.

D. Plaintiffs State Claims in Counts IV-VII on Which Relief Can Be Granted

1. Maryland Statues of Limitations Do Not Apply

Defendants' argument that Maryland statutes of limitations apply to the claims in Counts IV-VII against Defendant Lozada is incorrect. For one, the *Van Dusen* principle[37] invoked by Defendants, which typically prevents a transfer under 28 U.S.C. § 1404(a) from affecting choice of law in a diversity case, "is not necessarily applicable to every case," *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 991 (11th Cir. 1982), and is not to be applied "blindly and mechanically" when its policies are not advanced. *Volvo Const. Equipment North America, Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 600 (4th Cir. 2004). This is not a diversity case, but a federal question case, and *Van Dusen* concerned the former, not the latter. *See Harley v. Health Ctr of Coconut Creek, Inc.*, 469 F.Supp.2d 1212, 1213 (S.D. Fla. 2006); *In re Singleton*, 269 BR 270, 273 (Bankr. D.R.I. 2007). In addition, the claims against Defendant Lozada in Counts IV-VII were not transferred to this Court, but alleged here in the first instance, following transfer. The *Van Dusen* principle is inapplicable to claims alleged for the first time in the transferee court.[38] Third, while *Van Dusen* is intended to protect the plaintiff from a change in substantive law resulting from a transfer, *Van Dusen*, 376 U.S. at 629-630, here it is Defendant Lozada who seeks an advantage from the Maryland statute of limitations. Finally, the *Van Dusen* principle is inappropriate where, as here, it would lead to the application of the choice of law rules of different states (Florida choice of law rules apply to the claims in Counts IV-VII against Sánchez Berzaín) to consolidated cases concerning substantially similar issues and events. *See Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 135 F.3d 750, 753 (11th Cir. 1998) (applying only one state's choice of law rules to consolidated cases filed in separate states).

Because the *Van Dusen* principle is inapplicable, the Court should apply the choice of law rules of Florida, the forum in which it sits. *See Bi-Rite Enters., Inc. v. Bruce Miner Co., Inc.*, 757 F.2d 440, 442 (1st Cir. 1985). Florida applies a "most significant relationship" test. *See Grupo Televisa, S.A. v. Telemundo Comm. Group, Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007). Under that test, Florida would apply the substantive law of Bolivia, where the events described in the complaint occurred, or that of Florida, where this Court sits and where Defendant Sánchez

[37] *Van Dusen v. Barack*, 376 U.S. 612 (1964).

[38] *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 257 F. Supp. 2d 717 (S.D.N.Y. 2003), cited by Defendants, is inapposite. *Kaprun* involved an amendment to a complaint adding parties after a transfer.

Berzaín resides. *See id*. If Bolivian substantive law governs, Florida choice of law rules would likewise apply Bolivia's statutes of limitations, not those of Maryland. *See Merkle v. Robinson*, 737 So.2d 540, 542-43 (Fla. 1999).

In any event, Bolivian limitations periods would apply to Plaintiffs' state law claims even were *Van Dusen* applicable. Maryland applies relevant foreign statutes of limitations whenever they are substantive. *See Turner v. Yamaha Motor Corp.*, U.S.A., 88 Md. App. 1, 3, 591 A.2d 886 (Md.App. 1991). As the Constitutional Court of Bolivia has held, the applicable Bolivian statutes of limitations ("prescripción") are substantive:

> [W]hile the prescripción is now governed by the Code of Criminal Procedure (it was formerly governed by the Criminal Code), this is a *substantive* norm, as it is unequivocally stated in the doctrine and jurisprudence. … article 29 of the Code of Criminal Procedure … present[s] a fourth assumption of the prescripción, according to which the action is *extinguished* [upon the passing of the applicable period].

Pl. Ex. I, Sentencia Constitucional 165/2003-R, Sucre, February 14, 2003 ("Judgment 165/2003-R") (emphasis added).[39] Maryland law would also consider the Bolivian limitations periods to be substantive. First, Maryland considers statutes of limitations to be substantive whenever, as here, they apply to a statutory cause of action. *See 14 M.L.E. Limitations of Actions § 1* (citing *Slate v. Zitomer*, 275 Md. 534, 341 A.2d 789 (1975)). The claims in Counts IV-VII are recognized in the Bolivian Civil Code and thus are statutory. *See* Pl. Ex. J, Cód. Civ. Art. 984 (establishing liability for negligently or intentionally inflicting harm to another); Cód. Civ. Art. 998 (liability for harm caused to another while undertaking a dangerous activity). Moreover, Maryland applies foreign statutes of limitation whenever they extinguish the right of action. *See Knauer v. Johns-Manville Corp.*, 638 F.Supp. 1369, 1376 (D.Md. 1986). In Bolivian law, the expiration of the Bolivian limitations period "extinguishes" the action. Judgment 165/2003-R. *See also* Pl. Ex. K, Cód. Pen. Art. 101; Pl. Ex. L, Cód. Proc. Pen. Art. 29 (eliminating the "action"); Pl. Ex. M (defining "*prescripción*" as "Prescription, extinguishment limitation."). Accordingly, Bolivian, not Maryland, limitations apply to Plaintiffs' claims in Counts IV-VII.

[39] Bolivia applies penal statutes of limitations to civil actions where, as here, the cause of action would also be a crime under Bolivian law. *See* Pl. Ex. J, Cód. Civ. Art. 1508.II. Counts IV-VII concern liability resulting from homicide or negligent homicide, which are crimes in Bolivia. *See, e.g.*, Pl. Ex. K, Cód. Pen. Art. 251, 252, 260, 270 and 273. Thus, the penal limitations periods would apply.

2. Counts IV-VII Set Forth Transitory Tort Claims That Are Well-Grounded in Florida Law

Whether Bolivian or Florida law applies, Plaintiffs' claims in Counts IV-VII are properly before this Court through its supplemental jurisdiction authority, and do not, as Defendants suggest, raise "'novel or complex issue[s] of state law.'" Joint Mot. at 47. On the contrary, counts IV-VII are for transitory torts of the type that the courts of Florida (and other jurisdictions) have long recognized. In Florida, "'[t]he general rule is that an action for tort is transitory in nature and can therefore be instituted in any court which has jurisdiction in personam of the Defendant, regardless of the place where the cause of action arose, and even where both parties reside in a state other than that wherein the cause of action arose.'" *White v. Pepsico, Inc.* 568 So.2d 886 (Fla. 1990) (quoting 20 Am. Jur.2d Courts § 123 (1965)), *answering certified question from White v. Pepsico, Inc.*, 866 F.2d 1325 (11th Cir. 1989). Defendants' transitory torts follow them to any forum in which personal jurisdiction may be obtained, including this one.

3. Defendants Identify No Express Federal Policy That Might Preempt the Application of Neutral Principles of Florida Tort Law

The resolution of disputes by application of neutral tort principles is a "traditional competence" of states. *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 248 (1984). The exercise of this traditional authority through the application of neutrally applicable state laws in this case does not clearly or substantially conflict with any express federal interest. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003) (where a State acts within "its 'traditional competence' but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted") (internal citation omitted). In support of their assertion that adjudication of Plaintiffs' state tort claims would interfere with federal foreign policy interests, Defendants make broad statements about the federal executive's foreign policy powers (Joint Mot. at 47-48) and list various executive actions, including statements at press conferences (*id*. at 12), the issuance of State Department country reports (*id.* at 16), contemporaneous internal cables based on second hand reports (*id.*) and the acceptance of Defendant Sánchez Berzaín's asylum application. *Id.* But neither individually nor as a whole do

any of these actions reflect an express federal policy sufficient to preempt the neutral application of state tort law.[40]

Further, because the Florida legislature has not passed any statute in conflict with U.S. foreign policy, *Garamendi* is inapplicable. *See Doe v. Exxon Mobil Corp*., No. 01-1357, 2006 WL 516744, at *3 (D.D.C. March 2, 2006); *see also In re Agent Orange*, 373 F. Supp. 2d at 79-81. In *Garamendi*, a state statute that explicitly touched on foreign relations clearly and substantially conflicted with a series of executive negotiations and agreements. 539 U.S. at 408. Likewise, in *Miami Light Project v. Miami-Dade County*, a state statute that attempted to regulate international commerce conflicted with an extensive and detailed federal statutory scheme regarding the scope of an economic blockade. 97 F. Supp. 2d 1174 (S.D. Fla. 2000). Here, by contrast, the state tort laws in question are neutrally applicable and are clearly not directed towards influencing foreign relations. Defendants do not point to any executive agreement or any federal statute regulating U.S. relations with Bolivia that clearly or substantially conflicts with the application of Florida tort law here.

4. The Complaint Properly Alleges Causes of Action Under Florida Law

Defendants' contention that Plaintiffs have failed to adequately plead the elements of the causes of action in Counts IV-VII under Florida law is mistaken. Defendants cite *Williams v. Worldwide Flight Svcs. Inc.*, 877 So.2d. 869 (Fla. Dist. Ct. App. 2004), which holds that liability for intentional infliction of emotional distress "does not extend to mere insults, indignities, threats, or false accusations," *id.* at 870. That case is inapposite. As the Complaint makes clear, the conduct at issue here is not insults, indignities, threats or false accusations, but rather the deliberate killing of close family members, Compl. ¶¶ 40, 55-58, 70-72, in certain cases in front of Plaintiffs' own eyes, Compl. ¶¶ 40, 58, 71-72. There is no doubt that the targeted killing of innocent family members is "intolerable in a civilized community," *Williams v. City of Minneola*, 575 So.2d 683, 691 (Fla. Dist. Ct. App. 1991) and is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.'" *Williams v. Worldwide Flight*, 877 So.2d. at 870 (quoting *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 278-79 (Fla.

[40] Tying the federal interest to such scattered authority is especially suspect since federal occupation of the field is not to be presumed "in a field which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

1985)).[41] Nor is there any doubt that such acts involve recklessness or intent, as Defendants' acts clearly created the risk that Plaintiffs would suffer severe emotional distress. *See Williams v. City of Minneola*, 575 So.2d at 691 ("all that need be shown is that [Defendant] intended his specific behavior and knew or should have known that the distress would follow").[42]

Without citing to the Complaint, Defendants assert that Plaintiffs concede that Defendant's actions were an "exercise of legal authority," Joint Mot. at 49, and as such are privileged. Plaintiffs make no such concession. While Plaintiffs do note that Defendants' actions here were taken under color of law, Compl. ¶¶ 36, 47, these actions were tortious precisely because they fell outside the scope of Defendants' legal authority. *Cf. Posey v. Starr*, 208 So.2d 287, 288 (Fla. Dist. Ct. App. 1968) (sheriff who negligently uses unnecessary force in arrest can be liable for damages); *Liberti*, 912 F. Supp. at 1506 (police did not show that right to conduct sting operation included right to use children as bait).[43] Consistent with Restatement (Second) Torts § 46(e), law enforcement officers "may be held liable under Florida tort law 'for extreme abuse of their position.'" *Von Stein v. Brescher*, 904 F.2d 572 (11th Cir. 1990) (quoting *Dependable Life Ins. Co. v. Harris*, 510 So.2d 985, 988 n.7 (Fla. Dist. Ct. App. 1987)). Commanding and supervising the killing of innocent civilians constitutes such an extreme abuse.[44]

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[41] Moreover, if there is any doubt as to the outrageousness of the Defendant's actions, this is a question for a jury. *See Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494, 1506 (M.D. Fla. 1995).

[42] Contrary to Defendants' assertion, Federal Rule of Civil Procedure 8 does not require that a complaint plead in detail every fact on which a claim based, such as the nature of plaintiffs' physical injuries, but rather that they put defendants on notice of the general nature of their claims. *See Twombly*, 127 S. Ct. at 1964.

[43] Nor do the holdings in *Gibbs v. Republic Tobacco, L.P.*, 119 F. Supp. 2d 1288 (M.D. Fla. 2000) or *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla. 1985), support Defendants' contention that the acts alleged in the Complaint amount to the exercise of their rights by "legally permissible" means. Joint Mot. at 49. *Gibbs* involved a defendant's tobacco sales, and *Metropolitan Life* concerned an insurance company's denial of a claim. Neither case bears any resemblance to this one.

[44] Defendants wrongly suggest that the Court apply Florida's rules on sovereign immunity to Defendants who were officials of Bolivia. Joint Mot. at 50. Even if applicable, these laws would not extend immunity to the targeted killing of civilians. *See Henderson v. Bowden*, 737 So.2d 532, 537-38 (Fla. 1999) (police detention of plaintiff involved elements of discretion but was sufficiently operational to defeat immunity defense); *Seguine v. City of Miami*, 627 So.2d 14, 18 (Fla. Dist. Ct. App. 1993) (governmental entity is no longer exercising "discretionary function" when it undertakes affirmatively negligent acts which place a person in a zone of danger).

Defendants' assertion that they did not owe a duty of care to Plaintiffs, Joint Mot. at 43, is also wrong. Under Florida law, "a special tort duty does arise when law enforcement officers become directly involved in circumstances which place people within a 'zone of risk' by creating or permitting dangers to exist, by taking persons into police custody, detaining them, or otherwise subjecting them to danger." *Pollock v. Florida Dept. of Hwy Patrol*, 882 So.2d 928, 935 (Fla. 2004). A law enforcement official's "decision to assume control over a particular situation or individual or group of individuals is accompanied by a corresponding duty to exercise reasonable care." *Id.*; *see also Seguine v. City of Miami*, 627 So.2d 14, 16-18 (Fla. Dist. Ct. App. 1993) (law enforcement officers have duty of care in regard to affirmative acts); *Brown v. Miami-Dade County*, 837 So.2d 414, 418 (Fla. Dist. Ct. App. 2001) (law enforcement officials implementing sting operations owe a duty to exercise reasonable care to avoid harm to bystanders). Here, Defendants were responsible for affirmative acts involving Bolivian armed forces that placed Plaintiffs, their decedents, and other members of the Aymara community at risk. Defendants breached their duty of care when they orchestrated the targeted killings from which this case arises.

IV. CONCLUSION

Defendants' Joint Motion to Dismiss should be denied.

Dated: June 20, 2008
Miami, Florida

Respectfully submitted,

By: /s/ Ira J. Kurzban

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CERTIFICATE OF SERVICE

I hereby certify that that on June 23, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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