IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Miami Division)

Case Nos. 07-22459 & 08-21063 (JORDAN/MCALILEY)

ELOY ROJAS MAMANI, *et al.*,

Plaintiffs,

v.

GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendant,

JOSÉ CARLOS SÁNCHEZ BERZAÍN,

Defendant.

DEFENDANTS' JOINT MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTORY AUTHORITIES

STATE STATUTORY AUTHORITIES

INTERNATIONAL MATERIALS

OTHER MATERIALS

TABLE OF EXHIBITS

Ex. 14. Letter from President Sánchez de Lozada to General D. Gonzalo Rocabado Mercado, Commander in Chief of the Armed Forces, enclosing Directive 27/03, September 20, 2003.

Ex. 15. Directive 27/03, Office of the Commander in Chief of the Armed Forces, September 20, 2003.

Ex. 16. ["The Event"], *La Razón*, September 22, 2003.

Ex. 17. ["The Lives of the Hostages in Sorata Were in Danger"], *La Razón*, September 22, 2003.

Ex. 18. ["Evo Morales contradicts himself and threatens with blockades"], *La Razón*, October 4, 2003.

Ex. 19. ["La Paz is Paralyzed and Despairs Over Shortages of Gasoline, Meat and Bread"], *La Razón*, October 12, 2003.

Ex. 20. ["Shortages Strangle La Paz"], *La Prensa*, October 12, 2003.

Ex. 21. ["In the Children's Hospital: Three babies die due to a lack of available oxygen"], *El Diario*, October 14, 2003.

Ex. 22. Bolivian Supreme Decree 27209, October 11, 2003.

Ex. 23. Remarks by United States National Security Advisor Condoleezza Rice to the IAPA 59th General Assembly, October 13, 2003.

Ex. 24. Press Statement, State Department, "Call for Respect for Constitutional Order in Bolivia," October 13, 2003.

Ex. 25. Transcript of Daily Press Briefing, State Department, October 14, 2003.

Ex. 26. Press Statement, State Department, "Resignation of President Sánchez de Lozada," October 18, 2003.

Ex. 27. "State Department Reaction to the Indictment of Former Bolivian President Gonzalo Sánchez de Lozada," State Department, February 23, 2005.

Ex. 28. "Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches," John B. Bellinger III, April 11, 2008, *available at* http://www.state.gov/s/l/rls/103506.htm (last visited May 29, 2008).

Ex. 29. "Morales puts U.S. diplomat in sights," *Washington Times*, November 28, 2007.

Ex. 30. Transcript of Daily Press Briefing, State Department, November 15, 2007.

Ex. 31. ["Bolivia is asking the U.S.A. to 'collaborate' to extradite Sánchez de Lozada"], *Agence France Presse*, March 4, 2008.

Ex. 32. Statement of Interest of the United States, *Doe v. Qi*, No. 02-0672 (N.D. Cal. Sept. 25, 2002).

Ex. 33. (1) Executive Order No. 11364, 31 Fed. Reg. 10907 (July 24, 1967); (2) Executive Order No. 11403, 33 Fed. Reg. 5501 (April 5, 1968); (3) Executive Order No. 11405, 33 Fed. Reg. 5505 (April 7, 1968); (4) Executive Order No. 12804, 57 Fed. Reg. 19361 (May 1, 1992).

Ex. 34. Statement of Interest of the United States, *Matar v. Dichter*, No. 05-10270 (S.D.N.Y. Nov. 17, 2006).

Ex. 35. Statement of Interest of the United States, *In re Agent Orange Product Liability Litig.*, No. 04-400 (E.D.N.Y. Jan. 12, 2005).

Ex. 36. Humanitarian Assistance Agreement, November 20, 2003.

Ex. 37. Humanitarian Assistance Agreement, November 26, 2003.

Ex. 38. Humanitarian Assistance Agreement, December 5, 2003.

Ex. 39. ["The Executive Branch Makes Its Last Payments for October's Victims"], *Los Tiempos*, October 9, 2004.

Ex. 40. Brief of the United States as Amicus Curiae in Support of Appellee, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016 (2d Cir. May 16, 2007).

Ex. 41. Brief of the United States as Amicus Curiae in Support of Petitioner, *American Isuzu Motors, Inc., et al. v. Lungisile Ntsebeza, et al.*, No. 07-919 (U.S. Feb. 11, 2008).

"This Government will do whatever must be done to preserve order, to protect the lives of its citizens, and to uphold the law of the land."

—President John F. Kennedy, ordering military units to Birmingham, Alabama in 1963.[1]

"**Despite unrest created by two episodes of major social upheaval, the military and police acted with restraint and with force commensurate to the threat posed by protestors.**"

—U.S. Department of State, assessing Bolivia's response to the events of 2003 described in plaintiffs' Complaint.[2]

INTRODUCTION

This is a lawsuit brought by Bolivians against Bolivians. It concerns solely official actions taken by the Bolivian government to address an armed uprising that took place in Bolivia in September and October 2003. Though the Supreme Court has cautioned that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory," this is precisely what plaintiffs ask this Court to do. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). We respectfully submit that the Court should reject plaintiffs' request, and dismiss the Amended Consolidated Complaint (hereinafter "ACC").

Plaintiffs' lawsuit concerns actions taken by the defendants, then-President Gonzalo Sánchez de Lozada and then-Minister of Defense José Carlos Sánchez Berzaín, with the assent of the other members of President Lozada's cabinet. Plaintiffs concede that the Lozada government acted to protect the public order in the midst of an uprising that caused the death of Bolivian soldiers and citizens, trapped hundreds of tourists in one Bolivian city, and cut off all supplies from entering the nation's capital. The uprising successfully (and illegally) overthrew the democratically-elected government. The President and members of his cabinet were forced to resign by the insurgency, which was led by Evo Morales, the President's long-time political rival who ultimately ascended to the Presidency himself.

Like all armed uprisings, the fighting did not come without casualties. For example, in the course of their efforts to protect the public and the democratically-elected government, soldiers were killed or wounded as they attempted to escort tourists—trapped for over a week by

[1] Declaration of Beth A. Stewart; Exhibit ("Ex.") 1 (Kennedy Address, May 12, 1963).

[2] Ex. 2 at FOIA-012 (U.S. Department of State ("DOS"), April 2004 Report to Congress).

insurgents—out of Sorata, Bolivia. Innocents died as a result of both the insurgents' blockades (tragically, babies died in a hospital because the blockades prevented transit of medical supplies) and the cross-fire that resulted from the government's efforts first to free the trapped tourists and later to get supplies into the besieged city. The Bolivian government's effort to protect its citizens in response to this armed uprising forms the basis of the ACC.

The ACC must be dismissed for a number of independent reasons. Sound legal principles grounded in this country's respect for the separation of powers between the three branches of government leave political questions and the conduct of America's foreign policy to the Executive. It is the Executive's role to judge allegations of the type plaintiffs make, and—dispositively—the Executive has already made that judgment here. The Executive has publicly stated, in reference to the events alleged in the ACC, that the "constitutional government" of Bolivia was "under threat and under siege," that it acted appropriately to free hundreds of "virtual hostages," that security forces were "ambushed" and "attacked," and that the government's response was "commensurate with the threat posed by the protestors." Exs. 2 at FOIA-011–012; 3 at 2 (Amb. Greenlee Tr., Oct. 22, 2003). The State Department supported the Lozada government before, during, and after the 2003 events. It also granted Minister Berzaín's application for political asylum. Ex. 4 (Berzaín Asylum I-589 and Order). (President Lozada has not sought asylum.) To try President Lozada or Minister Berzaín, then, is not only to judge the Bolivian government's actions in 2003, but also to judge the response of the U.S. Executive to those actions. The Constitution does not permit the Judiciary to undertake such an effort.[3]

The ACC also must be dismissed because it asks the Court to judge foreign officials for foreign acts when it would not try their U.S. counterparts for identical acts taken in the United States. Courts in the United States have routinely refused to hear cases challenging the responses of presidents or high-level government officials to riots because such responses are squarely within the discretion of the Executive and not subject to judicial oversight. A U.S. court has no more (and in fact has less) authority to permit a trial of President Lozada or Minister Berzaín for their response to Bolivia's riots than it would have had to try President Kennedy or Secretary of Defense McNamara for their response to riots in the 1960s or President George H.W. Bush for his response to the Los Angeles riots of 1992.

[3] The State Department has asked the Court to be given until August 21, 2008 to file a brief in this matter. Case No. 07-22459, D.E. 78.

This is a lawsuit about the tragic, yet almost always inevitable, consequences that result when insurgents use force to further their political opposition to a sitting government. Plaintiffs do not allege that the democratically-elected Bolivian government should have ignored the very real threat posed or the actual harm inflicted by armed insurgents. Instead, the linchpin of the ACC is that the government over-reacted—not that it used force, but that it used too much force. They allege in insufficient, conclusory (and largely contradictory) fashion that amidst the fighting and the government's proper response, some bystanders who were not actually involved in the protests were killed. Yet whether a foreign government's response to any armed, internal uprising constitutes an over-reaction is unavoidably a question that cannot be answered with any precision. Obtaining military objectives often results, unavoidably, in the loss of innocent life. The question of whether such objectives were necessary in Bolivia in 2003 cannot be answered in a courtroom, particularly one of a different and otherwise uninvolved sovereign that is thousands of miles and many years distant from the contested events.

The reality is that governments worldwide are routinely forced to deal with riots that threaten public security and democratic institutions. Yet plaintiffs' allegations are susceptible to no limiting principle that would prevent all manner of such intrastate disputes from reaching U.S. courts. Our courts would soon be adjudicating claims arising from events thousands of miles away, such as riots in Haiti over food prices, clashes between Serbian demonstrators and NATO, or unrest in the Parisian suburbs. Simply put, the consequences of recognizing plaintiffs' allegations would be extreme.

The means and methods of restoring order in a city faced with the breakdown of civilian authority are delegated to the Executive branch of that country's democratically-elected government. The Lozada government exercised that delegated power in Bolivia to save hostages and to open up its capital city, which was cut off from life-sustaining supplies. The ACC concedes these points, and should be dismissed in its entirety.

BACKGROUND

The defendants summarize below the plaintiffs' factual allegations concerning the events of 2003 as set forth in the ACC. Further, for purposes of this motion to dismiss, the Court may properly consider materials which, though outside the complaint, are either referenced in the

complaint itself, or which constitute official documents of the Department of State.[4]

Accordingly, from the inception of this lawsuit, the defendants have actively sought materials from the Department of State that document the assessments and conclusions of the Department with respect to the underlying events. On April 16, 2008, after Minister Berzaín filed his Motion to Dismiss, defendants received a supplemental FOIA production from the State Department. The production included contemporaneous, almost-daily cables from the U.S. Embassy in La Paz to more senior officials in the State Department (hereinafter, "the Cables").[5] These documents are consistent with, and often offer greater detail than, the other State Department reports cited in Minister Berzaín's initial Motion to Dismiss. Defendants have voluntarily produced to plaintiffs every document received from the State Department in response to defendants' FOIA request, and cite the most relevant passages below. *See* Stewart Decl. ¶ 11.

By way of introduction, Gonzalo Sánchez de Lozada was the democratically-elected President of Bolivia from 1993 to August 1997 and again from August 2002 to October 2003. ACC ¶ 5; Ex. 5 at 1 (DOS 2003 Bolivia Country Report). Each Lozada administration was a staunch U.S. ally, worked closely with the Drug Enforcement Administration on the eradication of coca, and advocated free-market economic policies. Minister Berzaín was a member of President Lozada's first cabinet and the Minister of Defense in his second administration from

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[4] *See McMaster v. United States*, 177 F.3d 936, 940 (11th Cir. 1999) (materials outside the complaint are properly considered on a motion to dismiss which makes a factual attack on plaintiffs' assertion of subject matter jurisdiction). That the particular materials relied upon may be considered in cases such as this is well established. *See, e.g.*, *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *2–3 & n.5 (E.D. Va. Aug. 1, 2007); *cf. Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143–44 (2d Cir. 2000) (State Department reports admissible and inherently trustworthy). As a general matter, the Court may properly take judicial notice of historical facts, as well as of the existence and coverage of newspaper articles. *See Gafoor v. I.N.S.*, 231 F.3d 645, 654–55, 657 n.7 (9th Cir. 2000) (taking judicial notice of widely-reported ethnic violence in Fiji, based in part on news articles and State Department country reports). Moreover, as plaintiffs repeatedly reference press accounts in the ACC, *see, e.g.*, ¶¶ 42, 87, defendant may introduce contemporaneous newspaper articles. *See, e.g., Taylor v. Town of Franklin, N.C.*, No. 2:06CV13, 2007 WL 674577, at *1 (W.D.N.C. Feb. 28, 2007) (reviewing newspaper articles referenced in complaint).

[5] The self-authenticated Cables are admissible as, *inter alia*, inherently trustworthy government records under Fed. R. Evid. 803(8) or as non-hearsay introduced to establish the State Department's contemporaneous views of the events alleged in the ACC.

August 2003 to October 2003. ACC ¶ 19.

A. The Events of January and February 2003.

The second Lozada administration vowed to continue strong diplomatic relations with the United States and efforts to eradicate coca. In direct response to those pledges, the Lozada government was fervently opposed by two radicals: Felipe Quispe, who was a militant leader of a powerful union, Ex. 5 at 12, and Evo Morales, who was the leader of the cocaleros and had been the runner-up to Lozada in the closely contested 2002 Presidential election, Ex. 6 at 5 (DOS 2007 Background Note: Bolivia).

The State Department has found that the efforts of President Lozada and his security forces to eradicate coca were met with violent resistance in January 2003. Ex. 5 at 8. At that time, Messrs. Morales and Quispe each threatened to shut down and oust the Lozada government. Ex. 7 at 1 (AP, Jan. 23, 2003). The militant opposition to the Lozada government only increased in significance in February 2003. ACC ¶ 23(b). As reported by the State Department, "[u]nits of the National Police mutinied against the Sánchez de Lozada administration. . . . [M]utinous police units fought loyal military units, and, with the police absent, rioters looted and burned government buildings and private businesses." Ex. 8 at 4 (DOS Bolivia: 2007 Investment Climate Report). Over a period of two days of rioting and looting, 31 people were killed, including 15 civilians, 9 members of the police, and 5 members of the military. Ex. 5 at 8.

After the looting subsided, President Lozada immediately requested that the Organization of American States ("OAS"), an independent organization, investigate the events. Exs. 2 at FOIA-005; 9 at 1–2 (OAS 2003 Report). The OAS's independent investigation found that "[t]he shots fired at the Presidential palace undoubtedly targeted places and areas in which the President carries out most of his duties." Ex. 9 at 10. The OAS also found that "***[t]he life of the President of Bolivia was indeed in danger, as was the stability of Bolivian institutions and democracy***." *Id*. (emphasis added). The OAS concluded that the Bolivian military's response was both "proportional" and "controlled." *Id.*

B. The Events of September 2003.

Plaintiffs acknowledge that by September, the provocateurs illegally seeking to bring down the government had amassed followers so organized and numerous as to succeed in shutting down Bolivia. "[V]illagers and Aymara community members from El Alto and

surrounding areas, up to 15,000 in all, marched toward the neighboring [capital] city of La Paz" in order to "protest government policies." ACC ¶ 26. As part of "a general civil strike to oppose the natural gas sales," the groups "blocked major highways, halting automobile traffic on some routes into La Paz." *Id*. ¶ 28.

Multiple State Department documents confirm that the blockades plaintiffs plead in the ACC put total innocents in danger, a danger that increased as the insurgents sought to bring down the government. For example, plaintiffs allege that in the first clash for which damages are sought in the ACC, "travelers in Sorata, a rural highland village north of La Paz, were unable to return to the city because of the closed roads [and were stranded]." ACC ¶ 29. As explained by the State Department, the blame for this danger and damage rests with Mr. Quispe and his followers: "Aymara leader and congressional deputy Felipe 'Mallku' Quispe led his followers to begin blocking roads near Lake Titicaca; about 800 tourists, including some foreigners, were trapped in the town of Sorata." Ex. 5 at 8; *see also* Ex. 2 at FOIA-011; Ex. 10 at FOIA-026 (DOS FOIA Production, Apr. 16, 2008) (noting that 80 foreign tourists, including 12 American citizens, were among the more than 800 people trapped in Sorata).

In response, the Lozada government began negotiating for the release of the Sorata hostages. Ex. 10 at FOIA-034. Meanwhile, with their citizens taken hostage, foreign governments pressured the Lozada administration to act to protect their people. For example, the U.S. Ambassador to Bolivia, David Greenlee, requested protection for the trapped U.S. citizens. Ex. 11 at 1 (*La Prensa*, Sept. 25, 2003). Uruguay sent a formal diplomatic note requesting protection for its citizens, at least one of whom was being threatened by the insurgents through late September. *See* Ex. 12 at 1–2 (Uruguayan Diplomatic Note).

On September 19, 2003, the head of the Bolivian Police issued Instructive No. 17/2003, declaring a state of emergency. The Instructive sought to restore public order and further provided: "[i]t is recommended that police forces ***avoid the extreme use of force, respecting human and constitutional rights***; similarly, there should be special treatment accorded to representatives of the press, supporting their reporting efforts." Ex. 13 at 2 (Instructive No. 17/2003) (emphasis added). The next day, as observed by the State Department, "after more than a week of unfruitful negotiations, the government undertook an operation to rescue the virtual hostages." Ex. 2 at FOIA-011. According to the Cables, the Lozada government was "motivated by reports that trapped people were running low on food and money and that some

who had tried to escape had been threatened with physical violence. [The government] also received reports of physical threats against the few police who remained in Sorata." Ex. 10 at FOIA-026–027. Plaintiffs allege that as part of his authorization of the rescue operation, President Lozada sanctioned the use of "necessary force." ACC ¶ 36. Plaintiffs do not allege any action by President Lozada with respect to Sorata other than the issuance of this authorization. The relevant portion of the authorization states:

> There has been confirmation of a serious guerilla attack on security forces in the Warisata area. This attack also endangers the physical integrity of hundreds of civilians that are being rescued from a road blockade in this area thanks to an operation organized by the government. I therefore instruct you, as President of the Republic and General Captain of the Armed Forces, to mobilize and use the necessary force to restore public order and respect for the rule of law in the region.

Ex. 14 at 1 (Lozada Letter, Sept. 20, 2003); ACC ¶ 36. The Commander of the Armed Forces then promulgated Directive 27/03. ACC ¶ 36. That Directive established a task force of the Army, Air Force, and Navy to "restore public order and the Rule of Law, in order to guarantee that the population may carry out its normal activities." Ex. 15 at 2 (Directive 27/03).[6]

Acting pursuant to their constitutional mandate, on the morning of September 20, the Bolivian military and police entered Sorata and safely boarded the tourists onto buses in order to escort them back to La Paz. ACC ¶ 34. Plaintiffs acknowledge the serious threat posed: they plead that in the course of Minister Berzaín's efforts to direct the morning's rescue operation, protestors forcefully drove him from the town. *Id.* ¶ 34. Plaintiffs allege that Minister Berzaín then "engaged in the military operation from a helicopter in the area of Warisata." *Id.* ¶ 38.

According to the State Department, as the buses full of rescued tourists made their way out of town, they were "ambushed by armed peasants." Ex. 6 at 5; *see also* Ex. 2 at FOIA-011. (Photos in the press documented that the armed insurgents from Sorata and Warisata brandished Mauser rifles. Ex. 16 at 1 (*La Razón*, Sept. 22, 2003); Ex. 10 at FOIA-029–30.) The State Department also found that as the caravan of tourists made its way along the windy road back to La Paz, "150 people, some [ ] armed with 7.62 mm FN FALs, .30 caliber Mauser[ ] rifles and .22

[6] Exhibit 15 (as well as Exhibit 22) is cited in the ACC and defendants are entitled to rely on it, even as to the 12(b)(6) motion. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

caliber rifles," fired on the convoy from the surrounding hills, acting under the express authorization of Mr. Quispe. Ex. 10 at FOIA-027, FOIA-032. According to U.S. Embassy personnel, "[t]elevision images showed bullet holes in the caravan buses." *Id.* at FOIA-030. The Cables also confirm that government forces first attempted to disperse the ambushers by "firing teargas and rubber bullets" and only later resorted to live ammunition after "the opposition . . . ***first*** resorted to ***lethal*** violence." *Id.* at FOIA-027–28, FOIA-032 (emphases added).

As a result of the ambush, "a number of people were killed on both sides." Ex. 6 at 5; *see also* Ex. 2 at FOIA-011; Ex. 10 at FOIA-026; Ex. 16 at 1. Finally, in the early morning hours of September 21, 2003, the buses arrived at last in La Paz, where the American hostages were met by Ambassador Greenlee, the Deputy Chief of Mission, and other U.S. Embassy officials. Ex. 10 at FOIA-028. According to the Cables, one rescued hostage said, "We thank the police and army (for the rescue) because if not, campesinos would have killed us." Ex. 10 at FOIA-030. After the Government successfully freed the hostages, the "angry" insurgents further lashed out by setting fire to Sorata's mayor's office, police station, and a hotel. *Id.* at FOIA-026. It is noteworthy that the empty Government buses proceeded into Sorata without incident, but were ambushed on the same road on their way out of Sorata after they had been filled with the tourists and other of the more than 800 hostages.

It is tragic, but unsurprising, that soldiers and civilians died as a result of the armed insurgents' ambush. One victim of the violence was, plaintiffs allege, an eight-year-old girl whose parents now sue on her behalf. ACC ¶ 40. The Cables report that she died as a result of a "***stray*** bullet" that hit her in the chest "as she looked out a window." Ex. 10 at FOIA-028 (emphasis added). Plaintiffs concede that at least one soldier also was killed, ACC ¶ 41, and the State Department confirms that in fact two soldiers were killed that day, Ex. 10 at FOIA-026. The State Department adds that 17 other soldiers and civilians were injured. Ex. 2 at FOIA-011.

The State Department's personnel on the ground concluded in September 2003 that ***"[f]rom all indications, the GOB [Government of Bolivia] acted within its mandate to bring to safety some 80 foreign tourists and 800 Bolivian nationals who were trapped in Sorata under deteriorating circumstances."*** Ex. 10 at FOIA-026.

C. The Events of October 2003.

As plaintiffs plead, the violent strikes and blockades did not end after the Sorata rescue. *See, e.g.*, ACC ¶ 43. Rather, the State Department found that the events of September "united a

loose, nationwide coalition of opposition forces against the government." Ex. 2 at FOIA-011; *see also* Ex. 10 at FOIA-034. Thus, at the time, despite the loss of life among both soldiers and civilians, the insurgents proclaimed that Sorata was "only the beginning" of what they termed "the armed struggle against the government." Ex. 17 at 2 (*La Razón*, Sept. 22, 2003); Ex. 10 at FOIA-029. Brandishing weapons, they declared a "civil war." Ex. 10 at FOIA-030; Ex. 17 at 2. Mr. Quispe declared a "state of siege," explaining "that vehicles will not be allowed to travel on the roads and highways and not even one soldier will be allowed to patrol." Ex. 17 at 4.

In October 2003, therefore, "Aymara villagers blocked roads again." ACC ¶ 43. These blockades cut off major roads into La Paz, thereby suffocating the city from receiving necessary supplies. ACC ¶ 47; Ex. 10 at FOIA-033. Mr. Morales threatened further blockades in other parts of the country. *See, e.g.*, Ex. 10 at FOIA-063. He said: "[i]f the Government does not listen . . . there will be protest marches, demonstrations, [and] roadblocks." Ex. 18 at 1 (*La Razón*, Oct. 4, 2003).

According to the State Department, as of mid- to late-September, "[o]pposition rivals Quispe (reluctantly) and MAS cocalero leader Evo Morales (enthusiastically) [ ] forged a temporary alliance against the GOB [Government of Bolivia]," an alliance that "capitalize[d] on the Sorata/Warisata incident to promote its agenda." Ex. 10 at FOIA-029, FOIA-034–035. The combined opposition forces set about instituting "Plan Tourniquet" and "laid siege to La Paz, the first time that tactic had been used since 1781." *Id.* at FOIA-032–33.

By October 11, 2003, La Paz had been "besieged" by the insurgents for ten days, Ex. 6 at 5, and critically needed supplies—such as fuel, food, and medical provisions—had been unable to reach the city, Ex. 10 at FOIA-042 ("La Paz remains virtually cut off from the rest of the country by the mob's application of El Alto's 'tourniquet.'"). As documented in the Cables and press accounts, the lack of gas had devastating, cascading consequences on every aspect of the city's life, including the safety of its population and its economy. The State Department noted that "[i]n La Paz and El Alto, food was scarce and stores, schools, businesses and banks remained closed." *See* Ex. 10 at FOIA-048; *see also id.* at FOIA-043. And "[t]he absence of bread has seriously impacted the poor and sanitation services are practically nil." *Id.* at FOIA-048; *see also* Ex. 19 (*La Razón*, Oct. 12, 2003); Ex. 20 (*La Prensa*, Oct. 12, 2003).

The blockades turned deadly when a lack of supplies and the actions of the protestors resulted in otherwise avoidable deaths. According to the Cables and contemporaneous press

reports, for example, three babies died at a hospital due to shortages of oxygen. Ex. 10 at FOIA-032; Ex. 21 at 1 (*El Diario*, Oct. 14, 2003).

Faced with the insurgents' total blockade of fuel and supplies from entering La Paz, the loss of life, and the continuing threat to the safety and welfare of the citizenry, on October 11 President Lozada, together with his cabinet (including Minister Berzaín), signed Supreme Decree 27209. The decree authorized the military to escort fuel tanker trucks from El Alto to La Paz, in order to provide the city with necessary supplies. Ex. 22 (Supreme Decree 27209); *see also* ACC ¶ 47 (noting that the Supreme Decree "established a state of emergency in the country, declaring the transport of gas to La Paz a national priority"). Plaintiffs do not allege that President Lozada took any action with respect to the blockade other than adding his signature to the decree, which provided solely for the safe escort of fuel into the trapped city.

The State Department found that the Lozada government's efforts to deliver critical supplies to La Paz were met with further violence "when demonstrators attacked convoys bringing fuel and other supplies to La Paz." Ex. 2 at FOIA-011. In their attacks on the fuel trucks and security forces, the protestors were again fully armed; according to the State Department they were "***bringing dynamite and guns to bear***." Ex. 10 at FOIA-043 (emphasis added). Nonetheless, the Cables reported that "security forces first exhausted non-lethal means against the El Alto crowds," *id.* at FOIA-033, and that the forces only "***returned*** fire" directed at them, Ex. 2 at FOIA-011 (emphasis added). In the violence, police, military, insurgents and others were killed or wounded. According to the ACC, among those who lost their lives in the clashes on October 12 were five people on behalf of whom plaintiffs bring suit. ACC ¶¶ 54–58. Plaintiffs also sue on behalf of three people who allegedly died in the continuing violence on October 13. *Id.* ¶¶ 70–73. They allege that on that day, "after about an hour of constant firing on the ground"—the ACC does not state who was firing, the police and military, insurgents, or all, while the Cables report that all were fighting—Minister Berzaín was in a helicopter directing shots. ACC ¶ 69.

Throughout, President Lozada's government made continued requests for dialogue with the opposition. *See* Ex. 10 at FOIA-043. But with both supplies and stability scarce, the violence and unrest only continued in the days following the efforts to bring supplies into La Paz. The State Department reported that "[l]ocal residents fear looting, and ***the danger of misdirected fire coming through windows or walls is a real threat for even those who stay***

home." *Id.* at FOIA-043 (emphasis added). The State Department also noted that "[m]ost of El Alto was basically under the control of neighborhood vigilante groups," *id.* at FOIA-049, and that it had "received numerous credible reports that the neighborhood groups coerce ambivalent citizens into joining demonstrations," *id.* at FOIA-055. The violence was expressly directed against the Lozada government and the security forces. In the Chapare, "***a booby trap exploded*** as soldiers from the Army's Ninth Division were clearing debris from the highway." *Id.* at FOIA-056 (emphasis added). In Cochabamba, "[d]emonstrators attacked municipal buildings downtown with ***Molotov cocktails and dynamite***." *Id.* at FOIA-049 (emphasis added). And in Santa Cruz, "an effigy of President Sánchez de Lozada wearing a hat like Uncle Sam was burned." *Id.* at FOIA-063.

In La Paz, the U.S. Embassy was concerned that the insurgents "likely will try to charge the city with crowds again, supplemented by irate indigenous from Achacachi, tough miners from Oruro and dynamite-carrying cocaleros from the Yungas." *Id.* at FOIA-054. During massive demonstrations there, "[w]hile there were reports of some looting, ***police exercised enormous restraint in dispersing the crowds, resorting to tear gas but neither to rubber bullets or more lethal force in carrying out their responsibilities***." *Id.* at FOIA-065 (emphasis added). According to the Cables, "Evo Morales issued a statement from an undisclosed location calling for the resignation of the President because of his 'bloody acts,' and criticized the U.S. for supporting him." *Id.* at FOIA-048. Further, "[i]n another display of equivocation and political gamesmanship that has certainly added to the mounting uncertainty, Vice-President Carlos Mesa for the second time publicly distanced himself from the government and reiterated his personal distaste for violence under any circumstance. Mesa appears to be courting supporters for his accession to the presidency." *Id.* at FOIA-070. Ultimately, though President Lozada offered "major concessions[,] . . . the opposition stated that nothing short of the President's resignation would end the demonstrations." *Id.* at FOIA-059.

On October 17, 2003, left with no other way to restore peace and safety to La Paz, President Lozada and his cabinet, including Minister Berzaín, resigned under protest. Evo Morales was elected President on December 18, 2005, after the two presidents who followed Sánchez de Lozada were also forced to resign as a result of Morales-led violence. Ex. 6 at 5.

D. The U.S. Executive's Support of the Lozada Government.

As documented by the foregoing, the U.S. Government—with observers on the ground

throughout Bolivia communicating to Washington—supported the Lozada administration before and during the events of 2003. This support continued in full force after those events.

On October 13, 2003, after the September hostage situation and during the October blockades of La Paz, then-National Security Advisor Condoleezza Rice said, "I just want to note that as we speak right now the Bolivian government, Bolivia, is facing a great challenge. There have already been lives lost. We, the Organization of American States and the international community must fully support the democratic, constitutional government of Bolivia and our thoughts and hopes for a peaceful resolution are with the Bolivian people." Ex. 23 at 1 (NSA Rice Statement, Oct. 13, 2003). On the same day, the State Department issued a public statement in support of President Lozada: "The American people and their government support Bolivia's democratically elected president, Gonzalo Sánchez de Lozada, in his efforts to build a more prosperous and just future for all Bolivians." Ex. 24 (DOS Statement, Oct. 13, 2003). A State Department spokesman reiterated that the United States was "deeply concerned about the attack against the democracy and constitutional order in Bolivia." Ex. 25 (DOS Tr., Oct. 14, 2003). Further, the State Department emphasized that it "fully supported" the OAS Secretary General's expression of support for President Lozada, and his call for the opposition to resolve its differences without resorting to violence. *Id.* The State Department also noted that the Lozada government received "statements of support from approximately 16 (mostly Latin American) countries." Ex. 10 at FOIA-056. As documented in the Cables, throughout September and October, Embassy officials and other members of the State Department were unequivocal in their support of the protective actions taken by President Lozada and his government. *See generally* Ex. 10.

At the time President Lozada was forced to resign—and at a time when the United States was fully informed about the violence and loss of life that preceded the resignation—the United States reiterated its support and applauded President Lozada's efforts to protect the well-being of Bolivia, announcing through the State Department: "We regret the circumstances including the loss of life that led to ex-President Sánchez de Lozada's resignation. We commend ex-President Sánchez de Lozada for his commitment to democracy and to the well being of his country." Ex. 26 (DOS Statement, Oct. 18, 2003). The United States also has supported Minister Berzaín, and granted him political asylum in 2007. Ex. 4.

Further, in numerous statements and reports during and after the 2003 events, the State

Department consistently has found that insurgents were responsible for the violence to which the Lozada government appropriately reacted. Exs. 2 at FOIA-011–012; 5 at 8; 6 at 5. The U.S. Ambassador to Bolivia, David Greenlee, represented in November 2003 that the U.S. position was "to support constitutional government. The Lozada government was a ***constitutional government under threat and under siege. Governments should be able to defend themselves***." Ex. 3 at 2 (emphasis added).

In January 2004, Congress directed the State Department to submit a report on human rights practices in Bolivia as part of a review of U.S. funding for South American countries. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3. The State Department recommended that funds be released to Bolivia after finding that: "The Bolivian military and police generally respected human rights in 2003, despite two major incidents of social upheaval." Ex. 2 at FOIA-006. Referring specifically to the events of February and September/October 2003, the State Department expressly found: *"**Despite unrest created by two episodes of major social upheaval, the military and police acted with restraint and with force commensurate to the threat posed by protestors**."* *Id*. at FOIA-012 (emphasis added).

The State Department did not find that the Lozada government engaged in any systematic abuse, much less extrajudicial killings or crimes against humanity, during this time period. Indeed, it found just the opposite. The determination effectively ratified the Lozada government's actions and permitted the release of Congressionally-authorized funds to Bolivia. *See* Pub. L. No. 108-199.

STANDARD OF REVIEW

The standard of review that applies to this motion differs markedly from the standard usually applied to more commonplace motions to dismiss.

Plaintiffs bring their federal causes of action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note ("TVPA"). A claim under the ATS or TVPA is subject to a searching review at the earliest stages because the court's subject matter jurisdiction is dependent on an adequate allegation of a violation of international law. *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Defendants move to dismiss plaintiffs' ATS and TVPA claims under Rule 12(b)(1), which tests the complaint's jurisdictional basis. Plaintiffs bear the burden of establishing subject matter jurisdiction, *see OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002), which

cannot be "inferred argumentatively from averments in the pleadings," *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (quotation marks omitted). Therefore, evidence outside the pleadings may be considered. *See Goodman v. Sipos*, 259 F.3d 1327, 1332 n.6 (11th Cir. 2001); *supra*, notes 4–5.

Defendants move, in the alternative, to dismiss the ACC under Rule 12(b)(6), which tests the legal sufficiency of a complaint. There, the Court accepts as true those allegations that are not merely "conceivable," but that in fact are "plausible." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Id.* at 1965. "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964–65 (alteration and internal quotation marks omitted). This standard is meant to expose pleading deficiencies "at the point of minimum expenditure of time and money by the parties and the court," and the Supreme Court has recently cautioned that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 1966–67 (quotation marks omitted). Moreover, the Court is "not constrained to accept allegations clearly refuted by that which [the Court] can judicially notice." *Powers v. United States*, 996 F.2d 1121, 1125 (11th Cir. 1993).

ARGUMENT

Plaintiffs attempt to transform an armed uprising by Bolivian insurgents against their democratically-elected government into a federal lawsuit in the United States. The attempt falls short for numerous reasons.

As we discuss in Part I, this Court does not have jurisdiction to consider the ACC because it presents the very types of questions that U.S. courts repeatedly have held are left exclusively to the Executive under our Constitutional separation of powers. The U.S. Executive has ratified the actions taken by the Lozada government in 2003 to quell the uprisings, and plaintiffs cannot properly ask this Court to repudiate that ratification. Moreover, President Lozada is immune from suit for the official actions plaintiffs allege he took as a head-of-state, and Minister Berzaín is similarly immunized by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602–1611 (2000 & Supp. V 2005).

As we discuss in Part II, the ACC is independently barred under any of a number of

principles that apply to suits based, as these are, on the ATS and the TVPA. For one, the ACC should be dismissed under the Supreme Court's seminal case in this area, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Further, since this Court would not go forward on an analogous case against a U.S. official, it should not proceed on the same case against a counterpart foreign official for purely foreign-based acts.

Defendants assert other, independent grounds for dismissal. There is no cause of action for a government's disproportionate use of force, and, further, the ATS does not apply extraterritorially. Even if considered individually, each count of the ACC must be dismissed for lack of jurisdiction and/or failure to state a claim. Further, the secondary liability claims fail either independently or because without primary liability there can be no secondary liability. Finally, the state law claims should be dismissed for lack of jurisdiction, and, in any event, fail to state any claims.

I. UNDER TRADITIONAL SEPARATION-OF-POWERS AND COMITY PRINCIPLES, THIS COURT LACKS JURISDICTION.

A number of traditional separation of powers and comity principles deprive this Court of subject matter jurisdiction. First, the ACC poses political questions that this Court does not have jurisdiction to consider. Second, under the act-of-state doctrine, this Court should not judge the Lozada government's official response to an uprising. Third, the doctrine of head-of-state immunity immunizes President Lozada from suit here, and the FSIA similarly immunizes Minister Berzaín. Each doctrine independently bars suit.

A. The ACC Presents a Political Question Appropriately Left to the Executive.

Plaintiffs' suit presents a case study in the observation, made by the Supreme Court, that courts should dismiss suits that require "deference to the political branches." *Sosa v. Alvarez-Machain*, 542 U.S. at 733 n.21 (addressed at length, *infra*, Part II.A). Plaintiffs not only ask this Court to second-guess the actions of the Bolivian Executive in responding to an armed uprising, they also ask this Court to second-guess the U.S. Executive's endorsement and ratification of those actions. Yet, the Supreme Court has made plain that it is the role of the political branches, and not the courts, to handle such political and foreign policy questions. *See Baker v. Carr*, 369 U.S. 186, 211 (1962); *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997). Both the political question doctrine and *Sosa* squarely foreclose plaintiffs' suit.

Baker set out six factors to guide the application of the political question doctrine:

> [1] a textually demonstrable constitutional commitment of the issue to

> a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. A case need implicate only one of these factors to raise a political question. This litigation raises every one of them, and it must be dismissed.

Given their import to this case, we begin our analysis with *Baker* factors four, five, and six—in sum, the impossibility of a court undertaking independent resolution without effecting multifarious pronouncements and expressing lack of the respect due coordinate branches of government. Each factor mandates dismissal because the State Department has endorsed and ratified the actions taken by the Lozada government that form the basis of the ACC. *See supra*, Background. The State Department supported the Lozada government while the events were ongoing. *Id*. Contemporaneous with the Sorata rescue, the State Department found that the Lozada government properly "acted within its mandate." Ex. 10 at FOIA-026. After President Lozada resigned, Ambassador Greenlee gave the official U.S. position on the events in Sorata and La Paz: The Bolivian government was "under threat and under siege" and had the right to "defend" itself. Ex. 3 at 2. Later, at the request of Congress, which was considering U.S. funding of Latin American countries, the Executive found that Bolivia's actions in late 2003 were appropriate and "commensurate" in light of the threat posed. *See* Ex. 2 at FOIA-012. Since their ouster, President Lozada and Minister Berzaín have been criminally charged in Bolivia for actions related to those alleged in the ACC, and the State Department has publicly denounced those charges, stating that they "appear to be politically motivated." Ex. 27 (DOS Statement, Feb. 23, 2005).

Further, a finding by this Court against either defendant also would contradict the U.S. Executive's considered opinion in granting Minister Berzaín political asylum. In his application, Minister Berzaín represented, *inter alia*, that:

> While Evo Morales previously accused and threatened me, his new status as President of Bolivia has given him the capability to act on his threats against me and persecute me for my prior political

> activities and opinions. I can no longer safely return to Bolivia without risk to my life and freedom . . . .

Ex. at 4 at 13. To grant him asylum, under the applicable legal standard, the U.S. Executive made a finding that Minister Berzaín was credible. *See* 8 U.S.C. § 1158(b)(1)(B) (2000 & Supp. V 2005); *Niftaliev v. United States Att'y Gen.*, 504 F.3d 1211, 1217 (11th Cir. 2007). The U.S. Executive also found that, based on his application, he is a "refugee," i.e. one who is unable or unwilling to return to the country of removal "because of persecution or a well-founded fear of persecution on account of . . . political opinion." 8 U.S.C. § 1101(a)(42)(A) (2000). A refugee cannot be prosecuted in U.S. courts for the very actions for which the United States has found he would be persecuted at home.

Each of the remaining *Baker* factors also supports dismissal. The first factor, a "textually demonstrable constitutional commitment of the issue to a coordinate political department," favors dismissal. The area of foreign relations is best left, and is constitutionally committed, to the political branches. *Aktepe*, 105 F.3d at 1403 (*citing Haig v. Agee*, 453 U.S. 280, 292 (1981)). "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Baker*, 369 U.S. at 211 n.31 (quotation marks omitted).

Accordingly, courts routinely dismiss on political question grounds cases in which the Executive's foreign policy was questioned, including claims against parties alleged to have committed human rights abuses. As an example, the Ninth Circuit dismissed claims brought against a U.S. manufacturer of bulldozers whose sale was approved by the Executive for use by the Israel Defense Forces to demolish homes in the Palestinian Territories. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). The D.C. Circuit dismissed claims brought by victims of human rights abuses allegedly carried out by the Chilean government with the United States' assent. *See Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). And the D.C. District Court dismissed claims against military officials of Israel—a U.S. ally—for alleged extrajudicial killings. *See Doe I v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005). Plaintiffs thus cannot properly ask the Court to contradict the U.S. Executive's foreign policy judgments concerning the events of 2003 in Bolivia.

The second factor, "a lack of judicially discoverable and manageable standards for resolving [the issue]," also favors dismissal. *Baker*, 369 U.S. at 217. There exist no judicially

discoverable or manageable standards to judge the actions taken either by President Lozada and his cabinet in responding to a domestic (Bolivian) crisis or by the U.S. Executive in support of that government. Those decisions are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Decisions about whether, when, and how to negotiate with insurgents; to authorize military and police to free hundreds of "virtual hostages," Ex. 2 at FOIA-011; or to open roads to a city that has been cut off from all supplies are purely political considerations incapable of judicial resolution. *See Schneider v. Kissinger*, 310 F. Supp. 2d 251, 262 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005). And the propriety of a military decision is "bluntly political and not a judicial question." *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311 (2d Cir. 1973) (court could not hear claim seeking relief against bombing in Cambodia).

Moreover, judicially recognized standards do not exist that could assist the Court in evaluating the U.S. Executive's decision to ratify the actions of the Lozada government. *See Schneider*, 412 F.3d at 195. The political considerations involved are "myriad" and "thorny," *Schneider*, 310 F. Supp. 2d at 262, and "the courts lack the expertise to evaluate what information would be laid before them. . . . [E]valuation of this information requires not so much the application of law as the exercise of judgment. That judgment should be made by the political branches of our government." *Smith v. Reagan*, 844 F.2d 195, 200 (4th Cir. 1988). This is particularly the case as to actions by foreign heads-of-state and cabinet members: "No . . . coherent and widely accepted rules exist as yet as regard heads-of-state." *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 291 (S.D.N.Y. 2001), *aff'd on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

The third factor, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," still further favors dismissal. *Baker*, 369 U.S. at 217. To assess liability here, a U.S. jury would be asked to determine whether the Bolivian government engaged, as plaintiffs claim, in "crimes against humanity" or—as the Bolivian government assessed and the U.S. Executive agreed—in acts necessary to protect the public order and for a proper self-defense against an armed insurgency. Yet it is well-settled that the courts should not make such a determination. Thus, the Eleventh Circuit dismissed claims of Turkish sailors who sued for injuries sustained when an aircraft carrier mistakenly attacked their ship during a training exercise. *See Aktepe*, 105 F.3d at 1404. The court held, *inter alia*, that

assessing the Navy's actions would require a determination of how a "reasonable military force" should have acted. *Id.* It refused to undertake such an effort because it was "difficult to conceive of an area of governmental activity in which the courts have less competence" as they "lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *Id.* (quotation marks omitted). Other courts have similarly dismissed cases that would require the Court to characterize the ongoing armed conflict in the West Bank as either "genocide" or "self-defense." *Doe I v. State of Israel*, 400 F. Supp. 2d at 112–13 (dismissing suit concerning Israeli-Palestinian conflict); *Matar v. Dichter*, 500 F. Supp. 2d 284, 294 (S.D.N.Y. 2007) (same). This case is no different.

Given the U.S. Executive's endorsement and ratification of the Lozada government's actions, this lawsuit would impermissibly "compel the Court, at a minimum, to determine whether actions or omissions by an Executive Branch officer in the area of foreign relations and national security were 'wrongful.'" *Schneider*, 310 F. Supp. 2d at 262 (dismissing suit). This "would simply place too many actors on the diplomatic stage." *Smith*, 844 F.2d at 199.[7]

B. Under the Act-of-State Doctrine, the Court Should Not Judge the Actions of Foreign Governments.

The ACC is also barred by the act-of-state doctrine, which precludes courts "from inquiring into the validity of the public acts [that] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 416 (1964). This doctrine is predicated on notions of "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 408 (1990). Plaintiffs ask this Court to declare invalid public acts taken by the highest levels of the Bolivian government within its own territory. That is squarely precluded by *Sabbatino* and its progeny.

An action may be barred by the act-of-state doctrine if (1) it concerns an "official act of a foreign sovereign performed within its own territory"; and (2) "the relief sought or the defense interposed [would require] a court in the United States to declare invalid the official act." *W.S. Kirkpatrick*, 493 U.S. at 405. Both prerequisites are readily satisfied here. First, plaintiffs'

[7] Dismissal on political question grounds forecloses the need for this Court to consider the other bases for dismissal. *See Corrie*, 503 F.3d at 984 (affirming dismissal on political question grounds and not reaching district court's alternative dismissal on act of state grounds).

allegations concern only official actions taken by President Lozada and Minister Berzaín with respect to mobilizing Bolivia's military and police. *See, e.g.*, ACC ¶ 7. Yet, "[m]ilitary orders are official acts of the sovereign." *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007); *see, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (actions, even abuse, by police within Saudi Arabia immune from suit).

Second, the relief plaintiffs seek would require the court to rule those actions invalid. Plaintiffs attack the legality of President Lozada's and his cabinet's orders and decrees, the implementation of which are at the root of this lawsuit. *See, e.g.*, ACC ¶¶ 49–50 (attacking the legality of Executive Decree 27209). Such an attack is impermissible, because this Court must presume the validity of the Presidential decrees. *See Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1293 (11th Cir. 2001) (holding that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid" and dismissing on act-of-state grounds (quotation marks omitted)); *First Merchants Collection Corp. v. Republic of Argentina*, 190 F. Supp. 2d 1336, 1339 (S.D. Fla. 2002) (Seitz, J.) (same); *see also Doe I v. State of Israel*, 400 F. Supp. 2d at 113 (dismissing while noting that "[t]ort challenges brought against foreign military officials . . . during a political revolution implore the courts to declare invalid and deny legal effect to acts of a military commander representing the . . . government.") (internal quotation marks omitted).

Since the two threshold *W.S. Kirkpatrick* criteria are met, this Court should consider the following three factors in determining whether dismissal is warranted: (1) the existence of a low degree of consensus concerning a particular area of international law; (2) implications on foreign relations; and (3) whether the government that perpetrated the act is still in power. *See Sabbatino*, 376 U.S. at 428; *Doe I v. State of Israel*, 400 F. Supp. 2d at 113. The reviewing court measures these factors under a balancing approach. *See Roe v. Unocal Corp.*, 70 F. Supp. 2d 1073, 1077 (C.D. Cal. 1999). These factors favor dismissal here.[8]

First, the ACC alleges that both defendants were involved in implementing directives to free hostages and get supplies to La Paz. Such acts are part of a routine course of official conduct and responsibilities and do not violate international law. *See infra*, Part II; *see, e.g.*, *Roe*, 70 F. Supp. 2d at 1079 (noting that acts taken in a military capacity are official acts for

[8] Though cast in prudential rather than jurisdictional terms, review of a motion to dismiss under the act-of-state doctrine permits the court to look to evidence outside the pleadings. *See Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 550 (11th Cir. 1997).

purposes of the act-of-state doctrine).

Second, this case has substantial implications for the foreign relations of the United States, both generally with the world at large and with respect to Bolivia. When certain of plaintiffs' counsel sought to sue former Defense Secretary Donald Rumsfeld in Germany over U.S. military actions in Iraq, the United States was able to have that suit dismissed without proceeding to trial. Permitting this suit to go forward would severely undermine U.S. foreign policy by providing a template for other countries to permit suits against former American officials traveling overseas for actions in furtherance of U.S. military and police operations. Indeed, the Legal Adviser of the Department of State recently noted that "it strikes other countries as hypocritical [for U.S. courts] to entertain [ ] suits [against foreign officials] at the same time as we complain about civil and criminal actions brought against U.S. officials in other countries." Ex. 28 at 4 (Address by Legal Adviser John B. Bellinger, Apr. 11, 2008).[9]

Moreover, adjudication here would lead to a flood of suits against other former government officials, now residing in the United States, of any country that had occasion to use military or police to quell riots or protests—which is to say, virtually every country in the world. U.S. courts are not, and should not be made, the world's authority for determining the propriety of internal actions of sovereign foreign nations, especially when the U.S. Executive has already ratified those actions. *Cf. Doe I v. State of Israel*, 400 F. Supp. 2d at 113–14 (dismissing, *inter alia*, on act-of-state grounds a suit against Israeli officials for official acts taken by the State of Israel).

Additionally, this suit has specific importance to U.S. relations with Bolivia, which are currently in a very tense phase in light of President Morales's repeated condemnation of the United States. *See* Exs. 29 (*Washington Times*, Nov. 28, 2007); 30 at 9 (DOS Press Briefing, Nov. 15, 2007). The United States already has questioned efforts by the Morales government to charge wrongdoing by President Lozada or his cabinet stemming from these events. Ex. 27. Further, the Morales government publicly has stated it is preparing the necessary paperwork to

[9] Continuing, Mr. Bellinger stated: "Imagine, for example, what the U.S. reaction would be if a Swiss court sought to adjudicate claims brought against U.S. government officials or businesses for Jim Crow-era racial restrictions, or—since (without a statute of limitations) ATS suits can reach far into the past—even for slavery. As much as we might denounce past injustices, most of us would probably take offense at the notion that a Swiss court could hear such a suit and decide it based on the court's own articulation of international law." Ex. 28 at 4.

seek President Lozada and Minister Berzaín's extradition to Bolivia for the actions alleged in the ACC. *See* Ex. 31 at 1 (*Agence France Presse*, Mar. 4, 2008). The request is a hot-button issue between the two countries in light of the U.S. Executive's ratification of the challenged actions, and this Court should not permit civil suits against members of the Lozada government to serve as a substitute for the U.S. Executive's determination regarding extradition. The U.S. Executive needs the latitude to assess how to balance its historical relationship with Bolivia and U.S. allies there with the need to address President Morales's anti-American rhetoric and close ties to countries hostile to U.S. interests.

The third *Sabbatino* factor, whether the government that perpetrated the act is still in power, also supports dismissal. While it may not seem applicable by virtue of the fact that President Lozada and Minister Berzaín are no longer in office, the alleged actions were taken while President Lozada and Minister Berzaín, each part of a lawfully and democratically-elected government, were in power and were staunch U.S. allies (which they each remain). President Lozada and Minister Berzaín were forced from office as a result of violent uprisings. Such an insurgency should not and cannot in effect be rewarded by a holding that the unlawful ouster of the Lozada government assists in vesting jurisdiction in a foreign (vis-à-vis Bolivia) court, which would not have had such jurisdiction had the government not been unlawfully toppled.

As in *Doe I v. State of Israel*, "Plaintiffs' complaint is littered with issues that the . . . act of state doctrine[ ] shield[s] from judicial review." 400 F. Supp. 2d at 114. The Court should refrain from hearing this case.

C. The Defendants are Each Immune from Suit in the United States.

1. President Lozada is immune as a former head of state.

President Lozada, as a former head of state, is immune from the jurisdiction of U.S. courts for official acts taken while in office. *See Abiola v. Abubakar*, 267 F. Supp. 2d 907, 916 (N.D. Ill. 2003) (dismissing ATS claim against former head of state), *aff'd 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, 882–83 (N.D. Ill. 2003), *aff'd sub nom. Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (same); *see also Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 281 (S.D. Tex. 2005) ("The principles underlying head-of-state immunity apply even if the foreign sovereign had a different status at the time of the alleged acts or the time the lawsuit is filed."). There is no dispute that President Lozada is being sued here for actions that he took in

his official capacity. The suit plainly should be dismissed.

Recognizing that a foreign head-of-state is entitled to immunity for acts taken in his capacity as head of state fulfills important policy objectives. First, immunity ensures that U.S. leaders are themselves accorded immunity abroad. *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Zemin*, 282 F. Supp. 2d at 882–83; *see also* Ex. 32 at 8 (Statement of Interest of the United States, *Doe v. Qi*, No. 02-0672 (N.D. Cal. Sept. 25, 2002)). In fact, one of plaintiffs' counsel here, the Center for Constitutional Rights ("CCR"), filed a suit in Paris against former Defense Secretary Donald Rumsfeld that the French prosecutor promptly dismissed because Secretary Rumsfeld benefited from "customary" immunity from prosecution granted to heads of state and government officials, even after they left office.[10] German authorities have also rejected CCR's attempts at global forum-shopping.[11] This Court should do the same, lest other courts view a U.S. court's rejection of immunity as an invitation to treat U.S. officials in like manner. *See* Ex. 28.

Second, foreign presidents need, as do U.S. presidents, the maximum ability to discharge the duties of their office without having to worry that those acts could lead to civil liability. "[A] President must concern himself with matters likely to 'arouse the most intense feelings.' Yet . . . it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982) (citation omitted).

Plaintiffs could not sue the Republic of Bolivia directly for damages. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) (no jurisdiction over foreign states under ATS). The doctrine of head-of-state immunity prevents plaintiffs from circumventing that prohibition by instead suing its former head-of-state.

2. Minister Berzaín is immune under the FSIA.

The Foreign Sovereign Immunities Act of 1976 immunizes Minister Berzaín from suit. The FSIA is "the sole basis for obtaining [subject matter] jurisdiction over a foreign state in our courts." *Amerada Hess*, 488 U.S. at 434–39. Pursuant to the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as

[10] *See* http://www.ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf (last visited May 29, 2008).

[11] *See* http://www.ccrjustice.org/files/ProsecutorsDecision.pdf (last visited May 29, 2008).

provided in [28 U.S.C. §§] 1605 and 1607."[12] 28 U.S.C. § 1604 (2000). The FSIA applies to individuals acting in their official capacities. *See Belhas v. Ya'alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008). This derivative immunity exists because "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state."[13] *Velasco v. Government of Indonesia*, 370 F.3d 392, 398–99 (4th Cir. 2004); *see also Guevara v. Republic of Peru*, No. 04-23223, 2005 WL 6106147 (S.D. Fla. Oct. 14, 2005) (Cooke, J.) (holding FSIA applicable to individual Peruvian Secretary of Interior), *rev'd on other grounds*, 468 F.3d 1289, 1305 (11th Cir. 2006) (noting, without deciding the issue, that "several circuits have found that such [FSIA] immunity extends to state officials acting in their official capacity" but reversing in light of commercial activities exception). As plaintiffs allege that Minister Berzaín acted solely in furtherance of his official duties, the FSIA plainly immunizes his conduct. *See, e.g.*, ACC ¶¶ 7, 19, 30, 34, 36, 38, 47.[14]

3. Immunity cannot be waived without the express assent of the U.S. Department of State.

To be sure, Evo Morales—the current President of Bolivia and one of the men responsible for President Lozada's ouster—might attempt to waive President Lozada's immunity here. President Morales, however, can no more waive President Lozada's immunity in a U.S. court for signing Supreme Decree 27209 than the next U.S. president could waive President Bush's or former Secretary of Defense Rumsfeld's immunity if either were sued in a foreign country for his conduct of U.S. affairs. And, certainly, such immunity cannot be waived by the very government that the United States has found would ***persecute*** Minister Berzaín (and by implication President Lozada) upon any return to Bolivia. Instead, whether a foreign head-of-state or cabinet official's immunity is waived is within the sole province of the State Department.[15]

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[12] None of the FSIA exceptions apply here. *See, e.g.*, 28 U.S.C. § 1605.

[13] It makes no difference that the individual is no longer a state official at the time he is sued. *See, e.g.*, *Belhas*, 515 F.3d at 1284–85 (affirming dismissal of claims against retired general based on FSIA); *Velasco*, 370 F.3d at 395, 402 (same as to former officials).

[14] Plaintiffs' allegation that Minister Berzaín's actions constituted an abuse of military and police power directed by the State does not affect his right to immunity. The Supreme Court has made plain that "a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Nelson*, 507 U.S. at 361.

[15] In the unique context of the Marcos regime, some courts have held that a standing government

In sum, this Court should dismiss the ACC because President Lozada and Minister Berzaín are immune from suit under common-law and statutory doctrines of immunity.

II. DISMISSAL IS APPROPRIATE BECAUSE PLAINTIFFS FAIL TO ALLEGE ANY VIOLATION OF INTERNATIONAL LAW.

Should the Court reach plaintiffs' individual claims, defendants assert that each must be dismissed. Plaintiffs bring their claims under the Alien Tort Statute and (as to Count I) the Torture Victim Protection Act. The ATS, a jurisdictional statute grounding causes of action existing in customary international law, was recently strictly construed by the Supreme Court in *Sosa v. Alvarez-Machain*. 542 U.S. 692 (2004). *Sosa* demonstrates that plaintiffs' claims must be dismissed because: (1) the actions taken by President Lozada and Minister Berzaín are authorized and immunized under U.S. law and therefore cannot form the basis of an ATS suit; (2) the Court cannot consider claims based on the alleged disproportionate use of military force; (3) plaintiffs have failed to state claims for extrajudicial killing; (4) plaintiffs have failed to state claims for crimes against humanity; (5) this Court does not have jurisdiction to hear claims for violations of the right to life and liberty, and, in any event, plaintiffs do not state claims for such a cause of action; (6) the ATS does not apply to extraterritorial disputes; and (7) there is no secondary liability for either defendant.

A. The *Sosa* Decision.

The ATS specifies that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 USC § 1350. *Sosa* held that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. It was instead "enacted [in 1789] on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time [it was enacted]." *Id.*[16] ATS claims must therefore state a claim under customary international law, defined as "a very limited set" of claims that are "accepted by the civilized world" and "defined with a specificity" sufficient to

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can waive its predecessor's immunity. *See, e.g.*, *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988). The Marcos cases are inapposite here. There the United States and the Philippines previously had entered into a formal agreement to cooperate in investigations regarding Marcos's activities. *Id.* at 43. No such prior agreement exists with the Morales government, nor could it given that the United States has long ratified and continues to ratify President Lozada's actions.

[16] *Sosa* identified three such claims: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 724.

grant a court jurisdiction. *Id.* at 720, 725. *Sosa* thus held that a prohibition against arbitrary arrest and detention was not "so well defined [in international law] as to support the creation of a federal remedy" and therefore could not support an ATS claim. *Id*. at 738.

The Supreme Court made clear in *Sosa* that "independent judicial recognition of actionable international norms . . . should be exercised on the understanding that the door is still ajar ***subject to vigilant doorkeeping***." *Id.* at 729 (emphasis added). Courts must consider the "practical consequences of making that cause [of action] available to litigants in the federal courts," *id.* at 732–33, bearing in mind "adverse foreign policy consequences," *id.* at 728, and also "the extent to which recognizing an ATS claim would allow foreign plaintiffs to pursue claims in U.S. courts," *Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1164, 1182 (C.D. Cal. 2005). Thus, district courts considering whether to recognize new causes of action under the ATS should do so "if at all, with great caution." *Sosa*, 542 U.S. at 728. The Supreme Court also cautioned in *Sosa* that, because of the "potential implications for the foreign relations of the United States," courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727; *see supra*, Part I.A.

B. U.S. Courts Do Not Challenge the Executive's Handling of Riot Situations.

Under separation of power principles, U.S. courts do not challenge the U.S. Executive's response to riots taken in the United States. The ACC thus asks the Court to judge foreign officials' acts despite the fact that the Court could not try their U.S. counterparts for identical acts taken in the United States. Under *Sosa*, the non-viability of these claims in U.S. law indicates that they lack standing in customary international law, and therefore cannot ground an ATS or TVPA claim: "[W]e discern tension between the [district] court's simultaneous conclusions that the detention so lacked any legal basis as to violate international law, yet was privileged by state law against ordinary tort recovery." *Sosa*, 542 U.S. at 737 n.28; *see also Roe v. Unocal Corp.*, 70 F. Supp. 2d at 1080 ("[T]he Court places great reliance on the fact that requiring military officers to perform labor on civilian public works projects does not violate United States law. . . . In light of this fact, the Court is hard pressed to conclude that [plaintiff] has properly alleged a violation of international law.").

As a general matter, a U.S. president's official actions—in the context of a riot or otherwise—are shielded by absolute immunity, even if he or she is no longer in office. *See*

Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).[17] Similarly, a Cabinet Secretary's official actions are shielded by qualified immunity—even if he is no longer in office. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982). Such immunity would apply here. *See Gonzalez v. Reno*, 325 F.3d 1228, 1235–36 (11th Cir. 2003) (reversing denial of motion to dismiss suit against Attorney General in light of "presumption of legitimacy accorded to official conduct").

Further, the authority of the Executive to suppress insurrections that threaten the public order is statutorily established in the United States. The Act of Congress of 1795 granted authority to the President "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Its modern incarnation provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, ***as he considers necessary to enforce those laws or to suppress the rebellion.***

10 U.S.C. § 332 (2000 & Supp. V 2005) (emphasis added); *see also* 10 U.S.C. § 331 (2000). Under this provision, U.S. presidents have issued a number of Executive Orders—nearly indistinguishable from the orders plaintiffs challenge here—authorizing officials at the Department of Defense to act to restore law and order. *See, e.g.*, Executive Order No. 11364, 32 Fed. Reg. 10907 (July 24, 1967) (responding to riots in Michigan and declaring that "The Secretary of Defense is authorized and directed to take all appropriate steps to disperse all persons engaged in the acts of violence . . . and to restore law and order.").[18]

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[17] If plaintiffs' theory were extended in the domestic context, presumably the U.S. President (or each state governor) could be sued in their individual capacities for the tens of thousands of excessive force claims brought every year against local police departments and municipalities. *See* Citizen Complaints About Police Use of Force, Bureau of Justice Statistics, June 2006, *available at* http://www.ojp.usdoj.gov/bjs/abstract/ccpuf.htm (last visited May 29, 2008) (reflecting more than 26,000 citizen complaints of excessive force in 2002). Clearly, the law does not and should not permit this result.

[18] *See also* Ex. 33 (Executive Order No. 11403, 33 Fed. Reg. 5501 (Apr. 5, 1968) (responding to riots in Washington, D.C. and stating that "The Secretary of Defense is authorized and directed to take all appropriate steps to disperse all persons engaged in the acts of violence described in the proclamation and to restore law and order."); Executive Order No. 11405, 33 Fed. Reg. 5505 (Apr. 7, 1968) (same regarding unrest in Maryland); Executive Order No. 12804, 57 Fed. Reg. 19361 (May 1, 1992) (in wake of riots in Los Angeles, "Units and members of the Armed Forces

There is also a broader common law privilege to respond to a riot situation.[19] The Restatement (Second) of Torts § 142(2) provides:

> The use of force or the imposition of a confinement which is intended or likely to cause death or serious bodily harm for the purpose of suppressing a riot or preventing the other from participating in it is privileged if the riot is one which threatens death or serious bodily harm.

Under the Restatement "it is not necessary that the other against whom the actor uses force or upon whom he imposes a confinement be actually participating in it." *Id.* § 142 cmt. d. Further, "[i]f the riot itself threatens death or serious bodily harm, it is sufficiently serious to justify the use of deadly means to suppress it. It is not necessary that the avowed purpose of the riot be to inflict such harm. It is enough that the conduct of the rioters is such as to create the probability or even the possibility of such consequences." *Id.* § 142 cmt. g.

Accordingly, for two centuries, courts construing the scope of Executive authority to respond to riots have concluded that it belongs exclusively to the Executive and is immune from judicial interference. In *Martin v. Mott*, the Supreme Court held that the authority to decide when to respond to an insurrection or invasion "belongs exclusively to the President, and [ ] his decision is conclusive upon all other persons." 25 U.S. 19, 30 (1827). Similarly, in *Consolidated Coal & Coke Co. v. Beale*, the court held that "the necessity of using troops in a state in any given emergency" is "solely for the determination of the President of the United States." 282 F. 934, 936 (S.D. Ohio 1922). "[T]he function which this court is now asked to exercise belongs exclusively to the executive, and not to the judicial, branch of the government." *Id.*; *see also State of Alabama v. United States*, 373 U.S. 545 (1963) (rejecting action by Governor Wallace to prevent President Kennedy and his Secretary of Defense from exercising their authority under 10 U.S.C. § 333).

And courts construing the common law privilege equally abstain from interfering. *See Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 971 (4th Cir. 1992) (dismissing suit

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of the United States and Federal law enforcement officers will be used to suppress the violence described . . . and to restore law and order[.]")).

[19] "The word 'riot' is used to denote an assemblage of three or more persons in a public place for the purpose of accomplishing by concerted action and in a turbulent and disorderly manner a common purpose, irrespective of the lawfulness of the purpose." Restatement (Second) of Torts § 142 cmt. a. Plaintiffs allege, *inter alia*, that "widespread street protests . . . blocked major highways [and] halt[ed] automobile traffic." ACC ¶ 28; *see also id.* ¶ 43.

against United States for damage caused during riots coinciding with invasion of Panama). In short, "[c]ontrol of civil disorders that may threaten the very existence of the State is certainly within the police power of government." *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971) (quotation marks omitted). "[J]udgments about where troops or police should be stationed and what degree of force should be exerted to provide adequate protection for persons and property in riot control situations are precisely the judgments which . . . are best left to officials directly responsible to the electorate." *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1256 (D.D.C. 1973) (quotation marks omitted).

This privilege, and the rationales underlying it, are not undercut because the riot took place in Bolivia instead of the United States. If plaintiffs' ATS claims would fail as a matter of law if brought against a U.S. President or Secretary of Defense, then the claims fail under customary international law, and *Sosa* requires their dismissal.

C. The ACC Impermissibly Rests on a Theory of Proportionality.

The ACC attacks the proportionality of the force used by the Bolivian government compared to that which civilians in hindsight believe was necessary to attain military and police objectives. We are unaware of any U.S. court that has recognized a claim for the disproportionate use of military force as the basis for a cause of action. This Court should dismiss the ACC on that ground independently.

Simply put, proportionality is ***not*** a well-defined doctrine under customary international law, and it therefore fails the stringent *Sosa* test. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 122 (2d Cir. 2008) (an alleged norm of disproportionality was "simply too indefinite to satisfy *Sosa*'s specificity requirement" and, even if it was, it would contain a stringent intent requirement); *see also Corrie*, 403 F. Supp. 2d at 1025 (plaintiffs' allegation that "destruction of personal property is prohibited 'except where such destruction is rendered absolutely necessary by military operations' . . . does not set a clear, specific norm"). As a U.N. report put it, "[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective." *Final Report to the Prosecutor by the Committee Established to Review the NATO*

Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 48 (June 13, 2000), *available at* www.un.org/icty/pressreal/nato061300.htm (last visited May 29, 2008). A civil cause of action under a proportionality theory would be entirely unworkable in practice.

The Department of State has echoed these sentiments: "[W]hile all agree in the abstract that military force should not be 'disproportionate' to military objectives, this moral clarity tends to dissipate in the application of principle to practice." Ex. 34 at 40 (Statement of Interest of the United States of America, *Matar v. Dichter*, No. 05-10270 (S.D.N.Y. Nov. 17, 2006) (hereinafter "*Matar* SOI")). "Indeed, the very nature of the principles defy specificity, for they require the balancing of competing considerations and are inherently imprecise. That is, ***the rules do not proscribe any particular conduct that is readily identifiable***." Ex. 35 at 34 (Statement of Interest of the United States of America, *In re Agent Orange Prod. Liab. Litig.*, No. 04-400 (E.D.N.Y. Jan. 12, 2005) (hereinafter "*Agent Orange* SOI") (emphasis added)).

The implications of recognizing a civil cause of action for lack of proportionality would be "breathtaking," *Sosa*, 542 U.S. at 736. As the U.S. Executive has repeatedly and successfully argued, the principle of proportionality requires "consideration by combatant commanders of a variety of factors—unique to the context of any particular military action—that affect decisions on what means may be available to achieve the military objective and whether the harms that particular military actions might cause would be disproportionate to the advantages attained." *Agent Orange* SOI at 34. In resolving such a case,

> [a]ny number of intangibles must be considered: How important is the military objective sought to be achieved? What are the pros and cons of each option available to achieve that objective? For each option, what is the probability of success? What are the costs of failure? What are the risks of civilian casualties involved in each option? What are the risks of military casualties involved in each option? How are casualties of either kind to be weighed against the benefits of the operation?

Matar SOI at 40–41. The judiciary is not the proper branch to resolve these questions.

Recognizing a cause of action for disproportionate use of force, moreover, would permit a civil cause of action in U.S. courts—predicated solely on judge-made federal common law instead of Congressional legislation—for ***any*** death, ***anywhere*** in the world, that was incident to an authorized military or police operation. And any civilian or bystander casualty from any military or police operation anywhere could be transformed into a U.S. federal tort action. Further, unlike in the criminal context, there would not even be a check of independent

prosecutorial discretion before such a suit could be brought. *Sosa* expressed this very concern: "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." 542 U.S. at 727. This was never the purpose of the ATS, and this Court should not permit the statute to be misused in such a manner. *See also Corrie*, 403 F. Supp. 2d at 1025 (under *Sosa*, "subjective" norms are not sufficient to serve as the basis for a claim under the ATS); *Matar* SOI at 35–47.

Moreover, plaintiffs cannot circumvent the ATS by alleging instead that the same action falls under the TVPA. The TVPA excludes from the definition of extrajudicial killings those killings that "under international law" are "lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350 note § 3(a). Accordingly, the scope of international law principles limits the TVPA just as it does the ATS. *See infra*, Part II.D.1.

This fundamental deficiency in plaintiffs' suit is not remedied by the conclusory allegation, newly made in the ACC, that the plaintiffs "were not involved in the protests at all." ACC ¶ 1. Civilians who lose their lives in the course of military actions are often innocent bystanders. The question presented now is whether a U.S. court has the expertise necessary to determine if the actions taken by the Bolivian military in the midst of carrying out military objectives were proportional to the threat posed. It is well-settled that courts do not have that expertise and must refrain from undertaking that very analysis. Plaintiffs cannot plead around the impossible task of separating the loss of innocent life among bystanders from the legitimate military objectives of the Executive who is tasked with protecting the public welfare.

D. Count I for Extrajudicial Killings Fails To State a Claim.

Plaintiffs bring their claims for extrajudicial killings under both the ATS and TVPA. Under international law, and thus under the ATS and TVPA, an extrajudicial killing is a very narrow cause of action. The term does not encompass every killing that occurs outside the judicial process; such a broad definition would include killings in self-defense, or killings in the defense of others. And the narrow category of killings that are actionable under the statutes do not include the kinds of claims plaintiffs raise here. On a fundamental level, Count I fails because it is not a violation of either statute for a government to act pursuant to its own laws and Constitution in order to protect itself and its citizens. It also fails because it does not allege the elements of an extrajudicial killing under the statutes. Specifically, plaintiffs do not allege:

other than in speculative fashion that the killings were deliberate; that they occurred while the individuals were in state custody; or that plaintiffs' exhausted their remedies.[20]

1. The ATS and TVPA do not apply to government action of the type plaintiffs allege.

As discussed above, *Sosa* requires that a plaintiff identify a violation of customary international law for the ATS to apply. *See supra*, Part II.A. And the TVPA expressly adopts the narrow definition of "extrajudicial killing" accepted in customary international law: the term "***does not include*** any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350 note § 3(a) (emphasis added). The legislative history also makes clear that principles of international law limit the reach of the statute. *See* H. R. Rep. No. 102-367(I), at 87 (1991) (TVPA legislative history) ("The concept of 'extrajudicial killings' is derived from article 3 common to the four Geneva Conventions of 1949."); *see also* S. Rep. No. 102-249, at 3, 6 (1991) (stating that "only killings which are truly extrajudicial in nature ***and which violate international law*** are actionable under the TVPA"). "Th[e] definition further excludes killings that are lawful under international law—such as killings by armed forces during declared wars which do not violate the Geneva Convention and killings necessary to affect a lawful arrest or prevent the escape of a person lawfully detained." *Id.* at 6 (emphasis added) (footnote omitted).

Courts reject, for instance, the position that every "murder of an innocent person during an armed conflict" is a "per se violation of the law of nations." *Saperstein v. Palestinian Authority*, No. 1:04-cv-20225, 2006 WL 3804718, at *8 (S.D. Fla. Dec. 22, 2006) (Seitz, J.). As the *Saperstein* court explained, "such an interpretation would not only make district courts international courts of civil justice, it would be in direct contravention of the Supreme Court's specific prudential guidance admonishing lower courts to be cautious in creating new offenses under the law of nations." *Id*. (dismissing claims); *see also Kiobel v. Royal Dutch Petrol. Co.*, 456 F. Supp. 2d 457, 465 (S.D.N.Y. 2006) (dismissing claim where conduct alleged to be extrajudicial killing did not violate well-defined international customary law). Plaintiffs have failed to state a claim because they do not allege extrajudicial killings that violate international law. International law does not, for example, recognize a cause of action for deaths that result

[20] Moreover, plaintiffs' allegation that they themselves suffered mental pain and suffering is not cognizable under the TVPA, which only recognizes damages accruing to the direct victim of the alleged extrajudicial killing. *See* 28 U.S.C. § 1350 note § 2(a)(2).

from a disproportionate use of force, *see supra*, Part II.C. And as discussed *supra*, Part II.B, international law recognizes and authorizes the right of a government to act in the defense of its citizens and its democracy. Plaintiffs therefore cannot state claims for extrajudicial killings.

A case recently addressed by this Court exemplifies, by contrast, why this lawsuit does not raise a proper claim for extrajudicial killing under the ATS or TVPA. In *Lizarbe v. Hurtado*, CA 07-21783 (S.D. Fla. Mar. 4, 2008) (Jordan, J.), Peruvian security forces entered a remote village, and rounded up the unarmed villagers in the town square on the pretense of a general assembly. The villagers had done nothing to present a public threat and the security forces were not seeking in any way to act to protect the public or carry out an official act. Instead, the security forces simply began beating the men and raping some of the women. They ultimately used machine guns and grenades to kill the villagers they had rounded up and then searched each house and killed the remaining villagers. After the killings, the soldiers held a celebration.

The ATS and TVPA were intended to address the types of indiscriminate, brutal torture and killings exemplified in *Hurtado*. Yet the face of the ACC bears no relationship whatsoever to *Hurtado*. It would do serious damage to the effectiveness of the ATS and TVPA were they extended to cover actions that were taken by a democratically-elected government protecting the public welfare and that were ratified by the U.S. Executive.

2. Plaintiffs do not allege that the killings were deliberate or that the decedents were in the government's custody or control.

The TVPA carefully limits the definition of extrajudicial killing such that "the term . . . means a ***deliberated*** killing not authorized by a previous judgment." 28 U.S.C. § 1350 note § 3(a) (emphasis added). Failure to allege such deliberative intent is fatal to a claim for extrajudicial killing. *See, e.g.*, *In re Agent Orange*, 373 F. Supp. 2d 7, 112 (E.D.N.Y. 2005), *aff'd sub nom. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Matar* SOI at 47–51 (discussing legislative history of TVPA with respect to intent requirement and noting that "[t]he statutory text indicates that Congress understood 'extrajudicial killing' to be an especially grave offense, entailing more than unintentional civilian deaths").

Having taken several opportunities to amend (including after the filing of the original motion to dismiss), plaintiffs now finally include one conclusory allegation that defendants' response to the protests was to order Bolivian security forces "to attack and kill scores of unarmed civilians, many of whom—including the victims on whose behalf Plaintiffs are suing—were not involved in the protests at all, and who were not even in the vicinity of the protests."

ACC ¶ 1. Plaintiffs make no other allegation that supports this newfound conclusion. To the contrary, plaintiffs set forth in the ACC the official orders and decrees authorized by the Government during this time and none of them order an attack on unarmed civilians. The very documents that plaintiffs cite and rely upon make plain that the Government's response was to order the use only of "necessary force," and to respond to a "state of emergency." *Id.* ¶¶ 36, 47. Plaintiffs do not allege or make reference to a single document, conversation, command, or anything else that would support their conclusory statement. Indeed, in their rush to add this new conclusory allegation, plaintiffs failed to account for the fact that they allege precisely the opposite elsewhere in the ACC: that the government's response was to free hostages and address the riots, and that some of the victims on whose behalf they sue were in fact in the vicinity of the protests. *See, e.g.*, *id.* ¶¶ 30, 47 (alleging that the Government's objectives were to rescue the hostages and to get provisions to La Paz); 53–54 (alleging that decedent Ayala died in the course of a protest outside the Senkata gas plant in El Alto); ¶ 56 (alleging that decedent Constantino Quispe Mamani died while "check[ing] on his property in El Alto, which he believed might have been damaged that day" in the course of the protests); ¶ 72 (alleging that decedent Arturo Mamani died while watching the fighting). *Twombly* makes plain that plaintiffs cannot rely on the conclusory and speculative allegation that President Lozada and Minister Berzaín ordered an attack on innocent civilians, and that plaintiffs cannot survive a motion to dismiss by simply making allegations that are mere "labels and conclusions." 127 S. Ct. at 1965.

The ATS and TVPA also require that the claimant have died in government ***custody*** and in the absence of proper judicial process. *See In re Agent Orange*, 373 F. Supp. 2d at 112 (dismissing TVPA claim because, in part, plaintiffs were not in "custody or physical control" of defendant at time alleged killings occurred), *aff'd sub nom. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008). Plaintiffs do not allege, because they cannot allege, that the decedents were at any time under defendants' custody or control, and Count I should be dismissed on this basis as well.

3. Plaintiffs have failed to exhaust available remedies in Bolivia as required by the TVPA.

In recognition of the burden that claims under the TVPA can impose on U.S. courts, Congress has expressly provided that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note § 2(b). When plaintiffs have failed to

exhaust local remedies, U.S. courts "***shall*** decline to hear [the] claim." *Id.* (emphasis added).

Congress was well aware of the potential for TVPA claims to infringe upon the sovereignty and rights of foreign countries. It therefore included a stringent exhaustion requirement to "ensure[ ] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." TVPA, H. R. Rep. No. 102-367(I), at 5. Courts accordingly have required plaintiffs to exhaust their local remedies before proceeding in a U.S. court pursuant to the TVPA. *See Harbury v. Hayden*, 444 F. Supp. 2d 19, 41 (D.D.C. 2006) (dismissing due to plaintiff's failure to allege that she had exhausted remedies against her husband's alleged torturers in Guatemala); *Corrie*, 403 F. Supp. 2d at 1025–26 (dismissing for failure to exhaust remedies); *Friedman v. Bayer Corp.*, No. 99-cv-3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999) (same).

Plaintiffs not only fail to plead that they exhausted their administrative remedies, plaintiffs ***affirmatively plead*** that Bolivian law provided them with such remedies. Plaintiffs expressly plead that in October, "a clause in the Executive decree offered indemnification for damages to persons and property resulting from the government's actions." ACC ¶ 48. Indeed, Supreme Decree 27209—which plaintiffs expressly plead the defendants authorized, *id.* ¶ 47—states that "The Bolivian State guarantees compensation for any damage to property and persons that might occur as a result of compliance with the terms hereof." Ex. 22, art. 3. It is therefore evident from the face of the ACC that the TVPA claims must be dismissed in order to "avoid exposing U.S. courts to unnecessary burdens" in light of the remedies that the Bolivian government has already made available to plaintiffs. H. R. Rep. No. 102-367(I), at 87–88.

Moreover, the Court can take judicial notice that relatives of the victims of September and October 2003 had other administrative remedies, provided as part of an agreement reached by the Bolivian government and victims of the families. On November 20, 2003, the Bolivian Government entered into a Humanitarian Assistance Agreement with the "widows and legitimate heirs of the deceased," guaranteeing them 5,000 Bolivianos for funeral expenses and an additional 55,000 Bolivianos in further compensation. *See* Ex. 36 (Humanitarian Assistance

Agreement, Nov. 20, 2003).[21] The compensation has since been paid: "Yesterday, the Government finished paying compensation to families of the victims of October 2003 . . ." Ex. 39 (*Los Tiempos*, Oct. 9, 2004). If plaintiffs did not pursue that remedy, they are obligated to do so now. If they did, they cannot seek a double recovery here. *Corrie*, 403 F. Supp. 2d at 1025 ("A foreign remedy is adequate even if not identical to remedies available in the United States."), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007). In either event, their claims under the TVPA must be dismissed.

E. Count II for Crimes Against Humanity Fails To State a Claim.

In Count II plaintiffs allege that the Bolivian government committed "crimes against humanity." The allegations of the ACC do not support such a claim. As detailed below, to the extent crimes against humanity are recognized as violations of international law actionable under *Sosa*, they must include, *inter alia*, a course of conduct constituting a widespread or systematic attack directed against a civilian population. Courts have labeled as crimes against humanity atrocities such as the Holocaust, the Rwandan genocide, and ethnic cleansing in the former Yugoslavia. *See Bowoto v. Chevron Corp.*, No. C 99-02506, 2007 WL 2349343, at *10 (N.D. Cal. Aug. 14, 2007) (finding that the alleged conduct did not measure up to these historical examples of crimes against humanity). "Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims." *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment ¶ 644, *available at* 1997 WL 33774656 (May 7, 1997). Plaintiffs do not allege anything close, and Count II should be dismissed.

1. Plaintiffs do not adequately allege that defendants' acts were directed against a civilian population.

Plaintiffs do not adequately allege, as they must, that the decedents' deaths were actually attributable to attacks "directed against a[ ] civilian population," which has been defined as "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." Rome

[21] The Bolivian Government also reached similar agreements with those who were seriously wounded. *See* Exs. 37 (Humanitarian Assistance Agreement, Nov. 26, 2003) and 38 (Humanitarian Assistance Agreement, Dec. 5, 2003).

Statute of the International Criminal Court, arts. 7(1) & 7(2)(a), July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998). Plaintiffs' failures are thus twofold: they fail to allege that the attacks were ***directed*** against a civilian population, and they fail to allege the attacks were in furtherance of a ***policy***.

As to the first deficiency: "To be a crime against humanity, the emphasis must not be on the individual but rather on the collective—the individual is victimized not because of his or her individual attributes but because of membership in a targeted civilian population." *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 275–76 (E.D.N.Y. 2007) (finding sufficient the allegation that defendants had "the united purpose and shared mission to eradicate the State of Israel, murder or throw out the Jews, and liberate the area by replacing it with an Islamic or Palestinian State," thereby "reflect[ing] an intent to target people based on criteria prohibited by both the Genocide Convention and the Rome Statute"). Plaintiffs' bare allegation that President Lozada and Minister Berzaín bore animus against and targeted the Aymara is "speculative," *Twombly*, 127 S. Ct. at 1965, because it is unaccompanied by ***any*** factual support whatsoever. *See* ACC ¶ 98. In fact, the ACC fails to address the obvious: the victims were Aymaran because, as plaintiffs allege, the violent uprisings that precipitated their injuries involved large numbers of Aymarans. *See id.* ¶¶ 26, 28, 43. Thus, at most, the ACC alleges that the Lozada government "targeted" individuals who were illegally blockading roads and causing civil unrest and that several bystanders were killed in the violence. These allegations are consistent with the ACC's concession that the government's objectives were rescuing innocent tourists from Sorata, *id.* ¶ 30, and getting critical provisions to a besieged La Paz, *id.* ¶ 47, and had nothing to do with "crimes against humanity."

Not only does the ACC fail to support its internally-inconsistent allegation that the decedents were targeted as Aymarans, it effectively concedes that the decedents died amidst the government's response to unlawful and dangerous riots and blockades. This is fatal to Count II, for if the decedents were "targeted based on [the] individualized suspicion of engaging in certain behavior," *Bowoto*, 2007 WL 2349343, at *10, then they were ***not*** targeted as part of a "civilian population," and their deaths are no crime against humanity:

> [T]he victims of the [Nigerian Government Security Forces] were targeted because they were oil protestors, or because they were associated with oil protestors. Though the evidence indicates that the GSF were not particularly selective in choosing their targets,

> the victims of the GSF were not targeted . . . simply because they were civilians.

Id.; *see also Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment ¶¶ 227–28, *available at* 2005 WL 3746053 (Nov. 30, 2005) ("[T]he individuals who were abducted and then detained were singled out as individuals because of their suspected or known connection with, or acts of collaboration with, Serbian authorities—and not because they were members of a general population against which an attack was directed[.]").

As to the second deficiency: the "civilian population" element also requires, as a separate matter, that the attacks have been part of a "preconceived plan or policy." *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment ¶ 580, *available at* 1998 WL 1782077 (Sept. 2, 1998); *see also Tadic*, *supra*, ¶ 644 ("[T]here must be some form of a governmental, organizational or group policy to commit these acts."). The policy requirement "is well supported by the jurisprudence of international and national tribunals and the relevant commentaries," Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 A.J. I.L. 43, 56 (1999), and a departure from it here would be inconsistent with *Sosa*. Yet the ACC does not identify any specific policy of the Lozada government to harm the decedents rather than to restore order.

In sum, notwithstanding that civilians are alleged to have died, plaintiffs fail to properly allege that the alleged attacks were "directed against a civilian population."

2. Plaintiffs do not adequately plead a "widespread" or "systematic" attack.

To constitute a crime against humanity, an act must have been intended as part of a widespread or systematic attack. *See, e.g.*, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment ¶ 89, *available at* 1999 WL 33288417 (May 21, 1999). Plaintiffs fail to allege—in anything other than conclusory fashion—either a widespread or a systematic attack.

A "widespread" attack is a "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims." *Akayesu*, *supra*, ¶ 580. Widespread attacks occur in the context of thousands of deaths, such as those allegedly committed by Hamas with the purpose of eradicating the State of Israel and murdering Jews, *see Almog*, 471 F. Supp. 2d at 275, or the ethnic cleansing of the Tutsi in Rwanda, *see, e.g.*, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence ¶ 362, *available at* 2000 WL 33348765 (Jan. 27, 2000). No such attack is alleged here. The ACC does not allege

"collective" killing on a "massive, frequent, large scale."

Plaintiffs also fail to adequately allege that the attacks were "systematic," which is defined as "a high degree of orchestration and methodical planning," Robinson, *supra*, 93 A.J.I.L. at 47, and "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources," *Akayesu*, *supra*, ¶ 580. Plaintiffs' claim in this regard is solely that President Lozada and Minister Berzaín "met with military leaders and ministers in his government to plan widespread attacks." ACC ¶ 81. Even this singular allegation relies solely on conclusory boilerplate; is speculative and unsubstantiated by any specific factual allegations; and is contradicted by the remainder of the ACC, which recounts that the government reacted to violence by others and did so in a focused way for the limited objectives of freeing trapped tourists and freeing a trapped city. Neither the conclusory allegation nor the remainder of the ACC are sufficient to support an allegation that the defendants "methodically planned" to harm the decedents, or, for that matter, anyone else.

F. Count III Should Be Dismissed for Lack of Subject Matter Jurisdiction and Failure To State a Claim.

In Count III, plaintiffs allege violation of the "rights to life, liberty, and security of person, and freedom of assembly and association." This Count must be dismissed under *Sosa* because plaintiffs cannot establish that such a claim is grounded in customary international law. In any event, plaintiffs also fail to allege any elements of such claims.

1. Plaintiffs do not allege a violation of customary international law.

Count III fails because it is not sufficiently defined and accepted among civilized nations to meet *Sosa's* stringent tests. Like the prohibition against arbitrary arrest and detention which failed to meet the *Sosa* standard, the rights enumerated in Count III are an "aspiration that exceed[] any binding customary rule having the specificity" that *Sosa* requires. 542 U.S. at 738.

The "right to life" has been held to be "broad and indefinite" and to lack "limits," and is therefore "insufficiently definite to constitute [a] rule[ ] of customary international law." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254, 258 (2d Cir. 2003) (quotation marks omitted) (dismissing claim of intranational pollution brought under the ATS); *see also Saperstein*, 2006 WL 3804718, at *8 (dismissing ATS claim); *Kiobel*, 456 F. Supp. 2d at 467 (dismissing claim of "beatings, shooting, arrests and detention . . . by military personnel during peaceful demonstrations" because the alleged "right[s] to life, liberty and security of person, and . . . to peaceful assembly and association" upon which the claim was predicated were "not actionable

under the ATS" given the lack of "particular or universal understanding of [ ] civil and political rights").[22]

For the "practical consequences," *Sosa*, 542 U.S. at 732, that would befall the federal courts were these rights considered actionable under *Sosa*'s heightened standard, the Court need look no further than the vast complexities of U.S. constitutional law. The contours of rights such as "liberty" or "freedom of assembly" vary by jurisdiction and decade within the United States alone; moreover, U.S. law cabins these rights with complex limits on standing to sue. And the adjudication of such rights as between foreign citizens and their sovereigns—concerning acts taken on foreign soil and in a foreign political context—would put U.S. courts (and by implication U.S. foreign policy) in the dangerous position of "claim[ing] a limit on the power of foreign governments over their own citizens." *Sosa*, 542 U.S. at 727–28.

The Court lacks subject matter jurisdiction over Count III.

2. Plaintiffs also do not state a claim for relief.

Even were the Court to assert jurisdiction over Count III, the count must be dismissed for failure to state a claim. However defined, plaintiffs cannot make a claim that there was a violation of the right to life. While the Restatement (Third) of Foreign Relations Law provides that a state cannot "practice[ ], encourage[ ], or condone[ ] . . . the murder or causing the disappearance of individuals," § 702(c), it clarifies that this prohibition does not extend to state actions "necessary under exigent circumstances, for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime," § 702 cmt. f.

With respect to the freedoms of association and assembly, plaintiffs do not allege that any of the decedents were exercising or attempting to exercise any right to associate or assemble at the time of their death, or, for that matter, at any other time. *See, e.g.*, ACC ¶ 57 (alleging that at the time of her death, a decedent "was not engaged in any protests against the government"). Nor do they allege that President Lozada or Minister Berzain intended to prevent peaceful and lawful association or assembly.

G. The U.S. Should Not Adjudicate Actions Taken by a Foreign Government on Its Own Soil.

The Supreme Court has cautioned that "the courts of one country will not sit in judgment

[22] The rights are referred to in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. But the Supreme Court has expressly held that those two instruments cannot ground causes of action under the ATS. *See Sosa*, 542 U.S. at 734–35.

on the acts of the government of another, done within its own territory." *Sabbatino*, 376 U.S. at 416 (quotation marks omitted). Yet this is precisely what plaintiffs ask this Court to do.

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotation marks omitted), *superseded by statute as stated in Joyner v. Monier Roof Tile, Inc.*, 784 F. Supp. 872, 875 (S.D. Fla. 1992). The presumption against extraterritoriality can be overcome only by the "affirmative intention of the Congress clearly expressed." *Id.* at 248 (quotation marks omitted). The Eleventh Circuit has observed that this presumption "'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1129 (11th Cir. 1999) (*quoting Arabian Am. Oil Co.*, 499 U.S. at 248). Construing "ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations . . . helps the potentially conflicting laws of different nations work together in harmony." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citations omitted).

The presumption against extraterritoriality applies to the ATS, a generally worded statute that says nothing about its extraterritorial scope. Application of the presumption serves *Sosa*'s goal of avoiding foreign policy problems in the development of common law causes of action under the ATS. 542 U.S. at 727. It also respects *Sosa*'s admonition that courts should impose "a high bar to new private causes of action for violating international law" because of "the potential implications for the foreign relations of the United States of recognizing such causes." *Id.* The Supreme Court has already held that the ATS cannot be applied to suits against foreign states. *See Amerada Hess*, 488 U.S. at 440.[23] That prohibition cannot be circumvented by suing the

[23] The Supreme Court has also held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). Civil suits under the ATS to resolve foreign disputes that have no connection to the United States themselves violate customary international law. *See Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 ¶ 12, [2007] 1 AC 270 (House of Lords concludes that the absence of any basis in international custom for ATS-style civil suits for acts that take place outside the United States are "contrary to international law"); *Democratic Republic of Congo v. Belgium*, 2002 I.C.J. 3, ¶ 48 (Feb. 14, 2002), *available at* 2002 WL 32912040, at *77 (three prominent judges on the International Court of Justice, which included American judges, note that U.S. practice under the ATS "has not attracted the approbation of States"). The ATS contains no hint

head of state instead of the state itself.

Reading the ATS in accord with the presumption against extraterritoriality is also consistent with the original understanding of the statute. As *Sosa* made clear, its primary impetus was the federal government's inability to provide redress for attacks on ambassadors inside the United States. *See* 542 U.S. at 716–18. The ATS was more generally designed to ensure that the United States could avoid international responsibility for certain private insults to foreign sovereigns by providing a remedy for the redress of such insults in federal court. *Id.* Law in the late eighteenth and early nineteenth century was strictly territorial. The Supreme Court held early on that "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *see also* Joseph Story, *Commentaries on the Conflict of Laws* 21 (1834) ("[N]o state or nation can, by its laws, directly affect, or bind . . . persons not resident therein," because to do so "would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation."). Only violations of safe conducts, infringement of the rights of ambassadors, and piracy came within the "narrow set" of actions originally contemplated under the ATS, and it was unimaginable that the ATS would be used as a vehicle for regulating a foreign sovereign activity on foreign soil.[24] Indeed, the U.S. has previously argued that the ATS does ***not*** apply to extraterritorial claims. *See* Ex. 40 at 5–12 (Brief of the United States as Amicus Curiae in Support of Appellee, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016 (2d Cir. May 16, 2007)).

To be sure, courts have in the past applied the ATS, in limited fashion, to certain claims

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of extraterritorial application. The *Charming Betsy* canon thus demands that the ATS be read to be consistent with international law and thus not to entertain causes of action regulating activity outside the United States and exclusively within the boundaries of a foreign state.

[24] Nor does the analysis differ because President Lozada and Minister Berzaín live in the United States. Each left his country as a result of an uprising aimed at unlawfully unseating him from government. That uprising was successful and President Lozada and Minister Berzaín, long time and close U.S. allies, traveled here to escape certain persecution, the likelihood of which is expressly recognized in the Executive's grant of asylum to Minister Berzaín. Ex. 4. More importantly, the defendants' presence in the United States is relevant only to personal jurisdiction (which has not been contested); the presumption against extraterritoriality instead implicates the question of prescriptive jurisdiction, i.e., whether a cause of action arising under U.S. law can be applied to activity that took place entirely outside the United States. *See* Restatement (Third) of Foreign Relations Law § 401(a)–(b) (1987).

centering exclusively on acts taken abroad. *Sosa*, however, expressly questioned the power of U.S. courts to do so: "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Sosa*, 542 U.S. at 727–28. Further, *Sosa* cautioned that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise [the] risk[ ] of adverse foreign policy consequences, they should be undertaken, ***if at all***, with great caution." *Id.* (emphasis added). *Sosa*'s reasons for "great caution" in developing ATS causes of action to apply to a foreign government's treatment of its citizens are at their height when the foreign governmental action occurs on foreign soil.

Foreign countries are well aware, and concerned, with the application of the ATS extraterritorially. They have in the past submitted their views against such expansion to the U.S. Executive and the Supreme Court. Most recently, by diplomatic notes, the governments of the United Kingdom, Switzerland, Germany, and South Africa have expressed their strong concern to the State Department for filing with our Supreme Court. The U.K. wrote that holding parties liable "for actions taken by a foreign State in its own territory, with respect to its own citizens, based on conduct by the defendants that took place outside the United States, infringes the sovereign rights of States to regulate their citizens and matters within their territory." Ex. 41 at 4a (Brief of the United States as Amicus Curiae in Support of Petitioner, *American Isuzu Motors, Inc., et al. v. Lungisile Ntsebeza, et al.*, No. 07-919 (U.S. Feb. 11, 2008)). Germany highlighted that such litigation "can interfere with national sovereignty, create legal uncertainty and costs, and risks damaging international relations." *Id.* at 10a. And the Legal Adviser of the Department of State recently noted that the ATS imposes diplomatic costs: "In letters to the State Department or in amicus filings in federal courts, foreign governments consistently argue that the assertion of U.S. court jurisdiction over cases that have little connection to the United States is inconsistent with customary international law principles and interferes with national sovereignty." Ex. 28.

For all of these reasons, this Court should not apply the ATS extraterritorially to condemn conduct taken by a foreign government on its own soil, particularly in a case such as this where U.S. courts would not interfere had the actions taken place in the United States.

H. Secondary Liability Does Not Attach.

Plaintiffs' secondary liability claims for alleged "aiding and abetting," "command responsibility" and "ratification," and "conspiracy," ACC ¶ 89, all fail for the simple reason that plaintiffs have not stated any primary or underlying cause of action and therefore cannot state a claim that President Lozada or Minister Berzaín aided in the violation of any tort. *See Vietnam Ass'n for Victims of Agent Orange*, 517 F.3d at 123. Plaintiffs' secondary liability claims also independently fail under the ATS and TVPA because their conclusory allegations of secondary liability do not suffice. *See Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal"). All three bases for secondary liability should fail on this basis.

1. Plaintiffs cannot rely on aiding-and-abetting liability.

Plaintiffs do not state a claim for aiding and abetting liability as against President Lozada or Minister Berzaín. There is no presumption that a statutory cause of action includes an aiding-and-abetting liability corollary. To the contrary, the Supreme Court has held that courts should recognize aiding-and-abetting liability only with congressional direction. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994). The Court has explained that "when Congress enacts a statute under which a [private] person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* There is no Congressional direction instructing courts to recognize aiding-and-abetting liability under either the ATS or TVPA, and this Court therefore should not recognize such liability here. Moreover, customary international law does not recognize a ***civil*** claim for aiding-and-abetting liability within the meaning of *Sosa*. *See Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005). Because plaintiffs cannot identify a relevant treaty that embraces ***civil*** aiding-and-abetting norms, their aiding or abetting claim fails under *Sosa*.

Defendants recognize that this Circuit's ruling in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (per curiam), upheld a jury verdict, *inter alia*, on the basis that the jury could have found the defendant in that case liable for aiding-and-abetting a violation of customary international law. We respectfully suggest that *Cabello* would be decided differently today. The *Cabello* trial took place prior to the Supreme Court's decision in *Sosa*, and the

Eleventh Circuit did not even mention *Sosa* in its decision.

Even if aiding-and-abetting liability existed, plaintiffs do not state such a claim here. Nowhere do plaintiffs make any specific allegation whatsoever to support such a claim. First, for reasons stated in Parts II.B-F, *supra*, plaintiffs do not properly allege that a customary international law was violated under either the ATS or TVPA. Second, the allegations, if taken as true, do not allege that either defendant "knowingly" and "substantially assisted" human rights violations. *See Cabello*, 402 F.3d at 1158, 1161. And as to Minister Berzaín, at most the ACC alleges that he pointed from a helicopter during a military action against riotous protestors; nowhere does the ACC allege that Minister Berzaín pointed at, or directed the killing of, allegedly innocent civilians.

2. Plaintiffs cannot rely on command responsibility or ratification.

Plaintiffs contend that President Lozada and Minister Berzaín are liable under the theories of command responsibility and ratification. Command responsibility imposes liability on military commanders for their subordinates' violations of the laws of war. *See In re Yamashita*, 327 U.S. 1 (1946). It is a concept born in the laws of war and limited to violations of the laws of war. *See Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002) (requiring an allegation of "acts violative of the law of war"); L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 Transnat'l L. & Contemp. Probs. 319, 320 (1995) ("The concept of command responsibility . . . concerns the responsibility of a commander who has given an order to an inferior to commit an act which is in ***breach of the law of armed conflict*** or whose conduct implies that he is not averse to such a breach being committed." (emphasis added)). Yet there is no allegation that either defendant gave an order to breach the law of armed conflict. Further, plaintiffs cannot establish the existence of an independent basis for ratification liability in customary international law applicable to the defendants, and, in any event, do not allege that the defendants ratified anything other than the "avoid[ance of] the extreme use of force", a "respect[for] human and constitutional rights," Ex. 13 at 2, and the necessity "to declare a national emergency in order to safeguard the security and normal operation of the country's economic activities," Ex. 22 at 2.

3. Plaintiffs do not adequately allege any conspiracy.

Plaintiffs cannot rest on "a bare assertion of conspiracy." *Twombly*, 127 S. Ct. at 1966. Yet that is precisely what they attempt to do. Plaintiffs do not allege precisely with whom either

President Lozada or Minister Berzaín conspired or that they even conspired with each other. They do not identify when either defendant conspired with their coconspirators or what the purpose and plan of the alleged conspiracy was. Nor do they allege that the purpose or plan, whatever they believe it was, violated customary international law; that either defendant knew it violated customary international law; or that the violation, in fact, occurred. All of plaintiffs' allegations are equally consistent with President Lozada's directives (rescuing tourists and opening roads to La Paz) and independent action taken on the ground by military and police officers. Under *Twombly*, this is insufficient to allege that either defendant entered into a conspiracy.

Moreover, the text of the ATS does not include liability for civil conspiracy.[25] For the same reasons that *Central Bank* precludes civil aiding-and-abetting liability under the ATS, *see supra*, Part II.H.1, it also precludes civil conspiracy liability. *See, e.g.*, *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin,* 135 F.3d 837, 841 (2d Cir. 1998) (applying *Central Bank* to conspiracy claims under Rule 10b-5). Further, ***civil*** conspiracy is not a well-recognized norm in customary international law; any international norm is limited to the ***criminal*** context. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 7(1), U.N. Doc. S/RES/827 (May 3, 1993), *reprinted in* 32 I.L.M. 1159 (1993); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, E.A.S. 472, 82 U.N.T.S. 280. Even there, European concepts of conspiracy liability differ markedly from American concepts. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2784 (2006). Moreover, international "norms" against criminal conspiracy are limited to "conspiracy to commit genocide and common plan to wage aggressive war." *Id*. If criminal conspiracy liability, which plaintiffs seek to import to this civil context, is limited only to these two types of international law violations, then necessarily civil liability cannot be extended to the violations alleged in the ACC—which nowhere allege genocide or a plan by the government to

[25] The U.S. government has argued this very point. *See* Ex. 40. The Second Circuit's decision is pending. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016 (2d Cir.).

wage aggressive war.[26]

The Supreme Court has recently cautioned that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support" a claim. *Twombly*, 127 S. Ct. at 1967 (alteration in original) (quotation marks omitted). Such is precisely the situation here.

I. Plaintiffs' State Law Claims Should Be Dismissed.

The ACC attempts to ground jurisdiction over four state law claims, Counts IV-VII, in the supplemental jurisdiction statute, 28 U.S.C. § 1367 (2000). ACC ¶ 3. As an initial matter, should the Court dismiss Counts I–III for lack of subject-matter jurisdiction, the state law claims in Counts IV, V, VI and VII must be dismissed. *See* 28 U.S.C. § 1367(a); *Scarfo v. Ginsberg*, 175 F.3d 957, 962 (11th Cir. 1999). Should the Court instead dismiss Counts I–III for failure to state a claim, the Court should decline to exercise supplemental jurisdiction over the state law claims because it will have "dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3), and because no "substantial judicial resources" will have been expended, *Parker v. Scrap Metal Processors*, 468 F.3d 733, 746 (11th Cir. 2006).

Even were any of the federal law claims to survive, however, the Court should decline to exercise supplemental jurisdiction because the state law claims raise multiple "novel or complex issue[s] of State law," 28 U.S.C. § 1367(c)(1), namely whether state tort law should adjudicate liability as between citizens of a foreign state and a former government official.

Plaintiffs' state law claims should also be dismissed because foreign relations are exclusively the province of the federal government, specifically the Executive, and the Supreme Court has shielded this area from state interference. "The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003). The federal interest in the Executive controlling foreign relations as regards Bolivia, *see supra*, Part I.A, prevents this Court from placing the actions of the Lozada administration under the microscope of state tort law. *See Garamendi*, 539 U.S. at 419 n.11, 426 (Holocaust survivors

[26] While *Cabello* acknowledges the possibility of conspiracy liability under the ATS, *see* 402 F.3d at 1159, the intervening controlling precedent of both *Twombly* and *Hamdan* abrogates *Cabello*'s statement in this regard.

could not pursue state law claims against companies alleged to have defrauded Jewish refugees); *see also Miami Light Project v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1180 (S.D. Fla. 2000) (Moreno, J.) (striking down ordinance sanctioning companies doing business with Cuba).

Should the Court decide to reach the merits of Counts IV-VII, each should be dismissed for failure to state a claim.

1. Counts IV-VII against President Lozada fail under Maryland law.

Plaintiffs' suit against President Lozada was originally filed in the District of Maryland, which transferred it to this Court on April 15, 2008. After a case is transferred pursuant to 28 U.S.C. § 1404(a), the state law of the transferor forum continues to apply to all state law claims. *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) ("[T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue."); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 991 (11th Cir. 1982) (same); *James Ventures, LP v. TIMCO Aviation Servs., Inc.*, No. 06-60420-CIV, 2008 WL 895714, at *5 (S.D. Fla. Apr. 2, 2008) (Brown, M.J.) (same). This is because "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms," *Van Dusen*, 376 U.S. at 639, and the principle applies even when plaintiffs add new state law claims (or even new defendants) after the case is transferred, *see In re Ski Train Fire*, 257 F. Supp. 2d 717, 724 (S.D.N.Y. 2003). Here, the District of Maryland was the transferor forum, and Maryland state law must be applied to the state law claims alleged in the ACC—regardless of the fact that plaintiffs incorrectly denominated the claims as arising under Florida law.

Each of plaintiffs' state law claims fail under Maryland law. Count IV (wrongful death) fails because, as a condition precedent, such a suit must be brought within three years of the injury. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-904(g)(1); *Waddell v. Kirkpatrick*, 626 A.2d 353, 355 (Md. 1993) (describing § 3-904(g)(1)'s three-year period as condition precedent to suit).[27] This suit was filed on September 19, 2007, well over three years after the events of September and October 2003. Counts V, VI, and VII (IIED, NIED, and negligence) similarly

[27] Moreover, since siblings do not fall into the statutory delineation of potential wrongful death claimants in Maryland, plaintiffs Hernán Apaza Cutipa and Juan Patricio Quispe Mamani would lack standing even had the suit been filed within three years. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-904; *Munger v. United States*, 116 F. Supp. 2d 672, 675 (D. Md. 2000).

fail because they were not brought within the three-year limitations period. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101; *Singer Co., Link Simulation Sys. Div. v. Baltimore Gas & Elec. Co.*, 558 A.2d 419, 426 (Md. Ct. Spec. App. 1989) (applying § 5-101's three-year limitations period to negligence claim).[28]

2. Counts IV-VII against Minister Berzaín fail under Florida law.

Plaintiffs' state law claims also fail under Florida law.[29] As an initial matter, Count IV (wrongful death) is barred by a two-year statute of limitations. Fla. Stat. § 95.11(4)(d).

Count V (IIED) fails under Florida law because plaintiffs fail to adequately allege that Minister Berzaín intentionally or recklessly caused them any emotional harm, and because none of the pled conduct meets the definition of "outrageous conduct." *Williams v. Worldwide Flight Servs., Inc.*, 877 So.2d 869, 870 (Fla. Dist. Ct. App. 2004) (per curiam). Further, because (as the ACC concedes) the defendant's actions were an exercise of legal authority, his actions were privileged. Florida courts have repeatedly recognized that "[t]hose who pursue rights and objectives in a legally permissible manner cannot be held liable for intentional infliction of emotional distress, even if they know that their conduct will cause emotional distress to the plaintiff." *Gibbs v. Republic Tobacco, L.P.*, 119 F. Supp. 2d 1288, 1296 (M.D. Fla. 2000); *see also Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 279 (Fla. 1985).[30]

Counts VI (NIED) and VII (Negligence) both fail under Florida law because plaintiffs do not identify any duty of care owed by the defendant. Florida courts "'have consistently required plaintiffs suing governmental entities for negligence to allege and prove that the defendant

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[28] Even if the counts are construed as alleging violations of substantive Florida law, they are nonetheless time-barred because Maryland would apply its own procedural statute of limitations regardless of which state's substantive law applies. *See McVicar v. Standard Insulations, Inc.*, 824 F.2d 920, 921 (11th Cir. 1987) ("The transferee court must apply the law of the state in which the transferor court sits. This principle clearly applies to conflicts between statutes of limitations." (citation omitted)); *Cooper v. Berkshire Life Ins. Co.*, 810 A.2d 1045, 1053 (Md. Ct. Spec. App. 2002) ("The statute of limitations defense, asserted as to all the counts, is governed by the law of the forum because it is procedural.").

[29] Should the Court decide that Counts IV–VII against President Lozada are governed by Maryland law but not time-barred, or otherwise are governed by Florida substantive law, President Lozada hereby incorporates those defenses argued by Minister Berzaín.

[30] Count VI also fails because plaintiffs' conclusory allegations of physical injuries accompanying their emotional distress are nowhere supported by the factual allegations of the ACC. *See Willis v. Gami Golden Glades, LLC*, 967 So.2d 846, 850 (Fla. 2007).

breached a common-law or statutory tort duty owed to the plaintiff individually and not a tort duty owed to the public generally.'" *Wallace v. Dean*, 970 So.2d 864, 866–67 (Fla. Dist. Ct. App. 2007) (per curiam) (*quoting Holodak v. Lockwood*, 726 So.2d 815, 816 (Fla. Dist. Ct. App. 1999) (per curiam)). Yet plaintiffs affirmatively allege that the duty the defendant owed the plaintiffs was one to "ensure the protection of civilians." ACC ¶ 82. Assuming *arguendo* that the defendant bore such a duty, it was owed to the Bolivian public generally. And, in any event, Florida does not permit its own officials to bear liability for discretionary acts. *See Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So.2d 912, 918 (Fla. 1985). Allowing Counts VI and VII to proceed would impose a legal burden on the defendant from which Florida protects its own government officials.

CONCLUSION

With respect, the ACC should be dismissed with prejudice.

Respectfully submitted,

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Dated: May 30, 2008

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2008, I electronically filed the foregoing motion with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on the counsel listed on the attached Service List by electronic mail (in pdf format).

/s/ Eliot Pedrosa

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