UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

PLAINTIFFS' SURREPLY IN OPPOSITION TO JOINT MOTION TO DISMISS

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In their Reply in Support of Joint Motion to Dismiss ("Reply"), Defendants argue that pending legislation in Bolivia provides Plaintiffs with an adequate alternative domestic remedy. Reply at 18. Defendants also argue that events in Bolivia following Defendant Sánchez Berzaín's announcement that he had received political asylum in the United States support their claim that the political question doctrine is implicated in Plaintiffs' suit. Defendants did not raise these issues in their opening memorandum.[1] Because Defendants are raising the issue for the first time in their Reply, the Court should decline to consider it or permit Plaintiffs to submit this surreply.[2] *See Bauknight v. Monroe County, Fla.*, 446 F.3d 1327, 1330 n.2 (11th Cir. 2006).

Even assuming the pending legislation were properly before the Court, Defendants' argument is erroneous. Defendants cite no authority for the proposition that Plaintiffs must exhaust remedies that did not exist at the time they filed their complaints and are not presently available. Further, Defendants cite no case holding that payments by third parties constitute alternative adequate relief to the Torture Victim Protection Act ("TVPA"), which was intended, in part, to punish the wrongdoer and deter future extrajudicial killings.

Defendants also err when they argue that demonstrations protesting the United States' grant of asylum to Defendant Sánchez Berzaín is evidence that this case will disrupt diplomatic relations between Bolivia and the United States. The demonstrations, which occurred nine months after this suit was filed, concern only Defendant Sánchez Berzaín's conduct, not the fact of this suit or its subject matter.

In a footnote to their Reply, Defendants also suggest for the first time that this Court should apply the exhaustion requirement to Plaintiffs' claims under the Alien Tort Statute ("ATS"). Reply at 18 n.14. Here, too, Defendants err because Eleventh Circuit precedent clearly establishes that there is no exhaustion requirement under the ATS. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005).

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[1] The introduction of the still pending legislation and the announcement in Bolivia of the grant of asylum to Defendant Sánchez Berzaín both occurred after Defendants' opening memorandum was filed. Defendants failed to seek leave to brief these additional issues and instead impermissibly added these arguments to their Reply. *See* L.R. 7.1.C ("reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition…").

[2] Defendants previously argued that previously-enacted Bolivian legislation, which provided emergency relief to the victims of Defendants' human rights violation, was an adequate alternative remedy. Joint Motion to Dismiss at 35.

I. DEFENDANTS' NEW ARGUMENTS SHOULD NOT BE CONSIDERED BECAUSE THEY ARE BEING RAISED FOR THE FIRST TIME ON REPLY DENYING PLAINTIFFS AN OPPORTUNITY TO RESPOND.

A party may not raise in a reply brief evidence and arguments that were not raised in its opening brief. *Bauknight*, 446 F.3d at 1330 n.2; *see also Bruce v. PharmaCentra, LLC*, No. 1:07-CV-3053-TWT, 2008 WL 1902090, *1 (N.D. Ga. Apr. 25, 2008); *Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 317 n.89 (S.D. Ala. 2006). The policy supporting the prohibition against raising new arguments in a reply brief was explained in *Hardy v. Jim Walter Homes, Inc.*, No. 06-0687-WS-B, 2008 WL 906455 *8 (S.D. Ala. Apr. 1, 2008):

> In order to avoid a scenario in which endless sur-reply briefs are filed, or the Court is forced to perform a litigant's research for it on a key legal issue because that party has not had an opportunity to be heard, or a movant is incentivized to save his best arguments for his reply brief so as to secure a tactical advantage based on the nonmovant's lack of opportunity to rebut them, this Court does not consider arguments raised for the first time in a reply brief.

2008 WL 906455 at *8.

Here, Defendants did not identify as new the evidence and argument they now proffer in their Reply, and failed to seek leave of the Court to do so. If the Court considers Defendants' new evidence and arguments, then Plaintiffs' respectfully request that the Court consider the arguments set forth by Plaintiffs below, which demonstrate that Defendants' position on exhaustion, political question, and ATS exhaustion are untenable.

II. PLAINTIFFS HAVE NO OBLIGATION UNDER THE TVPA TO EXHAUST REMEDIES NOT AVAILABLE AT THE TIME THEY FILED SUIT AND ARE NOT AVAILABLE NOW.

To prevail on their TVPA defense of failure to exhaust, Defendants have the burden of showing with specificity that Plaintiffs did not avail themselves of local remedies that existed when they filed. In *Jean*, the Eleventh Circuit looked to the legislative history of the TVPA to determine the scope of the exhaustion requirement. 431 F.3d at 782. The Court noted that the Senate Committee considered that "the procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use." S. Rep. No. 102-249, at 9-10. Thus, Defendants bear the burden of proving that <u>at the time</u> the complaint was filed, a remedy existed. This is consistent with the more general

principle that a complaint is measured by the circumstances at the time it is filed. *See, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (sovereign immunity is determined by a defendant's status at the time of suit, not at the time of the events at issue); *Republic of Austria v. Altmann*, 541 U.S. 677, 708 (2004) (Breyer, J., concur.) (same); *McGill v. Parsons*, 532 F.2d 484, 489 (5th Cir. 1976) (appropriateness of the class action should be judged at the time the suit is instituted); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (class representative standing); *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 459 n.1 (1980) (jurisdiction turns on the facts existing at the time the suit commenced); *Meadows v. Legursky*, 904 F.2d 903 (4th Cir. 1990) (federal habeas statute, 28 U.S.C. § 2254(b),(c) requires a dismissal for failure to exhaust if an effective state remedy is available at the time of petition's filing).

Applying this principle, Plaintiffs have no obligation to exhaust remedies under the pending Bolivian legislation. The legislation was not available at the time Plaintiffs filed suit. Furthermore, at this stage, the legislation has merely been introduced. It is not presently available—and it may never be.

III. THE PURPOSE OF THE TVPA, TO PUNISH AND THEREBY DETER THE PERPETRATOR, WOULD BE IMPAIRED IF A PAYMENT BY A THIRD PARTY WERE CONSIDERED AN ADEQUATE ALTERNATIVE REMEDY.

In the seminal case *Xuncax v. Gramajo,* 886 F.Supp. 162 (D. Mass. 1995), the court held the TVPA "was designed not simply to compensate the victims of torture, but with an eye toward eradicating the evil altogether." 886 F.Supp. at 199-200. The purpose of the TVPA "to redress and, hence, deter" also was recognized in *Wiwa v. Royal Dutch Petrol. Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, *16 (S.D.N.Y. 2002). Another related purpose of the TVPA is to "mak[e] sure that torturers and death squads no longer have a safe haven in the United States." *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1335 (S.D. Fla. 2002), *quoting* S. Rep. No. 102-249, at *3; *see also Doe v. Qi*, 349 F. Supp. 2d 1258, 1279 (N.D. Cal. 2004) ("The purpose of the statute, as stated by both the House and Senate reports, is to unambiguously provide a federal cause of action against the perpetrators of such abuse ....").

Even assuming that the bill pending before the Bolivian Congress will be enacted and that it could retroactively impose on Plaintiffs an obligation they did not have when they filed suit, compensation from the Bolivian government will not provide an adequate alternative remedy as contemplated in the TVPA. To conclude that that these potential payments constitute an alternative

remedy would be to disregard the purpose of the TVPA to punish and deter. *See* Opposition to Motion to Dismiss ("Opp.") at 43.

Defendants also argue that the TVPA did not contemplate a judicially-based remedy. Reply at 19. That is incorrect, and Defendants' citation to *Corrie v Caterpillar*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005), *aff'd* 503 F.3d 974 (9th Cir. 2007) certainly supports no such principle. Congress intended that, consistent with the overall purpose of the Act, the alternative remedy be one directed against the perpetrator in the national courts where the injury occurred. This understanding is confirmed by the legislative history. The House Report states, "This [exhaustion] requirement ensures that U.S. courts will not intrude in cases more appropriately handled by courts where the alleged torture or killing occurred." H.R. Rep. No. 102-367 at 5, *reprinted in* 1992 U.S.C.C.A.N. at 87-88 (emphasis added); *see also* S. Rep. No. 102-249 at 10 ("this legislation involves international matters and judgments regarding the adequacy of procedures in foreign courts")(emphasis added); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1117 (E.D. Cal. 2004) ("Plaintiff justifiably believes that a fair and impartial hearing could not be received in the Courts of El Salvador") (emphasis added); *see also Corrie*, 403 F. Supp. 2d at 1026 (finding that "Israel's courts are generally considered to provide an adequate alternative forum"). The alternative remedy contemplated by the TVPA is a suit against the perpetrators in national courts where the injury occurred. Whether the remedy is adequate is evaluated by looking to international law principles. *See* Opp. at 44. The TVPA's exhaustion requirement does not provide a free pass to human rights abusers to reside here and avoid liability for their crimes.

IV. PROTESTS SPARKED BY DEFENDANT'S OWN CONDUCT ARE NOT EVIDENCE THAT THIS CASE IMPLICATES THE POLITICAL QUESTION DOCTRINE.

In support of their political question argument, Defendants erroneously rely on recent protests in Bolivia triggered by Defendant Sánchez Berzaín's public announcement on Bolivian radio that the United States had granted him asylum. The political question analysis focuses on six factors announced in *Baker v. Carr*, 369 U.S. 186 (1962). Defendants do not identify any specific *Baker* factor to which this evidence is relevant but instead suggest that it proves that the lawsuit will disrupt diplomatic relations the United States and Bolivia. Reply at 8. Defendants ignore the fact that it was not the lawsuit but Defendant's own announcement that caused the uproar. This case was filed in September of 2007, but the protests Defendants describe took

place on June 9, 2008, nine months later. With regard to the effect of the lawsuit on the U.S-Bolivian relationship, the Bolivian Minister of Foreign Affairs and Culture issued a letter to the State Department ten days after the June 9, 2008 protests, stating that this case would not cause any impact on U.S.-Bolivian relations. *See* Pl. Ex. D. Of course, the newspaper articles are not admissible for the facts reported in them. *U.S. v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005). Even assuming that the evidence were admissible, the protests over Sánchez Berzaín's public announcement does not support the application of the political question doctrine to this case.

V. THERE IS NO EXHAUSTION REQUIREMENT APPLICABLE TO THE ATS.

The Eleventh Circuit has indisputably held, post-*Sosa*, that the ATS does not require plaintiffs to exhaust remedies. *Jean*, 431 F.3d at 781; *Saravia*, 348 F. Supp. 2d at 1157–58. Ignoring *Jean*, Defendants suggest that *Sosa* opens the possibility of requiring exhaustion. Rather, *Sosa* merely noted that an *amicus* brief submitted in that case had advocated an exhaustion requirement, and suggested in *dicta* that it would consider that argument in an appropriate case. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). The *dicta* from a Supreme Court decision that it might consider the issue of exhaustion in an "appropriate case" does not, however, "upend settled circuit law." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007). The holdings of *Jean* remain binding Eleventh Circuit precedent.

VI. CONCLUSION

In sum, Defendants fail to demonstrate that there was any adequate and available remedy for Plaintiffs in Bolivia and there is no exhaustion requirement under the ATS. The motion to dismiss should be denied.

Dated: August 5, 2008
Miami, Florida

Respectfully submitted,

By: /s/ Ira J. Kurzban

Ira J. Kurzban (Fla. Bar No. 225517)
KURZBAN, KURZBAN, WEINGER & TETZOLI, P.A.
Plaza 2650
2650 SW 27th Avenue, 2nd Floor
Miami, FL 33133
Tel: (305) 443-4675
Fax: (305) 444-3503
E-mail: ira@kkwtlaw.com

Attorneys for Plaintiffs

Attorneys for Plaintiffs

Judith Brown Chomsky (*pro hac vice*)
CENTER FOR CONSTITUTIONAL RIGHTS
Post Office Box 29726
Elkins Park, PA 19027
Tel: (215) 782-8367
Fax: (215) 782-8368
E-mail: jchomsky@igc.org

Jennifer Green
Beth Stephens
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
Seventh Floor
New York, NY 10012
Tel: (212) 614-6431
Fax: (212) 614-6499
E-mail: jgreen@ccr-ny.org

David Rudovsky (*pro hac vice*)
KAIRYS, RUDOVSKY, MESSING & FEINBERG LLP
718 Arch Street, Suite 501 South
Philadelphia, PA 19016
Tel: (215) 925-4400
Fax: (215) 925-5365
E-mail: drudovsk@law.upenn.edu

James L. Cavallaro (*pro hac vice*)
Tyler R. Giannini (*pro hac vice*)
INTERNATIONAL HUMAN RIGHTS CLINIC, Human Rights Program
Harvard Law School
Pound Hall 401, 1563 Massachusetts Avenue
Cambridge, MA 02138
Tel: (617) 495-9362
Fax: (617) 495-9393
E-mail: jcavalla@law.harvard.edu
E-mail: giannini@law.harvard.edu

Paul Hoffman
SCHONBRUN, DE SIMONE, SEPLOW, HARRIS & HOFFMAN, LLP
723 Ocean Front Walk
Venice, CA 90201
Tel: (310) 396-0731
Fax: (310) 399-7040
E-mail: hoffpaul@aol.com

Steven H. Schulman (*pro hac vice*)
John L. Van Sickle (*pro hac vice*)
Meredith L. Bentley (*pro hac vice*)
AKIN GUMP STRAUSS HAUER & FELD LLP
Robert S. Strauss Building
1333 New Hampshire Avenue NW
Washington, DC 20036
Tel: (202) 887-4000
Fax: (202) 887-4288
E-mail: sschulman@akingump.com
E-mail: jvansickle@akingump.com
E-mail: mbentley@akingump.com

Michael C. Small (*pro hac vice*)
Jeremy F. Bollinger (*pro hac vice*)
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
Tel: (310) 229-1000
Fax: (310) 229-1043
E-mail: msmall@akingump.com
E-mail: jbollinger@akingump.com

CERTIFICATE OF SERVICE

I hereby certify that that on August 5, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jeremy F. Bollinger
Jeremy F. Bollinger

SERVICE LIST

Mark P. Schnapp, Esq.
Eliot Pedrosa, Esq.
Andres N. Rubinoff, Esq.
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0743
schnappm@gtlaw.com
pedrosac@gtlaw.com
rubinoffa@gtlaw.com

Gregory B. Craig
Howard W. Gutman
Ana C. Reyes
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
gcraig@wc.com
hgutman@wc.com
areyes@wc.com

Alan M. Dershowitz
Jack Landman Goldsmith III
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617 (Dershowitz)
(617) 495-9170 (Goldsmith)
dersh@law.harvard.edu
jgoldsmith@law.harvard.edu