

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

ELOY ROJAS MAMANI, ETELVINA )  
RAMOS MAMANI, SONIA ESPEJO )  
VILLALOBOS, HERNÁN APAZA CUTIPA, )  
TEÓFILO BALTAZAR CERRO, JUANA ) **Case No. 08-21063-CV-COHN**  
VALENCIA DE CARVAJAL, )  
HERMÓGENES BERNABÉ CALLIZAYA, )  
GONZALO MAMANI AGUILAR, AND )  
FELICIDAD ROSA HUANCA QUISPE )

Plaintiffs, )

v. )

GONZALO DANIEL SÁNCHEZ DE )  
LOZADA SÁNCHEZ BUSTAMANTE, )

Defendant. )

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ELOY ROJAS MAMANI, ETELVINA )  
RAMOS MAMANI, SONIA ESPEJO )  
VILLALOBOS, HERNÁN APAZA CUTIPA, )  
TEÓFILO BALTAZAR CERRO, JUANA ) **Case No. 07-22459-CV-COHN**  
VALENCIA DE CARVAJAL, )  
HERMÓGENES BERNABÉ CALLIZAYA, )  
GONZALO MAMANI AGUILAR, AND )  
FELICIDAD ROSA HUANCA QUISPE )

Plaintiffs, )

v. )

JOSÉ CARLOS SÁNCHEZ BERZAÍN, )

Defendant. )

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**PLAINTIFFS' OPPOSITION TO DEFENDANTS'  
JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT**

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## I. INTRODUCTION

Plaintiffs are the family members of eight unarmed Bolivian citizens gunned down in their homes, fields, or neighborhoods in September and October 2003. Those killed were innocent victims of Defendants' calculated plan to kill civilians in order to suppress popular opposition to their political and economic policies. Plaintiffs seek compensatory and punitive damages from the architects of this campaign of violence, Defendants Gonzalo Sánchez de Lozada ("Sánchez de Lozada"), former president of Bolivia, and José Carlos Sánchez Berzaín ("Sánchez Berzaín"), former minister of defense. Both men fled to the United States to escape criminal prosecution in Bolivia in 2003 and refuse to return to Bolivia to face trial. Accordingly, this is the only jurisdiction where they can be made to answer for their tortious conduct.

Defendants came to power in Bolivia in 2002 on a self-assigned mission to remake the Bolivian economic and political systems. Defendants knew that, in the past, unpopular government policies had often triggered widespread opposition in the form of large demonstrations that included blocking roads. They anticipated that their plans would trigger such protests. They also knew that, historically, Bolivian governments had modified unpopular policies in response to demonstrations. In an effort to put an end to this pattern, they agreed to a lethal, unlawful response: they would use military force to quell the demonstrations, killing hundreds or thousands of civilians, until the population was sufficiently terrorized to abandon the effort to use demonstrations to impact policy. Civilian deaths and injuries were not the incidental or random consequence of these military operations, but the intended result of a systematic plan in which military sharpshooters repeatedly shot and killed or injured civilians, in multiple locations over many weeks. Defendants' callous attitude toward the lives of the Bolivian civilians is reflected both in their repeated agreement that thousands of deaths were a reasonable cost of moving ahead with their economic policies and their expressed readiness to shoot to kill the "Indians"<sup>2</sup> who were blocking roads.

District Court Judge Jordan denied Defendants' motion to dismiss the then-operative Complaint (the Corrected Amended Consolidated Complaint or "FACC"), Order, *Mamani v. Berzain*, Nos. 07-22459, Dkt. #135 & 08-21063, Dkt. #120 (S.D. Fla. Nov. 25, 2009), concluding that Plaintiffs had adequately alleged Defendants' liability for extrajudicial killings,

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<sup>2</sup> Indigenous people constitute a majority of the Bolivian population. See The CIA World Factbook at <https://www.cia.gov/library/publications/the-world-factbook/geos/bl.html>.

crimes against humanity, and wrongful death based on the allegation that Defendants had ordered the Bolivian armed forces to target unarmed civilians. On an interlocutory appeal decided after the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Eleventh Circuit held that the FACC did not contain sufficient factual detail to show that Defendants were responsible for unlawful killings. *Mamani v. Berzain*, 654 F.3d 1148, 1153 (11th Cir. 2011).

Plaintiffs filed an amended Complaint ("Second Amended Complaint," or "SAC") in June 2013 that contains copious new factual allegations directly showing that Defendants developed and executed an unlawful plan that led to the deaths of Plaintiffs' family members. These detailed allegations were not part of the FACC and respond directly to the omissions identified by the Eleventh Circuit.<sup>3</sup> The new allegations in the SAC show that the Defendants (1) agreed in advance to use the military to kill thousands of civilians; (2) authorized the Bolivian armed forces to use unlawful military force against civilian demonstrators; (3) closely supervised the armed forces as they attacked civilian communities with illegal, lethal military force, resulting, as Defendants intended, in dozens of deaths and hundreds of injuries; (4) knew about the unlawful deaths and injuries, but rejected multiple pleas that they halt the use of lethal military force against civilians; (5) failed to investigate the shootings of civilians, repeatedly praised the armed forces after the deaths and injuries, and acknowledged that they bore responsibility for the military's actions; and (6) as an intended result of Defendants' actions, the armed forces killed or injured hundreds of civilians, including Plaintiffs' family members. The new allegations provided by the SAC state claims of extrajudicial killing, crimes against humanity, and wrongful death sufficient to survive Defendants' Motion to Dismiss (MTD).

Defendants' response to these new allegations is to ignore them and substitute their own version of the facts. First, their MTD ignores the specific new facts in the SAC. Indeed, the MTD reads as if it were filed in response to the old, superseded FACC. Second, as they did in the first motion to dismiss, Defendants attempt to tell a different story and to defend their actions

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<sup>3</sup> Many new facts became available in 2011 from documents and testimony furnished by witnesses at a criminal trial in Bolivia at which seven of Defendants' former colleagues were convicted of genocide based on the events at issue in this case. See SAC ¶¶ 166-171.

by introducing new facts.<sup>4</sup> Their impermissible challenge to the facts alleged by Plaintiffs cannot be obscured by labeling their version of the facts as “Background,” or by asking this court to take judicial notice of hearsay statements in documents that are not even admissible evidence, much less appropriate for judicial notice.

Defendants also raise two issues that were not addressed by the Eleventh Circuit. First, they misstate the holding of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which does not mandate dismissal of claims like those here, in which perpetrators of egregious human rights violations have escaped accountability in their home country by fleeing to seek safe haven in the United States. Second, Defendants wrongly attempt to evade liability under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 Note, by claiming that humanitarian payments made by the Bolivian government extinguish their individual liability.

As detailed below, Defendants’ motion to dismiss the SAC should be denied.

## II. PROCEDURAL HISTORY

Plaintiffs initially filed suit against Sánchez de Lozada in the District of Maryland and against Sánchez Berzaín in the Southern District of Florida, alleging claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the TVPA. *Mamani v. Bustamante*, 547 F. Supp. 2d 465 (D. Md. 2008). On Defendant Sánchez de Lozada’s motion, the case against him was transferred to this Court and the two cases were consolidated for pretrial purposes. *Id.* at 468. Plaintiffs then filed an Amended Consolidated Complaint which added common law claims, including a claim for wrongful death. This Court, per Judge Jordan, granted Defendants’ motion to dismiss the TVPA claim without prejudice. *Mamani v. Sánchez Berzaín*, 636 F. Supp. 2d 1326 (S.D. Fla. 2009). The Court then held that the Defendants were not entitled to immunity, that neither the political question nor act of state doctrines required dismissal, and that Plaintiffs had stated claims for extrajudicial killing, crimes against humanity, and wrongful death. 654 F.3d. at 1151 n.2. Additional ATS and state law claims were dismissed. *Id.*

Defendants appealed the denial of immunity as of right, and this Court and the Eleventh Circuit certified an interlocutory appeal on the political question doctrine and failure to state a claim. *Mamani*, 654 F.3d. at 1151. The Eleventh Circuit affirmed the denial of immunity and the

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<sup>4</sup> As explained below and in Plaintiffs’ concurrently filed Opposition to Defendants’ Motion for Judicial Notice (RJN Opp.), the bulk of the documents referenced are irrelevant, inadmissible, and/or inappropriate at this state of the proceedings.

rejection of the application of the political question doctrine, 654 F.3d. at 1151 n.4, but reversed the denial of the motion to dismiss for failure to state a claim. *Id.* at 1151.

On remand, this Court stayed further proceedings pending the Supreme Court's decision in *Kiobel*. After that ruling, the Court lifted the stay and granted Plaintiffs' unopposed Motion for Leave to Amend. On June 24, 2013, Plaintiffs filed a completely revised Second Amended Consolidated Complaint, with extensive new factual allegations based on information that was not available at the time the earlier complaints were filed.

Defendants' motion is based on *Kiobel*, failure to state a claim, and exhaustion.

### III. LEGAL STANDARDS

In reviewing Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim,<sup>5</sup> the Court must accept the facts alleged in the SAC as true and construe them in the light most favorable to Plaintiffs. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321-22 (11th Cir. 2012).<sup>6</sup> As the Eleventh Circuit explained in the interlocutory appeal in this case (654 F.3d at 1153), after disregarding conclusory legal allegations, the court must determine whether the complaint "contain[s] sufficient factual matter, *accepted as true*, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Plausible" does not, however, equal "probable." *See Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678. A plausible claim permits the court to draw "the reasonable inference that the defendant is liable for the misconduct alleged." *Mamani*, 654 F.3d at 1153. A court should look only to the complaint itself and documents referenced in it. *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007).

The issue of extraterritoriality addressed in *Kiobel* is not a question of subject matter jurisdiction. The scope of a statute's reach, including whether it reaches extraterritorial conduct, is a merits issue. *See Kiobel*, 133 S. Ct. at 1665 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010)). Thus the applicability of *Kiobel* raises a question under Rule 12(b)(6) rather than Rule 12(b)(1). *See Hrivnak v. NCO Portfolio Mgmt., Inc.* 719 F.3d 564, 569 (6th Cir. 2013).

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<sup>5</sup> Although Defendants styled their motion as both a Rule 12(b)(1) and 12(b)(6) motion, their challenge to the sufficiency of the complaint and the exhaustion requirement do not address subject matter jurisdiction. *See RJN Opp.* at 2-3 & n.3.

<sup>6</sup> The court may not disregard properly pled factual allegations because it concludes that proof of those facts will be difficult. *Twombly*, 550 U.S. at 563 n.8.

Failure to exhaust domestic remedies is an affirmative defense as to which Defendants bear a “substantial” burden of proof. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005).<sup>7</sup>

#### IV. STATEMENT OF FACTS<sup>8</sup>

Plaintiffs are the relatives of eight people killed in September and October 2003 by Bolivian soldiers acting under Defendants’ orders and according to Defendants’ plan. Plaintiffs filed this lawsuit in the United States where Defendants now live, SAC ¶¶ 13, 15, because the Defendants fled Bolivia to avoid criminal prosecution, SAC ¶ 164, and now are only amenable to suit in the United States, Declaration of Paulino L. Verástegui Palao (Verástegui Decl.) at ¶¶ 6, 19 (stating that Bolivia does not permit trials *in absentia*) & Ex. D (attached as exhibit to Plaintiffs’ Compendium of Evidence (Pl. Ex.)).

##### A. Defendants’ Plan.

Even before they took office in August 2002, Defendants made two decisions that would lead inexorably to the deaths of Plaintiffs’ decedents. The first decision was lawful: to push ahead with unpopular economic and political programs that they anticipated would be met by widespread popular opposition. SAC ¶¶ 2, 27, 29, 30, 33, 34. The second decision, however, was unlawful: in order to prevent civilian protests from impeding their programs, Defendants planned to use unlawful military force to kill hundreds or thousands of civilians in order to terrorize the population into abandoning those protests. SAC ¶¶ 3, 4, 30.

Sánchez de Lozada received 22 percent of the vote in the June 2002 presidential election and appointed Sánchez Berzaín as Minister of the Presidency. SAC ¶ 32. They assumed power in August 2002 knowing that their plan to export natural gas through Chile, a major focus of their economic policies, would trigger widespread opposition. SAC ¶ 33-34. In 2001, prior to their election, Defendants agreed that, when they took power, they would not negotiate with

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<sup>7</sup> An alleged failure to exhaust domestic remedies does not challenge the court’s subject matter jurisdiction over a TVPA claim. *See* RJN Opp. at 3 n.3.

<sup>8</sup> In a section of the MTD labeled “Background,” Defendants present a distorted and irrelevant narrative of purported facts that contradicts the allegations of the SAC. They attempt to support that narrative by attaching hundreds of pages of documents to their motion. As explained in the RJN Opp., most of the submitted documents are irrelevant, given that, for the purposes of this motion, the well-pleaded facts detailed in the Complaint must be taken as true. *See supra*, Legal Standards.

In addition, most of the documents contain inadmissible hearsay, and much of that hearsay is based on preliminary, uncorroborated reports that the U.S. Department of State later recognized required further investigation.

protestors and modify their policies, as prior administrations had done. SAC ¶¶ 29, 30. Instead, they agreed to respond to protests with military force, including highly trained troops willing and able to kill large numbers of civilians. SAC ¶ 30. They explicitly agreed that that they would have to kill 2,000 or 3,000 people in order to sufficiently terrorize the population and quash opposition to their plans. SAC ¶ 30. Defendants continued such discussions after they took office, speculating that it might be necessary to kill thousands of people to suppress popular dissent. SAC ¶¶ 31, 50. As detailed below, Defendants carried out their plan to target and kill civilians until massive public opposition forced them from office, out of Bolivia, and into the United States, where they have resided ever since.

**B. Defendants Distort Military Rules To Authorize Lethal Force Against Civilians.**

Although their 2002 term began without protests, Defendants immediately took steps to implement their plan. Under the authority of Sánchez de Lozada, the Armed Forces issued a secret Manual for the Use of Force that assigned to the Armed Forces the responsibility for what the Manual termed “Counter-Subversive Operations,” including responding to “marches” and “demonstrations,” MTD Ex. 3, III, I A, and equated “social conflict” with “subversion.” SAC ¶ 37. By labeling even peaceful, public protests as “subversion,” Defendants sought to justify the unlawful use of lethal military force against unarmed civilians during political protests, an intentional plan that became explicit in their subsequent orders.<sup>9</sup>

In January 2003, Sánchez de Lozada promulgated a second secret plan, the Republic Plan, which instructed the military to respond to political protests, including blocked roads, by applying “principles of mass and shock,” *see* MTD, Ex. 4 III(A), tactics of war that call for “application of the maximum combat force . . . to obtain superiority over the enemy.” *See* Bolivian Military Terminology, Pl. Ex. A at 255 (“mass” military tactics). The Republic Plan authorized full-scale combat operations, including the use of Special Forces, to conquer Bolivian

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<sup>9</sup> Defendants accurately point out that the Manual also cited international law and human rights norms, MTD at 9, but they ignore the document’s operational core: the authorization to use *lethal military force and military tactics* against civilians, an authorization that was implemented through a series of subsequent decrees. Defendants also ignore allegations that they did not pursue the lawful approaches called for by the Manual. For example, Defendants cite to the Manual’s instruction that “[t]he use of legal violence is only justified in situations of extreme necessity, and as a last resort when all appropriate methods of persuasion have failed.” MTD (quoting Ex. 3 at 14). However, the SAC provides specific examples of multiple situations in which Defendants rejected negotiations. SAC ¶¶ 24, 42-45, 64, 88, 105. *See also* SAC ¶56.



civilians as if they were armed, enemy combatants. SAC ¶ 38. The result was to authorize the military to shoot and kill unarmed civilians independent of any legitimate law enforcement needs. *Id.* Defendants knew that there were no armed guerrilla groups operating in Bolivia and no foreign enemy that would have justified deployment of the Armed Forces using military tactics under Bolivian or international law. SAC ¶¶ 41, 52, 72, 84.

### C. Defendants' Reaffirmed Commitment To Their Unlawful Plan.

In January and February 2003, Defendants began to implement their plan, refusing to negotiate with demonstrators on two separate occasions. SAC ¶¶ 42-46. Instead, they sent the Armed Forces to use lethal force, resulting in 32 civilian deaths and 214 injured. *Id.*<sup>10</sup> As a result of widespread criticism of the government's actions, Defendant Sánchez Berzaín was forced to resign from his position in the Cabinet. SAC ¶ 47.

In the following months, people inside and outside the government repeatedly warned Sánchez de Lozada that his use of military force against civilians was unlawful and dangerous and would lead to a many deaths, SAC ¶¶ 47-49; advised him that there were effective, lawful, non-violent means to respond to civilian protests, SAC ¶¶ 44, 48; and urged him to change course, SAC ¶ 48, but he refused to alter his plans, SAC ¶¶ 50-51. Instead, Defendants again discussed how many deaths would be sufficient to suppress popular dissent, SAC ¶ 50, and took additional steps to prepare the ground for those killings. SAC ¶¶ 55, 57-58. Defendants justified their military plans with knowingly false claims that armed groups threatened the country. SAC ¶ 41. *See also* SAC ¶ 49, 72, 84.

Sánchez de Lozada brought Sánchez Berzaín back into the government as Minister of Defense in August 2003. SAC ¶ 55. In early September 2003, farmers, union members, and students began peaceful protests around the country, including a hunger strike; the protestors' attempt to negotiate over their demands was rejected. SAC ¶ 56.<sup>11</sup> Instead, on September 9,

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<sup>10</sup> Defendants offer their own version of these events, improperly relying on extrinsic evidence not properly before the Court. MTD at 10. Moreover, they misuse their own documents, ignoring evidence that their military forces engaged in unlawful conduct in January and February 2003. *Compare* MTD at 10 *with* MTD Ex. 5 at 005 and MTD Ex. 6 at 1-2, 6, 10-12. *See also* SAC ¶ 46.

<sup>11</sup> Protests were spurred in part by opposition to the plan to export natural gas through Chile, as even top military and civilian leaders advised against it. SAC ¶ 53(b). On September 13,

Sánchez Berzaín set up a “war room,” SAC ¶ 57, and on September 11, the Commander in Chief of the Armed Forces declared a “Red Alert,” the practical equivalent of a state of war in which the Armed Forces are engaged in armed conflict against “enemy combatants” and are authorized to shoot and kill the “enemy.” SAC ¶ 58. No enemy combatants or “enemy” forces were present in Bolivia. SAC ¶ 79. As a result, armed military units began to patrol throughout the country, authorized to shoot and kill Bolivian civilians as if they were at war with them. Throughout September and October 2003, Defendants employed the military, with its overwhelming firepower, to maintain law and order, rather than allowing the police, which had extensive training and experience in civil disturbances, to respond to the demonstrations. *Id.* ¶¶ 60-145.

**D. Implementation Of The Plan Under The Defendants’ Operational Control, Pursuant To Their Orders, And With Their Full Knowledge.**

In mid-September, days after Defendants had declared the Red Alert, protesters blocked the road to Sorata, a small town several hours drive from La Paz. SAC ¶¶ 58, 62. Defendants seized upon the fact that foreigners were among those unable to leave Sorata as a pretext to implement their plan to use military violence to kill civilians. *Id.* ¶ 62.<sup>12</sup>

Both Defendants were personally involved in planning and directing the operation. SAC ¶¶ 63, 65, 67, 72, 83. At a meeting chaired by Sánchez Berzaín, high-ranking military officials, acting pursuant to an order from Sánchez de Lozada, ordered a military force to clear the road to Sorata. SAC ¶ 63. Defendants remained in constant telephone communications with each other throughout the military operation. SAC ¶ 65.

Early on the morning of September 20, the military convoy heading to Sorata entered the town of Warisata, a village on the road between La Paz and Sorata, and quickly cleared the roads, but also fired at, threatened, and beat villagers although no one was shooting at them. SAC ¶ 66. The convoy then continued on to Sorata. *Id.* ¶ 67. Sánchez Berzaín flew by helicopter to Sorata and, as he left, shouted at the gathering crowd, “Get those Indians off the

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Sánchez de Lozada announced that the contract to implement the plan would be signed shortly. SAC ¶ 59.

<sup>12</sup> Defendants sent military forces to open the roads at a time when non-military options, including negotiation with the protestors were available. SAC ¶¶ 39, 64, MTD Ex. 3, II, I(A). Defendants’ unsupported, self-serving claim that negotiations had been unsuccessful, MTD at 11, is improper at this stage of the proceedings, and, in any event, refuted by facts alleged in the SAC, SAC ¶ 64.

roads or I'm going to put a bullet in them.” *Id.* ¶ 67. Buses with the foreigners who had been in Sorata traveled back through the rural area between Sorata and Warisata accompanied by troops who fired rounds of ammunition at people running for safety in the hills and killed and injured several of them, although no one was shooting at the convoy. *Id.* ¶ 69. A second military contingent entered Warisata again at about 3 p.m. and began to shoot in all directions. *Id.* ¶ 70.<sup>13</sup>

At approximately 4 p.m., after speaking with Sánchez Berzaín by phone, Sánchez de Lozada ordered General Gonzalo Rocabado, the acting Commander in Chief of the Armed Forces, “to take Warisata.” SAC ¶ 71.<sup>14</sup> Civilian deaths were not an incidental consequence of these operations, but rather an intended and desired result that Defendants viewed as necessary to deter further protests. Sánchez de Lozada signed a written order, which Sánchez Berzaín had dictated, that made the false claim of “grave aggression by a guerilla group against the forces of public order in Warisata” and directed the Armed Forces to use “necessary force” to restore order. *Id.* ¶ 72. Defendants’ claim of an insurgency and of a “guerilla group” was knowingly false.<sup>15</sup> *Id.* ¶ 79. According to officials in charge of intelligence for both the police and military, there was no indication of any guerilla group activity or any armed organization involved in that day’s events or at any point in September and October 2003. *Id.* ¶ 79.

Multiple Special Forces units participated in violently “taking” Warisata on the afternoon of September 20, including units that Sánchez de Lozada had created earlier in 2003 and that were under his direct command. SAC ¶ 74. Following orders from the Defendants and directed personally by them, the military unlawfully treated Warisata as a military target. Troops moved

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<sup>13</sup> Defendants assert that “photos in the newspapers documented that there were armed insurgents from Sorata and Warisata.” MTD at 12. However, the newspaper they attach as an exhibit includes one unauthenticated photo of three men with rifles; it does not mention “armed insurgents,” gives no indication of when it was taken or whether the display was staged, and offers no confirmation that the rifles were functional or had been used in any way that threatened life or property. *Compare* MTD at 12 *with* MTD Exh. 10 at 1. *See also* RJN Opp. at 2, 8-9.

<sup>14</sup> Defendants erroneously claim that the orders for military action came only after a soldier was killed and two policemen were injured. MTD at 11. However, the plan for a military operation began on September 9 and the assault on Warisata began in the early morning hours of September 20, before the soldier was shot, *see* SAC ¶¶ 57, 61, 63, 64, 66-75. As alleged in the SAC, Defendants and the military never investigated whether the soldier had been killed, intentionally or by accident, by another member of the Armed Forces. *Id.* ¶ 70.

<sup>15</sup> Although Defendants characterize the events following the killings in Warisata as “violent strikes and blockades,” purportedly based on the SAC, MTD at 13, there is no indication in the SAC that any of the protests were violent. *See also* RJN Opp. at 6.

through the village deliberately shooting at unarmed people on the roads, in the hills, and in their homes. *Id.* ¶ 73. According to a soldier involved in the military assault, the troops were ordered to use lethal munitions and to shoot “at anything that moved,” and, when officers saw people looking out the windows of houses, they intentionally shot at those windows. *Id.* One of those shots by a marksman hit eight-year-old **Marlene Nancy Rojas Ramos**, who was killed while standing at a window; her home was a 45-minute walk from the road where protests had taken place.<sup>16</sup> *Id.* ¶¶ 63, 65, 75, 75a.

At a meeting of the cabinet that evening, Sánchez de Lozada took full responsibility for the day’s events. Vice-President Carlos Mesa criticized the civilian deaths and called on the government to enter into dialogue instead of using military force. SAC ¶ 81. The Defendants, however, expressed concern only for the negative media coverage of the deaths at Warisata, which included photographs of Marlene. Rather than investigate these civilian deaths or take any action to restrain the military, they again falsely blamed the violence on “subversives.” *Id.* ¶¶ 60, 82-84.<sup>17</sup>

#### **E. Defendants’ Plan Goes Into Full Effect Throughout The Country.**

On the evening of September 20, General Rocabado, the acting Commander of the Armed Forces, ordered the creation of a Joint Task Force with instructions to undertake counter-insurgency operations in seven locales. Such tactics are used exclusively “to combat subversion” by “groups engaged in clandestine insurrection,” defined as an “uprising . . . or rebellion against an established government.” SAC ¶ 78; *see* definition of “Internal Defense of the Territory,” the measures authorized in this decree, Pl. Ex. A at 118. Thus, by the evening of September 20, Defendants had made fully operational the plan they developed before they took office: to falsely label civilian marchers and demonstrators as subversives and use lethal military force to kill

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<sup>16</sup> The SAC alleges that Marlene was shot by a single high caliber military weapon and that no other shots were fired in the vicinity of the house by the military or by villagers. SAC ¶ 75. Defendants challenge the allegations of the SAC by improperly citing a hearsay report that states, without any indication of the source of this information, that Marlene was killed by a stray bullet. MTD at 13. *Compare* SAC ¶ 75 *with* MTD Ex. 11 at 027. *See also* RJN Opp. at 6.

<sup>17</sup> In an attempt to justify their violence in October, Defendants cite to U.S. Embassy reports criticizing Bolivian news coverage of the September and October events. These accounts provide no specific details about what happened in any place or date. *Compare* MTD at 11 *with* MTD Ex. 11 at 032. Moreover, the descriptions of the events in the reports are not the same in different sections. *Compare* MTD Ex. 11 at 32 *with* 43 and 48.

civilians, in order to deter further protests. Consistent with this plan, when the governor of La Paz negotiated a truce between protest leaders and the army on September 30, Sánchez de Lozada responded with rage, rejected it, and refused to withdraw the military. SAC ¶ 88.

Triggered in part by the killing of Marlene and the killing and injuries of other civilians, protest marches began in several areas of the country. SAC ¶¶ 86, 89. During attacks on protestors and other civilians who were not involved any protest activities, the military injured more civilians. *Id.* ¶¶ 89, 91, 92.<sup>18</sup> In early October, government officials and church and business leaders made additional unsuccessful attempts to persuade Sánchez de Lozada to adopt a political response to the protests, rather than use deadly military force. *Id.* ¶ 90. Instead, Sánchez de Lozada wrote to Sánchez Berzaín and instructed him to continue his actions against the protestors and not to “lower his arms” in the face of popular protest, and assured Sánchez Berzaín that he had the full support of Sánchez de Lozada. *Id.* ¶ 93.

On October 10, additional troops arrived in La Paz from the interior department of Beni, just as Defendants had planned before they took office. SAC ¶¶ 30, 97. On the evening of October 11, Father Ricardo Zeballos, a Jesuit priest, Waldo Albarracín, and others met with Sánchez de Lozada to ask him to resolve the conflicts through dialogue and offered to act as mediators. *Id.* ¶ 102. Sánchez de Lozada replied with threats of more violence. *Id.* The mediators’ hopes for dialogue were dashed the next day, when government representatives refused to talk with them and the military continued its killing spree. *Id.* ¶¶ 102, 105.

Relying again on the knowingly false claim that the military was facing armed insurgents, Sánchez de Lozada again authorized military measures that, according to Bolivian military rules, were to be “used exclusively to combat subversion,” defined as a “clandestine uprising or rebellion” to be implemented in eight regions of the country, including La Paz and El Alto. SAC ¶¶ 108, 108d. On October 12, the military conducted operations throughout the city of El Alto, intentionally shooting at unarmed people on the street and in their homes. *Id.* ¶¶ 107-111. Some soldiers who refused to shoot civilians were themselves attacked and even killed by the military. *Id.* ¶¶ 122, 123.

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<sup>18</sup> Defendants assert that La Paz was “besieged” by the insurgents and was unable to obtain “critical supplies such as fuel, food, and medical provisions.” However, the extrinsic documents cited, MTD Ex. 2 at 5, and MTD Ex. 11 at FOIA-042, do not support their hyperbolic description and themselves contain contradictory versions of the events. MTD Ex. 11 at FOIA-042.

As part of these operations, the military shot and killed the relatives of four of the Plaintiffs, despite the fact that none were involved in demonstrations or posed any threat to people or property when they were killed. The military operation covered a large area: at the far side of El Alto, despite being far from the road used to transport gas and far from the site of any protests or blockades, military sharpshooters who had been deployed as part of the plan turned onto side streets and killed three of Plaintiffs' decedents. SAC ¶¶ 109-113. Military forces killed **Teodosia Morales Mamani**, a thirty-nine-year-old pregnant mother of seven children, as she sat on the floor of her sister's apartment, several blocks from any demonstration. *Id.* ¶ 112. Nineteen-year-old **Roxana Apaza Cutipa** was on the roof of her house, far from the protests, when a soldier killed her with a single shot. *Id.* ¶ 115. Fifty-nine-year-old **Marcelino Carvajal Lucero** was fatally wounded when a soldier shot him in the chest from 19 yards as he went to close a window in his house.<sup>19</sup> *Id.* ¶ 116.

On the other side of the city of El Alto, off the route that ran from the gas plant to La Paz, military officers lined a street near the plant and targeted unarmed civilians as they ran for shelter, fatally wounding **Lucio Santos Gandarillas Ayala**. SAC ¶ 120.

Vice President Carlos Mesa met with Sánchez de Lozada that day and told him, "These deaths are going to bury you." SAC ¶ 125. Again, the Defendants refused to investigate or stop the killings. To the contrary: Sánchez de Lozada later told Mesa, after learning about the dozens of civilian deaths, "I'm too old to change." *Id.* Sánchez Berzaín met that same evening with top military leaders to emphasize that the Armed Forces were required to continue to obey orders from President Sánchez de Lozada, who was responsible for the actions of the military. *Id.* ¶ 126.

The dozens of deaths on October 12 accelerated the national outcry against the ongoing military violence, with members of all sectors of Bolivian society joining the growing protests. *Id.* ¶ 129.

On October 13, the Commander in Chief of the Army, under the command of

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<sup>19</sup> Defendants claim that "demonstrators attacked convoys bringing fuel and other supplies to La Paz." MTD at 14 (citing Ex. 5 at FOIA-011), relying on hearsay allegations that are inadmissible at this point in the proceedings. In addition, the claim is irrelevant to the killings on the far side of El Alto, described above, and the killings the following day in Uni, Apana, and Ovejuyo, described below, none of which were anywhere near the road used to bring supplies to La Paz. See SAC ¶¶ 107, 109, 131. See also RJN Opp. at 6.

Defendants, ordered a large combined force with hundreds of troops to take control of an area south of La Paz to prevent civilian marchers from entering La Paz via the Ánimas Valley road. *Id.* ¶ 131. The villages of Apana and Uni, where three of Plaintiffs' decedents were killed by military sharpshooters, are set far back from the road, a winding route with little traffic that was not used to transport supplies into La Paz. *Id.* ¶ 131. Soldiers in the area on October 13 were ordered to "shoot at any head that you see." *Id.* ¶ 136.<sup>20</sup> After approximately one hour, the soldiers ran out of ammunition. *Id.* Soon thereafter, a helicopter arrived carrying Defendant Sánchez Berzaín and additional ammunition. *Id.* ¶ 137. Sánchez Berzaín ordered military personnel in the helicopter to shoot at the people below. *Id.*<sup>21</sup> The helicopter flew over the area, circling twice and firing at civilians on the ground before landing near Uni, where soldiers unloaded munitions. The shooting intensified as the military, resupplied with ammunition, encircled the Ánimas area, *id.*, and soldiers were ordered to chase unarmed civilians into the hills. *Id.* ¶ 138. Over the course of the next several hours, the military killed seven civilians, each with a single fatal shot from a significant distance. *Id.* Soldiers were ordered to ignore injured civilians and therefore refused to assist those with bullet wounds. *Id.* ¶ 139.

**Jacinto Bernabé** and several other villagers were in the hills above the villages when the military began shooting at them. From a distance of about 300 yards, a soldier shot him with a single bullet and Bernabé subsequently bled to death. *Id.* ¶ 140. Also on October 13, soldiers shot **Arturo Mamani Mamani** with a single round, from a distance of over 320 yards, when he was in the mountains with his son tending their potato field. *Id.* ¶ 140. His neighbors were not able to carry him down the hill until after the military moved away, and he died on his way to the hospital. *Id.* That afternoon, as the military convoy left the Ánimas area and entered the village of Ovejuyo, the soldiers continued to shoot at unarmed civilians. *Id.* ¶ 144. **Raúl Ramón Huanca Márquez** was on his way to a small store to buy groceries when soldiers fired at him. He died as a result of one or more shots to his abdomen. *Id.* ¶ 145.

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<sup>20</sup> At some point that morning, a soldier was killed by a sharpshooter. SAC ¶ 135. Only military officers in the Bolivian Armed Forces receive sharpshooter training, *id.*; the identity of the shooter was never determined.

<sup>21</sup> Based on the allegations of the FACC, the Eleventh Circuit concluded that Sánchez Berzaín might have been directing the soldiers to *avoid* shooting civilians. *Mamani*, 654 F.3d at 1154 n.6. The new allegations in the SAC now make that alternative explanation implausible, by showing that civilian deaths were an intended result of the Defendants' military plan.

**F. Defendants Resign In The Face Of Mounting Opposition To Their Violent Plan.**

As the toll of civilian deaths mounted, Bolivian Government officials denounced Defendants' policies, including Vice President Mesa, SAC ¶ 146, the Minister of the Economy, *id.* ¶ 147, and the mayor of La Paz, who said that "a death machine has been installed in the government, and only the resignation of the head of state can stop it." *Id.* ¶ 149c. Members of the cabinet urged a referendum on the gas export plan but Defendants rejected the idea in favor of a government "firm hand."<sup>22</sup> *Id.* ¶ 149a. On October 13, top military officers informed Sánchez de Lozada that a military solution to the political protests would require thousands more casualties. *Id.* ¶ 149b. Sánchez de Lozada appeared on television, stated that he would not resign, and falsely claimed that Bolivia was "threatened by a massive subversive project, organized and financed by foreign sources in order to destroy Bolivian democracy." *Id.* ¶ 148.

Throughout the country, citizens started marching toward La Paz on October 14. Additional troops were deployed to prevent the protesters from reaching the capital. SAC ¶ 150. On October 15, hundreds of soldiers ambushed a group of miners who were marching to La Paz; two people were killed and about a hundred were injured. *Id.* ¶ 151. On October 15, former Ombudsman Ana Maria Romero de Campero began a hunger strike, joined by hundreds of professionals, religious leaders, business people, and others from Bolivia's middle class. *Id.* ¶ 152. Around the country, an estimated one million persons participated in protest marches demanding an end to the military violence. *Id.* On October 15, the presidential spokesperson resigned, saying that he could not accept the deaths and violence. *Id.* ¶ 154.

Defendants' role in directing the deadly military campaign against Bolivian civilians was repeatedly acknowledged by Defendants themselves and by the Armed Forces. *See, e.g.*, SAC ¶¶ 80, 83, 126, 156, 162-63. On October 16, Sánchez Berzaín commended the Army for strictly following the orders issued by Sánchez de Lozada, the Captain General of the Armed Forces. *Id.* ¶ 156. Sánchez Berzaín falsely claimed that the political protests were supported by anarchists working with drug traffickers who were themselves supported by the Colombian National Liberation Army, the Shining Path rebel group in Peru, and by the Cuban and Venezuelan

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<sup>22</sup> Defendants' unsupported assertion that their government made "continued efforts to engage in dialogue with the opposition," MTD at 15, is plainly contrary to the allegations of the SAC. *See also* RJN Opp. at 6.



governments, whose leaders, he said, were “openly intervening” in the sovereign affairs of Bolivia. *Id.* No facts supported any of these wild claims. *Id.*

The same day, Vice President Mesa stated he could not return to the government because “the defense of ethical principles, a moral vision, and a basic concept of the defense of life, prevent me from returning to be part of the current government of the nation.” *Id.* ¶ 159. In a radio address, Sánchez de Lozada accused Mesa of sedition and claimed that drug dealers and Colombia’s FARC were trying to turn Bolivia into a battleground. *Id.* ¶ 160.

On October 17, the U.S. Embassy issued a public statement withdrawing support for Sánchez de Lozada and his government. *Id.* ¶ 164. Later that day, Sánchez de Lozada resigned the presidency. *Id.* Both Defendants immediately fled to the United States. Vice-President Carlos Mesa succeeded to the presidency, as provided by the Constitution. *Id.*

**G. Defendants Have Remained In The United States And Have Refused To Return To Bolivia To Face Trial.**

In October 2004, one year after Defendants fled Bolivia, the Bolivian Congress authorized a Trial of Responsibilities to determine the criminal liability of Sánchez de Lozada, Sánchez Berzaín, and other civilian and military leaders for the deaths and injuries during September and October 2003. SAC ¶ 166. The trial began in May 2009; on August 30, 2011, the Court issued a judgment that found the seven defendants who had not fled Bolivia guilty of the crime of genocide through mass killings, Bolivian Penal Code, art. 138, and sentenced them to between three and fifteen years in prison. *Id.* ¶ 170.

Defendants Sánchez de Lozada and Sánchez Berzaín have refused to return to Bolivia to face criminal trial. *Id.* ¶ 171. Both are currently residents of the United States. *Id.* ¶¶ 13, 14. Bolivian law does not permit trials *in absentia*. Verástegui Decl. ¶¶ 6, 19.

In November 2003, the Bolivian government enacted a Humanitarian Assistance Agreement that granted “emergency and funeral expenses” to the widows and heirs of those who were killed by the military in September and October of 2003. SAC ¶ 173. In November 2008, newly enacted Law No. 3955 granted additional assistance to the victims’ families, including academic support and public acknowledgment of the victims. *Id.* ¶ 175. Plaintiffs received the monies from the Bolivian Government to which they were entitled under both statutes. *Id.* ¶¶ 174, 176. Law No. 3955 stated explicitly that the benefits it awarded “in no way expunge the criminal, civil or other type of liability” of the perpetrators of the abuses in proceedings in

Bolivian or foreign courts or before international tribunals. *Id.* ¶ 177. Defendants have not themselves accepted liability for the harm they caused Plaintiffs, have not paid compensation to them, and have not been held accountable in any court for their actions. *Id.* ¶ 178.

## V. SUMMARY OF ARGUMENT

The *Kiobel* presumption against extraterritorial application of the ATS creates a rebuttable presumption, not a categorical bar, and is rebutted under the facts of this case. Defendants fled Bolivia to the United States and have resided here for more than ten years. Given that they refuse to return to Bolivia, this is the only court in which Defendants can be held accountable for the deaths of Plaintiffs' family members. Moreover, because the Government of Bolivia has expressed its willingness to have the claims proceed here, issues of comity that arose in *Kiobel* and other ATS cases are not present here.

The factual allegations of the SAC meet the deficiencies that concerned the Eleventh Circuit when reviewing the FACC and satisfy the pleading standards of *Iqbal/Twombly*. The SAC contains allegations that plausibly suggest that Defendants agreed to an unlawful, systematic plan to intentionally target and kill civilians who opposed their policies; directed the implementation of that plan; and accepted responsibility for the killings and injuries that were its intended result. At the time that Plaintiffs' family members were killed by the military, none was participating in any demonstration. Each was distant in time and place from the demonstrations. None posed any threat to the military or property that could justify the use of deadly force against them. Given the evidence of Defendants' intentions and their orders to the military, it is implausible that their deaths were random or the result of individual soldiers' personal animus. These intentional killings constituted extrajudicial killings and were part of a systematic attack on the population that constituted crimes against humanity. Defendants are liable personally under the doctrines of command responsibility, conspiracy and/or agency under both international and federal common law.

Defendants cannot meet their burden of proving that Plaintiffs' TVPA claims are precluded by the assistance provided to victims by the Bolivian government. Section 2(a) of the TVPA assigns liability to the "individual" who subjects a person to extrajudicial killing. Barring claims against those individuals because the government provided some humanitarian assistance is inconsistent with basic tort law and with the doctrine of claims preclusion, and is contrary to the TVPA's goal to preclude wrongdoers from finding a safe haven in the United States.

Plaintiffs' state law claims do not raise issues that are novel or complex within the meaning of 28 U.S.C. § 1367(c)(1). This court applied Florida choice of law to Plaintiffs' state law claims and determined that the Bolivian statute of limitations permitted Plaintiffs' wrongful death claims to proceed under Bolivian law.

## VI. ARGUMENT

### A. Plaintiffs' ATS Claims Are Not Barred By The *Kiobel* Presumption Because The Claims "Touch And Concern" The United States.

The Supreme Court in *Kiobel* held that the principles underlying the presumption against extraterritoriality apply to the ATS, 133 S. Ct. at 1665-66, and applied those principles to dismiss an ATS case with the most minimal ties to the United States: the *Kiobel* plaintiffs sued a foreign multinational corporation with only a nominal corporate presence in this country, and the corporation's home state argued strenuously that the claim should have been litigated at home. Defendants wrongly assert that the Court imposed a categorical bar against all cases involving foreign conduct. MTD at 1. To the contrary, the Court held that some ATS claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669. This is such a case.

The claims in this case "touch and concern" the United States, as that requirement is defined by *Kiobel*, for two reasons. *First*, Defendants have lived in the United States for more than ten years and continue to reside here precisely to escape liability at home for the abuses they committed there. Unlike the foreign corporation in *Kiobel*, which had only minimal U.S. contacts, the United States has long been these individual Defendants' home – and is the only forum in which they can be held liable. As a result, failing to permit this claim to go forward would place the United States in violation of its international law obligation to refuse safe haven to perpetrators and would undermine the very purpose for the enactment of the ATS.

*Second*, the principles that inform application of the presumption – avoiding tensions with other countries, preventing judicial interference with foreign policy, and declining to make the United States a "uniquely hospitable forum" for human rights litigation, *Kiobel*, 133 S. Ct. at 1668 – all favor litigation of this case in the United States, given that the Bolivian government expressed its support of the litigation by waiving the Defendants' immunity from suit and the Department of State both accepted that waiver and explicitly stated that it took no position on litigation of these claims. *See* Letter to the Honorable Gregory Katsas, Assistant Attorney

General, Civil Division, Department of Justice, from the Honorable John B. Bellinger, III, Legal Advisor, Department of State (Oct. 21, 2008) [No. 07-cv-22459, Dkt. #107, 107-2,3], attached here as Pl. Ex. B. In this case, failure to provide a remedy would exacerbate international discord, the exact result that proper application of the presumption is intended to prevent.

The circumstances of this case are unlike any other decided since *Kiobel*: a suit against U.S. permanent residents, who cannot face trial elsewhere, where the foreign state has supported litigation in the United States. Together, these facts displace the *Kiobel* presumption and demonstrate why the Supreme Court carefully refused to create a bright-line rule barring litigation of all ATS claims based on conduct that occurred abroad.

**1. *Kiobel* Requires Courts To Apply A “Touch And Concern” Test That Examines The Facts Of Each Case, Rather Than Imposing A Categorical Bar On ATS Claims Involving Conduct Abroad.**

In *Kiobel*, the Supreme Court held that the “principles” underlying the presumption against extraterritoriality apply to the ATS. *Kiobel*, 133 S. Ct. at 1663-65. The Court held that that there was no categorical bar to all ATS claims arising from conduct outside of the United States, and that fact analysis was central to application of the presumption. *Id.* at 1669. In the final section of the opinion, the Court explicitly limited its holding to the application of the presumption to the factual circumstances of the case, holding that it did not involve conduct that “displace[d]” the presumption. *Id.* The Court made clear, however, that some ATS claims may involve conduct that displaces the presumption, even where the conduct constituting the violation occurred outside U.S. territory: the Court’s fact-sensitive standard states that claims that “touch and concern the territory of the United States” will “displace the presumption against extraterritorial application” if they “do so with sufficient force.” *Id.* Defendants argue that the presumption is displaced only if the conduct that gave rise to the claim occurred within the territory of the United States. MTD at 1. This, however, was the standard urged by the concurring opinion of Justice Alito, writing only for himself and Justice Thomas, who suggested that an ATS cause of action should be barred by the presumption against extraterritoriality unless the claim alleges domestic conduct that violates international law. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). But Justice Alito himself understood that the majority opinion did not adopt his view and wrote separately to “set out the broader standard” that he would have preferred. *Id.* at 1669-70 (emphasis added).

In fact, the concurring opinions joined by seven of the nine justices each emphasized the narrow focus of the five-Justice majority opinion. That opinion held that the specific claims at issue in the case failed to overcome the *Kiobel* presumption, but did not address what claims with greater ties to the United States might overcome that presumption. Justice Kennedy, who joined the majority opinion, emphasized the narrowness of the Court’s “reasoning and holding” in his short concurrence:

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition . . . . Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

133 S. Ct. at 1679 (Kennedy, J., concurring); *see also id.* at 1669-70 (Alito, J., concurring) (noting, with Justice Thomas, that *Kiobel*’s holding “obviously leaves much unanswered, and perhaps there is wisdom in the Court’s preference for this narrow approach”); *id.* at 1673 (Breyer, J., concurring) (stating, with Justices Ginsburg, Sotomayor, and Kagan, that *Kiobel* “leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome’”). The *Kiobel* concurrences—representing the views of justices with highly divergent views on the ATS itself—all emphasize the narrowness of the majority opinion rather than the creation of a bright-line rule.

Defendants’ insistence that *Kiobel* creates a bright-line rule based on where the human rights violations took place ignores the “touch and concern” test. *See* MTD at 20-22. That test explicitly looks at the ties between the United States and the plaintiffs’ *claims*, not only the conduct that violates international law. *Kiobel*, 133 S. Ct. at 1669 (stating that *claims* will displace presumption when they “touch and concern the United States,” in contrast with “*conduct*,” which is used in prior sentence to refer to element of broader “claim”).

## **2. Defendants’ Ten-Year Residence In The United States To Avoid Liability In Bolivia Overcomes The Presumption Against Extraterritoriality.**

The Court in *Kiobel* indicated that the location of the defendant is relevant to the “touch and concern” analysis: Chief Justice Roberts’ opinion for the majority held that the *Kiobel* defendants’ minimal corporate presence in the United States was insufficient to support an ATS

claim. 133 S. Ct. at 1669.<sup>23</sup> “Corporations are often present in many countries,” the Court stated, “and it would reach too far to say that mere corporate presence suffices” to displace the presumption against extraterritorial application. *Id.*

By contrast, Defendants’ long-term U.S. residence displaces the presumption. Defendants have lived in the United States since 2003.<sup>24</sup> Unlike corporations, individuals can be “present” in only one country. Under Bolivian law, individuals cannot face criminal prosecution in Bolivia unless they are physically present in that country. Verástegui Decl. ¶¶ 6, 19 & Ex. E. Therefore, as is generally true of natural persons, Defendants can be haled into court only in the country in which they are present – in this case, the United States. By leaving Bolivia and refusing to return, they have avoided prosecution for precisely the conduct at issue in this lawsuit. *See Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013) (holding claim by Somali citizen against Somali citizen for conduct occurring exclusively in Somalia displaced *Kiobel* presumption on sole ground that defendant was U.S. permanent resident), *report and recommendation adopted*, 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013).

No other post-*Kiobel* case involves the key factual circumstances found in this case, which, uniquely, involves residents of the United States, subject to suit only in the United States, and a foreign state that affirmatively supports litigation in the United States.<sup>25</sup> The facts of this

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<sup>23</sup> The U.S. contacts of the *Kiobel* defendants were described in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93-99 (2d Cir. 2000) (basing assertion of general personal jurisdiction over defendants, citizens of the United Kingdom and the Netherlands, on fact that employee of separate corporation served as defendants’ agent to facilitate contacts with investment community). *See also Kiobel*, 133 S. Ct. at 1678 (Breyer, J., concurring) (discussing “minimal and indirect American presence” of corporate defendant).

<sup>24</sup> Plaintiffs allege on information and belief that Sánchez Berzaín is a permanent resident in the United States and that Sánchez de Lozada is a U.S. citizen. SAC at ¶¶ 13, 14. In the MTD, Defendants state that Sánchez de Lozada is not a U.S. citizen, citing a 2007 filing which states that he is a citizen of Bolivia but does not address whether he is *also* a U.S. citizen. MTD at 22 n.10 (citing Mot. to Transfer Venue for Purposes of Consol., Decl. of President Gonzalo Sánchez de Lozada, ¶ 2, *Mamani v. Lozada*, No. 07-2507 (D. Md. Dec. 4, 2007)). For this Court’s analysis, however, the distinction is irrelevant as international law recognizes a nation’s obligation and right to apply its law to its residents as well as its citizens. *See* Restatement (Third) of the Foreign Relations Law of the U.S. § 402(2), cmt. e. (1987).

<sup>25</sup> Defendants’ reliance on other post-*Kiobel* cases is misplaced. Most of them have involved corporate defendants. *See, e.g., Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013) (dismissing corporate defendants); *Giraldo v. Drummond Co., Inc.*, No. 2:09-CV-1041-RDP, 2013 WL 3873960, at \*5-8 (N.D. Ala. July 25, 2013) (same).

case also resemble the many ATS cases against individuals residing in the United States. Since the modern era of ATS jurisprudence began with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), courts in this Circuit have consistently allowed similar ATS claims arising from extraterritorial conduct to proceed against individual defendants found residing in the United States. For example, in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), the Eleventh Circuit upheld a jury verdict in favor of plaintiffs who brought ATS claims against a former Chilean military officer who “secretly entered the United States and lived in an undisclosed location under the protection of the United States Government.” *Id.* at 1153; see also *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (affirming ATS judgment against U.S. residents for claims arising in El Salvador); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996)

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In post-*Kiobel* individual defendant cases, several courts have held that claims did not “touch and concern” the U.S. when the defendants were not present in the U.S. See, e.g., *Tymoshenko v. Firtash*, No. 11-CV-2794 KMW, 2013 WL 4564646, at \*4 (S.D.N.Y. Aug. 28, 2013); *Kaplan v. Cent. Bank of Islamic Republic of Iran*, No. CIV. 10-483 RCL, 2013 WL 4427943, at \*16 (D.D.C. Aug. 20, 2013). Other cases have been frivolous. See, e.g., *Ahmed-Al-Khalifa v. Al-Assad*, No. 1:13-cv-48-RV-GRJ, 2013 WL 4401831, \*1-2 (N.D. Fla. Aug. 13, 2013) (claims against heads of state of several countries, brought pro se by a Nigerian resident, seeking redress for crimes in Syria with no connection to plaintiff); see also *Ahmed-Al-Khalifa v. Obama*, No. 1:13-cv-49-MW/GRJ, 2013 WL 3797287, \*1-2 (N.D. Fla. July 19, 2013) (claims against President Obama and others dismissed); *Mwangi v. Bush*, No. 5: 12-373-KKC, 2013 WL 3155018, \*2 (E.D. Ky. June 18, 2013) (complaint against former President George Bush, Sr. that was “difficult to decipher” dismissed on multiple grounds).

Under the facts most similar to this case, a claim filed against a non-citizen U.S. resident, the court found that presumption against extraterritoriality did not bar litigation of the claim. See *Magan*, 2013 WL 4479077, at \*1-2; see also *Sexual Minorities Uganda v. Lively*, No. 12-cv-30051-MAP, 2013 WL 4130756, at \*13, 27 (D. Mass. Aug. 14, 2013) (denying motion to dismiss ATS claims against U.S. citizen). In the *Drummond* decision, on a motion for summary judgment, the court dismissed the claims against both the corporate defendant and two individuals on multiple grounds, including *Kiobel*, without distinguishing between corporate and individual defendants, and without discussing the connection between either individual defendant and the U.S.; indicating whether suit would be possible in Colombia; or stating whether the government of Colombia had taken a position on the litigation. *Drummond*, 2013 WL 3873965, at \*3 (dismissing claims against Mike Tracy), *Giraldo v. Drummond Co., Inc.*, No. 2:09-CV-1041-RDP, 2013 WL 3873978, at \*2 (N.D. Ala. July 25, 2013) (dismissing claims against Augusto Jimenez). Importantly, the court dismissed both the ATS and the TVPA claims because discovery had not produced sufficient admissible evidence of conduct by the individual defendants, either in the United States or in Colombia, that linked them to the alleged violations.

To the extent that any of these cases interpret *Kiobel* as applying a categorical rule barring ATS claims unless the actionable conduct took place within the territory of the United States, Plaintiffs respectfully suggest that they misinterpret *Kiobel*.

(same, for claims arising in Ethiopia); *Jean*, 431 F.3d at 782 (vacating dismissal regarding claims arising in Haiti).

Nothing in *Kiobel* indicates that cases against individuals residing in the United States are no longer viable. *Filartiga*, a Second Circuit case endorsed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), involved a claim that arose on foreign territory against a defendant found residing in the United States. *See Sosa*, 542 U.S. at 731 (noting that “[t]he position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga* . . .”). The *Kiobel* majority neither discussed *Filartiga* nor addressed cases against an individual defendant who seeks safe haven in the United States. Indeed in both its discussion of history and the specific facts of *Kiobel*, the Supreme Court recognized that the defendants’ ties to the United States were relevant to application of the *Kiobel* presumption. In its factual discussion, it referenced the *Kiobel* defendants’ minimal ties to this country—their “mere corporate presence.” And in its historical discussion, it distinguished *Kiobel* from the well-known 1795 Bradford Opinion, which was a contemporaneous interpretation of the ATS showing it allowed suits against U.S. citizens for acts abroad. *See* 133 S. Ct. at 1668 (discussing *Breach of Neutrality*, 1 Op. Att’y Gen. 57 [1795 WL 329] (1795), and noting Bradford concluded that ATS authorized claims against U.S. citizens for violations occurring on foreign soil).<sup>26</sup> History thus helps inform application of the “touch and concern” standard to claims in cases that are not governed by the Court’s application of that standard to the facts of *Kiobel*, including cases such as this involving individuals seeking to avoid facing trial by fleeing to the United States.<sup>27</sup> Both historical and modern jurisprudence show that claims

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<sup>26</sup> Faced with a diplomatic complaint from Britain, Attorney General Bradford wrote that although the acts by U.S. citizens had occurred on foreign territory, “there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States.” 1 Op. Atty. Gen. at 59 (emphasis in original).

<sup>27</sup> The history and purpose of the ATS affirm that claims against U.S. citizens, residents, or those seeking to make U.S. territory a safe haven, all “touch and concern” the United States. Historically, harboring a violator without providing legal redress for the violations would implicate the sovereign, violate international law, and endanger relations with other sovereigns. *See, e.g.*, Pl. App. 4, Emmerich de Vattel, *Law of Nations*, bk. 2, ch. 6, § 77 (Joseph Chitty, trans. and ed., T. & J. W. Johnson & Co. 1867) (1758) (“The sovereign who refuses to cause a reparation to be made of the damage caused by his subject, or to punish the offender, or finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.”).



against individuals living, residing, and/or seeking safe haven in this country touch and concern the United States with sufficient force to displace the *Kiobel* presumption.

**3. Dismissal Here Would Exacerbate The International Comity And Foreign Policy Concerns That The *Kiobel* Majority Sought To Protect.**

Finally, the *Kiobel* presumption cannot bar Plaintiffs' claims because applying it here would run contrary to the very international comity concerns that the *Kiobel* majority sought to address. The *Kiobel* majority explained that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." 133 S. Ct. at 1664 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). In *Kiobel*, the governments of the corporations' home states vehemently objected to the ATS litigation against their corporations. See Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 2-3, 6, 24-32, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2312825. Both governments also noted that their domestic courts would assert jurisdiction over claims in which a domestic corporation was sued for conduct that occurred abroad. *Id.* at 12, 14, 19, 21.<sup>28</sup> Under the facts of *Kiobel*, the Supreme Court recognized that adjudicating the ATS claims would provoke conflict with these foreign governments. *Kiobel*, 133 S. Ct. at 1664.

Unlike *Kiobel*, no negative foreign policy consequences would arise from proceeding

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When the ATS was enacted in 1789, the law of nations prohibited sovereigns from offering safe haven to those who had violated international law abroad, whether they were citizens or foreigners. Further, the United States is responsible under international law for providing remedies against both citizens and residents of this country. See Vattel, *supra*, bk. 1, ch. 19, §§ 212-13 (discussing sovereign "subjects" to include citizens, residents, or inhabitants). Historically, sovereigns have had jurisdiction over and responsibility for persons who owe temporary allegiance to the sovereign because they are present within the sovereign's territory. See Pl. App. 6, T. Rutherford, *Institutes of Natural Law*, bk. 2, ch. 9, § 12 (1832) ("But by granting protection to an offender, [a nation] may become a party, not only in such injuries as are committed by its own proper subjects, or by foreigners, who, by being resident within its territories, make themselves temporary subjects, but in such, likewise, as are committed abroad, either by its own subjects, or by foreigners, who afterwards take refuge in its territories.").

<sup>28</sup> The U.S. Brief also stated that assertion of jurisdiction over individuals living in the U.S. for conduct occurring in a foreign state would not violate international law. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 15-16, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290.

against these individual Defendants. Bolivia has waived immunity for both individuals and unsuccessfully sought their extradition. *See Mamani*, 654 F.3d at 1151. The U.S. State Department explicitly accepted the waiver of immunity, and the United States has not opposed litigation of these claims. *Id.* In *Kiobel*, the U.S. government submitted a brief stating that it opposed litigation of the *Kiobel* claims in U.S. courts, but affirmed that applying the ATS to conduct that arises abroad in circumstances like those in *Filártiga*—and by extension, in circumstances like those in this case—*supports* U.S. foreign policy. Supplemental Brief, 2012 WL 2161290, at \*13. Indeed negative foreign policy consequences could arise if U.S. courts *decline* to adjudicate this case, both because Bolivia has an interest in seeing these men held accountable—as demonstrated by the criminal prosecution of their accomplices, by Bolivia’s efforts to extradite Defendants for prosecution in Bolivia, and by Bolivia’s waiver of immunity—and because the United States has an interest in not being a safe haven for those who commit egregious human rights violations. Contrary to *Kiobel*, litigating this case would mitigate, not exacerbate, foreign policy tensions.

The Supreme Court has recognized that the ATS was enacted in part to protect the United States from the international conflict that might result from failing to hold accountable foreigners who had violated international law. *See Sosa*, 542 U.S. at 716-17 (discussing Marbois incident and foreign relations problems triggered by federal government’s inability to prosecute foreigners and citizens who violated the law of nations). In a case involving foreign corporate defendants, *Kiobel* noted “that the ATS was [not] passed to make the United States a uniquely hospitable forum for the enforcement of international norms,” especially for a “fledgling Republic[,] struggling to receive international recognition.” 133 S. Ct. at 1668. For claims against U.S. residents or those using the United States as a safe haven, however, the young nation would have been expected to provide a forum for redress to meet its international obligations. For example, the discussion in both *Sosa*, 542 U.S. at 721, and *Kiobel*, 133 S. Ct. at 1667-68, of the 1795 Bradford Opinion shows U.S. concern for British reprisals if the United States failed to provide remedies for violations of the law of nations committed by its citizens. *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 [1795 WL 329] (1795);<sup>29</sup> *see also Territorial*

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<sup>29</sup> In response to the attacks, British Minister Plenipotentiary George Hammond warned the U.S. Secretary of State that these “acts of hostility” invited “measures of severity” which would

*Rights—Florida*, 1 U.S. Op. Att’y Gen. 68, 69-70, 1797 WL 419 (1797) (noting that without remedy, Spain would have “just cause for war”, and opining that law of nations violations were actionable against citizens and non-citizens under U.S. common law no matter where violations had been committed). The instant case resembles the Marbois incident, in which France vehemently demanded extradition of its national, who had been accused of committing a violation of the law of nations; instead, the perpetrator was tried in U.S. courts. *Respublica v. De Longchamps*, 1 U.S. 111, 1 Dall. 111, 115 (Pa. O. & T. Oct. 1784), 1784 WL 85; *Trial of M. Longchamps, The Pennsylvania Packet*, Sept. 27, 1784, at 2, attached to Plaintiffs’ Appendix of Authorities (Pl. App.) 8. The ATS was enacted in large part because the federal government felt powerless to react to such complaints from other sovereigns. *See Sosa*, 542 U.S. at 719.

In sum, instead of justifying dismissal, the international comity concerns in this case reinforce that dismissal is inappropriate. Dismissal would make the United States a safe haven for violators of international law, which could provoke the very kind of disharmony with other nations that the *Kiobel* Court sought to avoid and undermine the original purpose of passing the statute. Thus, international comity concerns reaffirm that the instant case touches and concerns the United States. Defendants have made this country their home in order to avoid responsibility for their participation in law of nations violations. This Court should recognize that these circumstances displace the *Kiobel* presumption exactly because they reflect different reasoning and facts than the holding in that case, and should allow Plaintiffs’ claims to proceed.

**B. The SAC Alleges Sufficient Specific Facts To State A Claim For Extrajudicial Killings And Crimes Against Humanity.**

Defendants do not contest that both extrajudicial killings and crimes against humanity are cognizable under the ATS and that extrajudicial killings are cognizable under the TVPA as well. In reviewing a motion to dismiss an earlier version of the Complaint, the FACC, the Eleventh Circuit found the allegations insufficient to link Defendants to the killings or show that the killings themselves constituted extrajudicial killings. *Mamani*, 654 F.3d at 1153. As explained in Section A, new factual allegations in the SAC fill those gaps and meet the *Iqbal/Twombly* pleading standard by detailing Defendants’ role in planning and implementing a military campaign to terrorize the civilian population and by showing that the deaths of Plaintiffs’ family

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be “justified by the indisputable Laws of Nations” if the United States failed to provide redress. Pl. App. 5, Transcription from Original Memorial of George Hammond (June 25, 1795).

members were the result of that violent terror campaign. These allegations are sufficient to plead extrajudicial killing, including the requirement that the killing be “deliberated,” Section B(2). These same facts meet the elements of crimes against humanity by showing that the killings were part of systematic attacks on a civilian population, Section B(3). Finally, these allegations also show that Defendants are liable for the deaths of Plaintiffs’ decedents on any one of three theories of liability, Section B(4).

**1. The Revised Complaint Satisfies The Iqbal/Twombly Pleading Standard By Pleading Facts Showing That Defendants Planned And Implemented A Military Campaign Intended To Kill Thousands Of Civilians And That Plaintiffs’ Family Members Were Killed As A Result Of That Campaign.**

As explained above in Legal Standards, on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must accept the facts alleged in the complaint as true and construe them in the light most favorable to plaintiff. *Resnick*, 693 F.3d at 1321-22. Plaintiffs need only plead facts sufficient to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 570). A plausible claim for relief permits the court to draw “the reasonable inference that the defendant is liable for the misconduct alleged.” *Mamani*, 654 F.3d at 1153 (quoting *Iqbal*).

In the 2011 decision in this case, the Eleventh Circuit viewed the then-operative complaint as comparable to the inadequate complaints in *Twombly* and *Iqbal*, in which the plaintiffs concluded from supposedly suspicious sets of facts that the defendants must have engaged in illegal behavior. *Mamani*, 654 F.3d at 1153.<sup>30</sup> As the Eleventh Circuit read the FACC, Plaintiffs had alleged only that members of the Armed Forces had killed their family members “during an ongoing civil uprising.” *Id.* at 1155. The Eleventh Circuit determined that, as in *Twombly* and *Iqbal*, allegations of facts consistent with lawful alternative explanations would not suffice, absent facts justifying the inference of unlawful behavior that would “nudge[]” the claims “across the line from conceivable to plausible.” *Id.* at 1156 (quoting *Iqbal*, 556 U.S. at 680).

The SAC, responding to the deficiencies noted by the Eleventh Circuit, now contains detailed and specific factual allegations that support a claim that is not merely “conceivable” but

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<sup>30</sup> As the First Circuit noted in *Sepúlveda-Villarini v. Dep’t of Educ. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J., sitting by designation), in *Twombly*, “the same actionable conduct alleged on the defendant’s part had been held in some prior cases to be lawful behavior.”

“plausible” and must be assumed to be true at this point in the proceedings. Most important, the SAC contains factual allegations that the two Defendants repeatedly discussed their plan to kill civilians as a means to deter protests. The SAC thus contains factual allegations of an explicit agreement to engage in unlawful conduct, exactly the allegation that the Supreme Court found lacking in *Twombly* and *Iqbal* and the Eleventh Circuit found lacking in the FACC.<sup>31</sup>

The key factual allegations, detailed in the Statement of Facts, demonstrate that:

- (1) Even before taking office, Defendants agreed to use military force to kill 2,000 to 3,000 civilians to deter popular opposition that could derail their economic programs.
- (2) After assuming office, Defendants implemented their plan by issuing multiple decrees that, in violation of both international and Bolivian law, designated civilian protests as subversion and authorized the military to respond to those protests as if they were attacking enemy combatants, using “maximum combative force” to vanquish that “enemy.”
- (3) Defendants closely supervised the military operations as sharpshooters shot and killed or injured hundreds of civilians, including Plaintiffs’ family members.
- (4) People inside and out of the government repeatedly urged Sánchez de Lozada to reconsider his use of lethal force against the Bolivian population. Defendants repeated their intent to inflict hundreds or thousands of civilian deaths as a means to quell opposition to their policies.
- (5) Defendants repeatedly and falsely stated that they were responding to subversives or to guerrilla or foreign armed attacks on Bolivia, despite the fact that they knew that military intelligence officers had found no evidence to support those claims.
- (6) Defendants made no effort to investigate the civilian deaths, including the killing of eight-year-old Marlene, further suggesting that such deaths were a desired, expected result of their plans.
- (7) As pleas to change course and seek nonmilitary solutions mounted, Defendants remained committed to their plan and repeatedly stated that they took responsibility

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<sup>31</sup>See *Twombly*, 550 U.S. at 556 (noting that the complaint lacked “plausible grounds to infer an agreement”); *id.* at 557 (“terms like ‘conspiracy,’ or even ‘agreement,’ are border-line: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement. . . .”) (quoting *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)).

for the deaths and injuries. They rebuffed increasingly urgent pleas that they negotiate with the protestors.

- (8) Each of Plaintiffs' decedents was killed by a military sharpshooter deployed by the Armed Forces pursuant to Defendants' pre-conceived plan, at a time when the victim was neither engaged in nor in the vicinity of a protest; none presented a threat to people or property that would have justified the use of deadly force.

Defendants claim that their use of force was justified in light of mass demonstrations throughout the country. MTD at 39. However, the allegations of the SAC make clear that military force was neither legal nor required to respond to the protests, but that Defendants were instead committed *ex ante* to the use of lethal force to quell even peaceful political dissent because civilian deaths were an intended, necessary, and desired goal. SAC ¶¶ 26, 30, 31, 50, 60. Moreover, the SAC explicitly alleges that, contrary to Defendants' false statements about violent threats, *id.* ¶ 52, Defendants had been told that there was no evidence of an armed insurgency. Indeed, as the SAC alleges, the decision to kill civilians was made before protests even began.<sup>32</sup> *Id.* ¶ 30; *see also id.* ¶¶ 35, 37, 38, 40, 57, 58, 62.

The SAC contains allegations that “plausibly suggest,” and are “not merely consistent with,” an “illegal agreement” to unleash a campaign of lethal violence on the civilian population. *See Twombly*, 550 U.S. at 557. These facts suggest more than mere agreement: they plausibly suggest the planning, careful execution, and attempted cover-up of an unlawful lethal campaign.

**2. The Bolivian Military's Killing Of Civilians, Including Plaintiffs' Family Members, Was Planned And Implemented By Defendants And Constituted Extrajudicial Killings.**

The TVPA defines an extrajudicial killing as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” TVPA § 3(a), 28 U.S.C. § 1350).<sup>33</sup> The Eleventh Circuit held that the FACC had not alleged facts showing that the deaths of any of Plaintiffs' decedents were extrajudicial killings. *Mamani*, 654 F.3d at 1155.

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<sup>32</sup> For example, Defendants set up the “war room” and issued a “Red Alert” before the events in Warisata, *see supra* at Section IV.C.

<sup>33</sup> In *Mamani*, the Eleventh Circuit relied on this TVPA definition of extrajudicial killing, while also noting that the international law definition applicable under the ATS might be different. 654 F.3d at 1154 n.7.

The SAC remedies that flow, but not by alleging new facts about the circumstances of each death, which is Defendants' sole focus in their motion to dismiss. MTD at 1, 29-30. Rather, the SAC now includes detailed allegations showing that Defendants adopted an unlawful plan to use military force against civilians, with the intent to kill hundreds or thousands of those civilians; that the armed forces executed that plan under the close supervision of Defendants; and that, as a consequence, hundreds of civilians were shot, including Plaintiffs' family members, with dozens killed and over 400 injured.<sup>34</sup>

The combined impact of these allegations is to render plausible Plaintiffs' allegation that each of the decedents' deaths was an extrajudicial killing resulting from Defendants' implementation of their unlawful plan. In light of these new, detailed allegations, the alternative explanations suggested by the Eleventh Circuit are no longer equally likely. When viewed in light of an overt campaign that unlawfully treated all civilians as if they were enemy combatants, as a result of which military sharpshooters shot almost 500 civilians, it is no longer equally likely, for example, that those sharpshooters happened to take advantage of their deployment to kill people with whom they had a prior grudge, nor that stray bullets from those highly trained sharpshooters killed or injured a multitude of civilians who were far from the site of any demonstrations at the time that they were shot. *See Mamani*, 654 F.3d at 1155.

The unlawful nature of Defendants' use of lethal force against Bolivian citizens is evident when their actions are considered as a whole. Before any public protests to their economic plans were manifest (indeed even before they took office), Defendants decided that civilian deaths were necessary to deter opposition to their economic plans. Through a series of military decrees, they defined all civilians involved in protests as subversive, whether or not they were marching or demonstrating without violence; equated social conflict with "subversion," SAC ¶ 37; and described those opposed to their policies as members of an "organized armed rebellion supported by foreign organizations," SAC ¶ 52. They authorized full-scale combat against the civilian population by calling for the use of "maximum combative force" against the "enemy" in January 2003, putting the military on "Red Alert" in September 2003, SAC ¶ 58, Pl. Ex. A at 255 (mass definition), and repeatedly authorizing "DIT" operations, a counter-insurgency measure used exclusively "to combat subversion" by "groups engaged in clandestine insurrection," which is

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<sup>34</sup> Evidence of this plan also demonstrates that the killings were "systematic," as required to prove crimes against humanity, *see infra* Section VI.B.3.a.

defined as an “uprising . . . or rebellion against an established government.” SAC ¶ 78; *see* definitions of “Internal Defense of the Territory” (“DIT”), and “subversion,” Pl. Ex. A at 118, 393. Defendants justified the use of military tactics that are deployed during wartime by transforming those identified with civil unrest into enemy combatants who could be shot and killed. Plaintiffs’ family members were killed as a result of the implementation of this plan across multiple locations in Bolivia.

A finding of extrajudicial killings under the facts of this case is consistent with prior ATS decisions. Federal courts have held that, when government agents implement a deliberate campaign of generalized violence, the resulting murders of civilians constitute extrajudicial killings. In *Xuncax v. Gramajo*, 886 F. Supp. 162, 173 (D. Mass. 1995), the court found liability for extrajudicial killings where the Minister of Defense “devised and directed the implementation of an indiscriminate campaign of terror against civilians” that was ultimately carried out by Guatemalan military forces, who committed “widespread acts of brutality” as they systematically invaded villages and executed civilians. *Id.* at 172. Similarly, in *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 270 (S.D.N.Y. 2002), Zimbabwe’s ruling political party carried out a “campaign of terror designed to crush political opposition” that led to multiple civilian deaths. The court in that case found the defendants liable for extrajudicial killings because the plaintiffs’ decedents were murdered during the campaign of violence. *Id.* at 275. *See also Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627, 1996 WL 164496, at \*1-2 (S.D.N.Y. Apr. 9, 1996) (Rwandan Hutu leader liable for torture and summary execution committed as part of genocidal campaign).

Here, Defendants orchestrated a plan to suppress political dissent through a large-scale campaign of violence, resulting in the extrajudicial killings of Plaintiffs’ decedents. Like the perpetrators in *Xuncax* and *Tachiona*, the Bolivian Armed Forces acted under the direction of their military superiors in inflicting violence against civilians. Defendants responded to concerns raised by the Military High Command by reassuring the military that Defendants would take responsibility for these actions. As a result, the Bolivian Armed Forces committed crimes paralleling the “widespread acts of brutality” in *Xuncax*, 886 F. Supp. at 172, as scores of civilians were killed and hundreds more were injured. Because Defendants designed, implemented, and accepted responsibility for a plan that resulted in lethal violence and significant civilian deaths, they are liable for the extrajudicial killings of Plaintiffs’ decedents.

Defendants rely on *Belhas v. Ya’alon*, 515 F.3d 1279, 1293 (D.C. Cir. 2008), for the



proposition that the court may not inquire into the tactical military decisions of high-level government officers. MTD at 35. However, *Belhas*, as cited by the Eleventh Circuit in *Mamani*, 654 F.3d at 1155, is inapposite to the facts alleged in the SAC, the current complaint. *Belhas* made clear that the *conduct* alleged in the complaint was not actionable under the ATS because it did not violate international law: “The conduct alleged in the complaint, notwithstanding plaintiffs’ characterization of that conduct, simply does not amount to [a *jus cogens*] violation.” 515 F.3d at 1293 (original emphasis) (Williams, J., concurring). Similarly, the Eleventh Circuit held that the allegations of the FACC were consistent with military tactics in a lawful military operation. *Mamani*, 654 F.3d at 1155. By contrast, intentional killings of civilians do constitute extrajudicial killings. See, e.g., *In re Yamashita*, 327 U.S. 1, 14-16 (1946); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002); *Cabello*, 402 F.3d at 1157; *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996); *Xuncax*, 886 F. Supp. at 173. “High-level” military decisions were found to constitute extrajudicial killings in each of these cases. The key factor that distinguishes those cases from *Belhas* and from the FACC, the superseded complaint that was before the Eleventh Circuit, is evidence of an intentional plan to order the armed forces to engage in the unlawful killing of civilians, exactly the allegation that forms the basis of the current complaint.

Defendants ignore the factual allegations that they planned and implemented a vicious campaign against civilians, arguing instead that the Eleventh Circuit required that Plaintiffs demonstrate that Defendants specifically targeted each and every one of Plaintiffs’ decedents. MTD at 5. But neither international law nor the holding of the Eleventh Circuit require this. Instead, in the context of the FACC, the Court stated the unremarkable premise that “targeting” requires evidence that “plaintiffs’ decedents’ deaths were ‘deliberate’ in the sense of being undertaken with studied consideration and purpose.” *Mamani*, 654 F.3d at 1155. The Circuit found that requirement satisfied in the *Cabello* case, in which the defendant personally commanded a “killing squad” and selected plaintiff’s decedent for execution. *Id.* at 1155 n.9. But political assassinations such as that at issue in *Cabello* are not the only facts that constitute extrajudicial killings. As discussed above, courts have held that killings during generalized campaigns against civilian populations satisfy the definition of extrajudicial killing; proof that a particular individual was specifically targeted is not required. *Chiminya Tachiona*, 216 F. Supp. 2d at 275 (finding Zimbabwe’s ruling party liable for extrajudicial killing in light of decedents’

murders as part of a campaign of violence aimed at suppressing political opposition); *Xuncax*, 886 F. Supp. at 172-73 (finding defendant Minister of Defense liable for the extrajudicial killings of decedents committed during the Guatemalan military's widespread campaign of violence against civilians); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 102 (D.D.C. 2000) (finding that the Republic of Iran committed the extrajudicial killing of decedent as part of its campaign against opponents by ordering his assassination and circumventing lawful judicial processes); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1325-30 (S.D. Fla. 2011) (finding that murders committed during a campaign to torture and kill civilians in banana-growing regions were extrajudicial killings).<sup>35</sup> A military commander who orders a military sharpshooter to shoot and kill protesters is liable for an extrajudicial killing even though the commander does not identify the specific protesters to be killed. Defendants' legal liability is no different: they ordered the military to respond to protesters with maximum military force as they would attack a military enemy, thereby ordering them to shoot to kill civilians as if they were enemy combatants.

For all these reasons, Plaintiffs have stated a claim for extrajudicial killings against Defendants.

### **3. The Second Amended Complaint States A Claim For Crimes Against Humanity.**

The Eleventh Circuit has defined crimes against humanity as "widespread or systematic attack[s] directed against any civilian population." *Cabello*, 402 F.3d at 1161. Likewise, the Statute of the International Criminal Court, § 7(1)(a), defines a crime against humanity as any one of a list of violent acts, including murder, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." See *Tadić*, 1999 WL 33918295 at n.354.

The SAC sufficiently alleges facts to support each element of the norm.

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<sup>35</sup> International human rights bodies have recognized that killings committed as a result of government forces shooting "at random" constitute extrajudicial killings. See, e.g., *African Comm'n on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order for Provisional Measures, ¶¶ 2-3 (Afr. Ct. on Human and Peoples' Rights Mar. 25, 2011) (finding Libyan security forces to have committed a "serious violation[] of the right to life" for killing individuals when they opened fire "at random" on demonstrators), attached as Pl. App. 1.

**a. The Murders Of Plaintiffs' Decedents Were Part Of Widespread Or Systematic Attacks.**

Since “[t]he ‘widespread or systematic’ requirement is disjunctive, not cumulative,” an attack can support a finding of crimes against humanity if the action is systematic. *Chiquita*, 792 F. Supp. 2d at 1135 (quoting *Bowoto v. Chevron Corp.*, No. 99–2506, 2007 WL 2349343, at \*3 (N. D. Cal. Aug. 14, 2007)). The *Chiquita* court explained that “[t]he term ‘systematic’ refers to the ‘organized nature of the acts of violence and the improbability of their random occurrence.’ It ‘requires a high degree of orchestration and methodical planning.’” *Id.* (citation omitted). In *Mamani*, the Eleventh Circuit added that a systematic action cannot be composed of “isolated events (even if a series of them).” *Mamani*, 654 F.3d at 1156. The “thrust of [the systematic] requirement is to exclude a random act that was not committed as part of a broader plan or policy.” *Prosecutor v. Tadić*, No. IT–94–1–T, 1997 WL 33774656 (May 7, 1997), at ¶ 648 (citing I.L.C. Draft Code of Crimes Against the Peace and Security of Mankind).

Attacks against civilian populations are systematic when they result from planning and coordination. In *Drummond*, for example, where the plaintiffs’ complaint was “rife with allegations elucidating the planning and organization that precipitated the violence,” the court determined that plaintiffs had pled systematic attacks. *Doe v. Drummond Co., Inc.*, No. 09-cv-01041, 2010 WL 9450019, at \*10 (N.D. Ala. April 30, 2010). Similarly, in *Chiquita*, 792 F. Supp. 2d at 1337, the court found that the plaintiffs’ pleadings “discuss[ed] the planning and organization that occurred before and during the attacks, which establishes that the action was ‘systematic.’” Additionally, the defendant in *Doe v. Saravia* committed systematic attacks by participating in a “death squad” that assassinated Archbishop Romero as “part of a calculated strategy by the military to terrorize the civilian population into submission.” 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004).

In the SAC, Plaintiffs allege that Defendants planned the attacks against the civilian population in advance and executed those plans in a systematic way, including by personally supervising the execution of the campaign of repression. SAC at ¶¶ 35, 37-38, 63, 68, 83-85, 127-28, 137, 148. Defendants’ plans preceded the activities that they claim precipitated their actions and even preceded their taking office in 2002. *Id.* ¶¶ 30, 31, 37-38, 50, 52, 58. As in *Chiquita*, Defendants maintained lines of communication with military officers throughout the operations, repeatedly issued orders that authorized the military to use lethal force against

civilians, and specified where they should deploy. *Id.* ¶¶ 55, 63, 68, 71-74, 78, 83, 85. *See also Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 491 (D. Md. 2009) *aff'd in part, appeal dismissed in part* 402 F. App'x 834 (4th Cir. 2010) (defendant liable where he attended meeting where operation was discussed, oversaw firing on villagers and burning of homes, and set up a blockade of any escape route).

Defendants used a high level of coordination and deliberation in planning, laying the groundwork for, and executing a campaign to use lethal force against civilians in order to choke political opposition. Over the course of a month, the soldiers employed the same tactics, with the same result: civilian deaths. Defendants' motion fails to consider any of the factual allegations relating to the systematic nature of the military's attacks on Bolivian civilians and their role in it, and simply repeats the Eleventh Circuit's analysis of the FACC as if the complaints were identical. MTD at 5-6. Plaintiffs have amply met the standard for systematic attacks.

Although the showing that the attacks were systematic is sufficient, the facts support a finding that the attacks were widespread as well. A widespread attack has been defined as "one conducted on a large scale against many people." *Chiquita*, 792 F. Supp. 2d at 1334 (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 670 (S.D.N.Y. 2006)); *see also Doe v. Drummond*, 2010 WL 9450019, at \*9. Decisions applying the definition have not imposed a particular numerical cut-off for actual or targeted victims, but have required instead "massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims." *Chiquita*, 792 F. Supp. 2d at 1335 (quoting *Bowoto*, 2007 WL 2349343, at \*3 (quoting *Prosecutor v. Akayesu*, Judgment, No. ICTR-96-4-T § 6.4. (Sept. 2, 1998))). *See also Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at \*10 (S.D.N.Y. Feb. 28, 2002) (quoting *Prosecutor v. Rutaganda*, 39 I.L.M. 557, 571) (same, and noting that this definition is drawn from customary international law).<sup>36</sup> Defendants nevertheless interpret the Eleventh Circuit's holding in *Mamani* as imposing an arbitrary cutoff for the number of deaths that can constitute a "widespread" attack. MTD at 38-39. However, that is not what the Eleventh Circuit did. The Eleventh Circuit

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<sup>36</sup> The underlying purpose of the "widespread" inquiry is to "exclude an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim." *Tadić*, Trial Judgment, 1997 WL 33774656 at ¶ 648 (citing I.L.C. Draft Code of Crimes Against the Peace and Security of Mankind, commentary).

recognized that crimes against humanity “exhibit especially wicked conduct that is carried out in an extensive, organized, and deliberate way, and that is plainly unjustified. . . .” *Mamani*, 654 F.3d at 1156. “It is this kind of hateful conduct that might make someone a common enemy of all mankind.” *Id.* The Eleventh Circuit’s holding addressed the limited factual allegations in the FACC and clarified that, absent additional facts suggesting that an attack was “widespread,” sheer numbers alone may not be sufficient to state a claim for crimes against humanity.<sup>37</sup> The well-pleaded allegation that Defendants devised and implemented a plan intended to kill up to three thousand civilians in order to undermine opposition to their policies is certainly “wicked.”

Because there is no arbitrary number of deaths necessary to state a claim for crimes against humanity, the analysis of the “widespread” nature of the attack is contextual and qualitative.<sup>38</sup> *See, e.g., Doe v. Drummond*, 2010 WL 9450019, at \*9 (finding that killings perpetrated by a paramilitary organization were crimes against humanity because they were part of an attack that spanned two provinces and was directed at the large population living near the defendant company’s railroad corridor); *Cabello*, 402 F.3d at 1161 (holding that evidence showing that 13 killings in one city, in the context of a campaign of violence that resulted in 72 deaths across many cities, was relevant to the “widespread” inquiry). In *Doe v. Saravia*, the court found that a single death—that of Archbishop Romero—constituted a crime against humanity because it arose in an environment of “state-sanctioned violence” resulting in “widespread and brutal abductions and murders throughout the late 1970s and early 1980s.” 348 F. Supp. 2d at 1121, 1157.

As in *Drummond*, *Cabello*, and *Saravia*, the deaths of Plaintiffs’ decedents occurred as

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<sup>37</sup> The Eleventh Circuit stated that that conduct “carried out in an extensive, organized, and deliberate way, and that is plainly unjustified” would be sufficient to state a claim, but finds that “the conduct described in the *bare factual allegations of the Complaint* is not sufficient.” *Mamani*, 654 F.3d at 1156 (emphasis added). The SAC alleges numerous specific facts regarding Defendants’ planning and execution of a campaign of lethal violence against civilians, including facts demonstrating the unjustified, extensive, organized, and deliberate way in which this conduct was carried out by Defendants. SAC at ¶¶ 26-145.

<sup>38</sup> Even if far fewer deaths had resulted, the scope and nature of this campaign, as alleged in the SAC, would still result in a finding that Defendants perpetrated a “widespread” attack on the civilian population. *See Sexual Minorities Uganda*, 2013 WL 4130756, at \*10 (“To be widespread and systematic, acts do not have to ‘involve military forces or armed hostilities, or any violent force at all.’”). *See also Prosecutor v. Akayesu*, Opinion and Judgment, No. ICTR96-4-T, ¶ 581, 1998 WL 1782077 (Sept. 2, 1998) (“An attack may also be nonviolent in nature . . . if orchestrated on a massive scale or in a systematic manner.”).

part of attacks against large civilian populations that took place across vast areas in an environment of state-sanctioned violence. The SAC shows that Defendants repeatedly discussed the large number of civilian deaths that would be needed to suppress political dissent, SAC ¶¶ 30, 31, 50; that their plan to use lethal military was directed at hundreds and even thousands of civilians, *id.*; that Defendants directed the military to carry out a campaign of violence targeting entire civilian populations in areas experiencing protests, SAC ¶¶ 46, 61, 69, 73, 92, 119; and that Defendants' orders to use lethal force against civilians spanned multiple regions, *id.* ¶ 108. That the attacks resulted in fewer deaths than the thousands of deaths that Defendants were prepared to stomach does not diminish the widespread nature of the attacks. The facts alleged go well beyond a mere statement of the numbers of dead and injured and establish that the attack perpetrated by Defendants was sufficiently widespread to constitute a crime against humanity.

**b. Defendants' Campaign Of Unlawful Lethal Violence Was Directed At A Civilian Population.**

In order to qualify as a crime against humanity, the widespread or systematic attack must target a "civilian population." *Mamani*, 654 F.3d at 1156 (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (quoting *Cabello*, 402 F.3d at 1161)). A targeted population must be "predominantly" civilian in nature; "the presence of certain non-civilians in their midst does not change the character of the population." *Tadić*, Trial Judgment, 1997 WL 33774656 at ¶ 683; *see also Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment, at 2000 WL 1174929 ¶ 72 (Dec. 6, 1999). Moreover, perpetrators need not exclusively target civilian populations. *Chiquita*, 792 F. Supp. 2d at 1336 (finding attacks were directed at a civilian population even though perpetrators also periodically engaged in combat with non-civilian forces).

Defendants' campaign of lethal force was clearly an attack on a civilian population. The fundamental purpose was to terrorize the civilian population to deter protests. SAC ¶¶ 30, 31, 35, 37-38, 85, 148. Pursuant to their plan, Defendants labeled peaceful protests as "subversion," and sent the military to attack the population by falsely claiming they were armed guerillas or foreign invaders. SAC ¶¶ 35, 37, 38, 40, 41, 71, 72, 79, 83, 84, 108, 148, 160.

Even on the more limited facts in the FACC, the Eleventh Circuit expressed no doubts that the actions complained of were against a civilian population. *Mamani*, 654 F.3d at 1156. Nowhere did the Eleventh Circuit find that it was possible that the deaths resulted from

“individualized suspicion of engaging in certain behavior,” as argued by Defendants. MTD at 39 (citing *Bowoto*, 2007 WL 2349343). Indeed, in considering whether Plaintiffs had stated a claim for crimes against humanity in the FACC, the Eleventh Circuit did not draw a distinction between the “protesters” and a civilian population. *Mamani*, 654 F.3d at 1156.

Finally, populations do not lose their civilian character simply because Defendants labeled them as adversaries or “subversives.” In *Saravia*, the court found that an archbishop’s assassination constituted a crime against humanity even though the civilians targeted by the perpetrators’ widespread attack had been “automatically labeled subversive and [were] deemed to be working for the guerrillas.” 348 F. Supp. 2d at 1132. Similarly, Defendants’ ploy to legitimize their actions by labeling all protests as “subversion,” SAC ¶¶ 37, 40, 78, and all civilian participants as “enemies,” *id.* ¶ 38, does not strip the population of its “civilian” status.

**c. Acts Of Murder, Committed As Part Of A Widespread And Systematic Attack On A Civilian Population, Constitute Crimes Against Humanity.**

U.S. courts, looking to international legal instruments like the statutes of the international criminal tribunals for guidance, have consistently included murder among the acts that can constitute crimes against humanity. *See, e.g., Chiquita*, 792 F. Supp. 2d at 1334; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009); *Saravia*, 348 F. Supp. 2d at 1155.

Plaintiffs allege that their decedents were murdered as part of a campaign of violence to suppress political protests. As in *Chiquita*, *Wiwa*, and *Saravia*, the deaths occurred as part of a planned, widespread attack on the civilian population. SAC ¶¶ 30, 211, 213. In obeying Defendants’ orders, the military unleashed a campaign of violence against the population, murdering defenseless civilians who were running for cover in their fields and hiding in their own homes. *Id.* ¶¶ 61, 73, 75, 115, 116, 143, 144.

The murders of Plaintiffs’ family members constituted crimes against humanity as they occurred in the context of a campaign of unlawful lethal force planned and directed by Defendants.

**4. Defendants Are Liable For The Killings Of Plaintiffs’ Decedents.**

The SAC states sufficient facts to allege that Defendants are liable for the killings of Plaintiffs’ decedents under any one of three standards of liability, each supported by ample Eleventh Circuit authority: command responsibility, conspiracy and agency.

**a. Defendants Had Command Responsibility For The Deaths Of Plaintiffs' Decedents.**

The doctrine of command responsibility is applicable to claims under both the ATS and the TVPA. *Cabello*, 402 F.3d at 1157. Plaintiffs have sufficiently pled that Defendants are liable under that doctrine. In contrast to the FACC that was before the Eleventh Circuit, the SAC alleges facts concerning Defendants' knowledge of, planning for, and commendation of the assaults on civilians that led to the decedents' deaths. Liability here does not rely on the type of strict liability rejected by the Eleventh Circuit. 654 F.3d at 1154.

In the Eleventh Circuit, command responsibility requires three elements:

(1) that there be the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes or failed to punish the subordinates after the commission of the crimes.

*Ford*, 289 F.3d at 1288. International law recognizes the same three elements. *See, e.g., In re Yamashita*, 327 U.S. 1, 14-16 (1946); *Ford*, 289 F.3d. at 1289, 1293 (citing statutes of international criminal courts).

The superior-subordinate relationship prong of command responsibility is satisfied here because Defendants had both formal and effective control over the armed forces. SAC at ¶¶ 17, 32, 36, 67, 72, 107-08, 128, 137, 157. *See Ford*, 289 F.3d at 1290 (citing *Prosecutor v. Delaïc* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 256). In *Ford*, the Eleventh Circuit upheld a jury judgment in favor of the Minister of Defense and Director of the National Guard because evidence suggested "they did not have the ability to control their troops during this period." 289 F.3d at 1286. In contrast, the facts alleged in the SAC include numerous instances when Defendants themselves and high ranking military officials announced that Defendants were responsible for the acts of the military. SAC ¶¶ 80, 126, 156, 162-63, and that the Armed Forces were at all times following their orders. *Id.* ¶¶ 126, 157, 165. *See Doe v. Qi*, 349 F. Supp. 2d 1258, 1331-32 (N.D. Cal. 2004) (finding effective control because defendant actively participated in the "government bodies that supervised the acts of repression").

The SAC establishes the second prong of command responsibility with factual allegations that demonstrate Defendants' actual and/or constructive knowledge of the crimes committed by their subordinates. Defendants participated in meetings at which the results of the military



operations, including the deaths, were discussed and debated; the deaths were widely reported in the press; and Defendants repeatedly defended and took responsibility for the killings. *Compare* SAC ¶¶ 30, 31, 35, 38, 42, 45, 48-51, 77-85 *with Doe v. Qi*, 349 F. Supp. 2d at 1332-33 (knowledge alleged by demonstrating that the “patterns of repression and abuse were widespread, pervasive, and widely reported, and that both Defendants actively encouraged and incited the crackdown on [civilians].”); *Xuncax*, 886 F. Supp. at 173-74 (knowledge prong satisfied by evidence that defendant defended the acts so as to permit them to continue despite widespread criticism); *Lizarbe*, 642 F. Supp. 2d at 491 (finding defendant had knowledge of atrocities committed by his troops because he attended meeting where operation was discussed, oversaw firing on villagers and burning of homes, and set up a blockade of any escape route).

The third prong of command responsibility is met when defendants fail to take “necessary and reasonable” measures to punish subordinates for past crimes or to prevent the perpetuation of future crimes. *See, e.g., Ford*, 289 F.3d at 1292; Art. 6(3), Statute of the ICTR (Nov. 8, 1994); Art 7(3), Statute of the ICTY (May 25, 1993).<sup>39</sup> Here, Defendants participated actively in a plan that included, as intended, widespread civilian deaths; took deliberate steps to increase the likelihood of killings, by ordering the Armed Forces to respond to civilian demonstrations as subversion to be met with lethal military force; rejected attempts to negotiate nonviolent resolution of disputes; and transferred troops who would be most willing to use lethal force to the areas of civilian demonstrations. SAC ¶¶ 30, 37-38, 45, 88, 90, 93, 96, 102-05. They took no steps to investigate the death of Marlene Nancy Rojas Ramos on September 20, or any of the later civilian deaths, *id.* ¶ 77; moreover, not only did they fail to prevent future unlawful killings, they instead praised the work of the Armed Forces and encouraged additional killings, *id.* ¶¶ 156, 157, 165. *See Qi*, 349 F. Supp. 2d at 1334 (defendants satisfied the third prong because they not only failed “to prevent the repressive acts,” but “actively encourage[d] and incited the repression of Falun Gong supporters.”); *Prosecutor v. Hadžihasanović & Kubura*, No. IT-01-47-A at ¶ 41 (Apr. 22, 2008) (defendant satisfied the third prong because he chose not to intervene to stop violations committed by his subordinates and instead adopted “a passive

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<sup>39</sup> This element of command responsibility is connected to the superior-subordinate relationship prong because “the degree of effective control over subordinates can be evidence for the necessary and reasonable measures within the competence of a superior.” *Prosecutor v. Boškoski and Tarculovski*, No. IT-04-82-A, Judgment, P 230 (May 19, 2010) ¶ 231, available at [http://www.icty.org/x/cases/boskoski\\_tarculovski/acjug/en/100519\\_ajudg.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/acjug/en/100519_ajudg.pdf).

attitude towards resolving the ongoing crisis.”), *available at* [http://www.icty.org/x/cases/hadzihasanovic\\_kubura/acjug/en/had-judg080422.pdf](http://www.icty.org/x/cases/hadzihasanovic_kubura/acjug/en/had-judg080422.pdf).

Defendants’ weak response to all of this is to note that some of the deaths occurred just a few days before they left office. MTD at 37. Those deaths, however, were a continuation of the ongoing plans put into motion by the Defendants, and might never have occurred had Defendants investigated and punished the earlier deaths. Indeed, during the one-month period in which Plaintiffs’ relatives were gunned down, Defendants made no effort to investigate any of the civilian deaths or to punish any of their many subordinates who were involved in the killings. To the contrary, they repeatedly praised the Armed Forces, promised indemnity, and took responsibility for the military’s actions. Moreover, Defendants’ repeated praise for the Armed Forces’ conduct indicates a settled intention neither to investigate nor punish military abuses.

The Eleventh Circuit rejected command responsibility as applied to the facts of the FACC. In the absence of allegations linking Defendants to the acts of their subordinates, it held that command responsibility would amount to strict liability. Because Plaintiffs have now alleged in detail that Defendants planned, ordered, and supervised the acts at issue and both knew of and praised the actions of their subordinates, the SAC fills the gap identified by the Eleventh Circuit. *See Mamani*, 654 F.3d at 1154. *See also Williams v. Board of Regents of Univ. System of Georgia*, 477 F.3d 1282, 1304 (11th Cir. 2007) (Jordan, J. conc.) (discussing knowledge and strict liability or respondeat superior); *ComTran Group, Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1317 n.9 (11th Cir. 2013) (imputing knowledge from the malfeasant supervisor would not be strict liability).

**b. Plaintiffs Have Adequately Pled The Elements Of Conspiracy Liability.**

The Eleventh Circuit has repeatedly held that conspiracy is a recognized theory of liability under the ATS. *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1258 n.5 (11th Cir. 2009), abrogated on other grounds in *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012); *Aldana*, 416 F.3d at 1248; *Cabello*, 402 F.3d at 1157-59 (applying conspiracy liability to claims of both extrajudicial killing and crimes against humanity). *Cabello* also held that conspiracy liability is available under the TVPA. *Cabello*, 402 F.3d at 1157-58. Pleading conspiracy under the ATS requires a showing that “(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone

who was a member of the conspiracy and acted in furtherance of the conspiracy.” *Id.* at 1159 (citing *Halberstam v. Welch*, 705 F.2d 472, 481, 487 (D.C. Cir. 1983)). Thus, Defendants need not have intended each specific murder; they need only have agreed that the military would perform at least one unlawful act, and the individual abuses must have arisen out of military actions in furtherance of the shared goal. *Halberstam*, 705 F.2d at 481. International law likewise does not require intent that the conspirators agree to commit a specific murder, only that they agree to commit unlawful killings. *See Prosecutor v. Tadić*, No. IT-94-1-A, 1999 WL 33918295 at ¶ 220 Appeal Judgment, (July 15, 1999).

Plaintiffs have adequately alleged conspiracy liability. Defendants and their top military leaders agreed to a systematic plan of unlawful killings as means to quash opposition to their proposed economic programs and to terrorize the population. *See* SAC ¶¶ 30-41, 60. To implement their unlawful agreement, Defendants and their top military leaders defined lawful protest as “subversion” and directed the Armed Forces to use unlawful lethal force against unarmed civilians. As a result of this agreement, the Armed Forces shot and killed dozens of Bolivian civilians, including Plaintiffs’ family members, and injured hundreds more in multiple incidents, in separate locations, using the same pattern of lethal force. Despite the increasing number of civilian deaths, Defendants repeatedly commended the Armed Forces and explicitly assumed responsibility for the deaths. *See id.* ¶¶ 156-57, 165. Defendants intended to suppress opposition to their programs through the use of unlawful lethal force against unarmed civilians, an intention that led to the deaths of Plaintiffs’ decedents. *See id.* ¶¶ 75, 112-120, 140-142, 145.

Defendants argue that plaintiffs’ allegations of conspiracy are insufficient because they failed to allege any facts to support the inference that defendants acted with intent or purpose to facilitate extrajudicial killings, relying on a district court decision in *Chiquita*. MTD at 37. However, Plaintiffs satisfy the standard as set out in *Chiquita*. As detailed above, Plaintiffs have pled (1) Defendants and members of the Armed Forces agreed to commit unlawful killings, (2) Defendants joined the agreement with the purpose or intent to facilitate the commission of these violations, and (3) the Armed Forces committed the violations. Moreover, the district court decision in *Chiquita* requiring “purpose or intent,” 792 F.3d at 1351, is inconsistent with the binding precedent set in *Cabello*, which establishes that conspiracy liability requires “knowledge,” not shared “intent” or “purpose.” 402 F.3d at 1159. The “intent” required by *Cabello* is the intent to help the conspiracy accomplish its goal. *Id.*

**c. Defendants Are Liable As Principals For Acts Of Their Agents.**

In *Aldana*, 416 F.3d at 1247, the Eleventh Circuit looked to general principles of agency law and 42 U.S.C. § 1983 jurisprudence to analyze liability under the TVPA. Under the common law, agency, either implied or express, requires: (1) consent to the agency by both principal and agent; and (2) the control of the agent by the principal. *Commodities Future Trading Comm'n v. Gibraltar Monetary Corp. Inc.*, 575 F.3d 1180, 1189 (11th Cir. 2009); Restatement (Second) of Agency § 1 (1958); *Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1077 (11th Cir. 2003). Applying agency responsibility, the facts alleged in the SAC are sufficient to set forth defendants' liability as principals for the conduct of the military.

Members of the Armed Forces who shot and killed Bolivian civilians, including Plaintiffs' family members, were acting under Defendants' instructions, authority, and control in that Defendants issued orders to the Armed Forces, supervised implementation of the orders, and their orders were obeyed. In addition, Sánchez Berzaín had operational control over the military and was physically present and giving orders during military operations, and Sánchez de Lozada was in regular telephone communication with military units and with Sánchez Berzaín during military operations. See SAC ¶¶ 30-31, 37-41, 51-52, 58, 60, 71-74, 78-79, 83-84, 93, 98-101, 107-108, 131, 136-37. In light of these actions by Defendants, the soldiers and officers who shot and killed Plaintiffs' decedents reasonably inferred that Defendants desired them to do so.

Under federal common law of agency, when the act of an agent is beyond the scope of the agency, agency may be established when the principal has knowledge of the act and approved the act. Restatement (Third) of Agency § 4.0.1. Here, Defendants ratified and affirmed the conduct of the Armed Forces that led to the deaths of Plaintiffs' family members in that Defendants knew of, intended, and condoned that conduct. Defendants knew that the members of the Armed Forces had committed and were about to commit extrajudicial killings, crimes against humanity, and wrongful deaths because, *inter alia*, Sánchez Berzaín was present at the time of some of the killings; both Defendants received regular and contemporaneous reports on Armed Forces operations; the killings were widely reported in the media; and members of their Cabinet and prominent civilians discussed the killings with them and urged them to refrain from additional killings. See SAC ¶¶ 42, 45, 48-50, 56- 57, 61, 63, 65, 67-68, 71, 81-82, 88, 90, 96, 102, 105, 125, 137, 149.

Defendants ignore the binding precedents of the Eleventh Circuit to argue that Plaintiffs

must demonstrate that agency principles are “well accepted in international law” and that they cannot do so. MTD at 36. Defendants err in two ways. First, the Eleventh Circuit has consistently held that courts should look to federal common law for vicarious liability theories applicable to the ATS and TVPA, and should “fashion domestic common law remedies to give effect to violations of customary international law.” *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). As shown above, the Circuit adopted and applied common law rules governing agency in *Aldana*, 416 F.3d at 1247. Similarly, *Cabello* applied the federal common law conspiracy standard to an ATS claim. 402 F.3d at 1157-59 (citing *Halberstam*, 705 F.2d at 481).

The Eleventh Circuit’s reliance on federal common law principles of vicarious liability remains the applicable and appropriate law post-*Sosa*. In *Sosa*, the Supreme Court ruled that, in determining whether a claim is actionable under the ATS, a court should “recognize private claims under federal common law for violations of [an] international law norm.” *Sosa*, 542 U.S. at 732. Thus, courts look to international law to determine whether there has been a violation that would afford jurisdiction, while federal common law governs questions of secondary responsibility. *See, e.g., Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202-03 (9th Cir. 2007) (holding that federal common law doctrines of vicarious liability apply to ATS claims and noting that the law of nations at the time of the enactment of the ATS recognized vicarious liability).<sup>40</sup>

The two district court cases on which Defendants rely, *Chiquita* and *Giraldo v. Drummond Co.*, No. Civ. 09-1041, 2013 WL 3873965 (N.D. Ala. July 25, 2013), are inconsistent with Eleventh Circuit precedent on this issue. Both cases, *Chiquita*, 792 F. Supp. 2d at 1343, and *Giraldo*, 2013 WL 3873965, at \*6, rely on a Second Circuit decision that explicitly disagrees with *Cabello*. *See Presbyterian Church of Sudan*, 582 F.3d at 260 n.11.

Defendants also make the erroneous and unsupported conclusion that agency liability is not available under international law. The basic principles of agency are in fact firmly rooted in the world’s legal systems, and have become part of international law as “general principles of

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<sup>40</sup> Reliance on federal common law and well-recognized legal principles to implement federal statutes is a basic aspect of federal jurisprudence. *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law adjudicatory principles”); *Siemens Power Transmission & Distrib., Inc. v. The Norfolk S. Ry. Co.*, 420 F.3d 1243, 1251 (11th Cir. 2005) (federal statutes “are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”) (citation omitted).

law recognized by civilized nations” as well as by “judicial decisions.” *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). Courts in both common law and civil law jurisdictions regularly acknowledge a principal may be held liable for the acts of its agent, including intentional torts. *See, e.g., Lister v. Hesley Hall, Ltd.*, [2002] 1 A.C. 215 (H.L.) (U.K.) [2001 WL 415485] (holding school liable for sexual abuse by warden); *B.C. Ferry Corp. v. Invicta Sec. Serv. Corp.*, No. CA023277, 84 A.C.W.S. (3d) 195 (B.C. Ct. App. Nov. 11, 1998) (Pl. App. 2) (holding employer liable for arson committed by its security personnel), *available at* <http://canlii.ca/en/bc/bcca/doc/1998/1998canlii15029/1998canlii15029.html>; *Chairman, Ry. Bd. v. Das*, [2000] 2 L.R.I. 273 (India) (Pl. App. 7) (holding railway liable for rape by railway employees), *available at* <http://judis.nic.in/supremecourt/imgs1.aspx?filename=16557>.<sup>41</sup>

Whether this Court looks to general federal common law rules, international law, or both, ATS claims may be founded on agency liability, and Plaintiffs have sufficiently pled agency liability.

**C. Plaintiffs Have Exhausted All Available Remedies In Bolivia And Are Not Precluded From Proceeding With Their TVPA Claims.**

The TVPA was enacted to hold liable individuals responsible for torture and extrajudicial killings and to prevent the United States from offering safe haven to human rights abusers. Failure to exhaust domestic remedies is an affirmative defense that imposes a “substantial” burden of proof on defendants in order to ensure that defendants do not escape responsibility for their actions. *Jean*, 431 F.3d at 781. Defendants’ exhaustion and preclusion arguments here would defeat the essential purpose of the TVPA.

Defendants argue that humanitarian assistance offered to the victims of the 2003 violence by the Government of Bolivia and newspaper articles that describe a pending Bolivian lawsuit against other tortfeasors relieve them of TVPA liability for the extrajudicial killings alleged in the SAC. The inapposite authorities Defendants cite establish no such rule. Defendants have not met their burden of demonstrating that Plaintiffs are precluded from bringing TVPA claims against the two men who initiated and implemented the campaign of violence that led to the

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<sup>41</sup> Agency principles may also be enshrined in statute. *See, e.g.,* Pl. App. 3, C. Civ. (Civil Code) art. 1384 (1988) (Fr.) (establishing liability for damages “caused by the act of persons for whom [one] is responsible”) attached as Appendix 2 to Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 La. L. Rev. 1299, 1363-64 (1988).

deaths of their family members.<sup>42</sup>

To the contrary, the language and intent of the TVPA, basic principles of claim preclusion and tort law, and the specific facts of the Bolivian humanitarian assistance available to Plaintiffs in this case make clear that there is no basis to extinguish Defendants' liability under the TVPA. Rather, Defendants' argument would turn the TVPA on its head: under their proposed reading of the statute, the fact that Defendants fled to the United States relieves them of liability, first, because the current Bolivian government offered assistance to the victims of their violent campaign, and second, because individuals who acted under their command remained behind to face criminal and civil liability. When it passed the TVPA, Congress was clear that the statute would impose individual liability so that the United States would not become a safe haven for individuals responsible for extrajudicial killing and torture. *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1335 (S.D. Fla. 2002); *see* S. Rep. No. 102-249, at \*3 (1991) ("This legislation ... [will ensure] that torturers and death squads will no longer have a safe haven in the United States."). The statute cannot be read to provide Defendants with a shield from such liability merely because the subsequent government has offered assistance to the victims or because other actors might be subject to civil liability arising out of their criminal convictions.

**1. Defendants Cannot Meet Their Burden Of Proving That Plaintiffs' TVPA Claims Are Precluded By The Assistance Provided By The Bolivian Government.**

The first issue before this Court regarding Defendants' exhaustion defense is whether Defendants can prove that the claims against them under the TVPA are *precluded* by payments Plaintiffs received from the Bolivian government.<sup>43</sup> Defendants bear the burden of proof on this issue, a burden the Eleventh Circuit describes as "substantial." *Jean*, 431 F.3d at 782; *see also Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005) ("any doubt" regarding an exhaustion defense should "be resolved in favor of the plaintiffs"). As shown below, Defendants have not met this substantial burden.

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<sup>42</sup> Any such defense is inapplicable here. The TVPA requires that domestic remedies be "available," 28 U.S.C. § 1350 note § 2(b). Remedies not available at the time Plaintiffs filed their complaint should not meet that standard.

<sup>43</sup> It is undisputed that Plaintiffs have exhausted the remedies required by this Court's prior order. *See Mamani*, 636 F. Supp. 2d at 1332-33) ("The plaintiffs are required to seek compensation in Bolivia under Law No. 3955 before they can assert their TVPA claims."); MTD at 25 (conceding that Plaintiffs have received payment under the 2008 law).

This Court has not ruled on the preclusion issue. In 2009, it held that Plaintiffs must seek payment under two humanitarian assistance programs as a prerequisite for bringing this suit in federal court, but expressly reserved judgment on whether the benefits received would have any preclusive effect on actions against these two individual tortfeasors under the TVPA. *Mamani*, 636 F. Supp. 2d at 1330-32 (“I express no view on what preclusive effect, if any, [the 2003 and 2008 programs] may have on the plaintiffs’ TVPA claims.”).

A faithful reading of the TVPA makes clear that the Bolivian government’s assistance has not extinguished Defendants’ TVPA liability. Section 2(a) of the TVPA, captioned “Liability,” creates specific *individual* liability, explaining that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing shall, in a civil action, be *liable for damages* . . . .” 28 U.S.C. § 1350 note § 2(a) (emphasis added). Congress explicitly framed the statute to impose liability on the *individual* tortfeasor. Thus, an essential part of the statute is to address the actions and responsibility of the specific wrongdoer, rather than simply to establish a means of recovery or relief for the victim.

Section 2(b), captioned “Exhaustion of Remedies,” must be read consistently with the rest of the statute’s provisions that establish individual liability for torture and extrajudicial killing. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008) (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)) (“In reading a statute we must not ‘look merely to a particular clause,’ but consider ‘in connection with it the whole statute.’”). Section 2(b) simply explains that to bring a claim for this liability, the claimants must first assert their claims (if possible) in the place where the conduct occurred. Nothing in the text of the statute indicates that “exhaustion” means that humanitarian assistance from third parties could preclude a lawsuit against the alleged tortfeasors. To the contrary, precluding relief in these circumstances would conflict with the thrust of the rest of the statute. And, the TVPA’s legislative history explains that section 2(b) merely delineates the circumstances in which a court “may decline to exercise the TVPA’s grant of jurisdiction”—not that exhaustion of local remedies precludes a TVPA suit in these circumstances. S. Rep. 102-249, at \*9 (1991). The congressional purpose of the statute is clear—to ensure that the United States is not a “safe haven” for individuals who engage in



extrajudicial killing or torture. *See id.* at \*3.<sup>44</sup>

Basic principles of tort law and claim preclusion also make clear that Defendants' TVPA liability has not been extinguished. Previously, this Court observed that it would be difficult to decide "whose preclusion rules would apply," *see Mamani*, 636 F. Supp. 2d at 1331, but whether the Court applies U.S. or Bolivian claim preclusion rules, Plaintiffs' TVPA claims survive. If the Court applies U.S. claim preclusion rules, Plaintiffs' claims are not barred as a matter of basic tort law, which holds that payments from sources other than Defendants at most may be an offset against damages, but in no way extinguish Defendants' liability. *See, e.g., Robert E. Owen & Assocs., Inc. v. Gyongyosi*, 433 So. 2d 1023, 1025 (Fla. App. 1983) (payments from parties other than tortfeasor, including "social legislation benefits," have no effect on liability); *see also* Restatement (Second) of Torts § 920A(2) (1979) ("Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability").

Nor would Bolivian law bar this lawsuit. The statutes that authorized government assistance to the victims of the 2003 violence expressly preserved the right of the recipients to pursue judicial remedies against their tortfeasors. *See* Pl. Ex. E, Law for the Victims of the Events of February, September, and October, 2003, Art. 5; Verástegui Decl. ¶¶ 5, 10-14 & Ex. E. Furthermore, under Bolivian law, the Bolivian government assistance is not considered compensation; as a result, if the victims at some point in the future actually obtain a civil remedy against any tortfeasors still in Bolivia, the Bolivian government payments would not be deducted from any eventual recovery. Verástegui Decl. ¶¶ 28-29 & Ex. D. If the Bolivian government had intended these payments as indemnification or reparation, it would have sued Defendants to recover the amounts it paid the victims. *Id.* ¶ 12. The fact that the Bolivian government has not sought to recoup those amounts shows that the payments Plaintiffs received are *in addition to* any remedies they may receive from holding Defendants liable through a separate mechanism. *Id.* ¶ 13.

Furthermore, attempting to use the existence of these Bolivian humanitarian assistance programs to extinguish Defendants' TVPA liability is flatly contrary to the purpose of the

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<sup>44</sup> Scholarship on the issue confirms that interpreting the TVPA's exhaustion provision as "barring a remedy . . . would be a flat contradiction of the statutory language and the sparse legislative history in the Senate." William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of Int'l Law*, 37 Rutgers L.J. 635, 660 (2006) (cited with approval in *Mamani*, 636 F. Supp. 2d at 1331).

doctrine of exhaustion of local remedies, which is “grounded in principles of comity.” *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 829 (9th Cir. 2008) (quoting *Castille v. Peoples*, 489 U.S. 346, 349 (1989)). Bolivian law preserves Plaintiffs’ rights to bring civil claims against these Defendants for the atrocities of 2003. As Defendants note, comity to a foreign sovereign requires that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.” MTD at 26 (quoting *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 7, 27 (Mar. 21)); *see also Belize Telecom, Ltd. v. Gov’t of Belize*, 528 F.3d 1298, 1305 (11th Cir. 2008) (“International comity encompasses the principle of respect for the acts of sovereign nations.”). Yet Defendants’ interpretation of comity would require this Court to act contrary to the clear statement of the Bolivian government that claims against these Defendants should proceed. *See* Pl. Ex. B, Dkt. #107-2.

Accordingly, in this case comity counsels against preclusion because Bolivia intended neither aid program to substitute for Plaintiffs’ judicial remedies against these Defendants. The statutes authorizing the payments Plaintiffs have received explicitly state that such aid does not preclude a judgment against those responsible. Verástegui Decl. ¶ 10-11. Furthermore, the payments made by the Bolivian government may not be subtracted from any such judgment. *Id.* ¶ 28-32. In light of these clear pronouncements, respect for Bolivia and its laws can be shown only by *rejecting* Defendants’ attempt to evade liability. It would be ironic to conclude that as a matter of comity to Bolivia, this Court should preclude a lawsuit that Bolivia expressly supports.

## **2. Lawsuits In Bolivia Against Other Individuals Have No Effect On Defendants’ Liability.**

In a final attempt to avoid this Court’s jurisdiction, Defendants argue that six years after this action commenced, yet another hurdle remains—Plaintiffs must sue *other individuals* in Bolivia who may or may not have equivalent liability for the killings alleged in the SAC and may or may not have assets to satisfy a hypothetical judgment against them. MTD at 27-28. This novel theory—that the possibility of an action against joint tortfeasors precludes TVPA liability against these Defendants—is directly contradicted by hornbook tort law.<sup>45</sup> *See*

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<sup>45</sup> Even if the lawsuit against other tortfeasors were relevant, which it is not, Defendants’ citations to media reports do not meet their burden of showing that such a lawsuit has actually been filed, much less that it is legally valid under Bolivian law or that it has any possibility of resulting in an enforceable judgment against the named defendants.

Restatement (Second) of Torts § 882 (1979) (where multiple parties are subject to liability for tortious conduct, “the injured person can properly maintain a single action against one, some or all of them”).

This argument also contradicts the very purpose of the TVPA. If a defendant could avoid TVPA liability by pointing to other joint tortfeasors who, lacking the means or foresight to escape to the United States, remain in the place where the conduct occurred, it would do violence to the TVPA’s stated purpose of “making sure that torturers and death squads will no longer have a safe haven in the United States.” S. Rep. 102-249, at \*3 (1991). Indeed, never has a defendant avoided liability in a TVPA suit by shifting liability to tortfeasors who were unfortunate enough to remain in the country where the conduct occurred. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1349 (S.D. Fla. 2003) (motion to dismiss TVPA claims denied where paramilitary members who carried out alleged killings remained in Colombia); *accord Galvis Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1164, 1168 (C.D. Cal. 2005) (Colombian Air Force pilots who carried out bombing not joined as defendants); *Saravia*, 348 F. Supp. 2d at 1149 (members of Salvadorian death squad that killed archbishop at defendant’s instruction not joined in lawsuit).

Any suggestion that the existence of a civil lawsuit in Bolivia opens the door to a potential remedy against these Defendants, either in Bolivia or in the United States, is without merit. The claim described by Defendants can only be filed after a criminal conviction for the underlying conduct. Verástegui Decl. ¶ 21-23. But Bolivian law prohibits criminal prosecutions in absentia, and Defendants have left Bolivia and refused to return; for this reason, they cannot be criminally prosecuted in Bolivia and cannot be made a party to a civil action that requires a prior criminal conviction. *Id.* ¶ 6, 19. Courts have consistently rejected exhaustion defenses to TVPA actions under similar circumstances. *See Xuncax*, 886 F. Supp. at 178 (refusing exhaustion defense because defendants’ “criminal case had made no progress for several years; and, under Guatemalan law, a civil action cannot be brought until final judgment has been rendered in the criminal proceedings”); *accord Dacer v. Estrada*, No. C 10-04165 WHA, 2011

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Moreover, Defendants wrongly assert that a lawsuit against other individuals in Bolivia would result in full recovery because, they allege, “the government is required by law to establish a reparation fund to pay the judgment.” MTD at 28. The provision of the Bolivian Penal Code that Defendants cite for this proposition was repealed in 1999, and there is currently no provision for such a fund in Bolivian law. Verástegui Decl. ¶ 8, 24-27.

WL 6099381, at \*3 (N.D. Cal. Dec. 7, 2011); *Lizarbe*, 642 F. Supp. 2d at 484-85.

**D. This Court Should Exercise Supplemental Jurisdiction Over Plaintiffs' State Law Claims.**

Plaintiffs' state law claims arise under Bolivian law. After a careful analysis of Florida's choice of law principles, this Court found that the consolidated cases were subject to Florida's choice of law principles and determined that Bolivia's statute of limitations would apply. *See* No. 1:07-cv-22459-AJ, Dkt. #137-1 at 36-37. The Court considered the applicable Bolivian laws and dismissed some state law claims, but denied the motion as to wrongful death. *Id.* at 37.

Defendants simply ignore this Court's prior decision, erroneously claiming that dismissal of the state law claims is appropriate because "a novel or complex issue of state law is involved." MTD at 40 (citing 28 U.S.C. 1367(c)(1)). Defendants misstate the state law issue. There is nothing novel about this Court's application of choice of law principles to tort claims filed by citizens of a foreign country against two individuals who are subject to personal jurisdiction in Florida. *Mamani*, 547 F. Supp. 2d at 470. Because this Court has already determined that the claims are governed by Bolivian law, there is no basis for Defendants' assertion that the issues are "novel or complex."

**VII. CONCLUSION**

For all of the above reasons, Defendants' Motion to Dismiss the Second Amended Complaint should be denied.

Dated: December 18, 2013  
Miami, Florida

Respectfully submitted,

By:           /s/ Ira J. Kurzban          

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**CERTIFICATE OF SERVICE**

I hereby certify that that on December 18, 2013, 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/ Rebecca McNew  
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