UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-22459-CIV-COHN
CASE NO. 08-21063-CIV-COHN

ELOY ROJAS MAMANI, et al.,

Plaintiffs,

v.

JOSÉ CARLOS SÁNCHEZ BERZAÍN,

Defendant in No. 07-22459.

GONZALO DANIEL SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendant in No. 08-21063.
_____/

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR A NEW TRIAL

THIS CAUSE is before the Court upon Defendants' Motion for Judgment as a Matter of Law and Motion for a New Trial [DE 549 in Case No. 07-22459; DE 528 in Case No. 08-21063] ("Motion").[1] The Court has carefully considered the Motion, Plaintiffs' Response and Defendants' Reply, and the record in this case, and is otherwise advised in the premises. For the reasons set forth below, Defendants' Motion is denied.

I. BACKGROUND

As the Eleventh Circuit recently acknowledged, "[t]his case bears a long and complicated history—both procedurally and factually." Mamani v. Sánchez de Lozada, 968 F.3d 1216, 1219 (11th Cir. 2020) ("Mamani III"). This history was set forth in detail

[1] All docket citations in this Order refer to Case No. 07-22459, which was consolidated with Case No. 08-21093 in May 2008. See DE 68.

in Mamani III as well as in the two prior Eleventh Circuit decisions in this matter, see Mamani v. Berzaín, 654 F.3d 1148 (11th Cir. 2011) ("Mamani I") and Mamani v. Berzaín, 825 F.3d 1304 (11th Cir. 2016) ("Mamani II"), and need not be repeated in full here. Briefly put, Plaintiffs—the relatives of eight Bolivian civilians killed in 2003 during a period of civil crisis in Bolivia—sued the former President of Bolivia, Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante ("Lozada"), and the former Defense Minister of Bolivia, José Carlos Sánchez Berzaín ("Berzaín"), for extrajudicial killings under the Torture Victim Protection Act ("TVPA") and for wrongful death under Bolivian law. The crux of Plaintiffs' claims was that Defendants masterminded a violent military campaign that led to Plaintiffs' relatives' deaths, all in an effort to quell public opposition to their unpopular political agenda.

In early 2018, the Court held a three-week jury trial on Plaintiffs' claims. The jury rendered a verdict for Plaintiffs on their TVPA claims, finding that each death was an extrajudicial killing and that Lozada and Berzaín were liable under the command responsibility doctrine. DE 474. The jury awarded a total of $10 million in compensatory damages to Plaintiffs on their TVPA claims but returned a verdict for Defendants on Plaintiffs' wrongful death claims.[2]

Prior to the jury's verdict, and again after it was rendered, Defendants moved for judgment as a matter of law on the TVPA claims, arguing that Plaintiffs had failed to present a legally sufficient evidentiary basis that the deaths were extrajudicial killings. Defendants' principal argument was that the Court should enter judgment as a matter of law against Plaintiffs because of their failure to adduce any evidence at trial supporting

[2] In Mamani III, the Eleventh Circuit remanded for a new trial on Plaintiffs' wrongful death claims and those claims are not at issue here.

their allegation that Defendants entered office with a preconceived plan to deliberately kill civilians in order to suppress opposition to their economic policies. The Court agreed that Plaintiffs' failure to offer any evidence at trial in support of this allegation compelled the entry of judgment as a matter of law in favor of Defendants.[3] As the Court explained in its Order Granting Defendants' Renewed Motion for Judgment as a Matter of Law ("Order"), the allegation of a preconceived plan to kill civilians had been central to Plaintiffs' case since the filing of their Second Amended Complaint in 2013, which sought to cure the deficiencies identified by the Eleventh Circuit in Mamani I. DE 514 at 5-6.

In Mamani I, the Eleventh Circuit explained that, at a minimum, an extrajudicial killing is "'deliberate' in the sense of being undertaken with studied consideration and purpose." 654 F.3d at 1155. While leaving open the possibility that the allegations in Plaintiffs' 2008 Amended Complaint could indicate a deliberated killing by "someone," e.g. the shooters, the Eleventh Circuit held that Plaintiffs' 2008 Amended Complaint lacked facts connecting "what . . . [D]efendants personally did to the particular alleged wrongs." Id. at 1155 n.8. Leading up to trial, it was Defendants' alleged plan to kill civilians that served as the critical connection between what Defendants personally did and Plaintiffs' relatives' deaths and—in the absence of evidence of the identity of the shooters—created a factual issue for the jury as to whether the killings were undertaken with "studied consideration and purpose."

In the Order, the Court found that Plaintiffs' failure to present any evidence whatsoever at trial that Defendants had conceived and implemented a plan to

[3] As the Court determined that Plaintiffs failed to offer sufficient evidence that the killings were deliberated, it declined to address whether there was sufficient evidence to support command responsibility liability.

deliberately kill civilians was fatal to Plaintiffs' TVPA claims because the evidence that Plaintiffs did present was insufficient to support a reasonable inference that the killings were undertaken with "studied consideration and purpose." DE 514 at 25.[4] In Mamani III, the Eleventh Circuit reversed the judgment as a matter of law, finding that the absence of evidence of a preconceived plan was not fatal to Plaintiffs' claims because Plaintiffs' other evidence was "sufficient—even if not overwhelming—" to show that the killings were deliberated. 968 F.3d at 1234-36.

While not explicitly receding from its decision in Mamani I, the Eleventh Circuit focused its analysis less on whether Plaintiffs had presented evidence that the killings were undertaken with "studied consideration and purpose" than on whether Plaintiffs had "presented some evidence that their relatives' deaths were the result of a purposeful act to take another's life and . . . were not caused by 'accidental or negligent' behavior or other external circumstances and were not a result of just provocation or sudden passion." Id. at 1234-35. Under this standard, the Eleventh Circuit held that the jury could have reasonably found that the deaths were deliberated killings because "[f]or each decedent, Plaintiffs presented evidence that the cause of death was consistent with a deliberate shot from a member of the Bolivian military in the absence of just provocation." Id. at 1235.

Additionally, as extrajudicial killings do not include those "lawfully carried out under the authority of a foreign nation," the Eleventh Circuit remanded for the Court "to consider in the first instance whether, for each decedent, Plaintiffs produced sufficient evidence to demonstrate that each death was not lawful under international law and

[4] As one commentator subsequently noted, this standard "suggests a level of intentionality and planning for an extrajudicial killing . . ." William J. Aceves, When Death Becomes Murder: A Primer on Extrajudicial Killing, 50 Colum. Hum. Rts. L. Rev. 116, 175 (2018).

thus extrajudicial and, if so, whether Plaintiffs produced sufficient evidence to link Defendants to that wrongdoing via the command-responsibility doctrine." Id. at 1236, 1240. For the reasons set forth below, the Court answers both of these questions in the affirmative.

II. STANDARD

Defendants' Motion for Judgment as a Matter of Law is governed by Federal Rule of Civil Procedure 50(b). Under Rule 50(b), the Court is called upon to review the sufficiency of the evidence and "should grant judgment as a matter of law when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action." Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1278 (11th Cir. 2005). Conversely, the court should deny the motion "if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of the plaintiff's case." Id. "In other words, the evidence must be sufficient so that a jury will not ultimately rest its verdict on mere speculation and conjecture." Anthony v. Chevron USA, Inc., 284 F.3d 578, 583 (5th Cir. 2002).

The court must consider all of the evidence in the light most favorable to the nonmoving party and grant that party the benefit of all reasonable inferences. Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1192–93 (11th Cir. 2004). "Nonetheless, a non-movant must present more than a mere scintilla of evidence." U.S. Steel, LLC, v. Tieco, Inc., 261 F.3d 1275, 1288 (11th Cir. 2001). Additionally, a jury verdict is not entitled to "the benefit of unreasonable inferences, or those at war with the undisputed facts." United Fire & Cas. Ins. Co. v. Garvey, 419 F.3d 743, 746 (8th Cir. 2005) (internal quotation marks omitted); see also McGreevy v. Daktronics, Inc., 156

F.3d 837, 840-41 (8th Cir. 1998) (“A reasonable inference is one which may be drawn from the evidence without resort to speculation.”) (internal quotation marks omitted).

Ultimately, judgment as a matter of law is appropriate if the "facts and inferences point so overwhelmingly in favor of the movant that reasonable people could not arrive at a contrary verdict." Bogle v. Orange Cty. Bd. of Cty. Comm'rs, 162 F.3d 653, 656 (11th Cir. 1998) (internal quotation marks omitted). “While the court affords due deference to the jury's findings, it is axiomatic that such findings are not automatically insulated from review by virtue of the jury's careful and conscientious deliberation.” Ice Portal, Inc. v. VFM Leonardo, Inc., No. 09-60230-CIV, 2010 WL 2351463, at *5 (S.D. Fla. June 11, 2010). “Rule 50 ‘allows the trial court to remove cases or issues from the jury's consideration when the facts are sufficiently clear that the law requires a particular result.’” Weisgram v. Marley Co., 528 U.S. 440, 447 (2000) (internal quotation marks omitted).

III. DISCUSSION

During the three-week trial in this case, the jury heard from nearly forty witnesses about the deaths of the eight victims in September and October 2003. The evidence regarding the circumstances of these deaths and Defendants’ responsibility for same was hotly contested. Under Rule 50, however, it is clearly not the role of the Court to decide contested evidentiary issues. Rather, the proper question is simply whether, viewing the evidence in the light most favorable to Plaintiffs and granting them the benefit of all reasonable inferences, a reasonable jury could have found in their favor. Under that standard, the Court finds that Plaintiffs presented sufficient evidence for the jury to have found (1) that each death was not lawful under international law and (2) that Defendants are liable under the command responsibility doctrine.

A. The Jury Rationally Concluded That Each Killing Contravened International Law

In Mamani III, the Eleventh Circuit concluded that because "international law generally recognizes the use of proportionate force as lawful . . . the use of military force (and the resulting precipitate shootings) during an ongoing civil uprising may be lawful if the circumstances support such action." 968 F.3d at 1237. For instance, while a "military reaction to just provocation . . . is lawful under international law . . . soldiers indiscriminately shooting or using force against civilians in the absence of just provocation" is not. Id. at 1240.

As noted above, however, in analyzing whether Plaintiffs presented sufficient evidence that each death was a "deliberated killing," the Eleventh Circuit already found that "[f]or each decedent, Plaintiffs presented evidence that the cause of death was consistent with a deliberate shot from a member of the Bolivian military ***in the absence of just provocation***." Id. at 1235 (emphasis added). The Eleventh Circuit also held that the jury's verdict was supported by evidence that: (1) "[n]one of the decedents were armed, nor was there evidence that they posed a threat to the soldiers," (2) "[m]any were shot while they were inside a home or in a building" or "while they were hiding or fleeing," and (3) "the military aimed at or targeted each individual decedent or other civilians around the time of the incidents." Id. Additionally, there was "little to no evidence that members of the Bolivian military were in imminent danger . . . when they fired." Id.

Accordingly, Plaintiffs argue that "the Eleventh Circuit's own findings establish that the evidence was sufficient to find an extrajudicial killing based on a lack of just provocation or disproportionate response (or both)" with respect to each decedent. DE

551 at 10-11. The Court agrees. The Eleventh Circuit's findings that each decedent was deliberately killed by a member of the Bolivian military in the absence of just provocation precludes a finding that the deaths were lawful under international law.

Additionally, in its Order granting Defendants' prior Rule 50 Motion, this Court already found that Plaintiffs had "present[ed] evidence at trial of indiscriminate shootings by the Bolivian military in the locations where the decedents were killed." DE 514 at 18. While the Court held that this evidence could not, in and of itself, support a finding that the killings were undertaken with "studied consideration and purpose," it certainly provides a sufficient basis for a reasonable jury to conclude that each killing violated international law. That is, although there was also evidence of "specific crises at each of the locations where decedents were shot," the jury could have reasonably found that the shootings were "disproportionate reactions" to these crises based on the evidence of indiscriminate shooting in these locations and the evidence regarding the circumstances of each death identified by the Eleventh Circuit and summarized above. Id. at 19. Defendants' arguments to the contrary are unavailing.

First, Defendants claim that the "deployment of the military was lawful" because the police were insufficient to handle the crises gripping the country. DE 549 at 24. But the relevant question is not whether the decision to deploy the military was lawful, but whether, once deployed, the military violated international law by using force against civilians in the absence of just provocation or using disproportionate force in reaction to just provocation.

Next, Defendants cite the Three Prosecutors' Report—an investigatory report prepared by three Bolivian prosecutors who were appointed by Bolivia's Chief

Prosecutor to investigate the events of September and October 2003. DE 549 at 25 (citing Trial Ex. 1002).[5] Defendants contend that the Three Prosecutors' Report, which concludes that members of the Military High Command should not be tried for the deaths of civilians in September and October 2003, was the only evidence offered regarding whether the military's actions violated Bolivian law. Id. But again, this is not the relevant question. Mamani III makes clear that the analysis must focus on whether each death was "not lawful under ***international law*** and thus extrajudicial," not on whether the military's actions violated Bolivian law. 968 F.3d at 1240 (emphasis added). And even if the Three Prosecutors' Report suggested that the military's actions in September and October 2003 were lawful under international law,[6] the jury was obviously permitted to credit the firsthand testimony of witnesses to the military's indiscriminate and disproportionate use of force against civilians over the contents of the Three Prosecutors' Report. See Shannon v. Bellsouth Telecommunications, Inc., 292 F.3d 712, 715 (11th Cir. 2002) (quoting Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001) ("It is the jury's task—not ours—'to weigh conflicting evidence and inferences, and determine the credibility of witnesses.'").

Finally, Defendant's devote the bulk of their briefing on this issue to improperly attempting to re-litigate whether Plaintiffs presented sufficient evidence that decedents were deliberately killed by Bolivian soldiers. See, e.g., DE 549 at 28-29 (arguing "that the bullet that struck Marlene [Nancy Rojas Ramos ("Marlene")] could not have been fired by the soldiers Plaintiffs claim were responsible for her death"), id. at 31 (arguing that ballistic evidence shows that it is impossible that the bullet that struck Teodosia

[5] All trial exhibits were filed as attachments to DE 497 and DE 506.

[6] As Plaintiffs correctly note, the Three Prosecutors' Report did find evidence of the disproportionate use of force. DE 551 at 30 (citing Trial Ex. 1002 at 32).

Morales Mamani "came from the street level where the soldiers were located"), id. at 34 (arguing that "it would have been impossible for anyone to aim at and shoot Roxana [Apaza Cutipa]" from the soldiers' location). Clearly, however, Mamani III forecloses these arguments given the Eleventh Circuit's finding that, "[f]or each decedent, Plaintiffs presented evidence that the cause of death was consistent with a deliberate shot from a member of the Bolivian military . . ." 968 F.3d at 1235. When Defendants then shift to arguing that the military's use of force was justly provoked with respect to each killing or that the soldiers' actions were proportionate in each circumstance, they rely on their own contested evidence and ignore Plaintiffs' evidence. Again, however, the jury was entitled to reject Defendants' evidence and believe Plaintiffs' evidence instead. Defendants simply fail to show that the jury's determination that each death was an extrajudicial killing lacked a sufficient evidentiary basis.[7]

B. The Jury Rationally Concluded that Defendants Were Liable for the Extrajudicial Killings Under the Command Responsibility Doctrine

Having determined that Plaintiffs presented sufficient evidence for the jury to have found that each death was not lawful under international law, the Court must now analyze the sufficiency of Plaintiffs' evidence regarding Defendants' liability for these deaths under the command responsibility doctrine. The command responsibility doctrine imposes liability upon civilian and military commanders for the unlawful acts of their subordinates, even if that commander "[n]either committed [n]or directed the commission of such acts." In re Yamashita, 327 U.S. 1, 14-15 (1946). See also Ford

[7] Defendants also argue, in a footnote, that judgment as a matter of law is warranted because of Plaintiffs' failure to offer expert testimony on whether the forced used was disproportionate. DE 549 at 23 n.8. While this substantive argument is inappropriately raised in a footnote, the Court does not find that the determination of whether the forced used was justified or proportionate involved technical issues beyond a juror's ordinary knowledge.

ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1286 (11th Cir. 2002) (explaining that the command responsibility doctrine "makes a commander liable for acts of his subordinates, even where the commander did not order those acts, when certain elements are met."). As the Supreme Court explained, civilian populations would face an increased risk of harm "if the commander of an invading army could with impunity neglect to take reasonable measures for their protection." In re Yamashita, 327 U.S. at 15.

In Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002), the Eleventh Circuit recognized the "essential elements" of command responsibility liability as:

> (1) 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.

Id. at 1288. The Court will discuss these elements in turn.

1. Superior-Subordinate Relationship

The superior-subordinate relationship element of the command responsibility doctrine requires that a superior have "'effective *control* over a subordinate in the sense of a material ability to prevent or punish criminal conduct.'" Id. at 1290 (quoting Prosecutor v. Delalic ¶ 256 (Appeals Chamber ICTY, Feb. 20, 2001)). Such control may be "*de facto* or *de jure*." Id. at 1291; see also Doe v. Drummond Co., 782 F.3d 576, 610 (11th Cir. 2015) (the command responsibility doctrine "is available if the

requisite degree of responsibility, authority, and control is present to support liability.").[8] Applying these principles, the Court finds that the jury could have reasonably concluded, both as a legal and practical matter, that Defendants each had the ability to prevent or punish the extrajudicial killings committed in September and October 2003.

First, as President, Lozada clearly held enormous power over the Bolivian military. Under the Bolivian Constitution, the President is the Captain General of the armed forces. Trial Ex. 40 (Bolivia Const.), art. 97. "[T]he Armed Forces are subordinate to the President of the Republic and receive their orders from him on administrative matters, through the Minister of Defense." Id. art. 210. In Bolivia, however, the President is not the Commander in Chief of the armed forces. The Commander in Chief is appointed by President, receives orders from the President, and gives orders to the armed forces "on technical matters." Trial Ex. 13 (Organic Law of the Armed Forces of Bolivia ("Organic Law")), arts. 36-39. Thus, for operational or technical matters, the President gives "initial instruction[s] . . . [i]n a general manner" to the Commander in Chief who, in turn, gives more specific orders which are operationalized down the chain of command. DE 500-2 (General Antezana Testimony)

[8] A *de jure* superior-subordinate relationship exists for purposes of the command responsibility doctrine when "the superior has been appointed, elected or otherwise assigned to a position of authority *for the purpose of commanding or leading* other persons who are thereby to be legally considered his subordinates." Guénaël Mettraux, The Law of Command Responsibility 139 (2009). A formal title or position of authority is insufficient to establish a superior-subordinate relationship; rather, "any inference concerning the relationship of subordination" must be "accompanied by the powers and authority normally attached to such a role." Id. at 141. A defendant in a position of *de jure* authority exercises effective control over his subordinates when he "was effectively able to enforce his legal authority through the exercise of his legal powers over the perpetrators." Id. at 174.

A *de facto* superior-subordinate relationship exists under the command responsibility doctrine when "one party—the superior—has acquired over one or more people enough authority to prevent them from committing crimes or to punish them when they have done so." Id. at 142-43. A *de facto* superior must be (1) "cognizant of his position vis-à-vis other persons whose conduct he is responsible for," and (2) "aware of the duties which his relationship with another person, or group of persons, implied for him (in particular, a duty to prevent and punish crimes) and must have accepted this role and responsibility, albeit implicitly." Id. at 145.

at 154:21-155:3. In other words, the President, "as political leader and political head gives the initial concept and those who plan it are the commanders of the armed forces." Id. at 46:19-23.

Based on the foregoing, Defendants argue that Lozada did not have *de jure* authority over the troops who perpetrated the extrajudicial killings of Plaintiffs' relatives because of his lack of direct authority on operational matters. Defendants focus on Lozada's lack of "authority to order any Bolivian soldiers to open fire against any individuals." DE 549 at 9. The only support that Defendants offer for such a narrow interpretation of the *de jure* superior-subordinate relationship element of the command responsibility doctrine is Mamani I. DE 549 at 4-5, 21-22. Defendants argue that "[f]inding command responsibility under these circumstances would be tantamount to strict liability based solely on Defendants' high-level positions in the chain of command," a concept the Eleventh Circuit rejected in Mamani I. DE 549 at 22.

The Court is disinclined to find that Mamani I precludes command responsibility liability here. For one, Mamani I does not once mention command responsibility or the Ford elements.[9] And the Eleventh Circuit has subsequently reaffirmed "that the TVPA is not restricted to claims based on direct liability and that legal representatives can recover based on theories of indirect liability, including . . . command responsibility." Mamani III, 968 F.3d at 1220 (citing Doe v. Drummond Co., 782 F.3d 576, 603 (11th

[9] Although the Eleventh Circuit seemed to find that Plaintiffs had adequately alleged that the shooters committed extrajudicial killings, it did not analyze the Ford elements to determine whether Defendants could be held responsible for these killings under the command responsibility doctrine, instead holding that Plaintiffs failed to allege sufficient "facts connecting what *these* defendants personally did to the particular alleged wrongs." 654 F.3d at 1155 n.8. See also id. at 1154 (requiring "adequate factual support of more specific acts by *these* defendants."). Admittedly, this holding is difficult to reconcile with the command responsibility doctrine, which may be premised on a commander's *failure to act* to prevent or punish the wrongdoing of individuals under his or her authority and does not require that a commander have ordered the wrongdoing.

Cir. 2015)). As noted above, command responsibility liability may attach "even where the commander did not order" a subordinate's acts, provided that the elements are met. Ford, 289 F.3d at 1286. These elements ensure that command responsibility does not impose strict liability on high-level leaders like Defendants. That is, there is no liability without fault because such leaders are only responsible for the wrongful acts of their subordinates when they knew or should have known of the wrongdoing and failed to act.

Returning to the narrow question of whether Plaintiffs presented sufficient evidence for a reasonable jury to conclude that Lozada had *de jure* authority over the guilty troops, the Court finds that they clearly did. The Bolivian Constitution expressly provides that the military is subordinate to the President. Evidence that additional individuals—such as the Commander in Chief and various unit commanders—were also in the chain of the command and exercised authority over the guilty troops does not preclude a finding that Lozada had *de jure* authority over the guilty troops.

In Doe v. Qi, for instance, the court held liable under the command responsibility doctrine a government official who "acted only as part of a governing council or group under which subordinates carried out repressive policies." 349 F. Supp. 2d 1258, 1329 (N.D. Cal. 2004). The official lacked "lone authority to authorize the conduct at issue; rather, his authority was shared collectively with others through governing bodies." Id. at 1331. The Doe court recognized, however, that it "would make little sense" if "[t]he fact that command is shared by more than one official" precluded the imposition of command responsibility liability, because then "responsibility could never be imputed to members of a governing body which authorized human rights violations." Id. at 1332

n.47. The legislative history of the TVPA also suggests that command responsibility is not limited to the immediate superior of the shooter, but extends to "anyone with higher authority who authorized, tolerated or knowingly ignored [the subordinate's] acts." S. Rep. No. 102-249, at 9.

Accordingly, the Court does not find that the fact that Lozada shared command with other officials extinguishes his liability for the wrongful acts of his subordinates. As Ford explained, a superior-subordinate relationship only requires "effective *control* over a subordinate in the sense of a material ability to prevent or punish criminal conduct, ***however that control is exercised*** . . ." 289 F.3d at 1290 (emphasis added). The jury could have reasonably concluded that Lozada had "effective control" over the guilty troops by virtue of his legal powers as President that he exercised through a functioning chain of command.

Berzaín, as Minister of National Defense, also occupied a position carrying enormous power over the Bolivian military. He was the second most senior member, after the President, on the "High Military Command," "the top decision-making organism of the National Armed Forces," and he sat on the "Supreme Council on National Defense." Trial Ex. 13 (Organic Law), art. 19, 22. His "principal powers" included "plan[ning], organiz[ing], direct[ing], and supervis[ing] Civil Defense in the National Territory," "[e]nsuring the integrity of the National Territory," and [e]nabling the execution of the Operating Plans." Id. arts 22, 25. Additionally, he was one of six Bolivian authorities who could "order the final investigatory phase" of military justice matters. Id. art. 28.

Still, as with Lozada, Defendants argue that Berzaín did not have *de jure* authority over the guilty troops because of his lack of authority to directly command forces in the field. DE 549 at 8. For the reasons set forth above, the Court disagrees. The jury could have reasonably concluded that Berzaín had *de jure* authority over the guilty troops, despite evidence that he shared command with other officials, based on the broad powers outlined above.

Even if Defendants lacked the significant legal authority described above, the jury also heard sufficient evidence of Defendants' actual exercise of control over the military to support a finding of *de facto* authority. For instance, the jury heard evidence that before Marlene was killed in Warisata during a September 20, 2003 confrontation following an ambush on a military convoy, Lozada rejected an alternative to bringing the convoy through Warisata. DE 485 (Trial Tr. 3/20/18) at 80:1-24. Although there was concern about an ambush if the convoy traveled through Warisata, Lozada refused to take an alternative route, stating that "the state never retreats." Id. Later, in response to the violence in Warisata, Lozada ordered the acting Commander in Chief to "mobilize and immediately use the force necessary to restore public order and respect for the rule of law in the region." Trial Ex. 3. On October 11, 2003, Lozada also ordered the Commander in Chief to "restore order to the city of El Alto." Trial Ex. 45.

For his part, Berzaín was on the ground in Sorata overseeing the mobilization of the convoy that would travel through Warisata and declaring his authority over the military deployed there, while remaining in communication with Lozada—including dictating a letter that became Lozada's general order to the Commander in Chief directing the military into Warisata. See DE 476 (Trial Tr. 3/6/18) at 90:17-91:10; DE

485 (Trial Tr. 3/20/18) at 87:20-88:6, 89:19-90:16, 92:1-5. And with respect to the events of October 12 and 13, 2003, the jury heard that Berzaín presided over an October 10 meeting at the Ministry of Defense at which the deployment of the military to transport gas through La Paz was planned. DE 482 (Trial Tr. 3/14/18) at 29:14-31:5, 35:4-35:14. Berzaín responded to concerns about this plan leading to deadly explosions at gas stations by stating: "Well, there have to be deaths, but also gasoline." Id. at 35:9-14, 40:15-18. The next day, Berzaín personally drafted the directive signed by Lozada ordering the Commander in Chief to "restore order to the city of El Alto." DE 485 (Trial Tr. 3/20/18) at 92:1-23; Trial Ex. 45. Berzaín stressed that the directive was "very important," and the resulting Supreme Decree provided that he was responsible for "establish[ing] the mechanisms necessary for its execution." Trial Ex. 1 at 2.

This evidence amply demonstrates the authority that Defendants exerted with respect to command over the armed forces and supports a finding that Defendants had the practical ability to prevent or punish the extrajudicial killings committed in September and October 2003.

2. Knowledge

The jury also heard evidence from which they could have reasonably inferred that Defendants each knew—or at least should have known under the circumstances—that their subordinates "had committed, were committing, or planned to commit" extrajudicial killings. Ford, 289 F.3d at 1288.

First, the jury heard testimony that, well before any of the killings at issue, Berzaín stated in Lozada's presence that they would avoid civilian opposition derailing their policies by "us[ing] elite troops" to "kill 50, a hundred, a thousand." DE 445 (Trial

Tr. 3/14/18) at 91:23-25.[10] See also DE 457 (Trial Tr. 3/15/18) at 26:22-27:6 (Berzaín dismissing concerns of mayor of La Paz, stating that "if there are five dead, it doesn't matter if it's 50 more, as long as we solve the problem."). Additionally, shortly after coming to power, Lozada's government defined "roadblocks, marches, [and] demonstrations" as subversive acts and directed troops to "apply the Principles of Mass and Shock" to control public demonstrations. Trial Ex. 38 (Manual on the Use of Force) at 13; Trial Ex. 39 (Republic Plan) at 1. Finally, the jury also heard testimony that Defendants dismissed warnings that their aggressive response to protests would lead to "tragedy." DE 478 (Trial Tr. 3/8/18) at 56:12-17.

Defendants characterize these as "stray comments unrelated in time or place to any of decedents' deaths" and argue that there is no evidence that they played any role in the development of the Republic Plan or the Manual on the Use of Force. DE 549 at 8, 14; DE 552 at 14. But, regarding the Republic Plan and the Manual on the Use of Force, the jury could have reasonably inferred, based on Defendants' positions at or near the top of the Bolivian government, that they were at least aware of these changes in military doctrine. And, more broadly, the Court's role at this stage is not to examine the probative value of each piece of evidence in isolation. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000) ("[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.").

[10] The Court held in its 2018 Order Granting Defendants' Motion for Judgment as a Matter of Law that this testimony could not support a reasonable inference that Defendants entered office with a preconceived plan to deliberately kill unarmed civilians and that the killings in this case were therefore "undertaken with studied consideration and purpose" because they resulted from the implementation of this plan. DE 514 at 22-23 (noting lack of evidence that Lozada adopted Berzaín's statement). But a different question is before the Court now. For the reasons set forth below, the Court finds that, viewing this testimony in the light most favorable to Plaintiffs and in conjunction with Plaintiffs' other evidence on this point, it can support a reasonable inference that Defendants should have known that their use of force would result in extrajudicial killings.

When considered cumulatively, in context, and in the light most favorable to Plaintiffs, the Court finds that the above-described evidence could support a reasonable inference that Defendants should have known that their use of force would result in extrajudicial killings.

Plaintiffs evidence on the command responsibility doctrine's knowledge element is stronger after September 20, 2003, when Defendants learned that multiple civilians—including Marlene—had in fact been killed or injured as a result of the military's use of force in Warisata. Given their high-level roles, Defendants were obviously kept well informed of this military operation and the resulting deaths. Additionally, there were widespread media accounts of the deaths and public demonstrations in response to same. See, e.g., DE 474-7 (Harb Dep.) at 142:12-15 ("the media was following in detail the number of conflicts and casualties"); DE 476 (Trial Tr. 3/6/18) at 96:10-97:10 (describing an 800-person march from Sorata to La Paz organized one week after killings in Warisata); DE 480 (Trial Tr. 3/12/18) at 72:21-73:6 (describing civic strike in El Alto organized, in part, "as a result of the deaths of civilians that had happened in Warisata"). Still, the jury heard that just days before the events of October 12 and 13th, Berzaín dismissed concerns about the anticipated use of the military resulting in additional civilian deaths. DE 482 (Trial Tr. 3/14/18) at 35:9-14, 40:15-18.

Based on the above evidence, the jury could have reasonably inferred that Defendants should have known that their use of military force on September 20, 2003 had resulted in extrajudicial killings and that their continued use of force to respond to civil demonstrations in October 2003 would result in more extrajudicial killings. See Xuncax v. Gramajo, 886 F. Supp. 162, 173 (D. Mass. 1995) (defendant had requisite

knowledge where publicly confronted and the course of conduct continued in spite of public outcry); Qi, 349 F.Supp.2d at 1332–33 (defendants had requisite knowledge of their subordinates' alleged human rights violations where "repression and abuse were widespread, pervasive, and widely reported").

Defendants argue that even after the events of October 12 and 13th, there is no evidence that they knew any of the killings were extrajudicial killings "as opposed to deaths that could have occurred for a variety of reasons." DE 549 at 16. They say that if the Three Prosecutors' Report did not find evidence of extrajudicial killings after a ten-month investigation, it is unreasonable to infer that Defendants had contemporaneous knowledge that the military was committing extrajudicial killings. Id. The Court finds Defendants' interpretation of the command responsibility doctrine's knowledge element unreasonably narrow. Plaintiffs were not required to show that Defendants knew conclusively that the military had committed, or were about to commit, extrajudicial killings.[11] Evidence that Defendants should have known, "owing to the circumstances at the time," that extrajudicial killings had or would take place is sufficient. Ford, 289 F.3d at 1288. And as Plaintiffs correctly note, "knowledge must almost always be proved[ ] by circumstantial evidence." DE 551 at 39 (quoting United States v. Santos, 553 U.S. 507, 521 (2008)). Based on the above-described evidence, the jury could have reasonably inferred that, under the circumstances, Defendants should have possessed the requisite knowledge.[12]

[11] Clearly, as this case has demonstrated, determining whether a death resulted from an extrajudicial killing may be a lengthy process.

[12] Even assuming *arguendo* that this evidence is not "sufficient to compel the conclusion of the existence of [extrajudicial killings," the jury still could have reasonably found that it should have "indicated [to Defendants] the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by [their] subordinates." Prosecutor v. Delalic ¶ 393 (Appeals

3. Failure to Act

Finally, the jury could have reasonably found that Defendants "failed to prevent" the extrajudicial killings or "failed to punish" the soldiers afterwards. Ford, 289 F.3d at 1288. Under this element of the command responsibility doctrine, Plaintiffs were required to establish that Defendants "failed to take all necessary and reasonable measures" within their power to prevent or punish the extrajudicial killings. Id. at 1293. As Plaintiffs note, "reasonableness is a quintessential question for the jury." DE 551 at 43.

Here, the jury was presented with the above-described evidence that Defendants escalated tensions, rejected peaceful alternatives, and disregarded alarm from other officials and the public over the deaths of civilians that had resulted from the military's use of force in September 2003. Based on this evidence, the jury could have reasonably inferred that Defendants failed to take actions to prevent Marlene's death and then continued to use military force against civilians for several more weeks without taking reasonable measures to prevent further bloodshed.

C. Defendants are not Entitled to a New Trial on Plaintiffs' TVPA Claims

Defendants also move for a new trial under Federal Rule of Civil Procedure 59(a). "[U]nder Rule 59(a), a district court may, in its discretion, grant a new trial 'if in [the court's] opinion, the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" McGinnis v. Am. Home Mortgage Servicing,

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Chamber ICTY, Feb. 20, 2001). That is sufficient. See Ford, 289 F.3d at 1289 (explaining that the TVPA's "legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the Act.").

Inc., 817 F.3d 1241, 1254 (11th Cir. 2016) (quoting Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir.1984)). As grounds for a new trial on Plaintiffs' TVPA claims, Defendants simply reference the sufficiency of the evidence arguments contained in their Motion for Judgment as a Matter of Law.

As noted above, the jury in this case heard from nearly forty witnesses over the course of a three-week trial and was called to resolve highly disputed facts regarding the deaths of the eight victims in September and October 2003. Defendants have failed to show that this fact-intensive record is so heavily weighted in their favor that it is appropriate for the Court to "substitute its own credibility choices and inferences for the reasonable choices and inferences made by the jury." Auto-Owners Ins. Co. v. Se. Floating Docks, Inc., 571 F.3d 1143, 1145 (11th Cir. 2009).

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED and ADJUDGED** that Defendants' Motion for Judgment as a Matter of Law and Motion for a New Trial [DE 549 in Case No. 07-22459; DE 528 in Case No. 08-21063] is **DENIED**. The Court will enter a separate Final Judgment in favor of Plaintiffs on their TVPA claims consistent with this Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 5th day of April, 2021.

JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF