**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**
**(Miami Division)**
**Case Nos. 07-22459 & 08-21063 (COHN/SELTZER)**

ELOY ROJAS MAMANI, *et al.*,

Plaintiffs,

v.

GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendant,

JOSÉ CARLOS SÁNCHEZ BERZAÍN,

Defendant.

**DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW**

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## INTRODUCTION

The Second Amended Consolidated Complaint is little more than a repackaged version of Plaintiffs' prior complaint. The Eleventh Circuit ordered dismissal of the prior complaint, holding that Plaintiffs had failed to allege plausible claims for extrajudicial killing and crimes against humanity in light of the "severe civil unrest and political upheaval" occurring in Bolivia in 2003. *Mamani v. Berzain*, 654 F.3d 1148, 1150 (11th Cir. 2011). The amended complaint, like the prior complaint, is a lawsuit brought by Bolivians against Bolivians for actions that occurred solely in Bolivia. The allegations in the complaint still involve the same violent uprising in Bolivia that threatened the safety of innocent citizens and eventually toppled Defendants' democratically elected government. The allegations concerning how Plaintiffs' decedents died are essentially identical to the allegations the Eleventh Circuit previously held insufficient. And even if it were otherwise, the legal and factual landscape has shifted since the Eleventh Circuit's decision in ways that would independently justify dismissal.

On the legal front, the Supreme Court has recently clarified that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, does not apply to the extraterritorial claims that Plaintiffs pursue here. In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the Supreme Court explained that the presumption against extraterritoriality applies to the Alien Tort Statute and that nothing in the statute rebuts the presumption. *See id*. at 1669. For that reason, the Court held that the ATS does not confer jurisdiction for claims in which "all the relevant conduct took place outside the United States." *Id*. That holding is dispositive here. Plaintiffs' ATS claims concern activities that occurred outside the United States—namely, in Bolivia—and accordingly should be dismissed. *See* Part I, *infra*.

As a factual matter, subsequent developments in Bolivia defeat Plaintiffs' claim under the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350 note, in light of that statute's

exhaustion requirement. In the amended complaint, Plaintiffs acknowledge that they have now obtained two separate recoveries in Bolivia. Compl. ¶¶ 172–177. The TVPA's exhaustion requirement precludes the type of triple recovery that Plaintiffs seek here, and their claim should therefore be dismissed. In addition, while Plaintiffs claimed in the amended complaint that they "HAVE EXHAUSTED ALL AVAILABLE REMEDIES IN BOLIVIA," Compl. 42, they know that is not true. In October 2011, Plaintiffs gained the right to initiate civil lawsuits against individuals allegedly responsible for their injuries. Bolivian attorneys have now filed such lawsuits. At a minimum, Plaintiffs have available to them additional remedies in Bolivia that they must exhaust before pursuing a TVPA claim. *See* Part II, *infra*.

Even assuming, *arguendo*, that Plaintiffs could overcome those two considerable hurdles, the Eleventh Circuit's decision independently requires dismissal of the amended complaint. Reading the allegations in the previous version of the complaint in Plaintiffs' favor, the Eleventh Circuit found that the complaint was insufficient because "each of the plaintiffs' decedents' deaths could plausibly have been the result of precipitate shootings during an ongoing civil uprising." 654 F.3d at 1155. Plaintiffs' allegations as to each particular Plaintiffs' decedents' death at issue in this litigation remain the same. And there is no dispute that the deaths occurred during an ongoing civil uprising. Thus, each decedent's death still could plausibly have been the result of precipitate shootings in the course of that uprising. The Eleventh Circuit rejected Plaintiffs' allegations as insufficient, and this Court should do the same. *See* Part III, *infra*.

Plaintiffs' attorneys are on their third attempt to piece together a legitimate complaint. As explained below, this new attempt also fails. Plaintiffs' ATS claims fail under *Kiobel*, and their TVPA claim fails under principles of exhaustion. The amended complaint also fails to address any of the fatal deficiencies the Eleventh Circuit identified. This litigation should

therefore be brought to an end, and Plaintiffs' claims should be dismissed in their entirety and with prejudice.

## PROCEDURAL HISTORY

### A. Prior Proceedings In This Court

In 2008, Plaintiffs filed the previous version of their complaint—the First Corrected Amended Consolidated Complaint ("FACC")—in this Court, asserting claims under the ATS and TVPA as well as state-law claims. Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This Court issued two separate opinions, granting in part and denying in part Defendants' motion to dismiss. In its first opinion, the Court dismissed Plaintiffs' TVPA claims for lack of subject-matter jurisdiction because Plaintiffs had failed to exhaust available remedies under Bolivian law as required by Section 2 of the TVPA. *See Rojas Mamani v. Sanchez Berzain*, 636 F. Supp. 2d 1326 (S.D. Fla. 2009). In its second opinion, the Court concluded that Defendants were not entitled to immunity; that Plaintiffs had pleaded facts sufficient to state claims under the ATS for extrajudicial killings and crimes against humanity; and that Plaintiffs' state-law claims for wrongful death were timely. *See* Order, *Mamani v. Berzain*, Nos. 07-22459 & 08-21063 (S.D. Fla. Nov. 25, 2009), Dkt. 120, at 19–31, 35–39.[1] The Court dismissed Plaintiffs' other ATS claims and held that Plaintiffs' other state-law claims were time-barred. *Id*.

### B. The Eleventh Circuit's Decision

Defendants appealed as of right this Court's decision that they were not entitled to immunity, and were granted leave to pursue an interlocutory appeal on, *inter alia*, the question of

[1] Except where otherwise indicated, all citations to docket entries refer to *Mamani v. Berzain*, No. 08-21063 (S.D. Fla.).

whether Plaintiffs had stated a claim under the ATS. This Court stayed proceedings pending the appeal. Order (Mar. 16, 2010), Dkt. 138.

The Eleventh Circuit unanimously reversed and remanded with instructions to dismiss, holding that Plaintiffs had failed to plead sufficient facts to state a plausible claim for relief under the ATS. *See* 654 F.3d 1148 (11th Cir. 2011).[2] The court began its analysis by describing the circumstances in Bolivia during the relevant time period:

> Plaintiffs' claims arise out of a time of severe civil unrest and political upheaval in Bolivia—involving thousands of people, mainly indigenous Aymara people—which ultimately led to an abrupt change in government. Briefly stated, a series of confrontations occurred between military and police forces and protesters. Large numbers of protesters were blocking major highways, preventing travelers from returning to La Paz, and threatening the capital's access to gas and presumably other needed things. Over two months, during the course of police and military operations to restore order, some people were killed and more were injured.

*Id*.

In analyzing whether the operative version of Plaintiffs' ATS claim stated a plausible theory of liability for extrajudicial killings, the Eleventh Circuit relied upon the definition for extrajudicial killing as set forth in the TVPA. The TVPA provides that an extrajudicial killing is 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.'" 654 F.3d at 1154 (quoting TVPA § 3(a), 28 U.S.C. § 1350 note). "[D]eliberate" in this context means "undertaken with studied consideration and purpose." *Id*. at 1155. The court cautioned, however, that it is unclear precisely what constitutes an extrajudicial killing, and that, when "the law applicable to the circumstances is unclear, we have been warned

[2] The Eleventh Circuit also concluded that the case did not present a political question and that Defendants were not entitled to immunity from suit. 654 F.3d at 1151 n.4. Defendants respectfully submit that those conclusions were erroneous and reserve the right to challenge them in any future appeal.

not to create or broaden a cause of action." *Id.* at 1155 n.9 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)).

The Eleventh Circuit first determined that various allegations by Plaintiffs constituted impermissible statements of legal conclusions. The court explained its reasoning as follows:

> [Plaintiffs allege] that [D]efendants "order[ed] Bolivian security forces, including military sharpshooters armed with high-powered rifles and soldiers and police wielding machine guns, to attack and kill scores of unarmed civilians." Then, [P]laintiffs go on to allege in a conclusory fashion many other things . . . that [D]efendants "met with military leaders, other ministers in the Lozada government to plan widespread attacks involving the use of high-caliber weapons against protesters"; [and] that [D]efendants "knew or reasonably should have known of the pattern and practice of widespread, systematic attacks against the civilian population by subordinates under their command[.]" . . . These allegations sound much like those found insufficient by the Supreme Court in [*Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)]: statements of legal conclusions rather than true factual allegations.

654 F.3d at 1153. The court reasoned that "[f]ormulaic recitations of the elements of a claim, such as these, are conclusory and are entitled to no assumption of truth." *Id.*

The Eleventh Circuit then examined Plaintiffs' remaining allegations and concluded that they did not plausibly suggest that an extrajudicial killing had been committed by *anyone*, much less by Defendants. The Eleventh Circuit reasoned that "[f]acts suggesting *some targeting* are not [sufficient] to state a claim of extrajudicial killing under already established and specifically defined international law" and that "not all deliberated killings are extrajudicial killings." 654 F.3d at 1155 (emphasis added). It then determined that, even reading the allegations in the complaint in Plaintiffs' favor, "each of the [P]laintiffs' decedents' deaths could plausibly have been the result of precipitate shootings during an ongoing civil uprising." *Id.* The court explained that the facts alleged were just as "compatible with accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others)" as with extrajudicial killings. *Id.*

The Eleventh Circuit then concluded that, even if the complaint had included facts sufficient to allege extrajudicial killings by *someone*, the complaint nonetheless failed to state a claim for extrajudicial killing by *these Defendants*. *Id*. at 1155 n.8. The court noted that Defendants faced a situation in which their political opponents were acting "boldly and disruptively" by blocking major highways and trapping travelers. *Id*. at 1154. And in the face of such disruptive uprisings, Defendants had ordered a joint military operation to rescue the trapped travelers, authorized the use of necessary force to reestablish public order, and declared the transport of gas to be a national priority. *Id*.

The Eleventh Circuit contrasted Plaintiffs' allegations with those in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), "[t]he only case from this Circuit to give detailed consideration to the merits of a claim of extrajudicial killing under the ATS." 654 F.3d at 1155 n.9. The court explained that, in *Cabello*, there was sufficient evidence to support the jury's verdict finding a Defendant secondarily liable for extrajudicial killing where the Defendant, a former military officer, had personally commanded a "killing squad" that killed civilian prisoners who had opposed the military junta; where the Defendant personally participated in selecting the Plaintiff's decedent, a political prisoner, for execution after reviewing his prisoner file; and where the political prisoner was then tortured and killed by the Defendant himself. *Id*. According to the court, the "specific targeting of the victim based on his political beliefs, direct involvement of the defendant, and premeditated and deliberate circumstances of the victim's death set *Cabello* apart from the facts alleged in this case." *Id*.

The Eleventh Circuit further concluded that the mere "possibility that—*if* even a possibility has been alleged effectively—these [D]efendants acted unlawfully is not enough for a plausible claim." 654 F.3d at 1156. Rather, to hold Defendants secondarily liable for

extrajudicial killings, Plaintiffs were required to plead facts "connecting what *these Defendants personally did* to the particular alleged wrongs." *Id*. at 1155 n.8 (emphasis added). The court made clear that simply alleging that the armed forces acted under the authority of Defendants was insufficient. *Id*. The court also highlighted that the individual motivations and personal reasons of the particular soldiers who allegedly killed the decedents could not simply be attributed to Defendants. *Id*. The court noted that it was unaware of any case in which "high-level decisions on military tactics and strategy during a modern military operation [had] been held to constitute . . . extrajudicial killing under international law." *Id*. at 1155 (ellipsis in original) (quoting *Belhas v. Ya'alon*, 515 F.3d 1279, 1293 (D.C. Cir. 2008)).

Finally, with respect to Plaintiffs' claim for crimes against humanity, the Eleventh Circuit explained that, given the mass demonstrations and the threat to public safety, the death of fewer than 70 people over a two-month period did not constitute "widespread" or "systematic" violations of international law. 654 F.3d at 1156. The court added that a claim for crimes against humanity requires allegations of "especially wicked conduct that is carried out in an extensive, organized, and deliberate way, and that is plainly unjustified." *Id*. The court held that the "conduct described in the [complaint's] bare factual allegations" did not qualify and was insufficient to state a claim. *Id*.

Plaintiffs' petition for rehearing was denied without recorded dissent, *see* Order, *Mamani v. Berzain*, Nos. 09-16246-FF & 10-13071-FF (11th Cir. Jan. 4, 2012), and Plaintiffs did not seek certiorari from the Supreme Court.

**C. Subsequent Proceedings**

Plaintiffs sought, and Defendants agreed, to stay any further proceedings in this court pending the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Plaintiffs represented that the Court's decision "may determine the jurisdiction of [the

court] to hear [any amended] claims under the Alien Tort Statute." Consent Mot. (Mar. 16, 2012), Dkt. 146, at 2.

On April 13, 2013, the Supreme Court issued its decision in *Kiobel*, holding that the presumption against extraterritoriality applies to claims under the ATS and that nothing in the statute rebutted the presumption. 133 S. Ct. at 1669. The Court therefore held that the ATS did not confer jurisdiction for claims in which "all the relevant conduct took place outside the United States." *Id*.

Plaintiffs nevertheless seek to press ahead with essentially the same claims. On June 21, 2013, Plaintiffs filed their Second Amended Consolidated Complaint, raising claims for extrajudicial killing under the ATS (Count I), extrajudicial killing under the TVPA (Count II), crimes against humanity under the ATS (Count III), and intentional wrongful death under state law (Count IV).

## BACKGROUND

Defendants summarize below Plaintiffs' factual allegations concerning the events of 2003 as set forth in the Second Amended Consolidated Complaint. Defendants also address documents that the Court can consider for purposes of this motion. Defendants' accompanying motion for judicial notice sets forth the legal authority for the Court's consideration of those documents.

### A. Events In 2002 And Early 2003

Defendant Gonzalo Sánchez de Lozada was the democratically elected president of Bolivia from 1993 to 1997 and from August 2002 to October 2003. Compl. ¶ 13; Ex. 1, at 1 (U.S. Department of State ("DOS") 2003 Bolivia Country Report). Defendant José Carlos Sánchez Berzaín was the minister of defense of Bolivia from August 2003 to October 2003. Compl. ¶¶ 15, 55. The second Sánchez de Lozada government was opposed by Felipe Quispe, a

militant leader of a powerful union, and Evo Morales, the runner-up to Sánchez de Lozada in the 2002 presidential election and present-day president of Bolivia. Ex. 1, at 12; Ex. 2, at 5 (DOS 2007 Background Note: Bolivia).

Plaintiffs allege, in conclusory fashion, that President Sánchez de Lozada and Minister Berzaín ordered Bolivian security forces to "shoot to kill" scores of unarmed civilians "on sight." Compl. ¶¶ 6, 38. According to Plaintiffs, Defendants discussed such a plan before President Sánchez de Lozada's election and then implemented it from February to October 2003. *Id.* ¶¶ 3, 5–6. Plaintiffs contend that in furtherance of that alleged plan, in August 2002, the Bolivian Army Commander issued a "secret" "Manual for the Use of Force" to limit military actions occurring domestically. *Id.* ¶ 37. Although Plaintiffs cite that manual in the amended complaint, they did not attach it; they claimed it "defined even peaceful civilian political protests as 'subversion,'" and "called for the application of doctrines of armed conflict to domestic political protests." *Id.*

In fact, the Manual for the Use of Force—attached as Exhibit 3—outlined various principles governing, and *limiting*, the military's use of force. It began with the following statement:

> The Armed Forces, and the Army specifically, believe that respecting Human Rights is not a question of image, but a reality, and that ensuring they are strictly enforced is a priority of their operations.

Ex. 3, at 5.[3] The manual went on to set out "Principles on the Use of Force." The first principle is that the use of force must be proportional; the manual categorically stated that "[n]o firearms may be used against unarmed people." *Id.* at 10. The manual also cautioned soldiers that, "[i]n

[3] Exhibits 3, 4, 6, 8–10, 12–13, and 15–17 have been translated from their original Spanish. Both the original and translated versions, along with certificates of accuracy, are included in each exhibit.

identifying and separating the aggressor from the bystander, *act only against elements that you believe are a threat*. The use of legal force must make a strict distinction between the aggressors, *avoiding collateral damage to non-participating individuals*." *Id.* at 12 (emphases added). The manual added 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." *Id.* at 14. The manual not only required the use of force to be proportional to the threat posed, but expressly limited the situations in which force could be used—none of which involved breaking up allegedly peaceful protests. *See id.* at 14–15. The use of force was also constrained in a number of ways, including that, "[a]ll precautions shall be taken to avoid damage to nearby persons or to adjacent property . . . ." *Id*. at 15.

Plaintiffs allege that, in January 2003, President Sánchez de Lozada promulgated an additional document, the "Republic Plan." Again, Plaintiffs did not attach that document to their complaint, but alleged that the plan "authorized the military to shoot and kill unarmed civilians on sight." Compl. ¶ 38. The two-page document, attached as Exhibit 4, did no such thing. To the contrary, it provided that "[t]he National Army and its Large Units and Special Forces shall engage in support operations to ensure the stability of the Republic, on orders, in their jurisdiction, in order to guarantee the rule of law and the exercise of constitutional rights." Ex. 4, at 1. Nothing in the plan authorized anyone to shoot civilians on sight.

Plaintiffs further allege that, in January and February 2003, the Sánchez de Lozada administration used lethal military force against civilians. *See* Compl. ¶¶ 42–48. Plaintiffs, however, do not allege that any of the decedents on whose behalf they sue died during this time period. In any event, after the events in question, President Sánchez de Lozada immediately requested that the Organization of American States ("OAS"), an independent organization,

conduct an investigation. Ex. 5, at FOIA-005 (DOS April 2004 Report to Congress);[4] Ex. 6, at 1–2 (OAS 2003 Report). The OAS's investigation found that "[t]he life of the President of Bolivia was indeed in danger, as was the stability of Bolivian institutions and democracy," and concluded that the Bolivian military's response was both "proportional" and "controlled." Ex. 6, at 10. The State Department reached a similar conclusion. *See* Ex. 7, at 4 (DOS Bolivia: 2007 Investment Climate Report).

**B. The Events Of September 2003**

Plaintiffs allege that protests against the government escalated in September 2003. Plaintiffs specifically allege that, by "mid-September, protestors dug trenches and placed rocks on the road between La Paz and Sorata." Compl. ¶ 62. Plaintiffs further allege that "[a] festival had attracted many people to Sorata, including foreign tourists," and those tourists "were unable to leave because of the blocked road." *Id*. According to additional detail provided by the State Department, those tourists were effectively being held hostage, as "about 800 tourists, including some foreigners, were trapped in the town of Sorata." Ex. 1, at 8; *see also* Ex. 5, at FOIA-011. In response, the Sánchez de Lozada government began negotiating for the release of the Sorata hostages.

On September 20, 2003, after a week of unfruitful negotiations, the government undertook an effort to rescue the hostages. Ex. 5, at FOIA-011. Plaintiffs allege that, as part of his authorization of the rescue operation, and after a soldier was killed and two policemen were injured, President Sánchez de Lozada sanctioned the use of "necessary force." Compl. ¶¶ 70–72. Plaintiffs do not allege any action by President Sánchez de Lozada with respect to the rescue

[4] Defendants have received FOIA productions from the State Department and have voluntarily provided the productions to Plaintiffs. The productions included State Department memoranda and contemporaneous cables from the American Embassy in La Paz to the State Department.

operation other than the issuance of this authorization and an order to the commander-in-chief of the armed forces to "take Warisata." *Id*. ¶ 71. The relevant portion of the authorization states as follows:

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

Ex. 8 (Sánchez de Lozada Order, Sept. 20, 2003), at 1; *see* Compl. ¶ 72. Later that day, the Commander of the Armed Forces promulgated Directive 27/03, establishing a task force of the Army, Air Force, and Navy to "restore public order and the Rule of Law, in order to guarantee that the population may carry out its normal activities." Ex. 9, at 2 (Directive 27/03); *see* Compl. ¶ 78.

On the morning of September 20, the Bolivian military and police entered Sorata and safely boarded the tourists onto buses in order to escort them back to La Paz. Compl. ¶ 67. According to the State Department, as the buses full of rescued tourists made their way out of town, they were "ambushed by armed peasants." Ex. 2, at 5; *see also* Ex. 5, at FOIA-011. As a result of the ambush, "a number of people were killed on both sides." Ex. 2, at 5; *see also* Ex. 5, at FOIA-011. Photos in the press documented that the armed insurgents from Sorata and Warisata brandished rifles. Ex. 10, at 1 (*La Razón*, Sept. 22, 2003).

Plaintiffs allege that one victim of the violence was an eight-year-old girl whose parents now sue on her behalf. Compl. ¶ 75. Cables from the American Embassy in La Paz reported that she died as a result of a "*stray* bullet" that hit her in the chest "as she looked out a window." Ex. 11, at FOIA-028 (DOS FOIA Production, Apr. 16, 2008) (emphasis added). Plaintiffs

concede that one soldier was killed and at least two police officers were injured in the incident. Compl. ¶ 70.

At the same time, the State Department's personnel in Bolivia concluded that, "[f]rom all indications, the [Bolivian government] acted within its mandate to bring to safety some 80 foreign tourists and 800 Bolivian nationals who were trapped in Sorata under deteriorating circumstances." Ex. 11, at FOIA-026.

**C. The Events Of October 2003**

The violent strikes and blockades did not end after the Sorata rescue. *See, e.g.*, Compl. ¶¶ 89, 94, 132–134. Rather, the events of September "united a loose, nationwide coalition of opposition forces against the government." Ex. 5, at FOIA-011. In October 2003, protesters again blocked roads. Compl. ¶ 89. Those blockades cut off major roads into La Paz, thereby preventing the city from receiving necessary supplies. *Id*. ¶ 94; Ex. 11, at FOIA-033. Mr. Morales threatened further blockades in other parts of the country. *See, e.g.*, Ex. 11, at FOIA-063. The combined opposition forces set about instituting "Plan Tourniquet" and "laid siege to La Paz, the first time that tactic had been used since 1781." Ex. 11, at FOIA-032 to FOIA-033.

By October 11, La Paz had been "besieged" by the insurgents for ten days, Ex. 2, at 5, and the city was unable to obtain critical supplies such as fuel, food, and medical provisions. Ex. 11, at FOIA-042. The lack of gas, in particular, had devastating, cascading consequences on every aspect of the city's life, including the economy and the safety of more than a million people: "In La Paz and El Alto, food was scarce and stores, schools, businesses and banks remained closed." Ex. 11, at FOIA-048; *see also id.* at FOIA-043. And "[t]he absence of bread has seriously impacted the poor and sanitation services are practically nil." *Id.* at FOIA-048. Three babies died at a hospital due to shortages of oxygen. *Id*. at FOIA-032.

On October 11, President Sánchez de Lozada, together with his cabinet (including Minister Berzaín), signed Supreme Decree 27209. The decree authorized the military to escort fuel tanker trucks from El Alto to La Paz in order to provide the city with necessary supplies. Ex. 12 (Supreme Decree 27209); *see also* Compl. ¶ 100. The decree also contained a clause offering indemnification for damage to persons and property resulting from the government's actions. Ex. 12, at 2. Plaintiffs do not allege that President Sánchez de Lozada took any action with respect to the blockade other than to send a letter ordering the armed forces to "restore and maintain order and public security." Compl. ¶ 101; *see also* Ex. 13 (Sánchez de Lozada Letter, Oct. 11, 2003).

The Sánchez de Lozada government's efforts to deliver critical supplies to La Paz were met with further violence "when demonstrators attacked convoys bringing fuel and other supplies to La Paz." Ex. 5, at FOIA-011. In those attacks, the protesters were again fully armed; according to the State Department, they were "bringing dynamite and guns to bear." Ex. 11, at FOIA-043. Nonetheless, the "security forces first exhausted non-lethal means against the El Alto crowds," *id.* at FOIA-033, and only "*returned* fire" that was directed at them, Ex. 5, at FOIA-011 (emphasis added). In the violence, police, soldiers, insurgents, and others were killed or wounded. According to the amended complaint, four of the persons on whose behalf Plaintiffs are bringing suit died during the clashes on October 12. Compl. ¶¶ 112–120.

The blockades continued into October 13, when demonstrators blocked a road leading into La Paz. Compl. ¶ 133. Soldiers, deployed to disperse the demonstrators, fired tear gas and non-lethal bullets. *Id*. ¶ 134. According to Plaintiffs, only *after* a soldier was killed by a sniper did officers order soldiers to defend themselves with lethal ammunition. *Id*. ¶¶ 135–136.

Plaintiffs sue on behalf of three persons who allegedly died amid the continuing violence. *Id.* ¶¶ 140–145.

Throughout this period, President Sánchez de Lozada's government made continued efforts to engage in dialogue with the opposition. *See*, *e.g.*, Ex. 11, at FOIA-043. The violence and unrest, however, only mounted in the days following the efforts to bring supplies into La Paz. The State Department reported that "[l]ocal residents fear looting, and *the danger of misdirected fire coming through windows or walls is a real threat for even those who stay home*." *Id.* (emphasis added). The State Department also noted that "[m]ost of El Alto was basically under the control of neighborhood vigilante groups," *id.* at FOIA-049, and that it had "received numerous credible reports that the neighborhood groups coerce ambivalent citizens into joining demonstrations," *id.* at FOIA-055. In the Chapare, "a booby trap exploded as soldiers from the Army's Ninth Division were clearing debris from the highway." *Id.* at FOIA-056. In Cochabamba, demonstrators attacked "with Molotov cocktails and dynamite." *Id.* at FOIA-049.

During massive demonstrations in La Paz, "[w]hile there were reports of some looting, police exercised enormous restraint in dispersing the crowds, resorting to tear gas but neither to rubber bullets or more lethal force in carrying out their responsibilities." Ex. 11, at FOIA-065. Ultimately, although President Sánchez de Lozada offered "major concessions," the opposition stated that "nothing short of the President's resignation would end the demonstrations." *Id.* at FOIA-059.

On October 17, 2003, to restore peace and safety to La Paz, President Sánchez de Lozada and his cabinet, including Minister Berzaín, resigned under protest. Both men subsequently left Bolivia for the United States. Ex. 2, at 5. Evo Morales was elected president on December 18,

2005, after the two presidents who followed President Sánchez de Lozada were also forced to resign as a result of popular, violent uprisings. *Id*.

**D. Subsequent Events**

In January 2004, Congress directed the State Department to submit a report on human-rights practices in Bolivia as part of a review of government funding for South American countries. *See* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3. The State Department recommended that funds be released to Bolivia after determining that "[t]he Bolivian military and police generally respected human rights in 2003, despite two major incidents of social upheaval." Ex. 5, at FOIA-006. Referring specifically to the events of February and September/October 2003, the State Department expressly found that, "[d]espite unrest created by two episodes of major social upheaval, the military and police acted with restraint and with force commensurate to the threat posed by protestors." *Id.* at FOIA-012.

In September 2012, the Bolivian government announced that the United States had formally denied Bolivia's request to extradite President Sánchez de Lozada and his ministers. *See* Ex. 14 (*Chicago Tribune*, Sept. 7, 2012).

**E. Compensation To Plaintiffs**

On November 20, 2003, the Bolivian government entered into a "Humanitarian Assistance Agreement" with the heirs of those killed in the civil unrest of September and October 2003, guaranteeing them 5,000 Bolivianos for funeral expenses and an additional 55,000 Bolivianos in further compensation. *See* 636 F. Supp. 2d at 1329. When measured in 2003 dollars, that is the equivalent of over $7,000, or almost eight times the average annual per capita income in Bolivia. *See id*. Plaintiffs received the compensation to which they were entitled under that agreement. Compl. ¶ 174.

In November 2008, the Bolivian government also enacted a "Law for the Victims of the Events of February, September, and October 2003," which provided heirs of those killed 250 "national minimum salaries"—equivalent to $19,905—as well as free public university educations. 636 F. Supp. 2d at 1329–30 (citation omitted). Plaintiffs also received the payments to which they were entitled under that law. Compl. ¶ 176.

In August 2011, a Bolivian court found seven individuals connected with the events of September and October 2003 guilty of various crimes. Compl. ¶ 170.[5] Upon sentencing, which occurred on October 4, 2011, Plaintiffs and other persons who were harmed during the events of that time period became eligible to pursue civil remedies against the defendants in that proceeding, who would be jointly and severally liable for any judgment. *See* Ex. 15, at Art. 92 (Criminal Code of Bolivia). Indeed, at least some of those injured and the legal representatives of some of the injured have filed a civil action in Bolivia to pursue this remedy, seeking up to 1 million Bolivianos (approximately $140,000) each. *See* Ex. 16 (*El Diario*, Sept. 10, 2013); *see also* Ex. 17, at 1–2 (Tr., Aug. 21, 2013).

**STANDARD OF REVIEW**

Defendants move first to dismiss Plaintiffs' claims under Rule 12(b)(1) for lack of subject-matter jurisdiction. The Court's subject-matter jurisdiction over the ATS claims depends on an adequately pleaded violation of the law of nations. *See* 28 U.S.C.

[5] In Defendants' view, the Bolivian court proceeding was politically motivated and lacked the most basic procedural safeguards. Defendants do not concede that the verdicts carry any meaningful weight as to whether any laws were violated in September and October 2003. The Bolivian court proceeding is relevant here only in that, the criminal trial having been completed, Plaintiffs in Bolivia are now entitled to proceed with a civil suit against those who were convicted.

§ 1350.[6] Because of that jurisdictional threshold, the ATS "requires a more searching review of the merits to establish jurisdiction than is required under the more flexible 'arising under' formula of section 1331." *Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005) (internal quotation marks omitted); *see generally Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–26 (2004). As to Plaintiffs' TVPA claim, a motion to dismiss for failure to exhaust remedies is treated as a motion under Rule 12(b)(1). *See Mamani Rojas v. Sanchez Berzain*, 636 F. Supp. 2d 1326, 1328–29 (S.D. Fla. 2009).[7]

Defendants also move, in the alternative, to dismiss Plaintiffs' claims under Rule 12(b)(6). The Eleventh Circuit, in dismissing Plaintiffs' previous complaint, succinctly stated the applicable standard of review. A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Mamani*, 654 F.3d at 1153 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). And "[w]here a complaint pleads facts that are 'merely *consistent* with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. (emphasis added) (quoting *Iqbal*, 556 U.S. at 678).

Defendants move to dismiss Plaintiffs' amended complaint in its entirety with prejudice. Dismissal with prejudice is appropriate where, as here, a plaintiff has had multiple opportunities

[6] Because jurisdiction depends on a well-pleaded violation of the law of nations, the jurisdictional analysis under the ATS typically involves an analysis of whether plaintiffs have stated a claim for a violation of the law of nations. *See, e.g.*, *Mamani v. Berzain*, 654 F.3d 1148, 1154 (11th Cir. 2011); *Best Med. Belg., Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230, 237 (E.D. Va. 2012).

[7] In *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), the Eleventh Circuit stated that courts should dismiss insufficiently plead TVPA claims under Rule 12(b)(6). *Id*. at 1269. *Sinaltrainal*, however, did not address whether courts should dismiss TVPA claims for failure to exhaust under Rule 12(b)(1) or Rule 12(b)(6). *See id.*

to amend his complaint. *See*, *e.g.*, *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1014 (11th Cir. 2005) (per curiam).

## ARGUMENT

### I. THE COURT SHOULD DISMISS PLAINTIFFS' ATS CLAIMS UNDER *KIOBEL v. ROYAL DUTCH PETROLEUM*

Plaintiffs seek to invoke this Court's subject-matter jurisdiction pursuant to the Alien Tort Statute for alleged violations of the law of nations that occurred entirely outside of the United States. The ATS provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Because the ATS does not confer jurisdiction over Plaintiffs' extraterritorial claims, this Court should dismiss Counts I and III for lack of subject-matter jurisdiction.

The Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), is dispositive of the analysis here. In *Kiobel*, the Court considered "whether and under what circumstances courts may recognize a cause of action under the [ATS], for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Id.* at 1662. In addressing that question, the Court applied the "presumption against extraterritorial application," which directs that "when a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 1664 (alteration and internal quotation marks omitted). The Court reasoned that that presumption "applies to claims under the ATS, and that nothing in the statute rebuts that presumption." *Id.* at 1669. Accordingly, the Court held that the ATS does not afford jurisdiction over claims "seeking relief for violations of the law of nations occurring [abroad]." *Id.* The Court noted, moreover, that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the

presumption against extraterritorial application." *Id.* In the case before it, "all the relevant conduct took place outside the United States," and thus the Court concluded that the ATS did not provide jurisdiction over petitioners' claims. *Id*.

The import of *Kiobel* for this case could not be clearer. As the Second Circuit recently concluded, "[t]he Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Balintulo v. Daimler AG*, Civ. No. 09-2778, 2013 WL 4437057, at *7 (2d Cir. Aug. 21, 2013). Accordingly, "*Kiobel* forecloses [claims which] . . . fail[] to allege that any relevant conduct occurred in the United States." *Id.* at *6.

The plaintiffs in *Balintulo* had attempted to circumvent *Kiobel*'s clear holding by arguing that the decision "does not preclude suits under the ATS . . . when the defendants are American nationals, or where the defendants' conduct affronts significant American interests identified by the plaintiffs." 2013 WL 4437057, at *6. The Second Circuit flatly rejected this attempt: "[T]his interpretation of *Kiobel* arrives at precisely the conclusion reached by Justice Breyer, who . . . only concurred in the judgment of the Court . . . . The plaintiffs' argument, however, seeks to evade the bright-line clarity of the Court's actual holding." *Id.* (citation omitted). The court went on to explain that "[t]he Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States . . . if all the relevant conduct occurred abroad, that is

simply the end of the matter under *Kiobel*." *Id*. at *7.[8] District courts since *Kiobel* have also resoundingly rejected arguments that the ATS affords jurisdiction in cases involving extra-territorial conduct.[9] *See*, *e.g.*, *Ahmed-Al-Khalifa v. Queen Elizabeth II*, Civ. No. 13-103, 2013 WL 2242459, at *1 (N.D. Fla. May 21, 2013) (dismissing claims against United States persons and other individuals "because the violations at issue all occurred outside of the United States,

[8] In reaching this conclusion, the Second Circuit explained further that "the presumption against extraterritoriality applies to the *statute*," and "[i]n *all* cases, therefore[,] the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign." *Balintulo*, 2013 WL 4437057, at *8; *see also Al Shimari v. CACI Int'l, Inc.*, Civ. No. 08-827, 2013 WL 3229720, at *8 (E.D. Va. June 25, 2013) (same); *cf. Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 889 (11th Cir. 2013), *petition for cert. filed*, 81 U.S.L.W. 3584 (Apr. 3, 2013) (No. 12-1202).

[9] *See also, e.g.*, *Tymoshenko v. Firtash*, Civ. No. 11-2794, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) ("Plaintiffs' ATS claim against Nadra Bank is impermissibly extraterritorial and must therefore be dismissed."); *Muntslag v. Beerens*, Civ. No. 12- 7168, 2013 WL 4519669, at *3 (S.D.N.Y. Aug. 26, 2013) ("Simply put, the conduct plaintiff alleges clearly occurred overseas and it is therefore not covered by the ATS."); *Adhikari v. Daoud & Partners*, Civ. No. 09-1237, 2013 WL 4511354, at *7 (S.D. Tex. Aug. 23, 2013) ("Since all relevant conduct . . . occurred outside of the United States, summary judgment on Plaintiffs' ATS claim must be granted."); *Kaplan v. Central Bank of the Islamic Republic of Iran*, Civ. No. 10-483, 2013 WL 4427943, at *16 (D.D.C. Aug. 20, 2013) ("Because these extraterritorial attacks do not 'touch and concern the territory of the United States' . . . ," the claims are barred . . . ."); *Hua Chen v. Honghui Shi*, Civ. No. 09-8920, 2013 WL 3963735, at *7 (S.D.N.Y. Aug. 1, 2013) ("Plaintiffs' alleged detention, torture, and abuse took place entirely abroad. The ATS thus does not provide the Court with jurisdiction over any of Plaintiffs' causes of action."); *Giraldo v. Drummond Co.*, Civ. No. 09-1041, 2013 WL 3873960, at *8 (N.D. Ala. July 25, 2013) ("Even if . . . certain decisions had been made in the United States to support the AUC in Colombia, [plaintiffs'] theory on extraterritorial reach still does not hold water based on the most logical and unstrained reading of *Kiobel*."); *Ezekiel v. B.S.S. Steel Rolling Mills*, Civ. No. 13-167, 2013 WL 3339161, at *2 (N.D. Fla. July 2, 2013) ("In light of *Kiobel*, the ATS cannot confer subject-matter jurisdiction upon plaintiff's claims because the violations at issue all occurred outside of the United States, and unlawful arrest and detention in Nigeria does not 'touch' or 'concern' the United States in such a way that would overcome the ATS's presumption against extraterritoriality."); *Al Shimari*, 2013 WL 3229720, at *10 ("Plaintiffs' ATS claims are barred because the ATS does not provide jurisdiction over their claims, which involve tortious conduct occurring exclusively outside the territory of the United States."); *Mohammadi v. Islamic Rep. of Iran*, Civ. No. 09-1289, 2013 WL 2370594, at *15 (D.D.C. May 31, 2013) ("[T]o the extent that the plaintiffs seek to pursue claims under the ATS against defendants . . . for conduct that occurred entirely within the sovereign territory of Iran, those claims are also barred under the holding of *Kiobel*.").

and the South African apartheid does not 'touch' or 'concern' the United States in such a way that would overcome the ATS's presumption against extraterritoriality").

Here, all of the alleged violations of the law of nations for which Plaintiffs sue occurred strictly within Bolivia; Defendants were citizens and residents of Bolivia at the time they allegedly carried out the violations; and none of the alleged planning for the events occurred in the United States. *See* Compl. ¶¶ 13, 15, 27–165. Plaintiffs' amended complaint contains only three allegations that could even arguably be said to concern the United States. *First*, Plaintiffs allege that, after the events giving rise to their claims occurred, Defendants were granted asylum by and now reside in the United States. *Id*. ¶¶ 13, 15, 164. As a legal matter, Defendants' current presence in the United States is irrelevant. Lower courts are without authority to "reinterpret" *Kiobel's* "binding precedent in light of irrelevant factual distinctions, such as the citizenship of the [parties]." *Balintulo*, 2013 WL 4437057, at *7. If Plaintiffs' allegations have any relevance, they support *dismissal*, because the United States government has already determined that Defendants warrant the protection of the United States. Lest there be any question on that score, the State Department has expressly rejected Bolivia's request to extradite Defendants to Bolivia to face trial for these alleged events. *See* Ex. 14.[10]

*Second*, Plaintiffs allege that President Sánchez de Lozada intended to sell natural gas to the United States and Mexico, Compl. ¶¶ 33, 59, and, *third*, in a similar vein, they allege that the American Embassy withdrew support for his government the day he resigned the presidency. *Id*.

[10] The amended complaint alleges—"on information and belief" and for the first time—that President Sánchez de Lozada is a citizen of the United States. Compl. ¶ 13. He is not. *See* Mot. to Transfer Venue for Purposes of Consol., Decl. of President Gonzalo Sánchez de Lozada, ¶ 2, *Mamani v. Lozada*, Civ. No. 07-2507 (D. Md. Dec. 4, 2007). Even if he were a citizen of the United States, that fact would not alter the extraterritorial nature of the alleged conduct and is thus "irrelevant" to the analysis. *Balintulo*, 2013 WL 4437057, at *7.

¶ 164. But while those allegations mention the United States, they do not describe any *illegal conduct* in the United States.

In sum, there is not a single allegation in the 224-paragraph complaint of activity occurring in the United States in connection with the alleged violations. Because Plaintiffs' claims seek relief for "violations of the law of nations occurring outside the United States," they are "barred" under *Kiobel*. 133 S. Ct. at 1669.

## II. PLAINTIFFS' TVPA CLAIM SHOULD BE DISMISSED IN LIGHT OF THE ACT'S EXHAUSTION REQUIREMENT

Plaintiffs' TVPA claim fares no better. The TVPA expressly provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note. Plaintiffs fail to satisfy this requirement in two respects. *First*, Plaintiffs have received compensation for their injuries pursuant to at least two Bolivian governmental schemes, the 2003 Humanitarian Assistance Agreement and the 2008 Law for the Victims of the Events of February, September, and October of 2003. Where, as here, Plaintiffs have successfully obtained "remedies in the place in which the conduct giving rise to the claim occurred," *id*., further relief under the TVPA is unwarranted. *Second*, even putting aside the fact that Plaintiffs have obtained relief under those two schemes, Plaintiffs have failed to exhaust *other* available avenues for relief under Bolivian law. Specifically, Plaintiffs have not exhausted available civil claims in the Bolivian court system.[11] Because Plaintiffs have not satisfied the TVPA's exhaustion requirement, their TVPA claim should also be dismissed.

[11] The Eleventh Circuit has held that the ATS does not incorporate an exhaustion requirement. *See Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005). Defendants respectfully submit that this holding was erroneous and reserve the right to challenge it in any future appeal.

### A. Plaintiffs Have Received Compensation For Their Alleged Injuries

In deciding the prior motion to dismiss, this Court dismissed the TVPA claim because Plaintiffs had "not exhausted available remedies in Bolivia." *Rojas Mamani*, 636 F. Supp. 2d 1326, 1328 (S.D. Fla. 2009). At that time, Plaintiffs had received compensation under the 2003 Humanitarian Assistance Agreement, which provided each Plaintiff with 60,000 Bolivianos for "humanitarian assistance compensation" and "emergency and funeral expenses." *Id.* at 1329 (internal quotation marks omitted). This sum amounted to "almost 8 times the 2003 annual average per capita income." *Id.* Plaintiffs had not yet, however, sought relief under the 2008 Law for the Victims of the Events of February, September, and October of 2003, which provided heirs to deceased victims of the events at issue here "a payment equal to 250 'national minimum salaries,' as well as free public university educations to obtain bachelors' degrees." *Id.* (citation omitted). That "substantial sum" amounted to roughly 15 times the average annual per capita income in Bolivia. *Id.* at 1330–31. The Court determined that the failure to seek compensation under that law precluded Plaintiffs from raising their TVPA claims. *Id.*

Because this Court dismissed Plaintiffs' claim as a result of their failure to seek compensation under the 2008 law, it did not decide whether the 2003 payments would alone preclude Plaintiffs' TVPA claim. 636 F. Supp. 2d at 1331. It noted, however, that "[i]t seem[ed] . . . that the [D]efendants have the better of the argument with respect to the effect of the 2003 payments." *Id.* at 1330. The Court explained that "[i]t is difficult for the [P]laintiffs to say that the 2003 payments did not constitute compensation (albeit non-individualized compensation) for their losses," and that, while "those payments may not have affected the [P]laintiffs' ability to seek further recovery from the [D]efendants under Bolivian law, [that] cannot alter the exhaustion of remedies requirement found in § 2(b) of the TVPA." *Id.* The Court additionally noted that "[o]ne of the early supporters of the [TVPA] . . . explained that the

bill would 'permit victims of foreign torture to undertake a civil action against their torturers in the United States *if they are unable to obtain redress in the country where the torture took place*." *Id.* at 1331 n.9 (internal quotation marks omitted) (citing 134 Cong. Rec. 28,611, 28,614 (1988)).

Plaintiffs now allege that they have received the monies to which they were entitled under the 2008 law. Compl. ¶ 176. In other words, each Plaintiff has now received compensation under at least two separate schemes, totaling approximately 23 times the average annual per capita income in Bolivia. 636 F. Supp. 2d at 1329–30. This Court should now hold that Plaintiffs' compensation under these two schemes precludes their claim for further relief in an American court under the TVPA. The legislative history of the TVPA and customary international law both suggest that an individual who has been adequately compensated under local law may not invoke the resources of an American court for yet additional relief.

To begin with, as this Court noted in its earlier opinion, the legislative history of the TVPA suggests that the purpose of the Act was to provide relief to victims of torture only "if they are unable to obtain redress in the country where the torture took place." 636 F. Supp. 2d at 1331 n.9 (emphasis and internal quotation marks omitted). The House Report on the TVPA, for example, explains that "the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred," as this "ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred." H.R. Rep. No. 102-367, at 4–5 (1991). In other words, claims must be brought under the TVPA "as a last resort," after attempts to obtain local remedies have failed. S. Rep. No. 103-249, at 9 (1991); 134 Cong. Rec. 28611, 28614 (1988) (statement of Rep. Broomfield) (stating that, "as a last recourse to justice, [the TVPA] would then allow a person to turn to the Federal courts for

help"); *see generally Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012) (noting that "[C]ongress appeared well aware of the limited nature of the cause of action it established in the [TVPA]").

The legislative history further states that "the interpretation of section 2(b) . . . should be informed by general principles of international law." S. Rep. No. 249, *supra*, at 9; *see also Cabello v. Fernandez-Larios*, 291 F. Supp. 2d 1360, 1365 (S.D. Fla. 2003) (same), *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005). Those principles of international law, in turn, suggest that an individual who has successfully obtained local remedies may not pursue a claim for additional relief in international proceedings. "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law . . . ." *Interhandel (Switzerland v. United States*), 1959 I.C.J. 6, 27. The purpose of that rule is to allow "the State where the violation occurred [to] have an opportunity to redress it by its own means, within the framework of its own domestic legal system." *Id.* "If an injured alien's claim can be remedied within the domestic sphere," elevating the claim to the international sphere "is precluded." Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 Colum. Hum. Rts. L. Rev. 223, 236–37 (1987).

The legislative history of the TVPA suggests that there might be one exception to this general rule: A Plaintiff is not precluded from seeking further relief where the local remedy is manifestly unjust. The Senate Report alludes to that narrow exception, indicating that American courts need not recognize foreign judgments in "situations much like those that exempt a plaintiff from the exhaustion of remedies requirement: unfairness of the judicial system, unfair procedures, and lack of competence." S. Rep. No. 102-249, *supra*, at 10; *see also* Nsongurua J.

Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human And Peoples' Rights*, 97 Am. J. Int'l L. 1, 22 (2003).[12]

This Court need not explore the precise contours of that exception, however, because it plainly does not apply to Plaintiffs. As explained above, Plaintiffs have concededly been compensated under two separate schemes. And the Court has already found that the payment Plaintiffs would receive under the 2008 law constitutes "a substantial sum" and that their "total monetary compensation [would be] even greater if the 2003 payments are considered." 636 F. Supp. 2d at 1331. This Court would not have required exhaustion in the first instance if it believed the compensation system established by the 2008 law to be inadequate. Now that Plaintiffs have recovered under that law, they have indisputably received adequate remedies under Bolivian law, and this Court should therefore dismiss their TVPA claim.

### B. Plaintiffs Have Failed To Exhaust All Avenues For Relief Under Bolivian Law

In the alternative, the Court should dismiss Plaintiffs' TVPA claim because Plaintiffs are entitled to additional relief under Bolivian law—and thus have not fully exhausted their remedies. *See* 28 U.S.C. § 1350 note.

Specifically, Plaintiffs are entitled to seek compensation by pursuing civil claims in Bolivian courts. As Plaintiffs allege in their amended complaint, seven individuals were found criminally liable for the events at issue here on August 30, 2011. Compl. ¶ 170. Article 87 of the Bolivian Code of Criminal Procedure provides that "[a]ny person who is criminally liable, is also liable civilly and is obligated to compensate for the material and moral damages caused by

[12] That exception, too, is consistent with general principles of international law. As Chief Judge Kozinski, then sitting on the Court of Claims, noted in *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985), seeking relief before an international tribunal is "not generally appropriate" unless the Plaintiff "has exhausted such local remedies as may be open to him and has sustained a denial of justice as that term is understood in international law." *Id.* at 243 n.12 (internal quotation marks omitted).

the crime." Ex. 15. Indeed, the 2012 State Department Human Rights Report on Bolivia cites the fact that, "[a]t the conclusion of a criminal trial" for human rights violations, "the complainant can initiate a civil trial to seek damages." Ex. 18, at 4 (DOS Bolivia 2012 Human Rights Report). Plaintiffs are accordingly entitled to bring a civil suit against those seven individuals seeking compensation for their injuries in Bolivian court.

It appears that Plaintiffs are in the process of pursuing this remedy. At least some of those injured and the legal representatives of at least some of the injured have filed a civil action in Bolivia seeking up to 1 million Bolivianos (approximately $140,000) each. *See* Ex. 16. And during a radio interview on a Bolivian radio station on August 21, 2013, an attorney claiming to represent some of the injured, Freddy Avalos, stated that they intend to pursue their civil claims. *See* Ex. 17. Mr. Avalos noted that his clients planned to file suit against those convicted in Bolivia. *Id.* Mr. Avalos disclosed that his team has been actively working on such a lawsuit, including by reviewing international law to determine the amount of damages that Plaintiffs should seek. He stated as follows:

> [T]aking similar cases in other countries as precedent, we've been able to more or less determine a quantitative number that can to some extent compensate for the loss of one of the victims of 2003, or one of the people grievously wounded in 2003. Based on that assessment, we've done our work and are submitting [it] to the Supreme Court of Justice so that once assessed the Sentencing Court will surely determine and grant the economic benefit. We're talking about money that they will surely grant.

Ex. 17, at 2. If the plaintiffs in that lawsuit are successful, they will be entitled to recoveries from the defendants in that suit, who would be jointly and severally liable under Bolivian law. Ex. 15, Art. 92. If those defendants are unable to satisfy the full judgment, the government is required by law to establish a reparation fund to pay the judgment. *See id.*, Art. 94.

In Defendants' view, the remedies Plaintiffs have already obtained in Bolivia are sufficient to support dismissal of their TVPA claim. At a minimum, however, the availability of additional remedies in Bolivia demonstrates that Plaintiffs have failed to satisfy the TVPA's exhaustion requirement. Either way, dismissal of the TVPA claim is warranted.[13]

## III. THE AMENDED COMPLAINT SUFFERS FROM THE SAME INFIRMITIES IDENTIFIED BY THE ELEVENTH CIRCUIT AND THEREFORE FAILS TO STATE A VALID CLAIM

The amended complaint fails to address any of the deficiencies identified by the Eleventh Circuit when it ordered dismissal of Plaintiffs' prior ATS claims. In particular, Plaintiffs remain unable to allege that extrajudicial killings were committed by *anyone*, much less by *these Defendants*. *See Mamani*, 654 F.3d at 1155. Instead, Plaintiffs rehash the same allegations expressly rejected by the Eleventh Circuit as insufficient. And while the TVPA claim was not at issue before the Eleventh Circuit, the court analyzed the extrajudicial-killing claim under the ATS by relying on the definition of extrajudicial killing in the TVPA, *id*. at 1154, and thus its reasoning applies equally to plaintiffs' TVPA claim. Plaintiffs' complaint can be dismissed on this basis alone.

### A. The Amendments To Plaintiffs' Extrajudicial-Killing Claims Fail To Address The Deficiencies Identified By The Eleventh Circuit

The Eleventh Circuit concluded that Plaintiffs had failed to state that *anyone*, much less Defendants, had committed extrajudicial killings in light of the severe civil unrest occurring in Bolivia during the relevant time period. Even reading the allegations in Plaintiffs' favor, "each

[13] When he signed the TVPA into law in 1992, President George H.W. Bush expressed concern that "potential abuse of [the TVPA] undoubtedly would . . . be a waste of our own limited and already overburdened judicial resources," and his hope that "the expansion of litigation by aliens against aliens" would be "approached with prudence and restraint. . . . [and] by sound construction of the statute and the wise application of relevant legal procedures and principles." Presidential Statement on Signing H.R. 2092, 28 Weekly Comp. Pres. Doc. 465, 1992 U.S.C.C.A.N. 91 (Mar. 16, 1992).

of the [P]laintiffs' decedents' deaths could plausibly have been the result of precipitate shootings during an ongoing civil uprising." 654 F.3d at 1155. According to the Eleventh Circuit, the facts alleged were just as "compatible with accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others)" as with extrajudicial killings. *Id*.

To establish that any extrajudicial killing occurred, Plaintiffs were required to address those deficiencies. They have not. In Exhibit 19, Defendants provide a table that compares the relevant allegations in the previous version of the complaint as to each decedent's death with the relevant allegations in the current version. As that exhibit shows, the specific allegations in the current version that recount how the decedents died are nearly identical to those in the previous version.[14] The only material difference is that Plaintiffs add the conclusory allegation that the decedents were "intentionally and deliberately" killed, Compl. ¶¶ 203, 207, whereas they claimed in the previous version of the complaint that the killings were committed in a manner that constituted an extrajudicial killing. That, of course, is not a sufficient change to transform their allegations into a valid claim. Plaintiffs' allegations remain devoid of any *facts* plausibly suggesting that anyone intentionally killed the decedents with the "studied consideration and purpose" that is required to state a claim of extrajudicial killing. *Mamani*, 654 F.3d at 1155.

The other alterations to the complaint are little more than cosmetic. Plaintiff Cerro sues on behalf of his deceased wife. In its prior opinion, this Court held that Mr. Cerro's allegations were insufficient to state a claim for extrajudicial killing because the facts did not exclude that possibility that the bullet, which the complaint alleged had gone through a *wall* and killed the

[14] Juan Mamani, one of the Plaintiffs on the previous version of the complaint, is not a Plaintiff on the amended complaint. The nine current Plaintiffs bring claims on behalf of eight decedents.

decedent, was simply a stray bullet fired during the nearby violence. *See* Order (Nov. 25, 2009), Dkt. 120, at 27. The amended complaint now deletes any references to the wall and instead alleges that the decedent was sitting "next to the window" when she was shot. Compl. ¶ 113. That slight change does not affect the analysis. There remains no allegation that the bullet actually went *through* the window, as opposed to the wall (as was alleged in the previous version of the complaint). And the complaint still does not exclude the possibility that the bullet was a stray one.

As for the other decedents' deaths, other alternative explanations remain equally likely, if not more so, than that they were the victims of extrajudicial killings. *See* 654 F.3d at 1155. As the Eleventh Circuit explained, the alleged facts concerning those deaths—each of which occurred in the cloud of violent protests and severe civil unrest—are equally compatible with alternative explanations that the decedents were killed as a result of stray bullets, negligent and accidental shootings, self-defense, or mistaken identification. *See id.*[15] Plaintiffs' claims for extrajudicial killing should therefore be dismissed.

[15] With respect to Plaintiffs Eloy and Etelvani Mamani, the amended complaint fails even to allege *who* shot their respective decedents—a Bolivian soldier, protester, or someone else. The complaint alleges only that the killers were "sharpshooter[s]" with access to "military weapon[s]," not that that the sharpshooters were members of the military or police. Compl. ¶ 75. Notably, State Department cables confirm that the protestors also had access to military equipment. Ex. 11, at FOIA-027, FOIA-034.

### B. Even If Plaintiffs Had Alleged A Valid Extrajudicial-Killing Claim, Plaintiffs Fail To Allege A Basis For Holding Defendants Liable

Assuming, *arguendo*, that the amended complaint included facts sufficient to allege extrajudicial killings by *someone*, the complaint still fails to state a claim for extrajudicial killing by *these Defendants*.[16] Should the Court reach the issue, therefore, it should dismiss the extrajudicial-killing claims on this alternative ground.

#### 1. Plaintiffs' Allegations That Defendants Authorized The Military To Kill Innocent Civilians Are Expressly Rebutted By Documents On Which They Rely

The core of Plaintiffs' earlier complaint was the allegation that Defendants "order[ed] Bolivian security forces . . . to attack and kill scores of unarmed civilians." FACC ¶ 1. The Eleventh Circuit rejected this allegation as conclusory and held it was not entitled to any weight in the analysis. 654 F.3d at 1155. In response, Plaintiffs now allege, repeatedly, that "[d]efendants chose to continue to implement their strategy to use lethal military force to kill and terrorize civilians." Compl. ¶ 50; *see also id*. ¶¶ 6, 30–31, 35, 50–51, 203, 207. If anything, those allegations are even vaguer and less specific than the allegation that Defendants "ordered" security forces to kill civilians—the very allegation the Eleventh Circuit rejected. This Court should therefore attach no weight to those allegations in assessing the validity of Plaintiffs' claim.

Plaintiffs also now allege that unnamed government officials hypothesized that "they would have to kill 2,000 or 3,000 people" in order to quell anticipated protests, Compl. ¶ 4, and

[16] Glaringly, any time the amended complaint refers to an "order" to kill, it does so in the passive voice. *See*, *e.g.*, Compl. ¶ 73 ("troops were ordered to use lethal munitions and to shoot 'at anything that moved'"); *id*. ¶ 122 ("were ordered"); *id*. ¶ 136 ("were ordered"); *id*. ¶ 138 ("were ordered"); *id*. ¶ 139 ("were ordered"). The only time the amended complaint comes close to identifying who ordered soldiers to kill civilians is in Paragraph 104, where it alleges only that "*[o]fficers* ordered soldiers to kill civilians." (emphasis added).

that Defendant Berzaín commented that "999 deaths were not enough, but that 1,000 deaths would be sufficient," *id*. ¶ 50; *see also id*. ¶ 30. But allegations as to conversations concerning hypothetical events have no bearing on what in fact occurred. Moreover, this Court is not required to consider any allegations concerning an alleged plan to kill innocent civilians, because those allegations are flatly contradicted by the very documents relied upon by Plaintiffs.[17] "[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1205–06 (11th Cir. 2007); *see also Merl v. Warner Bros. Entm't Inc.*, Civ. No. 12-20870, 2013 WL 266049, at *3 (S.D. Fla. Jan. 23, 2013) (same).

In an effort to establish a connection between Defendants' conduct and the decedents' death, Plaintiffs identify two "secret" government documents evidencing Defendants' intent to use lethal force against peaceful protesters and to authorize the killing of innocent civilians. Compl. ¶¶ 37–38.[18] Plaintiffs first allege that Bolivia's Army Commander issued "a secret Manual for the Use of Force" to provide guidance to the military in conducting domestic operations. *Id*. ¶ 37. But far from supporting their claims, the manual destroys them. According to the manual, the military:

- was required to "respect" and "defend" human rights;
- was forbidden from using firearms "against unarmed people";

[17] The allegations cannot be credited even if not contradicted, because they are insufficient to establish the existence of a plan. Notably, Plaintiffs do not allege that there was a single follow-up meeting to implement any plan to effectuate the conversations concerning hypothetical events.

[18] Plaintiffs make much of the assertion that the military and executive plans were "secret." Compl. ¶¶ 37–38. There is nothing inherently sinister, however, about protecting the confidentiality of military and executive plans; after all, governments around the world do the same.

- could use only proportional force and only in self-defense;
- could act only against individuals that pose a threat;
- was required to avoid collateral damage to non-participating individuals; and
- could use lethal force only as a last resort.

Ex. 3, at 5, 10–12. And contrary to Plaintiffs' claims that the military was permitted to use force to disrupt peaceful protests, the manual restricted the use of force to only the following circumstances:

- in the exercise of self-defense;
- to avoid being disarmed;
- to avoid being captured or taken hostage;
- to prevent the seizure of military installations;
- to prevent the seizure of military equipment;
- to prevent individuals from preventing the army units to fulfill their missions; and
- to prevent conflict escalation.

*Id.* at 18. This manual belies Plaintiffs' claim that Defendants authorized the military to commit violations of the law of nations.[19]

In a similar vein, Plaintiffs allege that President Sánchez de Lozada promulgated a secret document called the "Republic Plan," which allegedly authorized the military to "shoot and kill unarmed civilians on sight." Compl. ¶ 38. Again, Plaintiffs fail to allege that any of the

[19] Indeed, the principles in the manual are similar to those outlined in the "Standing Rules for the Use of Force" issued by the United States Department of Defense concerning a military response to domestic emergencies. Those rules require that troops use deadly force only to stop a threat, such as the "sabotage of a national critical infrastructure," and only "when all lesser means have failed or cannot reasonably be employed." Ex. 20, at 32–41 (Defense Support of Civil Authorities Handbook).

individuals who shot at the decedents were aware of or acting consistent with this purportedly "secret" plan. In any event, the two-page plan does not in any way authorize or condone the shooting of unarmed civilians on sight. It does not even discuss use of force at all, much less the use of force against civilians. The plan does nothing more than to direct military personnel to "guarantee the rule of law and the exercise of constitutional rights." Ex. 4, at 1. That is a far cry from an authorization to kill unarmed civilians on sight.

**2. The Amended Complaint Contains No Other Allegations That Defendants Were Complicit In Extrajudicial Killings**

The amended complaint fails to identify any additional directions that President Sánchez de Lozada provided to the military—other than his directions to respect human rights and to apply deadly force only as a last resort, pursuant to the plans discussed above—beyond the directions that the Eleventh Circuit considered (and rejected) from the previous version of the complaint. *See* Compl. ¶ 63 (order to create a task force to clear roadblocks and rescue trapped tourists); *id*. ¶¶ 71–72 (order to "use necessary force"); *id*. ¶ 93 (order to "suppress the protestors"); *id*. ¶ 101 (order to use "'all necessary resources'" to "'restore and maintain order and public security.'"); *see generally* 654 F.3d at 1154–55 (determining that those orders were insufficient to establish liability). As the Eleventh Circuit correctly noted, Plaintiffs can identify no case in which such "high-level decisions on military tactics and strategy during a modern military operation have been held to constitute . . . extrajudicial killing under international law." *Id*. at 1155 (ellipsis in original) (quoting *Belhas v. Ya'alon*, 515 F.3d 1279, 1293 (D.C. Cir. 2008)).

Similarly, the amended complaint alleges no facts establishing any connection between Minister Berzaín and extrajudicial killings. The only direction allegedly given by Minister Berzaín to the military came immediately after the soldier had been killed. Soon after, Minister

Berzaín allegedly ordered soldiers in a helicopter to fire on people below. Compl. ¶¶ 135–137. But the amended complaint does not allege that the people at whom Minister Berzaín allegedly directed fire were unarmed or did not pose a threat. The amended complaint also does not allege that any of the decedents (or anyone else, for that matter) was actually killed or injured as a result of that order. The amended complaint therefore fails to establish any connection between Minister Berzaín and any extrajudicial killings—assuming, *arguendo*, that extrajudicial killings *by someone* have been sufficiently alleged.

**3. Plaintiffs Fail To Sufficiently Allege Any Other Valid Theory On Which Defendants Can Be Secondarily Liable**

To the extent that Plaintiffs relied on other theories of secondary liability in their defense of the previous version of the complaint and seek to rely on them again now, nothing in the amended complaint cures the deficiencies in those theories.

a. To the extent that Plaintiffs contend that the individuals responsible for the alleged extrajudicial killings were acting as Defendants' agents, that contention must be rejected because Plaintiffs cannot demonstrate that such a theory is well accepted in international law. *See In re Chiquita Brands Int'l, Inc., Alien Tort Statute & Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1352 (S.D. Fla. 2011), *appeal pending*, No. 12-90020 (11th Cir.); *Giraldo v. Drummond Co.*, Civ. 09-1041, 2013 WL 3873965, at *7 (N.D. Ala. July 25, 2013) (holding that the agency theory is unavailable under the TVPA).

Even if Plaintiffs could proceed on an agency theory of liability, their claim in this case must still be dismissed. Plaintiffs have failed to allege that the individuals who shot the decedents were acting on Defendants' directions at the time they took the shots. *See* Restatement (Third) of Agency § 2.01 (2006).

b. To the extent that Plaintiffs persist in arguing that Defendants can be liable because they sat atop the chain of command, that argument, too, is unavailing. The Eleventh Circuit unequivocally rejected Plaintiffs' reliance on a command-responsibility theory of liability, stating that it "d[id] not accept that, even if some soldiers or policemen committed wrongful acts, present international law embraces strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one." 654 F.3d at 1154. Indeed, in their petition for rehearing, Plaintiffs conceded that the Eleventh Circuit had ruled that Defendants could not be held liable on the basis of command responsibility. *See* Pet. for Reh'g at 13, *Mamani v. Berzain*, Nos. 09-16246-FF & 10-13071-FF (11th Cir. Sept. 16, 2011) (stating that the Eleventh Circuit had "ruled that . . . Defendants could not be held liable under the ATS on the basis of command responsibility for the actions of the military forces they led"). The amended complaint alleges nothing new that would alter the foregoing analysis.

In any event, Defendants were forced to leave Bolivia on October 17. Compl. ¶ 164. Plaintiffs cannot plausibly allege that Defendants "failed to investigate or punish their subordinates," *id*. ¶ 187, when Defendants had less than a month (and for all but one of the decedents, less than five days) in which to do so.

c. Finally, to the extent that Plaintiffs contend that Defendants engaged in a conspiracy, that theory is likewise insufficiently alleged. Even if Plaintiffs had sufficiently alleged that any supposed co-conspirators had committed extrajudicial killings, Plaintiffs fail to allege any facts that would permit the Court to draw a reasonable inference that Defendants entered into an agreement with those individuals with the *purpose or intent* of facilitating extrajudicial killings. *See Chiquita Brands*, 792 F. Supp. 2d at 1343, 1351; *see* Part III.B(1), *supra* (addressing Plaintiffs' failure to allege extrajudicial killings).

### C. The Amendments To Plaintiffs' Crimes-Against-Humanity Claim Also Fail To Address The Deficiencies Identified By The Eleventh Circuit

As with the extrajudicial-killing claims, the amended complaint fails to overcome the deficiencies in the crimes-against-humanity claim identified by the Eleventh Circuit. As the Eleventh Circuit explained, "crimes against humanity exhibit especially wicked conduct that is carried out in an extensive, organized, and deliberate way, and that is plainly unjustified." 654 F.3d at 1156. For instance, courts have labeled as crimes against humanity such massive and notorious atrocities as the Holocaust, the Rwandan genocide, and the ethnic cleansing in the former Yugoslavia. *See generally Prosecutor v. Tadic*, No. IT-94-1-T, 1997 WL 33774656, Judgment ¶ 644 (I.C.T.Y. May 7, 1997).

In order to state a claim under the ATS for crimes against humanity, Plaintiffs must allege "a widespread or systematic attack" that is "directed against any civilian population." *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005). The Eleventh Circuit concluded that the previous version of the complaint failed to allege "injuries [that were] sufficiently widespread—or that wrongs were sufficiently systematic, as opposed to isolated events (even if a series of them)—to amount definitely to a crime against humanity under already established international law." 654 F.3d at 1156. In particular, the Court explained that "the [death] toll—one arising from a significant civil disturbance—was fewer than 70 killed and about 400 injured to some degree, over about two months." *Id.* While this toll was "sufficient to cause concern," the Court reasoned that, "especially given the mass demonstrations, as well as the threat to the capital city and to public safety," it "[could not] conclude that the scale of this loss of life and of these injuries" amounted to a crime against humanity. *Id.* The Court explained that "[a]llowing [P]laintiffs' claims to go forward would substantially broaden . . . the kinds of circumstances from which claims may properly be brought under the ATS." *Id.*

Plaintiffs' amended complaint makes no effort to address those deficiencies. *First*, Plaintiffs still allege neither a "widespread or systematic" attack. As to the "widespread" nature of the attack, Plaintiffs now allege that the military killed 9 and injured 32 people in 1996; the military killed 40 and injured 214 people in January and February 2003; and the military killed 58 and injured 400 people in September and October 2003. Compl. ¶¶ 6, 28, 42, 46. Those allegations are not meaningfully different from plaintiffs' prior allegations that the military killed 38 and injured 182 people in January and February 2003, and killed 67 and injured 400 people in September and October 2003. FACC ¶¶ 1, 23(b). Given the Eleventh Circuit's determination those prior allegations were insufficient, Plaintiffs' amended allegations likewise fail to establish a "sufficiently widespread" attack. 654 F.3d at 1156. Plaintiffs similarly fail to allege a "systematic" attack. And as discussed above, Plaintiffs' conclusory allegations of a plan to kill civilians are implausible and are contradicted by the very documents on which Plaintiffs rely.

*Second*, Plaintiffs also fail to allege an attack that was "directed against [a] civilian population." "An 'attack directed against [a] civilian population' involves some degree of scale, as well as a policy element." *Bowoto v. Chevron Corp.,* Civ. No. 99-2506, 2007 WL 2349343, at *4 (N.D. Cal. Aug. 14, 2007) (alteration and internal quotation marks omitted). If an attack is not "plainly unjustified," 654 F.3d at 1156, or is "based on individualized suspicion of engaging in certain behavior," *Bowoto*, 2007 WL 2349343, at *10, it is not the sort of attack "directed against [a] civilian population" that rises to the level of a crime against humanity. *Id*. Plaintiffs fail to sufficiently allege an attack "directed against [a] civilian population" for the same reason they fail to allege a claim for extrajudicial killings: namely, because the most plausible inference raised by Plaintiffs' complaint is that Defendants' actions were directed toward responding to "a significant civil disturbance," 654 F.3d at 1156, not toward attacking peaceful civilians. The

ATS claim for crimes against humanity, like the ATS claim for extrajudicial killings, should therefore be dismissed.

## IV. THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER PLAINTIFFS' STATE-LAW CLAIM

The amended complaint attempts to ground jurisdiction over its state-law wrongful-death claim (Count IV) in the supplemental-jurisdiction statute, 28 U.S.C. § 1367. Compl. ¶ 10. Should the Court dismiss the ATS and TVPA claims, the Court should decline to exercise supplemental jurisdiction over the state-law claim because it will have "dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3), and because no "substantial judicial resources" will have been expended to justify retaining jurisdiction over the state-law claim, *Parker v. Scrap Metal Processors*, *Inc*., 468 F.3d 733, 746 (11th Cir. 2006).

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

## CONCLUSION

The amended complaint should be dismissed in its entirety with prejudice.

Respectfully submitted,

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Dated: September 19, 2013

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on September 19, 2013, I electronically filed the foregoing motion with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on the counsel listed on the attached Service List by electronic mail (in PDF format).

/s/ Eliot Pedrosa

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