No. 18-12728

In the United States Court of Appeals for the Eleventh Circuit

ELOY ROJAS MAMANI, ET AL.,
APPELLANTS

v.

JOSE CARLOS SÁNCHEZ BERZAÍN AND
GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,
APPELLEES

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(CIV. NOS. 07-22459 & 08-21063)
(THE HONORABLE JAMES I. COHN, J.)

BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Counsel for appellees certify that all parties to this appeal are natural persons, and thus no entity owns 10% or more of the stock of any party. Pursuant to Local Rule 26.1-1, the following persons have or may have an interest in the outcome of this case or appeal:

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JULY 25, 2018

STATEMENT REGARDING ORAL ARGUMENT

Defendants respectfully submit that the issues presented by this appeal are straightforward and do not present novel or difficult questions of law. Accordingly, Defendants do not believe that oral argument would assist this Court.

TABLE OF CONTENTS

TABLE OF CITATIONS

FEDERAL CASES

OTHER FEDERAL AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

This Court heard oral argument in two earlier appeals in this case and issued published decisions, which are reported at 654 F.3d 1148 (11th Cir. 2011) ("*Mamani I*") and 825 F.3d 1304 (11th Cir. 2016). Counsel for Defendants are not aware of any other case pending in this or any other court that will directly affect, or be directly affected by, the Court's decision in this appeal.

STATEMENT OF THE ISSUES

1. Plaintiffs concede that Defendants gave no orders to use lethal force against civilians. There is no evidence identifying who shot any decedent or the state of mind of anyone who fired a shot. And there is no evidence of any plan by Defendants to kill civilians. Did the district court properly grant judgment for Defendants under Rule 50 based on Plaintiffs' failure to adduce evidence from which a reasonable jury could find Defendants liable for "extrajudicial killings" under the standard established in *Mamani I*?

2. Did the district court abuse its discretion by (i) declining to give a jury instruction requested by Plaintiffs and (ii) admitting into evidence diplomatic cables from the United States Department of State describing matters observed while under a legal duty to report?

INTRODUCTION

More than seven years ago, in *Mamani I*, this Court warned that courts "must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens." *Mamani v. Berzaín*, 654 F.3d 1148, 1152 (11th Cir. 2011). The Court held that an "extrajudicial killing" requires proof that the deaths were "'deliberate' in the sense of being undertaken with studied consideration and purpose." *Id.* at 1155. Shootings by soldiers "not linked to defendants," and "precipitate shootings during an ongoing civil uprising," do not constitute extrajudicial killings. *Id.*

Plaintiffs have never alleged or provided any evidence that identifies who actually shot any of the decedents. They concede that Defendants gave no orders to use lethal force against civilians. Supp.App.-Vol:2-Doc:484 at 25:4-12. Without that evidence, it is impossible to establish—as Plaintiffs must—that any shot was "deliberate" as opposed to "accidental or negligent." 654 F.3d at 1155. It is impossible to show that any gunman fired with "studied consideration and purpose" as opposed to "mistakenly identifying a target as a person who did pose a threat to others." *Id.* And it is impossible to prove that the shooter was acting on orders from superiors as opposed to "individual motivations (personal reasons) not linked to defendants." *Id.*

This case made it to trial only because Plaintiffs claimed, in a last-ditch effort to overcome this lack of evidence, that they could prove Defendants had a plan to kill innocent civilians even before they took office. App.-Vol:5-Doc:514 at 25. No evidence of that supposed "plan" ever materialized during three weeks of trial. The jury deliberated for six days but remained deadlocked. Shortly after receiving an *Allen* charge, the jury returned a verdict that was inconsistent and irreconcilable. The jury found *in favor of Defendants* on the intentional wrongful death claims, specifically answering that the deaths of Plaintiffs' relatives were *not* intentional, *not* willful, and *not* malicious. But the jury somehow found that the very same deaths were deliberate, and thus returned a verdict for Plaintiffs on the TVPA claims.

Rather than granting a mistrial, Judge Cohn discharged the jury and requested supplemental briefing on Defendants' Rule 50 motion. Judge Cohn previously had expressed "serious reservations" about the sufficiency of Plaintiffs' evidence when he deferred ruling on this motion twice during the trial. Unlike the jury, Judge Cohn had prior experience applying the law-of-the-case established in *Mamani I*. Judge Cohn applied that established standard to trial evidence that was uncontested and unimpeached, and granted the Rule 50 motion. He found that Plaintiffs failed to adduce any evidence of a preconceived plan to kill civilians. App.-Vol:5-Doc:514 at 17. He further found no evidence that any deaths were "deliberated" or "undertaken with

studied consideration or purpose." *Id.* at 25. Judge Cohn explained that although there had been an "evolution of Plaintiffs' claims" in their amended complaints and at trial, the evidence turned out to be no different from the allegations in *Mamani I* that this Court held "were insufficient to make out a plausible claim for extrajudicial killings." *Id.* at 3-4, 17.

Accordingly, Judge Cohn entered judgment in favor of Defendants. In doing so, Judge Cohn faithfully exercised the court's "responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." Fed. R. Civ. P. 50 advisory committee's note to 1991 amendment. This Court should affirm the district court's judgment.

STATEMENT OF THE CASE

After months of violent protests, armed insurgents overthrew Bolivia's democratically elected government on October 17, 2003. Insurgents ambushed police and soldiers, shooting and killing them. They threw dynamite at tanker trucks loaded with fuel. They blew up a gas station. They lit military vehicles on fire. They took hostages. They blocked roads and cut off supplies to the City of La Paz, resulting in deaths, including deaths of infants in a hospital that ran out of oxygen. Dialogue and negotiations failed. The Bolivian police, who do not carry lethal ammunition, were overrun. When soldiers eventually were called in, the military was unable to restore order.

The country was in crisis. These facts, established at trial and cited below, are undisputed.

Defendants Gonzalo Sánchez de Lozada Sánchez Bustamante and José Carlos Sánchez Berzaín are the former president and defense minister of Bolivia, respectively. Following the overthrow of Sánchez de Lozada's government, and facing public death threats from the leader of the coup—current Bolivian President Evo Morales—Defendants left Bolivia and flew to Miami with assistance from the U.S. State Department.

Plaintiffs, nine Bolivian nationals, subsequently filed suit against Defendants. Plaintiffs alleged that their relatives were killed when the military used disproportionate force in response to the civil unrest in September and October 2003, and that Defendants were responsible for all the deaths. After a three-week trial featuring more than 40 witnesses, the district court issued an order under Rule 50 concluding that Plaintiffs had failed to adduce sufficient evidence to support their claims and granting judgment to Defendants. This appeal follows.

I. FACTUAL BACKGROUND

A. President Sánchez de Lozada and Minister of Defense Berzaín

Sánchez de Lozada came to Washington, D.C. with his family when he was 18 months old. Supp.App.-Vol:2-Doc:485 at 108:22-109:6. His father served as a diplomat and his mother worked with Eleanor Roosevelt at the

Inter-American Council for Human Rights. Supp.App.-Vol:2-Doc:485 at 109:4-16. He attended high school at a Quaker boarding school in Iowa and graduated from the University of Chicago in 1952 with a degree in Philosophy. *Id.* at 111:12-112:14, 112:19-25. He decided to return to Bolivia. *Id.* at 113:1-3.

Before entering politics, Sánchez de Lozada worked as a filmmaker (discovering the story of *Butch Cassidy and the Sundance Kid*) and later bought a lead-silver mine. *Id.* at 113:1-25. He joined the MNR party in the 1950s, and when democracy returned to Bolivia after 20 years of military rule, he became a congressman, a senator, and a government minister. *Id.* at 114:1-115:10. He gained credibility with Bolivians for his role in helping to stop a hyperinflation crisis and change Bolivia to a market economy. *Id.* at 114:21-115:24. He won a landslide victory in the 1993 Presidential election. *Id.* at 117:2-8. During his four-year term, Sánchez de Lozada implemented significant reforms: "popular participation" that gave counties 20% of the government's income; free insurance policies for mothers, expecting mothers, and children up to age five; creation of a human rights ombudsman; and a government pension program for all Bolivians at age 65 that was funded by capitalization of government-owned companies. *Id.* at 117:11-122:1.

Sánchez de Lozada could not seek reelection because Bolivian law prohibited successive terms. *See id.* 117:9-10. He continued to work as a

leader of the MNR party and decided to run for President again in 2002. *Id.* at 122:2-4, 122:25-123:2. The election occurred amid the turmoil of a worldwide recession. *Id.* at 123:3-17. Sánchez de Lozada won by a narrow margin over Evo Morales. *Id.* at 123:18-25. Morales had a history of violence. He was the leader of the *cocaleros*, Bolivia's coca growers union, and had threatened to overthrow the government in early 2003 because Defendants supported joint Bolivia-U.S. efforts to eradicate illegal cocaine. *Id.* at 124:1-15; Supp.App.-Vol:1-Doc:481 at 119:8-120:24. As a congressman, Morales had orchestrated the 2001 Sacaba Massacre in which his followers attacked ambulances carrying wounded soldiers away from a coca-growing region, and burned and murdered them. Supp.App.-Vol:2-Doc:482 at 21:5-20.

Sánchez de Lozada appointed Berzaín as Minister of the Presidency, and later as Minister of Defense. Supp.App.-Vol:1-Doc:481 at 71:9-13; 76:3-9. Berzaín had worked as a constitutional lawyer in private practice before serving in the government, first as a minister during Sánchez de Lozada's first term and then as a congressman. *Id.* at 64:14-65:4, 67:17-23, 70:9-18. Currently, he serves as the executive director for the Inter-American Institute for Democracy, does public speaking, and teaches at a university. Supp.App.-Vol:2-Doc:482 at 19:15-21.

B. 2003 Social Unrest

Morales quickly exploited the divisions created by the close election. Sánchez de Lozada worked to continue coca eradication efforts to end the massive exportation of illegal cocaine. *See* Supp.App.-Vol:1-Doc:481 at 118:12–199:11; Supp.App.-Vol:2-Doc:485 at 40:20-41:9, 124:1-15. Morales demanded that the government end the eradication and, in January 2003, summoned the public to "overthrow the government." Supp.App.-Vol:1-Doc:481 at 118:12–119:11, 120:21-24. Morales teamed up with Felipe Quispe, a union leader and member of the Tupac Katari Guerilla Army who had spent time in jail for terrorist attacks against members of the American Embassy in La Paz. *Id.* at 137:6-9. After joining forces with Quispe, Morales withdrew from mediation with the Catholic Church, and told the church: "Our only interest is to have [Sánchez de Lozada] put out of office, and we're going to make life impossible for him." Supp.App.-Vol:2-Doc:485 at 125:9-20.

A month later, armed protestors, including police units, fired hand guns and assault rifles at military personnel stationed in front of the Presidential Palace. Supp.App.-Vol:2-Doc:497-1 at 1001.6; Supp.App.-Vol:2-Doc:497-2 at 1002.1. Sharpshooters fired into the Presidential Palace while Sánchez de Lozada, Berzaín, and others were inside. Supp.App.-Vol:2-Doc:497-1 at 1001.6. They managed to escape but an infantry captain and soldier were killed in the attack. *Id.* at 1001.8. The Organization of American States

investigated the attack and concluded: "The life of the President of Bolivia was indeed in danger, as was the stability of Bolivian institutions and democracy in this country." *Id.* at 1001.10. The OAS also determined that the Bolivian "armed forces acted to defend democracy and the rule of law against an attack by police, and their response was controlled and proportional, the large number of victims notwithstanding." *Id.*

Negotiations with Morales and Quispe over the next six months failed to bring peace. Their demands increased over time. Many simply could not be met, such as immediately releasing from prison a union leader who was convicted of torturing and hanging two suspected cattle thieves. *See* Supp.App.-Vol:2-Doc:485 at 128:25-129:12; Supp.App.-Vol:2-Doc:497-2 at 1002.2. Quispe responded with a threat that, if the government did not meet his demands, "we will be obliged to radicalize the actions resolved upon by the nationwide rank and file." Supp.App.-Vol:2-Doc:485 at 131:3-10; *see* Supp.App.-Vol:2-Doc:497-10. Sánchez de Lozada continued his attempts to engage in dialogue over the summer. Supp.App.-Vol:2-Docs:497-9, 497-12, 497-13, 497-14, 497-15, 497-16, 497-17. Morales and Quispe rejected all compromise. *See, e.g.*, App.-Vol:5-Doc:500-7 at 94:23-97:19; Supp.App.-Vol:2-Doc:497-2 at 1002.2.

C. Events of September and October 2003

The deaths in this case happened in the midst of violent conflict on three different days in September and October 2003. App.-Vol:5-Doc:514 at 18. The death of Marlene Nancy Rojas Ramos in Warisata on September 20 occurred when she was struck by a bullet during an ambush of a police and military convoy as it drove through the town. Supp.App.-Vol:2-Doc:497-2 at 1002.3. The military was escorting a fleet of buses carrying hundreds of tourists who had been held hostage by Quispe's followers in the nearby mountain town of Sorata. *Id.* As the convoy entered Warisata, insurgents attacked, firing shots from the surrounding hills and local homes. Supp.App.-Vol:2-Doc:497-2 at 1002.3, 1002.27; Supp.App.-Vol:2-Doc:500-1 at 68:20-69:24.

The deaths in October occurred when the Capital City of La Paz (and its 750,000 residents) were "virtually cut off from the rest of the country by the mob's application of El Alto's "'tourniquet.'" App.-Vol:4-Doc:497-28 at 1089.2; App.-Vol:4-Doc:497-30 at 1091.2. "[F]ood was scarce and stores, schools, businesses[,] and banks remained closed." App.-Vol:4-Doc:497-29 at 1090.2. Those "who suffered from the effects of the strangulating blockade[] include[d] three newborns who died because the hospital ran out of oxygen." *Id.* Dynamite-wielding protestors surrounded the only airport, forcing it to close. App.-Vol:4-Doc:497-28 at 1089.3; App.-Vol:5-Doc:500-7 at 119:10-120:05. Insurgents launched attacks "on the tanker trucks transporting gasoline to

the city of La Paz" as "the mobilized civilian population was armed with Mauser rifles and dynamite." Supp.App.-Vol:2-Doc:497-2 at 1002.27. The "attacks" targeted "the members of the joint forces" and "endangered the lives of the hundreds of civilians who did not take part in the clashes." *Id.*

The military was forced "to respond to acts of aggression from the demonstrators, which in some cases endangered the lives of their forces." *Id.* "There were numerous violent encounters between protesters and security forces over the weekend, with increasing levels of violence (with the protesters now bringing dynamite and guns to bear)." App.-Vol:4-Doc:497-28 at 1089.3. "[I]nsurgents on rooftops" fired down on the police and military from their "elevated positions." Supp.App.-Vol:2-Doc:488 at 150:2-20; *see id.* at 130:21-131:4. The U.S. State Department concluded that "the danger of misdirected fire coming through windows or walls is a real threat for even those who stay home." App.-Vol:4-Doc:497-28 at 1189.3. Meanwhile, in the Southern Zone, insurgents blocked the main road and ambushed the military from a large hill; a soldier was shot in the head and killed. Supp.App.-Vol:1-Doc:480 at 130:12-131:10, 151:22-152:1.

Negotiations failed to bring peace. Days later, on October 17, Sánchez de Lozada and his cabinet resigned under protest in an attempt to restore peace and safety to La Paz. Morales convened the people to assassinate

Sánchez de Lozada and his cabinet, stating over the radio and television: "we have to kill them." Supp.App.-Vol:2-Doc:482 at 20:4-14.

D. Aftermath of the Coup

Sánchez de Lozada requested an independent investigation into the events that had occurred. He wrote letters to the Inter-American Commission for Human Rights and the United Nations Human Rights Committee. Supp.App.-Vol:2-Docs:497-25, 497-26. Both letters "advocate[d] for the need for this important investigation to be conducted" and offered his full cooperation. *Id.*

Meanwhile, three independent Bolivian prosecutors conducted a ten-month investigation of all the deaths. Supp.App.-Vol:2-Doc:497-2. The investigation included witness interviews, ballistics evaluations, and forensic analysis. *Id.* The Bolivian prosecutors found "no evidence of the existence of any order to engage in . . . criminal conduct." *Id.* at 1002.32. And they did not conclude that any deaths resulted from deliberated killings by soldiers. *Id.* at 1002.3, 1002.27-1002.32.

Morales became president of Bolivia in 2005. Supp.App.-Vol:1-Doc:480 at 121:12-17. His control over the government is so absolute that he is still the president today notwithstanding the five-year term limit established in the Bolivian Constitution.

II. PROCEDURAL HISTORY

A. Pre-Trial

1. In 2007, Plaintiffs filed a complaint asserting claims against Defendants under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and Torture Victims Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note), as well as state law claims. Plaintiffs alleged that soldiers fired upon civilians without justification in the areas of the country where Plaintiffs' relatives were shot, and that Defendants bore responsibility for the military's actions. *See, e.g.*, App.-Vol:1-Doc:77 ¶¶ 38-39, 54, 63, 78.

Defendants moved to dismiss on a number of grounds. As is relevant here, Defendants argued that Plaintiffs' allegations did not establish that they had violated an actionable international norm, as is required for jurisdiction to lie under the ATS. In particular, Defendants challenged the allegations that they had violated the norm prohibiting extrajudicial killing—e.g., the targeted killing of a political opponent or the summary execution of innocent civilians without provocation. Defendants also argued that the TVPA claim should be dismissed because Plaintiffs had failed to exhaust available remedies in Bolivia, as the TVPA requires. The district court granted Defendants' motion as to Plaintiffs' TVPA claim, but denied the remainder of the motion. 636 F. Supp. 2d 1326 (S.D. Fla. 2009).

This Court granted interlocutory review and reversed, holding that Plaintiffs had failed to state a valid claim for relief under the ATS. *Mamani I*, 654 F.3d at 1157. At the outset, the Court noted that this case "arise[s] out of a time of severe civil unrest and political upheaval in Bolivia," and it emphasized that courts "must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens." *Id.* at 1150, 1152. The Court explained that, "in the face of significant conflict," Defendants had "ordered the mobilization of a joint police and military operation to rescue trapped travelers" and "reestablish public order." *Id.* at 1154.

The Court rejected Plaintiffs' argument that Defendants could be liable for any alleged extrajudicial killings committed by soldiers during the relevant military operations. *Id.* The Court explained that "Defendants were facing a situation where many of their opponents in Bolivia were acting boldly and disruptively . . . not merely holding—or talking about—political opinions." *Id.* In such circumstances, the Court continued, "even if some soldiers or policemen committed wrongful acts," international law does not "embrace[] strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one." *Id.*

The Court also noted that Plaintiffs had "allege[d] no facts showing that the deaths in this case met the minimal requirement for extrajudicial killing—

that is, that plaintiffs' decedents' deaths were 'deliberate' in the sense of being undertaken with studied consideration and purpose." *Id.* at 1155. "On the contrary," the Court explained, "each of the plaintiffs' decedents' deaths could plausibly have been the result of precipitate shootings during an ongoing civil uprising." *Id.* The Court concluded that "[a]llowing plaintiffs' claims to go forward would substantially broaden, in fact, the kinds of circumstances from which claims may properly be brought under the ATS." *Id.* at 1156. The Court therefore reversed and remanded to the district court with instructions to dismiss. *Id.* at 1157.

2. On remand, Plaintiffs sought and received leave from the district court to amend their complaint.[1] The amended complaint included new allegations that Defendants took office intending to implement economic programs that they knew would trigger protests and that they planned to use unlawful, lethal military force to quash and deter any opposition. *See, e.g.*, App.-Vol:1-Doc:174 ¶¶ 2-7. Defendants again moved to dismiss. Supp.App.-Vol:1-Doc:183.

Citing the amended complaint's new allegations that the deaths were the intended result of Defendants' alleged preconceived plan, the district court held that Plaintiffs had sufficiently stated a claim that their relatives' deaths

[1] On remand, the case was transferred to Judge Cohn after the original district judge, Judge Jordan, was elevated to this Court. Supp.App.-Vol:1-Doc:168.

were deliberated, and therefore extrajudicial killings. 21 F. Supp. 3d 1353, 1373-75 (S.D. Fla. 2014). On interlocutory appeal, this Court held that the TVPA's exhaustion requirement did not bar Plaintiffs' claims but exercised its discretion not to decide whether the amended complaint stated a claim for extrajudicial killings under the TVPA. 825 F.3d 1304, 1312-13 (11th Cir. 2016).

3. Two counts remained following this Court's 2016 decision: the TVPA claim, and a state-law claim for "Intentional Wrongful Death." Defendants filed a motion for summary judgment in November 2017. Defendants explained in their motion that, despite a year of extensive discovery, Plaintiffs had failed to come forward with evidence establishing that any of Plaintiffs' decedents was shot by a member of the military, let alone intentionally. Supp.App.-Vol:1-Doc:342-1 at 18-19. Defendants further explained that there was no evidence of any order by Defendants to kill civilians. *Id.* at 14-15, 27-29. Without such evidence, Defendants argued, it was impossible for Plaintiffs to satisfy the standard established by this Court in *Mamani I* because Plaintiffs could not show that (i) the unknown shooters had the required intent, (ii) the unknown shooters were soldiers linked to Defendants, or (iii) the unknown shooters were acting on orders from Defendants or under their control. *Id.* at 14-15, 18-25, 27-29.

In their response, Plaintiffs cited no evidence identifying any shooter, much less any shooter's state of mind. Instead, Plaintiffs argued that such

evidence was unnecessary because Defendants still could be held liable based on the existence of a preconceived "plan to use military force to kill unarmed civilians in order to suppress civilian protests and deter opposition to their policies." Supp.App.-Vol:1-Doc:375 at 11, 14. The only fact Plaintiffs offered that such a plan existed was the declaration of one individual, Victor Hugo Canelas. Canelas claimed that he was present during a meeting in 2001 at which Berzaín stated that when he and Sánchez de Lozada came to power, it would be necessary to kill civilians to deter protests. Supp.App.-Vol:1-Doc:375-10, ¶¶ 4-6. According to Canelas's declaration, Sánchez de Lozada "indicated that he approved of what Berzaín said." *Id.* ¶ 7.[2]

The district court denied Defendants' motion for summary judgment. The district court acknowledged that under the TVPA and the standard previously set by this Court, Plaintiffs were required to "show that decedents were intentionally killed by the Bolivian military." App.-Vol:2-Doc:408 at 42. The court concluded, however, that such intent "need not necessarily be shown with evidence regarding each individual shooter's state of mind"—evidence Plaintiffs did not have—but could be "inferred by proof that decedents' deaths resulted from the implementation of Defendants' plan to use military force to kill unarmed civilians." *Id.* Because the district court was "satisfied that a

[2] After receiving Plaintiffs' response, the district court ordered Plaintiffs to file a sur-reply confirming that Canelas would testify at trial; Plaintiffs affirmed he would. App.-Vol:2-Doc:408 at 3 n.4; Supp.App.-Vol:1-Doc:383.

showing that decedents[’] deaths resulted from implementation of Defendants’ plan is sufficient to show that these were deliberated killings under the TVPA,” the district court set the case for trial. *Id.* at 41.

B. Trial

1. In March 2018, after more than ten years of litigation, the case proceeded to trial. Plaintiffs’ case, which included the testimony of 29 witnesses over eight days, included no evidence identifying who fired the shots that killed any of the decedents, or the state of mind of anyone who fired a weapon. Plaintiffs provided no evidence to connect anything that Defendants personally did to any of the deaths of Plaintiffs’ relatives. They conceded that there were no orders from Defendants to use lethal force against civilians. Supp.App.-Vol:2-Doc:484 at 25:9-11. And they failed to offer any testimony about ballistics or forensic evidence. The only evidence on these subjects came from Defendants’ experts who showed, without impeachment, that it is not possible from the postmortem records to determine (i) the distance from which any decedent was shot, or (ii) whether the shot was deliberate. Supp.App.-Vol:2-Doc:487 at 27:24-31:4, 32:8-33:14, 34:13-35:18, 61:16-24, 62:25-65:25, 67:25-69:5.

There was another conspicuous omission in Plaintiffs’ case: any evidence of a plan to use the military to kill civilians. Not a single witness testified that Sánchez de Lozada or Berzaín planned or ordered innocent

civilians to be killed in order to deter protests in 2003. Not even Plaintiffs' key witness on this point, Canelas, testified to such a plan. To the contrary, after testifying about Berzaín's alleged comment during a meeting years before the events in question—still the entire basis of the purported "plan"—Canelas testified only that Sánchez de Lozada had stated, "This is over," and then "just adjourned the meeting." Supp.App.-Vol:2-Doc:482 at 92:6-12. "Despite repeated prodding by Plaintiffs' counsel," Canelas could not remember anything else President Sánchez de Lozada said or did, and he did not offer any admissible testimony that "otherwise indicated any agreement to a plan to kill civilians." App.-Vol:5-Doc:514 at 10. Without Canelas's testimony, Plaintiffs were left without any evidence of the existence of any plan—much less that the Sánchez de Lozada had agreed to any plan.

At the end of Plaintiffs' case, Defendants moved for judgment under Rule 50 based on that lack of evidence. The district court expressed "serious reservations" about the sufficiency of Plaintiffs' evidence and deferred ruling on the motion. When Defendants renewed their motion at the end of the trial, before jury deliberations, the district court again reiterated those reservations, but again deferred ruling.

2. By the close of the three-week trial, more than 40 witnesses had testified. The jury was deadlocked for six days and ultimately received an *Allen* charge. Hours later, the jury returned a verdict that was inconsistent

and irreconcilable: it found in favor of Defendants on the intentional wrongful death claims, answering on the verdict form that the deaths of Plaintiffs' relatives were not intentional, not willful, and not malicious. App.-Vol:2-Doc:474. But on the TVPA claims, the jury found that the very same deaths were deliberate. The district court denied Defendants' request for a mistrial, discharged the jury, and requested supplemental briefing on Defendants' Rule 50 motion.

Following that additional briefing, the district court granted Defendants' motion. The court initially noted that the evidence relied on by Plaintiffs' to establish deliberate killing "has evolved during the course of trial and briefing the instant Motion." App.-Vol:5-Doc:514 at 15. By the time of the post-verdict briefing, Plaintiffs were reduced to arguing that "solely based on evidence that over fifty people died in different locations on different days, it is reasonable to infer that all of those people were killed deliberately." *Id.* at 16. The district court rejected that argument, concluding that "Plaintiffs' failure to adduce evidence at trial of Defendants' alleged preconceived plan to kill civilians—which had been central to their case theory for the past five years of this litigation and to this Court's Summary Judgment Order—compels the Court to grant Defendants' Motion." *Id.* at 17.

As the district court recounted, the evidence established that on the days when Plaintiffs' decedents died, "not only was the country of Bolivia in crisis,

but there were specific crises at each of the locations where decedents were shot." *Id.* at 18. Given that the evidence "establishes a plausible reason for the military's presence and its use of some degree of force in each shooting location," it was imperative that Plaintiffs "present some evidence to the jury from which it could reasonably infer (not merely speculate) that the shootings were more than disproportionate reactions to civil unrest or attacks on the military, but were essentially premediated, or deliberated, killings." *Id.* at 19. The district court observed that "this was the critical gap filled by evidence at summary judgment of Defendants' preconceived plan to kill civilians." *Id.* Without such evidence, the court concluded, Plaintiffs were "back where they were seven years ago, when the Eleventh Circuit found legally insufficient their allegations of indiscriminate shooting in multiple locations." *Id.* "At most," the district court concluded, "the evidence in these cases supports an inference that Defendants responded to civil unrest in their country with a heavy hand, and that some unidentified members of the Bolivian military fired upon civilians for unknown reasons. But that is not sufficient to impose TVPA liability on these defendants." *Id.* at 25. The district court accordingly entered judgment in favor of Defendants.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to grant a motion for judgment as a matter of law. *Hubbard v. BankAtlantic Bancorp, Inc.*, 688

F.3d 713, 723 (11th Cir. 2012). "[I]n order to survive a defendant's motion for judgment as a matter of law . . . the plaintiff must present evidence that would permit a reasonable jury to find in the plaintiff's favor on each and every element of the claim." *Bogle v. Orange Cty. Bd. of Cty. Comm'rs*, 162 F.3d 653, 659 (11th Cir. 1998). Rule 50 requires a court to "draw[] all reasonable inferences in favor of the [non-movant]." *Hubbard*, 688 F.3d at 724. That does not mean a court must credit a version of the facts the record belies; a court should also "give credence to . . . 'evidence supporting the moving party that is uncontradicted and unimpeached.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (quoting 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, at 300 (2d ed. 1995)). Critically, "the nonmoving party must provide more than a scintilla of evidence that there is a substantial conflict in evidence to support a jury question." *Mee Indus. v. Dow Chem. Co.*, 608 F.3d 1202, 1211 (11th Cir. 2010) (internal quotation marks omitted). This standard supports the underlying function of Rule 50. "The whole purpose of . . . judgment as a matter of law is to allow judges to remove questions from the jury when the evidence can support only one result." *Home Design Servs., Inc. v. Turner Heritage Homes Inc.*, 825 F.3d 1314, 1326 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 1335 (2017).

This Court reviews a district court's refusal to give a requested jury instruction for abuse of discretion. *Burchfield v. CSX Transp., Inc.*, 636 F.3d

1330, 1333 (11th Cir. 2011). "An abuse of discretion is committed only when (1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the requesting party." *Id.* at 1333-34 (internal quotation omitted). The Court will find reversible error only if it is "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283, 1295 (11th Cir. 1998) (internal quotation marks omitted).

This Court reviews for abuse of discretion a district court's evidentiary rulings. *Burchfield*, 636 F.3d at 1333. The Court will overturn a district court's ruling only if the district court (1) "made a clear error of judgment, or . . . applied the wrong legal standard" and (2) the ruling had a "substantial prejudicial effect." *Id.* (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

I. Plaintiffs began this case with sensational allegations: that the democratically elected President of Bolivia and his Minister of Defense ordered the military to kill Plaintiffs' relatives—just so the government could sell natural gas to the United States. This Court warned that Plaintiffs faced a high burden: Plaintiffs were required to establish not only that the decedents were shot by members of the military, but also that the "decedents' deaths were 'deliberate' in the sense of being undertaken with studied

consideration and purpose." *Mamani I*, 654 F.3d at 1155. After a three-week trial in which more than 40 witnesses testified, Plaintiffs were unable to produce any proof that would meet the standard set out by this Court. There was no evidence that any decedent was shot by a member of the military, let alone intentionally. Indeed, all Plaintiffs conceded that they could not identify the person who shot their relative.

Plaintiffs contend that, notwithstanding these undisputed facts, the district court erred in granting judgment to Defendants under Rule 50. According to Plaintiffs, the district court misapplied the law by requiring Plaintiffs to prove that Defendants had a preconceived plan to kill innocent civilians. But it was *Plaintiffs* who made the existence of such a plan a central feature of the case, arguing, in a last-ditch effort to save their case, that evidence of a plan could overcome their complete failure to show that their decedents were intentionally killed by the military as a result of Defendants' commands. The district court did not err in holding Plaintiffs to the standard of proof that they themselves set.

In any event, evidence of a plan to kill civilians—with no evidence of who actually killed anyone or why—still would not establish that any deaths resulted from deliberated, extrajudicial killings. The point is moot, however, because Plaintiffs came up empty on evidence of the supposed plan, much less any evidence that Defendants authorized the killing of civilians. Civilian

deaths during military operations—in the context of hostage taking, debilitating road blockades, and armed and violent protests—are not the legal equivalent of a plan by Defendants to kill civilians.

Finally, judgment in Defendants' favor can be affirmed because Plaintiffs failed to establish any basis for holding Defendants liable under the doctrine of command responsibility. The doctrine of command responsibility does not permit a lawsuit against the former leaders of a country simply because individual soldiers, far down the chain of command, are alleged to have committed extrajudicial killings. Plaintiffs failed to come forward with evidence from which a reasonable jury could conclude that either Defendant exercised the level of control required for liability premised on command responsibility to apply.

II. Plaintiffs' additional arguments fail. The district court did not abuse its discretion in declining to give Plaintiffs' proffered instruction on an element of Bolivian law. There is no question that the instruction the district court actually gave on that element correctly stated the law. Regardless, Plaintiffs were not harmed by the rejection of their proposed instruction because they were permitted to argue for liability based on the same theory they now contend they were barred from advancing.

Equally unpersuasive is Plaintiffs' contention that the district court should have excluded certain State Department cables at trial. The cables

were trustworthy reports made as a result of embassy personnel's legal duty to report on events in Bolivia; the district court correctly admitted that evidence under the hearsay exception for public records. And even if the admission of the cables was erroneous, Plaintiffs were not harmed because the evidence was cumulative of other properly admitted evidence.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED JUDGMENT TO DEFENDANTS.

A. There Was No Evidence that Decedents' Deaths Resulted from Extrajudicial Killings as Defined by This Court.

1. Earlier in this litigation, this Court set a clear standard for establishing an extrajudicial killing under the TVPA. To meet that standard, it is "not enough" to allege "facts suggesting some targeting"; rather, a plaintiff must show that the killing was "undertaken with studied consideration and purpose." *Mamani I*, 654 F.3d at 1154-55. The Court also made clear that "not all deliberated killings are extrajudicial killings." *Id.* at 1155. In particular, shootings by soldiers "not linked to defendants," even if deliberated, do not constitute extrajudicial killings. *Id.* Thus, "to decide whether plaintiffs have stated a claim for extrajudicial killing against *these* defendants, [the court] must look at the facts connecting what these defendants personally did to the particular alleged wrongs." *Id.* at 1155 n.8.

Plaintiffs could not, and did not, satisfy that exacting standard. They presented no evidence from which the jury could conclude that the deaths of Plaintiffs' decedents were the result of extrajudicial killings, rather than "the result of precipitate shootings during an ongoing civil uprising." *Id.* at 1155. Certainly, there was no evidence presented at trial that identified who actually shot anyone—much less the state of mind of any of the unidentified shooters. Indeed, Plaintiffs concede as much. *See* Br. 29-32. They attempt to fill this glaring hole by contending that the jury "heard extensive evidence of a coordinated military campaign" and that "[e]ven if the soldiers did not know whom exactly they would kill and could not be certain that any specific individual would die, the jury reasonably inferred that these soldiers deliberately fired deadly shots with measured awareness that they would mortally wound civilians who posed no risk of danger." *Id.* at 31-32 (internal quotation marks omitted). This Court, however, made clear in this very case that Plaintiffs' allegations of a pattern of indiscriminate shootings, without more, were insufficient to meet even the most minimal requirement for establishing an extrajudicial killing. *Mamani I*, 654 F.3d at 1156.[3]

[3] Plaintiffs also briefly reference evidence of a "lopsided death toll" of 58 civilian deaths. Br. 31. But this Court specifically held that although the death toll (at that time, allegedly 70), was "sufficient to cause concern and distress," given the "mass demonstrations, as well as the threat to [La Paz] and to public safety," it was not sufficiently "widespread" or "systematic" to amount to

2. Despite this Court's clear rejection of their theory of liability, Plaintiffs forge ahead. Plaintiffs first attempt to reinvent the evidence at trial, stunningly claiming that in each of the areas where decedents died, there was "testimony that *only* Bolivian soldiers fired . . . and that these soldiers had no justification for shooting." Br. 32. To the contrary, as the Court found in its Rule 50 Order, the unrebutted evidence shows that in each of the areas where decedents died, there were specific crises to which the military responded. App.-Vol:5-Doc:514 at 18.

Warisata: There was unrebutted evidence presented at trial that in Warisata, the military convoy transporting the hostages was ambushed on September 20. Supp.App.-Vol:2-Doc:497-2 at 1002.3, 1002.27; Supp.App.-Vol:2-Doc:500-1 at 68:20-69:13. It was only after a soldier was shot that the military switched from nonlethal to lethal ammunition. *Id.* at 76:18-25.

El Alto and La Paz: Undisputed evidence similarly confirmed that these areas were in crisis, suffering from crippling blockades and violence. *See, e.g.*, App.-Vol:4-Docs:497-28, 497-29, 497-30; App.-Vol:5-Doc:500-7 at 119:10-120:05; Supp.App.-Vol:1-Doc:478 at 86:5-87:11; Supp.App.-Vol:1-Doc:480 at 95:11-98:5; Supp.App.-Vol:2-Doc:497-2 at 1002.27. Indeed, on October 12, insurgents, armed with rifles and dynamite, attacked tanker

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"conduct that is carried out in an extensive, organized, and deliberate way, and that is plainly unjustified." *Mamani I*, 654 F.3d at 1156.

trunks in El Alto that were transporting gasoline to La Paz. Supp.App.-Vol:2-Doc:497-2 at 1002.27. Separately, from their "elevated positions," "insurgents on rooftops" fired down on the military in El Alto. Supp.App.-Vol:2-Doc:488 at 150:2-20; *see id.* 130:21-131:4. In addition, on October 13 in the Southern Zone of La Paz, insurgents blocked the main road and attacked the military; a soldier was shot in the head and a military truck was burned. App.-Vol:4-Doc:500-2 at 139:05-143:13; Supp.App.-Vol:1-Doc:480 at 130:12-131:10; Supp.App.-Vol:2-Doc:503 (attached Ex. 1145A). This evidence, too, was undisputed.

With this unrebutted evidence, no reasonable jury could find—even assuming *arguendo* the deadly shots came from the Bolivian military—that the unknown shooters acted deliberately, with studied consideration and purpose, in a way that was "plainly unjustified." *Mamani I*, 654 F.3d at 1156. Indeed, having specifically found that each death was *not* the result of an intentional killing by Bolivian soldiers, the jury could not reasonably have found that the deaths were deliberated killings. App.-Vol:2-Doc:474 at B.8; *see also* App.-Vol:2-Doc:408 at 42 ("Plaintiffs must show that decedents were *intentionally* killed by the Bolivian military." (emphasis added)).

Plaintiffs next attempt to escape this Court's prior ruling on the governing legal standard. Plaintiffs suggest that *Mamani I* is distinguishable because it involved liability under the ATS, not the TVPA. That purported

distinction rings hollow. In *Mamani I*, this Court *used the definition of extrajudicial killing under the TVPA* to evaluate whether Plaintiffs stated a claim for extrajudicial killing under the ATS. 654 F.3d at 1154 (evaluating the extrajudicial killing claims by "relying—as did plaintiffs—on the TVPA definition for guidance"). To be sure, there may be instances where the ATS is interpreted more narrowly than the TVPA. But those hypothetical situations are not presented here because this Court "assume[d] for purposes of this discussion that an extrajudicial killing falling within the statutory definition of the TVPA would also likely violate established international law," and therefore constitute an extrajudicial killing under the ATS. *Id* at 1154 n.7. In other words, this Court dismissed Plaintiffs' ATS claims for extrajudicial killing because, even under the potentially broader TVPA definition at issue here, Plaintiffs *still* failed to state such a claim.

Finally, Plaintiffs wrongly suggest that *Mamani I* actually supports them. Plaintiffs note that when assessing the sufficiency of Plaintiffs' allegations, the Court commented that the complaint "may possibly include factual allegations that seem consistent with ATS liability for extrajudicial killing for *someone*: for example, the shooters." *Id.* at 1154 n.8 (emphasis added). According to Plaintiffs, this is the theory of liability ultimately accepted by the jury. Br. 40. As this Court explained, however, "to decide whether plaintiffs have stated a claim for extrajudicial killing against *these*

defendants, we must look at the facts connecting what these defendants personally did to the particular alleged wrongs." 654 F.3d at 1154 n.8. The Court made clear that "Plaintiffs ha[d] not pleaded facts sufficient to show that *anyone*—especially *these defendants*, in their capacity as high-level officials—committed extrajudicial killings within the meaning of established international law." *Id.* at 1155 (first emphasis added). Plaintiffs cannot evade their burden (at the pleading stage or at trial) by suggesting that the evidence is merely consistent with liability for *someone*, especially when there is no evidence of who actually shot any decedent or what that person was thinking. Plaintiffs were required, but failed, to "present any evidence supporting a reasonable inference that decedents' deaths were 'undertaken with studied consideration and purpose.'" App.-Vol:5-Doc:514 at 25 (quoting *Mamani I*, 654 F.3d at 1155); *see also Carlson v. United States*, 754 F.3d 1223, 1229 (11th Cir. 2014) ("[A]n inference is not reasonable if it is only a guess or a possibility, for such an inference is not based on the evidence but is pure conjecture and speculation." (internal quotation marks omitted)).

B. The District Court Properly Applied This Court's *Mamani I* Test and the Rule 50 Standard.

1. The District Court Did Not "Require" a Plan To Kill Civilians, Nor Would Proof of Such a Plan Suffice.

Plaintiffs argue that the district court erred in requiring them to produce evidence of a "preconceived plan" to kill unarmed civilians. Br. at 35.

That argument fundamentally misconceives the district court's order and, indeed, Plaintiffs' own case.

Consistent with the TVPA and *Mamani I*, the only requirement the district court imposed on Plaintiffs was that they adduce evidence from which a jury reasonably could conclude that the deaths were extrajudicial killings. App.-Vol:5-Doc:514 at 19 ("Plaintiffs needed to present some evidence to the jury from which it could reasonably infer (not merely speculate) that the shootings were more than disproportionate reactions to civil unrest or attacks on the military, but were essentially premeditated, or deliberated, killings."). At the summary judgment stage, however, it became apparent that Plaintiffs could not meet this standard because there is no evidence of the identity or intent of any shooter. But rather than dismiss the case, as Defendants requested, the district court accepted Plaintiffs' argument that the requisite deliberateness for extrajudicial killings "c[ould] be inferred by proof that decedents' deaths resulted from the implementation of Defendants' plan to use military force to kill unarmed civilians." App.-Vol:2-Doc:408 at 42; *see also* Supp.App.-Vol:1-Doc:375 at 11, 14 (Plaintiffs arguing that Defendants could be liable based on a "plan to use military force to kill unarmed civilians in order to suppress civilian protests and deter opposition to their policies"). Evidence of a preconceived plan, in other words, was merely the way in which the district court determined—*at Plaintiffs' own urging*—that Plaintiffs could attempt to

fill the evidentiary void, despite their complete failure to produce evidence that the shootings were "linked to defendants" based on "what these defendants personally did," *Mamani I*, 654 F.3d at 1155, or anything "sufficient to plausibly suggest that their relatives' deaths had been 'deliberate,'" *Mamani v. Berzaín*, 21 F. Supp. 3d at 1374.

Having no evidence of their supposed "plan," Plaintiffs now ask this Court to find that the district court erred in faulting them for that failure. Plaintiffs appear to be arguing that evidence of Defendants' intentions is irrelevant to whether a particular death was deliberated, because that is a question of the shooter's intent. Defendants agree that the shooter's state-of-mind must be determined before any death can be deemed deliberate, regardless of any alleged plan. As Plaintiffs now assert, "the relevant inquiry was the purpose of the *Bolivian soldiers* who shot Plaintiffs' relatives, not the 'cho[ice]' and 'desire' of Defendants." Br. 37 (alterations in original). And that is exactly why Plaintiffs' case fails: inquiring into the shooter's state-of-mind is impossible where, as here, there is no evidence of the identity of any shooter.[4] Without such evidence, a jury could not reasonably infer that a

[4] Plaintiffs have suggested that the identity of the shooter is not always required to determine deliberateness, citing cases involving terrorist bombings, but in those cases the deliberated nature of the deaths was not in question. *See* App.-Vol:5-Doc:514 at 21 ("These cases are unhelpful to Plaintiffs for obvious reasons."); *see, e.g., Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (suicide bombing by state-sponsored terrorist group); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1242, 1248 (S.D. Fla.

particular shooter fired with "studied consideration and purpose" as opposed to "mistakenly identifying a target as a person who did pose a threat to others." *Mamani I*, 654 F.3d at 1155. Similarly, a reasonable jury would have to speculate to conclude that in each of the cases the shooter was acting on orders from superiors as opposed to "individual motivations (personal reasons) not linked to defendants," or "precipitate shootings during an ongoing civil uprising." *Id.*; *see also id.* at 1154 (dismissing as insufficient Plaintiffs' allegations that "in the face of significant conflict and thousands of protesters, [Defendants] ordered the mobilization of a joint police and military operation").

At bottom, Plaintiffs' case required the jury to make inference upon inference—infer that a soldier shot their decedents, then infer that the soldier took an intentional shot, then infer that the soldier knew he was shooting at an unarmed civilian and did not perceive himself to be under any threat, and then infer that the soldier took the shot based on some order from Defendants as opposed to personal reasons (where Plaintiffs concede that Defendants gave no such order). There was no evidence to support the first speculative inference, much less every inference thereafter. *See Hammett v. Paulding Cty.*, 875 F.3d 1036, 1050 (11th Cir. 2017) (rejecting inferences as "pure

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1997) (shooting down unarmed civilian airplanes by the Cuban Air Force; pilots "obtained authorization from state officials prior to shootdown of each plane and hearty congratulations from those officials after the planes were destroyed").

speculation" even "when viewed in the light most favorable to Plaintiff"). For that reason, the district court correctly granted judgment to Defendants.

2. There Was No Evidence of a Plan To Kill Civilians.

Even if evidence of a plan to kill civilians were sufficient to carry Plaintiffs burden, the district court properly concluded that there was no evidence of such a plan.

a. No Direct Evidence of a Plan.

Plaintiffs called 29 witnesses over eight trial days. The word "plan" was spoken zero times in connection with a plan to kill. At summary judgment, "[a]lthough Defendants' alleged plan to kill civilians was central to Plaintiffs' theory of the case, Plaintiffs' only evidence of the existence of this plan was the Declaration of Victor Hugo Canelas Zannier." App.-Vol:5-Doc:514 at 8. According to the Canelas written *declaration*, Berzaín stated in 2001 that the government would confront opposition from the people, including "marches and road blockades," by bringing in elite, trained troops from Beni and that *2,000 to 3,000* would need to be killed. Supp.App.-Vol:1-Doc:375-10 ¶¶ 5, 6. The declaration concludes that Sánchez de Lozada "indicated" his approval for this plan. *Id.* ¶ 7.

At trial, Canelas and his written declaration fell apart. Canelas did not testify that Berzaín discussed using military force to respond to protestors, marches, or road blockades, and did not testify that Sánchez de Lozada

indicated approval in any way. Canelas testified only that, in 2000, he arrived at a meeting in Sánchez de Lozada's garden, was told to approach, and heard the following in a conversation that had been in progress before he arrived:

> A. . . . In Bolivia, in the year 2000, under the government of Banzer, what was known as the Water War, where the people of Cochabamba opposed the privatization of water, and Banzer uses force in the attempt to repress them. And I heard Carlos Sánchez Berzaín say, "It's not going to happen to us as it happened to Banzer." Banzer used soldiers without what we call in Bolivia mostrencos. Mr. Sánchez Berzaín continues, and he says, "What we're going to use are elite troops, troops from the Beni, and we will kill 50, a hundred, a thousand." Upon hearing that I said to the people that were gathered there, but I was addressing Sánchez Berzaín, that if it were a matter of killing people, dictatorships would have lasted forever.
> Q. What happens after that?
> A. The leader of the—the national leader of the party [Sánchez de Lozada] adjourns that meeting, because other people are now arriving. He says to everyone and he says to me, "This is over."

Supp.App.-Vol:2-Doc:482 at 91:15-92:8. That is the full extent of Plaintiffs' evidence of a plan to kill innocent civilians. It is not even a "mere scintilla of evidence" of a plan. There is nothing in Canelas's testimony that Berzaín contemplated using troops to kill *unarmed civilians*. In fact, Canelas did not testify *at all* about protestors, marches, or blockades, as he had in his declaration. Canelas simply had no context, and provided none, for Berzaín's stray comments in the garden.

No jury could reasonably infer that these comments constituted a plan to kill civilians, let alone that Sánchez de Lozada's response constituted "assent" to such a plan. In support, Plaintiffs cite an inapposite Restatement excerpt regarding when silence may constitute assent. Br. 47 (citing Restatement (Third) of Agency § 1.03 cmt b ("Silence may constitute a manifestation [of assent] when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence.")). But Plaintiffs' corresponding *record* citation is incomplete—it cuts off immediately before Sánchez de Lozada's response. Br. 47 (citing Vol:4-Doc:482 at 92:1-4). Sánchez de Lozada was not silent. He said, "[t]his is over," and adjourned the meeting. Supp.App.-Vol:2-Doc:482 at 92:5-14.

No one could infer that his response constituted acquiescence to a plan to kill unarmed civilians three years later when he became the President. Indeed, such an inference is inconceivable where the two alleged architects of the supposed plan never ordered or told anyone to execute it. Yet Plaintiffs *concede* this very fact and thereby confirm that no reasonable jury could find that any deaths were the result of a plan to kill civilians. This is no doubt why Plaintiffs did not contend there was evidence of a plan by Defendants to kill civilians, in opening statement or closing argument.

Absent any evidence that Defendants planned to kill civilians, Plaintiffs conflate evidence of a plan with the knowledge element of command

responsibility. But there is not a single piece evidence that Sánchez de Lozada or Berzaín learned of or should have known that soldiers were committing extrajudicial killings at any time. To the contrary, Plaintiffs' own witness, Vice Minister José Elías Harb, gave unrebutted testimony that Defendants were receiving intelligence reports that (i) police officers were killed in the Warisata ambush, and (ii) the "police had casualties" during "clashes between law enforcement and some people who would become radical during the blockages." App.-Vol:5-Doc:500-7 at 106:25-107:21, 108:13-22.[5]

b. No Circumstantial Evidence of a Plan.

Lacking any direct evidence, Plaintiffs attempt to string together excerpts from the record to suggest that there is circumstantial evidence of a plan. That attempt also fails.

[5] Plaintiffs point to evidence that the Cabinet learned that Marlene Rojas Ramos died, Supp.App.-Vol:1-Doc:481 at 101:2-13, but there is no evidence that the Cabinet learned she was deliberately killed by a soldier, as opposed to being killed by a stray shot or in the midst of cross-fire during an ambush. Indeed, this Court specifically held that precipitate shootings during a civil uprising, or accidental or negligent shooting (including mistakenly identifying a target as a person who did not pose a threat to others), are *not* extrajudicial killings. *Mamani I*, 654 F.3d at 1155. There is no evidence that Defendants were told of any extrajudicial killings, as opposed to being aware of deaths that could have occurred for a variety of reasons. *See Doe v. Drummond*, 782 F.3d 576, 604-05, 608 (11th Cir. 2015) ("[G]eneral awareness of the presence of the AUC and the AUC's violent methods" is insufficient to support TVPA liability; the TVPA requires evidence of "active participation" by defendants.).

The Republic Plan and Manual for the Use of Force. After "chang[ing] tack" and abandoning reliance on these two documents, Plaintiffs repackage them yet again. App.-Vol:5-Doc:514 at 15. Plaintiffs cite them as the main evidence in support of their argument that Sánchez de Lozada "took actions consistent with a plan to kill civilians," Br. 48, and that there were "facts on the ground" that "corroborated" Berzaín's purported plan to kill civilians, *id.* at 45.

First, neither document authorizes extrajudicial killings, or evidences a plan thereof. To the contrary, the Manual requires that the military's "[u]se of force must be proportional," App.-Vol:5-Doc:506-22, at 38-0010. The Republic Plan merely aided the police in clearing blockades. Supp.App.-Vol:2-Doc:485 at 19:8-23:8. And when it was offered into evidence, Plaintiffs disavowed the very purpose for which they now advocate here: "We're not saying it was a plan. We're not saying that it was implemented." Supp.App.-Vol:1-Doc:478 at 24:19-23. Finally, there is no evidence that Defendants even knew about these military documents or what they contained. Both Defendants testified, but Plaintiffs did not ask either one about either of these documents.

Troops from the East. No nefarious inference can be drawn from evidence that some soldiers were from various parts of Bolivia, including the eastern region. Br. 44. This is to be expected, given the unrebutted evidence

that there is a one-year mandatory service requirement for all Bolivians, and that conscripts are sent to different posts throughout the country. Supp.App.-Vol:2-Doc:485 at 24:21-25:3. There is zero evidence in the record that *elite soldiers* from Beni were used in September or October 2003, let alone as part of a plan to kill civilians.

Actions by Sánchez de Lozada. Sánchez de Lozada issued only two orders to the military: the first on September 20, 2003 to General Rocabado, App.-Vol:5-Doc:506-3, and the second on October 11, 2003 to General Claros Flores, App.-Vol:5-Doc:506-26. Both were issued in response to a crisis. *Id.* Plaintiffs admitted that neither order instructed the military to kill or use lethal force against civilians: "[W]e have not said that President [Sánchez] de Lozada issued an explicit order to shoot and kill unarmed civilians." Supp.App.-Vol:2-Doc:484 at 25:9-11. Indeed, based on undisputed facts, there is no possible link between the September 20 order and the death of Marlene in Warisata. That order was not typed until after 5:00 p.m., more than one hour after she died. Supp.App.-Vol:2-Doc:485 at 87:20-88:14; Supp.App.-Vol:2-Doc:506-7. As for the October 11 order, the unrebutted testimony confirmed what the order made plain: amid the ongoing crisis, it was "*necessary* to declare a national emergency in order to safeguard the security and normal operation of the country's economic activities." App.-Vol:5-Doc:506-1 at 1-0002

(emphasis added); *see also* Supp.App.-Vol:1-Doc:482 at 44:6-22, 45:13-23, 46:3-12, 48:11-19; Supp.App.-Vol.2-Doc:486 at 15:15-18:1.

Berzaín's approach to conflicts. At most, the evidence suggests Berzaín had a strict approach to the ongoing conflicts; it does not come close to evidencing a plan to kill civilians. Vice Minister of Government Harb, a witness for Plaintiffs, testified that there were differences "of a political and ideological nature" for dealing with conflict. App.-Vol:5-Doc:500-7 at 79:20-80:04. As Harb explained, some (including Berzaín) "believed that a solution of the conflict . . . could be reached through the control of the State mechanisms." *Id.* at 164:11-20. Notably, Harb freely admitted that "[e]very day the issue of restoring order was talked about . . . because that is the purpose of every state, to maintain restored order. *It's a legal obligation*." *Id.* at 61:17-24 (emphasis added). The legal obligation arose because "[c]ertain sectors of society had been radicalized" and "there was a widespread crisis in the country." *Id.* at 133:19-134:2. Plaintiffs' own witness thus confirmed that the military was deployed, not under a plan to kill civilians, but under a "legal obligation" to restore order in response to a national crisis.

Statements from Berzaín. The handful of inflammatory statements attributed to Berzaín do not come close to evidencing a plan to kill civilians. Berzaín's alleged statement to a political rival (the Mayor of La Paz) about "clashes" between the police and the military during an armed attack on the

Presidential Palace—seven months before the Sorata hostage rescue—has no bearing on an alleged plan to kill unarmed protestors. Statements to a local leader in Sorata also prove nothing relevant because the rescue of the tourists in Sorata was peaceful—the shooting started only after the caravan of buses had left Sorata and troops clearing their path came under attack by armed insurgents in Warisata. Supp.App.-Vol:1-Doc:477 at 50:3-10, 53:19-54:14; Supp.App.-Vol:2-Doc:497-2 at 1002.3. And statements in October 2003 concerning the government's response to the gas shortage crisis have nothing to do with any alleged plan. According to Germán Loza, Berzaín commented at a meeting that the military's escort of gas tankers could result in deaths. Supp.App.-Vol:2-Doc:482 at 35:2-14. Loza made clear, however, that "the concern being expressed at the October 10th meeting about deaths related to possible explosions at gas stations," not to the possibility of soldiers killing unarmed civilians. *Id.* at 40:15-18. That testimony was unimpeached and unrebutted.

c. Plaintiffs' Remaining "Plan" Arguments Are Meritless.

The district court correctly dispensed with Plaintiffs' "there must have been a plan because so much shooting occurred" argument: "The problem for Plaintiffs, of course, is that evidence suggesting that shootings occurred as part of a plan is not itself evidence that a plan existed in the first place." App.-Vol:5-Doc:514 at 15. Indeed, although Plaintiffs elicited eyewitness testimony

that some soldiers were shooting in places where clashes occurred (e.g., Br. 11), they failed to adduce any evidence identifying any soldier who shot any of the decedents, let alone "deliberately" or "with studied consideration and purpose." App.-Vol:5-Doc:514 at 25.

The district court did precisely what this Court has deemed proper: grant judgment as a matter of law for a defendant after denying the defendant's earlier motion for summary judgment, where "the non-movant's evidence, when presented at trial, does not live up to its promise at the summary judgment stage." *Bogle*, 162 F.3d at 658 n.7; *see also Gleason v. Title Guarantee Co.*, 317 F.2d 56, 58 (5th Cir. 1963) ("Sound practical reasons . . . may justify a trial judge's denying a motion for summary judgment even on the identical evidence supporting his granting a directed verdict."). Most importantly, the district court entered judgment based on "Plaintiffs' failure to present any evidence supporting a reasonable inference that decedents' deaths were 'undertaken with studied consideration and purpose.'" App.-Vol:5-Doc:514 at 25.

C. Defendants Cannot Be Held Liable Under the Doctrine of Command Responsibility.

The district court's judgment in favor of Defendants also should be affirmed because the evidence adduced at trial cannot support a finding of secondary liability for either Defendant under the theory of command

responsibility.[6] In *Mamani I*, this Court rejected the concept of "strict liability akin to respondeat superior for national leaders at the top of the long chain of command." *Mamani I*, 654 F.3d at 1154. As the Court explained, liability under the TVPA requires "facts connecting what these defendants personally did to the particular alleged wrongs." *Id.* at 1155 n.8. No reasonable jury could find on this record that *these* Defendants are responsible for the deaths at issue under a theory of command responsibility.[7]

1. The Organic Law of the Armed Forces of Bolivia requires the President to call in the military when the police are insufficient to maintain public order: the President "*shall* order the use of the military forces: . . . Domestically, for maintaining public order when the institutions legitimately constituted for this purpose prove insufficient." App.-Vol:5-Doc:506-11, art. 8

[6] The district court did not address Defendants' argument concerning command responsibility liability. *See* App.-Vol:5-Doc:514 at 12 n.10. This Court "may affirm for any reason supported by the record, even if not relied upon by the district court." *Allen v. USAA Cas. Ins. Co.*, 790 F.3d 1274, 1278 (11th Cir. 2015) (explaining in the 12(b)(6) context). Indeed, "a prevailing party is entitled to defend its judgment on any ground preserved in the district court." *Molina v. Aurora Loan Servs., LLC*, 635 F. App'x 618, 623 (11th Cir. 2015) (per curiam). It is undisputed that this argument was preserved here. *See* Supp.App.-Vol:1-Docs:447-1; Supp.App.-Vol:2-Docs:501, 513.

[7] Plaintiffs' designated expert on command responsibility and proportionate use of force, Allen Borrelli, did not show up at trial after portions of his opinions were excluded under *Daubert*. Supp.App.-Vol:1-Doc:427. The *amicus* briefs filed in support of Plaintiffs are an insufficient substitute for expert testimony that Plaintiffs were unable (or unwilling) to provide at trial.

(emphasis added); Supp.App.-Vol:2-Doc:485 at 23:21-24:3. Moreover, neither the President nor the Defense Minister has authority to order the military to shoot anyone. Under the military's Manual for the Use of Force, "the decision to open fire is the exclusive responsibility of the Unit Commander and will always be under his control." App.-Vol:5-Doc:506-22 at 38-0012; Supp.App.-Vol:2-Doc:485 at 27:10-23.

In Bolivia, the President is not the Commander in Chief of the Armed Forces. The Commander in Chief is a military general who is the highest command and decision-making body of a technical/operating nature. App.-Vol:4-Doc:500-2 at 154:4-155:3; App.-Vol:5-Doc:500-6 at 83:12-17; App.-Vol:5-Doc:506-11 at 13-0007, art. 36. Bolivia thus differs from the United States because the President has no control over operational matters of the military. Supp.App.-Vol:1-Doc:481 at 78:21-79:11, 124:3-8. The President can only provide orders of a general concept that become operationalized through the Commander in Chief. App.-Vol:4-Doc:500-2 at 154:15-155:17.

Here, Sánchez de Lozada issued only two orders to the military: the first on September 20 to General Rocabado, App.-Vol:5-Doc:506-3, and the second on October 11 to General Claros Flores, App.-Vol:5-Doc:506-26. Both were issued in response to a crisis, *id.*, after consulting the Constitution, Supp.App.-Vol:2-Doc:485 at 99:8-10, 100:21-101:8, and with the benefit of legal advice, *id.* at 97:8-23. Neither order instructed the military to kill or use lethal

force against civilians. *See* App.-Vol:5-Docs:506-3, 506-26. Accordingly, there is no link between any orders by Defendants and any extrajudicial killings by the military.

2. For his part, Berzaín did not give any orders to the military at all, and it is undisputed that he had no authority to do so. App.-Vol:5-Doc:506-11 at 13-0007, art. 36 (Commander in Chief is the highest Command). In Bolivia, the Defense Minister has no authority to order military operations. Bolivian law specifically limits the Defense Minister's authority to providing orders "on administrative matters." App.-Vol:5-Doc:506-24 at 40-0042, art. 210.

3. The lack of any evidence linking Defendants to any deaths cuts across all three command responsibility elements.[8] First, neither Defendant had effective control over those who could have committed the extrajudicial killings: Defendants lacked control over operational matters of the military,

[8] Although the Eleventh Circuit has applied the command responsibility doctrine to defendants regardless of their military status, *see Doe*, 782 F.3d at 576, Defendants maintain, consistent with their objections to the jury instructions on this issue, that the command responsibility doctrine does not apply to a civilian leader outside of armed conflict as defined under international law. Supp.App.-Vol:2-Doc:487 at 85:12-86:5, 90:1-7; *see also* Gunael Mettraux, *The Law of Command Responsibility* 97 (2012). Even when the command responsibility doctrine is applied to a civilian leader, different standards apply. *See* Supp.App.-Vol:1-Doc:447-1 at 14 n.4; App.-Vol:2-Doc:415 (Instruction Nos. 21, 21(a-c)); *see also* Supp.App.-Vol:1-Doc:415-1 (expert report submitted in support of jury instructions). Regardless of the standard applied, however, there is no evidence to support command responsibility as to each of the three elements.

let alone the "actual ability to control the guilty troops." *Ford ex rel Estate of Ford v. Garcia*, 289 F.3d 1283, 1291 (11th Cir. 2002). Second, there was no evidence that either Defendant knew or should have known that the deaths at issue constituted extrajudicial killings, as opposed to shootings "not linked to defendants" or "precipitate shootings during an ongoing civil uprising." *Mamani I*, 654 F.3d at 1155. Third, there is no evidence that Defendants could have prevented or punished the extrajudicial killings: they lacked the operational ability to prevent (or order) the deaths, and any investigation and punishment was governed by military rules and independent tribunals. Supp.App.-Vol:1-Doc:481 at 89:6-21, 93:12-94:6; App.-Vol:5-Doc:500-7 at 63:17-65:02.[9] Permitting command responsibility liability under these circumstances would be tantamount to strict liability based solely on Defendants' high-level positions in the government—a result squarely rejected in *Mamani I*.[10]

For these reasons, the Court should affirm the district court's judgment based on a lack of command responsibility. At a minimum, Defendants respectfully request that the Court remand "for the district court to consider th[is] issue[] in the first instance." *Bennett v. Hendrix*, 325 F. App'x 727, 743

[9] The Minister of Defense's only role was to see that this worked as an institution, not to intervene in the work of the independent tribunals. Supp.App.-Vol:1-Doc:481 at 93:12-94:6.

[10] Defendants briefed this issue fully in the district court. *See* Supp.App.-Vol:1-Doc: 447-1; Supp.App.-Vol:2-Docs:501, 513.

n.10 (11th Cir. 2009) (remanding issue where district court did not consider issue in judgment as a matter of law).[11]

II. THE DISTRICT COURT'S DISCRETIONARY TRIAL RULINGS WERE CORRECT.

A. The District Court Properly Instructed the Jury on Plaintiffs' Wrongful Death Claim.

In addition to their TVPA claim, Plaintiffs asserted a claim for "Intentional Wrongful Death" based on Bolivian law. App.-Vol:1-Doc:174 ¶¶ 215, 216. Consistent with Bolivian law, the district court instructed the jury that to find Defendants liable on this claim, it must find a "willful and intentional killing of [each Plaintiff's] relative by a Bolivian soldier." App.-Vol:2-Doc:455 at 23. Plaintiffs contend that the district court abused its discretion by declining to provide an additional instruction stating that Plaintiffs could satisfy the intent requirement by showing "that a defendant knows that death is a probable result of his action, whether or not the defendant wanted to cause that particular death." Br. 50; Supp.App.-Vol:2-Doc:487 at 101:2-9. There is no merit to Plaintiffs' argument.

A party is not entitled to particularly worded instructions. *Corey v. Jones*, 650 F.2d 803, 806 (5th Cir. Unit B 1981). "So long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style

[11] On any remand, the district court also would need to address a motion for new trial under Rule 59.

and wording employed in the instructions." *United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir. 1995). No one disputes that the wrongful death instruction actually given by the district court is an accurate statement of Bolivian law taken directly from the Bolivian Penal Code.[12] Yet Plaintiffs contend a more partisan instruction should have been given, notwithstanding their concession below that their requested additional language was "not a statement from the Bolivian code." Suppl.App.-Vol:2-Doc:487 at 103:20-23. Indeed, Plaintiffs offered a paraphrase of Bolivian law offered by one of their own experts. *See* App.-Vol:2-Doc:414 at 31. The district court did not abuse its discretion by declining to allow Plaintiffs to place their own interpretive gloss on Bolivian law. *See, e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008) ("When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism." (internal quotation marks omitted)).

Moreover, even if the Court were to conclude that the district court should have given Plaintiffs' requested instruction, Plaintiffs cannot establish that the omission of that instruction "resulted in prejudicial harm." *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1485 (11th Cir. 1997). First, Plaintiffs were

[12] Under Bolivian law any criminally liable person is also potentially civilly liable. *See* Bol. Penal Code art. 87 (Civil Liability). As such, the parties agreed below that the criminal code informs civil liability under Bolivian law.

permitted to argue fully in closing their theory that the deaths were, if not specifically intended, "a probable consequence" of soldiers' actions. *See, e.g.*, Supp.App.-Vol:2-Doc:489 at 68:4-8 ("And we looked at . . . why you can and should infer that her death was caused by the military indiscriminately shooting at the window she happened to be looking out of."). Second, as explained above, Plaintiffs presented no evidence at trial as to the identity or state of mind of any shooter who caused any death. *See supra* pp. 18, 32-34. Accordingly, there was no evidence from which the jury could reasonably have concluded that Plaintiffs' decedents were killed by *any* Bolivian solider, let alone that such solider "kn[ew] that death [was] the probable result of his action." App.-Vol:2-Doc:414 at 31.

B. The District Court Properly Admitted the U.S. State Department Cables Into Evidence.

Finally, Plaintiffs argue that the district court abused its discretion by admitting into evidence seven diplomatic cables written by personnel of the U.S. State Department at the U.S. embassy in La Paz. Br. 53. Plaintiffs contend that the cables were inadmissible as hearsay. The district court correctly rejected that argument, concluding that the cables were admissible under the "public records" exception in Rule 803(8).

Rule 803(8) applies to "[a] record or statement of a public office" if it sets out "a matter observed while under a legal duty to report," or "factual findings from a legally authorized investigation," provided that the party opposing

admission "does not show that the source of information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8). Here, embassy personnel had a legal duty to report to the State Department on the ongoing developments they observed in Bolivia during the 2003 civil unrest.[13] The cables in question reflected embassy personnel's reasoned conclusions as to what factual information was sufficiently important and reliable to convey to their superiors in Washington. Courts frequently have found that similar legally mandated government reports are admissible under Rule 803(8). *See, e.g.*, *United States v. Gluk*, 831 F.3d 608, 614 (5th Cir. 2016) (holding that SEC investigative memo was "an official communication from the SEC to the DOJ," "a 'factual finding' of the SEC" and therefore admissible under Rule 803(8)); *Union Pac. R.R. Co. v. Kirby Inland Marine, Inc. of Miss.*, 296 F.3d 671, 679 (8th Cir. 2002) (holding that required investigative report prepared by Coast Guard was admissible under Rule 803(8)).[14]

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[13] *See, e.g.*, 2 U.S. Dep't of State, Foreign Affairs Manual § 113.1(c)(10) (2012), https://fam.state.gov/fam/02fam/02fam0110.html (including as Chief of Mission duties "*[o]bserving, analyzing*, and on a highly selective basis, *reporting* significant political, economic, and societal developments occurring abroad" (emphases added)); *see also, e.g.*, 22 C.F.R. § 71.1 (protection of Americans abroad); *id.* § 101.4 (economic and commercial reporting).

[14] Plaintiffs misplace their reliance on *United Technologies Corp. v. Mazer*, 556 F.3d 1260 (11th Cir. 2009). The Court held in that case that Rule 803(8) could not be used as a basis for admitting hearsay statements contained within a public report. *Id.* at 1278. Plaintiffs have not identified any such "double hearsay" statements in the State Department cables at issue here. The other

Plaintiffs further argue that the State Department cables lack sufficient indicia of trustworthiness. To the contrary, the cables bear exceptional *guarantees* of trustworthiness: they were signed by high-level embassy officials (including the U.S. Ambassador) and identified as official State Department materials. That the Ambassador or other State Department official may not have witnessed first-hand every fact they reported is irrelevant, because "lack of personal knowledge is not a proper basis for exclusion of a report otherwise admissible under Rule 803(8)." *Alexander v. CareSource*, 576 F.3d 551, 562-63 (6th Cir. 2009); *see also* 2 Kenneth S. Broun et al., McCormick on Evidence § 296 (6th ed. 2006) ("As the name indicates, [public] reports embody the results of investigation and accordingly are often not the product of the declarant's firsthand knowledge, required under most hearsay exceptions."). And while Plaintiffs baselessly suggest that the cables may contain a slanted version of events, it should be beyond question that the State Department had no incentive to do anything but report the political climate of Bolivia fairly and accurately. *See* Fed. R. Evid. 803(8) advisory committee's note (noting that the Rule is grounded in the presumption "that a

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decision Plaintiffs rely on, *United States v. Ransfer*, 749 F.3d 914 (11th Cir. 2014), is even farther afield. The Court did not address Rule 803(8) at all, and instead considered (but did not decide) whether portions of a police officer's oral testimony recounting the course of an investigation constituted hearsay.

public official will perform his duty properly and the unlikelihood that he will remember details independently of the record").

In any event, any error in admitting the State Department cables was harmless. The jury heard days of testimony from scores of witnesses regarding the extent of the chaos confronting Defendants and the circumstances under which Plaintiffs' decedents were killed. *See, e.g.*, App.-Vol:4-Doc:500-2 at 139:05-143:13; Supp.App.-Vol:1-Doc:478 at 86:5-87:11; Supp.App.-Vol:1-Doc:480 at 95:11-98:5, 130:12-131:10; Supp.App.-Vol:1-Doc:481 at 137:10-139:7; Supp.App.-Vol:2-Doc:482 at 28:15-20, 41:13-48:19; Supp.App.-Vol:2-Doc:497-2 at 1002.3-5, 1002.27. The State Department cables simply corroborated what the uncontested evidence already demonstrated—that on the days Plaintiffs' decedents were killed, "not only was the country of Bolivia in crisis, but there were specific crises at each of the locations where decedents were shot." App.-Vol:5-Doc:514 at 18 (citing "unrebutted evidence" establishing these facts). Thus, even if the district court had excluded the State Department cables, there would still have been overwhelming and undisputed evidence inconsistent with Plaintiffs' theory of the case. Plaintiffs' substantial rights therefore were not affected by the admission of the cables. *See Jordan v. Binns*, 712 F.3d 1123, 1138 (7th Cir. 2013) (declining to reverse based on erroneous admission of evidence under Rule 803(8) because, "[a]s a

general rule, errors in admitting evidence that is merely cumulative of properly admitted evidence are harmless").

CONCLUSION

The judgment of the district court should be affirmed.

Dated: January 4, 2019

Respectfully submitted,

/s/ Ana C. Reyes

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CERTIFICATE OF COMPLIANCE

On behalf of Appellees, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the attached motion is proportionally spaced, has a typeface of 14 points or more, and contains 12,387 words.

Dated: January 4, 2019

/s/ Ana C. Reyes
ANA C. REYES

CERTIFICATE OF SERVICE

I, Ana C. Reyes, counsel for Appellees and a member of the Bar of this Court, certify that, on January 4, 2019, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Ana C. Reyes
ANA C. REYES