Nos. 09-16246 & 10-13071

IN THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ELROY ROYAS MAMANI, ET AL.,

Plaintiffs-Appellees,

v.

JOSE CARLOS SÁNCHEZ BERZAÍN AND GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMENTE,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
HON. ADALBERTO JORDAN, J., JUDGE
NOS. 07-22459 & 08-21-63

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Counsel for Plaintiffs-Appellees certifies 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 11th Cir. R. 26.1-1, the following persons have or may have an interest in the outcome of this case or appeal:

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees submit that oral argument would be helpful to the disposition of this appeal because it would serve to clarify the issues before this Court.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§1331, 1332, and 1350. Following the denial of the motion to dismiss of Defendants-Appellants Sánchez Berzaín and Lozada (collectively, "Defendants"), the District Court granted Defendants' petition for certification for interlocutory appeal under 28 U.S.C. §1292(b)(2). R155. This Court certified two issues: whether this litigation should be dismissed under the political question doctrine and whether Plaintiffs-Appellees' (hereinafter, "Plaintiffs") complaint states a claim under 28 U.S.C. §1350. It has jurisdiction to consider those issues under 28 U.S.C. §1292(b)(2). This Court declined to certify for interlocutory review the applicability of the act of state doctrine. Accordingly, that issue is not before the Court.

Defendants filed a notice of appeal, asserting that this Court has jurisdiction under 28 U.S.C. §1291's collateral order doctrine to review the District Court's denial of Defendants' claim of immunity. Dist. Ct. Dkt. Nos. 137, 138. On April 6, 2010, this Court requested that the parties submit briefs addressing whether the Court has jurisdiction to entertain the immunity appeal. Plaintiffs submitted a brief stating their position that this Court lacks jurisdiction over that appeal. Plaintiffs continue to adhere to that position. For purposes of this brief, however, Plaintiffs will address the immunity appeal as if it were properly before this Court.

STATEMENT OF THE ISSUES

1. Whether Defendants, who are former officials of the government of a foreign state, are immune from this lawsuit in the face of (A) the explicit waiver of their immunity by the current government of that state and the United States' acceptance of that waiver, and (B) common law principles that foreclose immunity in lawsuits that post-date the official's service in the foreign government and for acts that exceed the scope of the official's authority.

2. Whether Plaintiffs' claims have been constitutionally committed for resolution to the judiciary, involve the application of manageable standards, and would not require reexamination of actions or decisions of the executive, thus rendering the case justiciable and not subject to dismissal under the political question doctrine.

3. Whether Plaintiffs' complaint alleging intentional targeted killings of peaceful unarmed civilians states claims for extrajudicial killing and crimes against humanity under the Alien Tort Statute, 28 U.S.C. §1350.

STATEMENT OF THE CASE

A. Introduction.

Plaintiffs brought claims for extrajudicial killing and crimes against humanity against Defendants Gonzalo Sánchez de Lozada, the former President of Bolivia, and José Carlos Sánchez Berzaín, the former Defense Minister of Bolivia. According to the complaint, Defendants commanded armed forces, including

sharpshooters, who intentionally targeted and killed Plaintiffs' relatives—their spouses, children, siblings, or parents. The victims were seven peaceful, unarmed civilians who posed no threat to anyone when they were shot and killed in their homes, while tending to their fields, and while returning home after a trip to a local store.

Based on the allegations in the complaint, the District Court denied in relevant part Defendants' motion to dismiss and held that Plaintiffs stated claims for extrajudicial killing and crimes against humanity that are actionable under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350.

In asking this Court to overturn that ruling, Defendants misrepresent the facts as alleged in the complaint and attempt to obscure the issues correctly decided below. They present a counter narrative of events cobbled together from hundreds of pages of documents outside the complaint that fill two volumes of the record on appeal, and then go on to misrepresent what those documents actually say. Defendants also invent legal rules that have been recognized by no court and that directly contradict existing precedent.

First, Defendants say that, as former officials of a foreign government, they are immune from this lawsuit. However, the current Bolivian Government expressly waived Defendants' immunity, and the U.S. State Department accepted that waiver. Defendants' proposed rule that a foreign government cannot waive

the immunity of its former officials defies an unbroken line of authority holding precisely the opposite.

Second, Defendants say that this case poses a nonjusticiable political question and thus should be dismissed. This Court has recognized, however, that Congress has committed international human rights claims of the type brought by Plaintiffs to the judicial branch, including claims arising in the context of unrest or armed conflict. The claims for extrajudicial killing and crimes against humanity in this case are narrowly focused on the lawfulness of Defendants' conduct related to specific incidents and involve the application of judicially manageable standards with which U.S. courts are well-versed. Defendants' assertion that permitting the suit to proceed will transgress separation of powers boundaries by requiring the judiciary to second-guess U.S. executive branch decisions has no grounding in the record. Defendants mischaracterize the U.S. Government's response to their actions as "unequivocal . . . support." AOB 29. To the contrary, the executive branch has never condoned Defendants' alleged conduct that led to the targeted killings in this suit. Defendants' citations to the documents outside the complaint omit the State Department's discussion of credible reports that human rights violations occurred at the time of the events alleged in the complaint. Additionally, the U.S. Government has taken no position on whether the suit should go forward, and it unequivocally accepted the Bolivian Government's

waiver of Defendants' immunity, further underscoring that this case does not raise a political question.

With no separation of powers concerns present, Defendants resort to proclaiming that this case raises a political question because it will call on the judiciary to review the military judgments of a foreign government. But that argument reflects concerns embodied in the act of state doctrine, not the political question doctrine. This Court declined to certify the act of state issue for interlocutory appeal and thus it is not before this Court.

Third, Defendants say that Plaintiffs' complaint fails to state a claim on which relief can be granted. But under fundamental rules of civil procedure, a motion to dismiss for failure to state a claim on which relief can be granted must be limited to the allegations in the complaint. Time and again, Defendants breach that rule. For example, Defendants rely on hearsay contained in an inadmissible document to challenge the factual allegations of the complaint involving the killing of an eight-year-old girl. AOB 45, n.4. It is premature to contest the factual allegations in the context of a motion to dismiss for failure to state a claim. Similarly, Defendants argue ad nauseam that Plaintiffs have failed to state a claim for disproportionate use of force in response to protests against the Bolivian Government. Indeed, they use the word "disproportionate" or variants thereof two dozen times in their brief. However, the complaint does not contain any

allegations that Plaintiffs' relatives were killed as a result of a "disproportionate" use of force. In the same vein, Defendants repeatedly state that this case arises from the use of force against "insurgents." But according to the allegations in the complaint, Plaintiffs' relatives were not insurgents and were not involved with or in the vicinity of any protests.

Based on the allegations in the complaint that Plaintiffs filed, not on the one that Defendants have rewritten, the District Court properly held that Plaintiffs' claims should proceed. Defendants offer no basis for this Court to disturb that ruling.

B. Statement of Facts.

Plaintiffs are Bolivian citizens. R77-2 to R77-4. Their complaint alleges that Bolivian armed forces, including military sharpshooters and troops with machine guns, intentionally targeted and killed Plaintiffs' relatives, who also were Bolivian citizens. *Id*. The killings occurred in September and October 2003, during a time of a protest in Bolivia against government policies. *Id*. As the District Court noted, however, the complaint alleges that killings of Plaintiffs' relatives were part of a "massacre" ordered by Defendants "to attack and kill unarmed civilians, many of whom were not involved in the protests and were not in the vicinity of the protests." R135-1. Plaintiffs' relatives were among those innocent civilians struck down far from the fray: according to the complaint, they

were neither involved in nor in the vicinity of the protests when they were killed. R135-25 to R135-26.

The complaint alleges the following factual circumstances surrounding the killings of Plaintiffs' relatives:

- **Marlene Nancy Rojas Ramos**, who was eight years old, "was killed deliberately by a sharpshooter with a single bullet striking her in the chest as she peered out of a second-floor window in her home," R135-26, which was a significant distance from the location of the protests. R77, ¶ 40.

- **Jacinto Bernabe Roque** "was killed by military officers who had been dispersed throughout the hills surrounding Lake Animas while [he] walked through the hills to tend to his crops." R135-26 (citing R77, ¶ 70).

- **Lucio Santos Gandarillas Ayala** was killed by military officers "who took up firing positions and began shooting directly at civilians with rifles and machine[] guns from at least one block away." R135-25 (citing R77, ¶ 54).

- **Roxana Apaza Cutipa** "was killed by a sharpshooter shooting a bullet to her head as soon as she peeked over the ledge of her fourth floor terrace. There were no protestors in front of or near the home where she was shot." R135-25 (citing R77, ¶ 55).

- **Marcelino Carvajal Lucero "**was shot in the chest by military personnel as he closed a window in his home." R135-26 (citing R77, ¶ 58).

- **Arturu Mamani Mamani "**was shot in the leg by military personnel from a significant distance while he was up in the hills tending to his farm." R135-26 (citing R77, ¶ 72).

- **Raul Ramon Huanca Marquez** "was shot 'from a significant distance as he crawled along the ground to avoid gunfire' while the military shot at

> civilians as they drove through the village of Ovejuyo" at a time when there was no conflict in Ovejuyo. R135-26 (quoting R77, ¶ 73).[1]

As alleged in the complaint, responsibility for the killings of Plaintiffs' relatives rests squarely with Defendants. Defendant Lozada, then President of Bolivia and Captain General of the Bolivian Armed Forces, is alleged to have authorized policies and promulgated orders that led to the intentional targeted killing of civilians, including Plaintiffs' relatives. R77, ¶¶ 36, 47-50, 79. Defendant Sánchez Berzaín, then Minister of Defense, is alleged to have implemented these policies and orders. R77, ¶ 36. Together, Defendants allegedly "'exercised command and control over the armed forces of Bolivia . . . and ha[d] the actual authority and practical ability to exert control over subordinates in the security forces,'" including the authority to appoint, remove, and discipline personnel. R135-33 (quoting R77, ¶¶ 79-80). In addition, Defendants allegedly aided and abetted the killings detailed in the complaint, and engaged in a conspiracy that resulted in those killings. Specifically, Defendants met with leaders of the armed forces under their command and other Government ministers to plan widespread attacks involving the use of high-caliber weapons against protesters "to silence opposition and intimidate the civilian population," and "to terrorize the indigenous Aymara population of the La Paz region." R135-30; *see*

[1] The relatives of two additional Plaintiffs also were killed. R77,¶¶ 56, 57. The District Court ruled that they failed to state a claim. R135-27. That ruling is not before this Court.

R77, ¶¶ 30, 34, 36, 38, 39, 52, 69, 98. Sánchez Berzaín was personally present and directed the operations during many of the killings. R77, ¶¶ 34, 38, 42, 69. For example, he was in a helicopter and directing personnel "where to fire their weapons" at peaceful, unarmed civilians. R77, ¶ 69. The same helicopter then brought ammunition to soldiers engaged in armed attacks on civilians. *Id*. All told, the violence orchestrated by Defendants resulted in 67 deaths and over 400 injuries. R135-29-30.

Through extensive coverage of the events on Bolivian television and meetings with human rights groups, Defendants had knowledge of the widespread violence perpetrated by their armed forces against the civilian population. R77, ¶¶ 42, 86-87, 88-91. On October 11, 2003, Defendants issued an Executive Decree that purported to establish a state of emergency and, anticipating that the military would use deadly force and indiscriminate violence, offered indemnification for damages to persons and property resulting from the Government's actions. R77, ¶¶ 47-50. Two days later, Carlos Mesa Gisbert, Bolivia's Vice President, made a statement on Bolivian television criticizing the Lozada administration's violent actions. R77, ¶ 60.

Despite the outcry that followed the growing number of deaths, including the public criticism by Vice President Mesa, Defendant Lozada did not order an end to the violence, investigate the atrocities, or take steps to punish the

perpetrators. R77, ¶¶ 59-60, 87-88. Even after it was clear that their armed forces were intentionally killing civilians, including children, Defendants continued to press forward with the attacks. R77, ¶¶ 42-49, 59, 61-73, 87-88.

On October 17, 2003, the U.S. Government withdrew support for the Lozada administration. R77, ¶ 74. Defendants subsequently fled to the United States, where they reside today, R77, ¶¶ 4, 74, and Vice President Mesa became President of Bolivia. R81-3-12.

The U.S. State Department reported to Congress in April 2004 that the Bolivian Government was investigating the human rights violations that had occurred in September and October 2003, and that President Mesa "supported efforts to try former officials accused of human rights abuses." R81-3-12.[2] The State Department also commented that "there were credible reports of abuses by security forces, including use of excessive force," and that because of "cases of alleged human rights abuses, such as torture and extra-judicial killings [during Lozada's administration, the U.S.] Embassy ha[d] hired a Bolivian lawyer devoted exclusively to human rights." R89-1-10 to R89-1-11.

[2] The document cited in the text above is one of many outside the four corners of the complaint that Defendants submitted below. Such documents may be considered in connection with a motion to dismiss for lack of jurisdiction, but not in connection with a motion to dismiss for failure to state a claim. *See infra* at 20. Accordingly, Plaintiffs cite these documents only in connection with the jurisdictional (immunity and political question) issues in this appeal.

In November 2004, President Mesa's administration initiated a Trial of Responsibilities "to determine the criminal liability of [Defendants] for the 67 deaths and over 400 injuries during September and October of 2003." R77, ¶ 75. In 2005, Bolivia requested that the United States notify Defendants of the charges against them. R77, ¶ 76. Defendants "have refused to return to Bolivia to face trial." *Id*.

In December 2005, more than two years after Defendants fled Bolivia, Juan Evo Morales Ayma was democratically elected as President of Bolivia. R81-7-6. The United States has recognized the Morales government as Bolivia's constitutional government and has continued to provide aid to Bolivia during the Morales administration. R89-1-10, R89-1-16, R89-1-19.

C. Procedural History.

In 2007, Plaintiffs sued Defendants in U.S. federal court asserting, *inter alia*, claims for extrajudicial killing and crimes against humanity that are actionable under the ATS. R77-21 to R77-22.[3]

In May 2008, Defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. With respect to their Rule 12(b)(1) motion, Defendants argued that, as former officials of a foreign government, they are immune from suit in the United States; that Plaintiffs' claims

[3] Plaintiffs also brought state law claims, R77-23 to R77-28, and a claim under the Torture Victim Protection Act ("TVPA"), R77-21.

present a nonjusticiable political question; and that the act of state doctrine bars review of their actions. R135-5. With respect to their Rule 12(b)(6) motion, Defendants argued that Plaintiffs failed to state claims that are actionable under the ATS. *Id.*

After Defendants filed their motion to dismiss, the Bolivian Government sent a letter to the U.S. State Department in which it "expressly waive[d] any immunity asserted or attempted by [Defendants]" in this litigation. R89-4-7. The State Department forwarded Bolivia's waiver letter to the Justice Department, which filed a statement in the District Court confirming that "[t]he United States has accepted the waiver." R107-1. The Justice Department's submission further stated that, beyond "accept[ing] the waiver of immunity [the United States] "takes no position" on the litigation. R107-2. The United States has taken no further position on this case.

D. The District Court Decision.

As relevant to the issues before this Court, the District Court denied Defendants' motion to dismiss.

With respect to Defendants' Rule 12(b)(1) motion, the District Court held that Defendants were not immune from suit in light of the Bolivian Government's express waiver of their immunity and the United States' acceptance of that waiver. R135-20 to R135-21. The District Court also held that Plaintiffs' claim did not

pose a nonjusticiable political question. Applying the factors of *Baker v. Carr*, 369 U.S. 186 (1962), the District Court concluded that Defendants' claims are constitutionally committed to the judiciary, involve the application of judicially manageable standards, and do not require reexamination of actions or decisions of the U.S. executive. R135-8 to R135-16. As to the act of state doctrine, the District Court held that it was inapplicable. R135-16 to R135-19.

With respect to Defendants' Rule 12(b)(6) motion, the District Court held that Plaintiffs stated claims for extrajudicial killing and crimes against humanity that are actionable under the ATS. The District Court based this holding on what it concluded were plausible allegations in the complaint that Bolivian military forces under the direction of Defendants deliberately targeted Plaintiffs' family members without provocation (extrajudicial killing) and did so as part of a widespread or systematic attack directed against a civilian population (crimes against humanity). R135-25 to R135-26.[4]

Defendants sought interlocutory review of the District Court's political question, act of state, and ATS rulings under 28 U.S.C. §1292(b)(2). The District

[4] The District Court dismissed Plaintiffs' claims under the TVPA for failure to exhaust remedies in Bolivia. R124. The District Court also dismissed Plaintiffs' ATS claims for violations of the right to life, liberty and security of person and freedom of assembly and association, R135-34 to R135-35, as well as certain state law claims, R135-40. Additionally, the District Court dismissed claims brought by two Plaintiffs. R135-26 to R135-27. Plaintiffs did not seek leave to appeal these interlocutory rulings but may appeal them when procedurally appropriate.

Court certified those issues for interlocutory review. R155. This Court granted Defendants' petition for certification of the rulings on the applicability of the political question and on whether Plaintiffs stated claims under the ATS. It declined to certify the ruling on the applicability of the act of state doctrine. Defendants also sought appeal as of right under 28 U.S.C. §1291's collateral order doctrine from the District Court's ruling denying their immunity claims. Plaintiffs submit that this Court lacks jurisdiction to consider that appeal. Plaintiffs' Jurisdictional Brief, April 16, 2010.

SUMMARY OF ARGUMENT

I. As former officials of the Bolivian Government, Defendants are not entitled to immunity because the current Bolivian Government, which was democratically elected and is recognized by the United States, has expressly waived their immunity. Every U.S. court to consider the issue, including the Second and Fourth Circuits, has held that the immunity of former officials of a foreign state can be waived by that state's current government. These precedents, which Defendants ignore, are rooted in the principle that immunity is an attribute of state sovereignty, not an individual right of state officials, and thus may be waived by the state. Defendants' contention that judicial recognition of Bolivia's waiver of their immunity will disrupt U.S. foreign relations is betrayed by the United States' unequivocal acceptance of the waiver. That the United States has taken no

position on the merits of the case does not diminish the effect of the waiver or the United States' acceptance of it: put simply, the waiver disposes of Defendants' immunity claim.

Even if the Bolivian Government's waiver of Defendants' immunity were given no weight, Defendants still would not be entitled to immunity under the common law principles on which they rely. Those principles state that a defendant's entitlement to immunity depends on whether the defendant held office at the time the suit was filed. When this suit was filed, Defendants were out of office. Additionally, common law principles bar immunity for actions that exceed the scope of authority of a foreign government official under the domestic law of the official's country or under international law. Here, based on the allegations in the complaint, Defendants exceeded the scope of their authority under both Bolivian and international law in directing the intentionally targeted killings of peaceful, unarmed citizens as part of a widespread, systematic attack that was intended to terrorize a civilian population.

II. Plaintiffs' claims for extrajudicial killing and crimes against humanity do not present a nonjusticiable political question under the six factor test set forth in *Baker v. Carr* because they do not implicate the constitutional separation of powers between the political branches and the judiciary. Defendants' primary contention that this case raises a political question because it challenges the military and

political judgments of a foreign government is a non-starter. Foreign policy concerns over judicial review of the actions of a foreign government are embodied in the act of state doctrine, but this Court declined to certify that issue for appeal.

The first and most important of the *Baker* factors is whether the matters raised in a lawsuit are textually committed to the political branches or to the judiciary. Congress has made plain in the text of the ATS that it is for the judiciary to resolve international human rights law claims. And this Court has held that claims for extrajudicial killing and crimes against humanity are among the ATS claims committed to the judiciary for resolution. Defendants do not address those precedents, and otherwise fail to demonstrate that the first *Baker* factor is implicated here.

The second *Baker* factor asks whether there are judicially discoverable and manageable standards for resolution of the issues raised in the lawsuit. In this case, there are. Numerous courts, including this one, have held that claims for extrajudicial killing and crimes against humanity are based on long-established norms of international law that furnish judicially discoverable and manageable standards. This Court and others have repeatedly recognized that such standards may be drawn upon even in litigation arising from violence perpetrated in an armed military conflict. The prospect that civil discovery in this case may prove difficult is not a ground for dismissal under the political question doctrine. Courts

have routinely allowed international litigation to proceed under far more daunting circumstances than here, including in cases requiring discovery in active conflict zones.

Together, the remaining *Baker* factors ask whether judicial resolution of a lawsuit will tread on, and thus potentially undercut, actions and decisions of the political branches. That is not the case here. This litigation does not challenge any action or decision of the executive or legislative branches of government. Notwithstanding Defendants' distortions of the factual record, the United States never ratified, endorsed, or condoned the human rights violations that give rise to this lawsuit. And the executive has declined to express views on the impact of this litigation on U.S. foreign relations, despite an invitation to do so. As in analogous cases that this Court and others have declined to dismiss on political question grounds, this lawsuit is narrowly focused on the lawfulness of Defendants' conduct, not on the conduct of U.S. foreign policy.

III. In a motion to dismiss for failure to state a claim, the allegations in the complaint must be accepted as true. A complaint will withstand a motion to dismiss if the allegations state a claim for relief that is plausible on its face. Plaintiffs' complaint meets that standard. It states claims for extrajudicial killing and crimes against humanity, both of which are well-accepted violations of international law norms and thus are actionable under the ATS.

The elements of a claim for extrajudicial killing are a deliberated killing that is not authorized by a regularly constituted court. Based on the allegations in the complaint, Plaintiffs' relatives were intentionally targeted. Each of them was killed at a distance remote from areas of conflict between the military and protestors. None was engaged in any protest. And no regularly constituted Bolivian court authorized the killings.

The elements of a claim for crimes against humanity are a widespread or systematic attack directed against any civilian population. Based on the allegations in the complaint, Plaintiffs' relatives were shot as part of a coordinated campaign to terrorize a civilian population in which 67 persons were killed and more than 400 injured. Under relevant precedents, including from this Court, the allegations in the complaint state a claim for crimes against humanity.

The complaint plausibly alleges that Defendants were responsible for the targeted killings of Plaintiffs' relatives under the doctrines of command responsibility, aiding and abetting, and conspiracy. In particular, the allegations state with specificity that Defendants planned, coordinated, and oversaw the campaign of violence that led to the deaths of Plaintiffs' relatives, thus rendering Defendants legally responsible.

Defendants' arguments in support of dismissal for failure to state a claim are based on an impermissible counter-narrative of events. Defendants' story of what

they claim happened disputes the truth of the allegations in the complaint and cites reams of documents outside the complaint. This approach is procedurally improper in connection with a motion to dismiss for failure to state a claim. Defendants' belabored contention that Plaintiffs have failed to state a claim for disproportionate use of force underscores the dimensions of their misrepresentation of the facts. Plaintiffs' complaint contains no allegations that Defendants ordered a disproportionate use of force, and the complaint asserts no disproportionality claim. The issue before the Court is whether the complaint as written states a claim, not whether the complaint as rewritten by Defendants does so.

ARGUMENT

STANDARD OF REVIEW

This Court reviews de novo a decision on whether to grant a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction or under Rule 12(b)(6) for failure to state a claim on which relief can be granted. *Clark v. Riley*, 595 F.3d 1258, 1264 (11th Cir. 2010); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

While this Court may consider documents outside the complaint when reviewing a disposition of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, its review of a disposition of a Rule 12(b)(6) motion for failure to state a claim is limited to the allegations in the complaint itself. *Grossman v.*

Nationsbank, N.A. 225 F.3d 1228, 1231 (11th Cir. 2000). In the Rule 12(b)(6) context, this Court, like district courts, must "accept[] the allegations in the complaint as true [and] constru[e] them in the light most favorable to the plaintiff." *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (internal quotations omitted). A decision denying a Rule 12(b)(6) motion must be affirmed if the allegations in the complaint "state a claim to relief that is plausible on its face." *Id*. at 1289 (internal quotations omitted). [5]

I. DEFENDANTS ARE NOT ENTITLED TO IMMUNITY.

The District Court correctly held that the Bolivian Government's waiver of Defendants' immunity, which was accepted by the U.S. State Department, disposes of Defendants' claim that they are immune from suit in this litigation. A failure to recognize that waiver would contradict the core purpose of sovereign immunity,

[5] In the District Court, Defendants introduced hundreds of documents in support of their motion to dismiss. Defendants did not observe the limitations on what may be considered in connection with a Rule 12(b)(6) motion. Instead, they cited the mountain of documents indiscriminately in support of both their Rule 12(b)(1) and Rule 12(b)(6) motions. In granting Plaintiffs' motion to strike the bulk of the documents that Defendants submitted, the District Court held that it would consider that material only in ruling on the Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Dist. Ct. Dkt. No. 119. Before this Court, Defendants repeat the error of their ways: they again cite the voluminous documents outside the complaint in support of their appeal from the denial of both the motion to dismiss for lack of jurisdiction *and* the motion to dismiss for failure to state a claim. *See, e.g*, AOB 45 n.4. Consistent with the strictures of Rule 12(b)(6), this Court should disregard any document outside the allegations of the complaint that Defendants cite in support of their argument that Plaintiffs have failed to state a claim on which relief can be granted.

which is granted as a gesture of comity to foreign states, not to their officials or employees. Even if the Bolivian Government's waiver were disregarded altogether, Defendants would not be entitled to immunity under the common law principles they invoke.

A. The Bolivian Government's Explicit Waiver of Defendants' Immunity, Which the U.S. State Department Accepted, Is Dispositive of Their Immunity Claim.

1. Defendants Offer No Basis For This Court To Disregard The Bolivian Government's Waiver Of Defendants' Immunity.

After Defendants filed their motion to dismiss on immunity grounds, the Bolivian Government informed the U.S. State Department that it "expressly waive[d] any immunity asserted or attempted by [Defendants]" in this litigation. R89-4-7. The State Department forwarded the waiver to the Justice Department along with a letter stating that, "informed by the rules of customary international law and in the exercise of its responsibility for the foreign affairs of the U.S. government," the State Department "accept[ed]" the Bolivian government's waiver. Dist. Ct. Dkt. No. 107-2.[6] The Justice Department's submission to the District Court reiterated that "[t]he United States has accepted the waiver." R107-1.

[6] Defendants failed to include the State Department's letter in the Record Excerpts even though this crucial piece of the record was an attachment to the Justice Department's notice that is in the Record Excerpts.

Defendants argue that the Bolivian Government's explicit waiver of their immunity should be given no weight. AOB 50. Defendants point to no precedent that supports that argument, and there is none. To the contrary, every court to consider waivers of immunity has squarely held that a foreign government can waive the immunity of former officials and that such a waiver disposes of the former officials' immunity claims. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (accepting waiver of head-of-state immunity by subsequent administration); *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1111 (4th Cir. 1987) (same);[7] *Paul v. Avril*, 812 F. Supp. 207, 210-11 (S.D. Fla. 1993) (same); *Howland v. Resteiner*, No. 07-CV-2332, 2007 WL 4299176, at *2 (E.D.N.Y. Dec. 5, 2007) (same).

This solid wall of authority recognizes that foreign government official's immunity is an "attribute of state sovereignty, not an individual right," and thus may be waived by the state after the official leaves office. *In re Grand Jury Proceedings*, 817 F.2d at 1111; *see Republic of Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986) (same); *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 786 (W.D. Wash. 1988) (same). The executive branch of the

[7] Defendants misleadingly quote a sentence from *In re Grand Jury Proceedings* which states that "prior cases 'do not make clear . . . whether a state can waive one of its former ruler's head-of-state immunity.'" AOB 55. But the "prior cases" to which the Fourth Circuit referred were cases decided before *In re Grand Jury Proceedings*, which held (like all decisions since) that a foreign government can waive the immunity of a former government official.

U.S. Government agrees with this principle. It has taken the position that immunity "is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state." Brief for the United States as Amicus Curiae at 26, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031.

Defendants ignore this unbroken line of precedent and the views of the U.S. executive branch. They boldly insist that "the better view" is that "a former government official's immunity cannot be waived by a subsequent regime." AOB 56. The only case they can muster as support for this "better view," however, is a nineteenth-century decision of a New York state intermediate court that did not involve a waiver of immunity or even address whether a subsequent regime can waive the immunity of a former government official. *Id*. (citing *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596 (App. Div. 1876)).[8]

Defendants misleadingly assert that trial of this case would "represent the first time that a foreign head of state has stood trial in the United States under the ATS for his actions while in office." AOB 16. Federal courts have issued ATS judgments against former heads of state for human rights abuses they committed while in office. Those former heads have not "stood trial" only because they chose to default, as in *Paul v. Avril*, *supra*, or because the defendant died before the case

[8] *Hatch* dismissed claims against a former head of state under the act of state doctrine. 14 N.Y. Sup. Ct. at 599-600.

went to trial, as in *In re Estate of Ferdinand Marcos Human Rights Litig. (Hilao v. Marcos)*, 25 F.3d 1467, 1472 (9th Cir. 1994).

Defendants also posit that allowing a lawsuit to proceed in this country against former officials of a foreign government based on a subsequent regime's waiver of the officials' immunity will disrupt "the peace and harmony of nations." AOB 56. Defendants have it backwards. As this Court has noted, the immunity of foreign states and their officials is rooted in the concept of mutual respect and comity among nations. *United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997). U.S. courts have consistently accepted foreign governments' waivers of former officials' immunity precisely to avoid any possible disruption of U.S. relations with those governments. *See In re Grand Jury Proceedings*, 817 F.2d at 1111 ("application of the [head-of-state immunity] doctrine to Ferdinand and Imelda Marcos would clearly offend the present Philippine government, which has sought to waive the Marcos' immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote."); *Paul*, 812 F. Supp. at 210-11 (international comity promoted by recognition of waiver of immunity of former Haitian head of state).[9]

[9] Defendants belatedly challenge the validity of the waiver on the ground that the Bolivian official who issued it, the Minister of Justice (R89-4-7), "lacked the authority" to do so under Bolivian law. AOB 58 n.6. Defendants did not raise this argument below, and, therefore, it is waived. *Jones v. Apfel*, 190 F.3d 1224, 1228 (11th Cir. 1999) (issues presented for first time on appeal are waived). The

2. Defendants Offer No Basis For This Court To Disregard The U.S. Government's Acceptance Of The Bolivian Government's Waiver Of Their Immunity.

Despite the fact that the executive branch filed a notice in the District Court stating that the State Department had received and "accept[ed]" the Bolivian Government's waiver of Defendants' immunity in this litigation, R107-1, Defendants argue that the State Department did not really accept the waiver because the U.S. Government declined to take a position on the merits of the litigation. AOB 58 (citing R107-2). This is a non-sequitur: that the United States has not taken a position on the litigation has no bearing on the whether it has accepted the waiver. Defendants' thesis would require the rejection of all valid waivers accepted by the United States, unless acceptance is coupled with an endorsement of the merits of the suit against a former official of a foreign state. No court ever has imposed such a standard.[10]

Defendants' reliance on *Noriega* is similarly misguided. AOB 57-58. In *Noriega*, this Court inferred that, by pursuing the prosecution of the former leader

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argument is also wrong. The Bolivian law that Defendants cite contains a non-exhaustive list of the Justice Minister's specified functions, which include protecting human rights and facilitating access to justice. Ley de Organizacion del Poder Ejecutivo, Ley 3351, Art. 4, 21 de Febrero de 2006 (Bol.). The Justice Minister's waiver of Defendants' immunity falls comfortably within those duties.

[10] Defendants' immunity claims are not advanced by *A v. Jiang Zemin*, 282 F. Supp. 2d 875 (N.D. Ill. 2003). In that case, China did not waive immunity and the court deferred to the State Department's position that the defendant should be immune from suit. *Id*. at 881-82. Here, the State Department has accepted Bolivia's waiver of Defendants' immunity.

of Panama, the United States had "manifested its clear sentiment" that he should be denied head-of-state immunity. *Noriega,* 117 F.3d at 1212. But the Court in no way intimated that such a clear statement of position was necessary to override an immunity claim. Indeed, the Court noted that if the executive branch takes no position as to immunity, then a court should make an independent determination, considering whether a foreign government has waived immunity. *Id.*; *see also Spacil v. Crowe*, 489 F.2d 614, 618-19 (5th Cir. 1974) (courts should make independent determination regarding immunity when executive fails to convey its position).[11] The *Noriega* Court also explained that the fact that the Panamanian government had not sought immunity for Noriega would counsel against accepting his immunity claim. 117 F.3d at 1112. Thus, the District Court's rejection of Defendants' claim of immunity in light of the Bolivian government's waiver and the United States' acceptance of the waiver is consistent with *Noriega*.

B. Even in the Absence of the Waiver, Defendants Are Not Entitled to Immunity.

Even absent a valid waiver of immunity, Defendants would not be entitled to head-of-state immunity or any other common law immunity. Neither doctrine applies to former government officials. And neither doctrine immunizes conduct

[11] Fifth Circuit decisions like *Spacil* that were issued before October 1, 1981 are binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

that exceeds the scope of an official's authority under both the domestic law of a foreign state and international law.[12]

1. A Foreign Official's Immunity Is Determined As Of The Time Of Suit.

Because foreign official immunity protects the interests of current foreign governments, it is determined by a defendant's status at the time of suit, not at the time of the events giving rise to the suit. *Dole Food Co. v. Patrickson* 538 U.S. 468, 478-80 (2003); *Republic of Austria v. Altmann*, 541 U.S. 677, 708 (2004) (Breyer, J., concurring) ("[S]overeign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit.") (original emphasis). Federal courts have repeatedly recognized this basic limitation on official immunity. *See, e.g.*, *In re Grand Jury Proceedings*, 817 F.2d at 1111 (immunity attaches to the head of state only while he or she occupies

[12] The District Court denied Defendants' claims of immunity based on the Bolivian Government's waiver of immunity and therefore did not consider whether Defendants would be entitled to immunity in the absence of the waiver. If this Court declines to give weight to the waiver, it may affirm on the ground that Defendants are not immune under the common law doctrines they invoke because the record makes plain that the doctrines are inapplicable here. *See Welding Servs. Inc. v. Forman*, 509 F.3d 1351, 1356 (11th Cir. 2007) ("This Court may affirm on any ground supported by the record.").

Bestowing common law immunity on Defendants in the face of a foreign government waiver that was accepted by the State Department would be unprecedented. Thus, if this Court declines to give weight to the waiver and believes that Defendants may be immune under common law principles, the Court should remand to the District Court with instructions to seek the views of the State Department on that subject.

office); *Republic of Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986) (same); *Estate of Domingo*, 694 F. Supp. at 786 ("Head of state immunity serves to safeguard the relations among foreign governments and their leaders, not . . . to protect former heads of state regardless of their lack of official status."). Under these authorities, Defendants, who were former officials of the Bolivian Government when this lawsuit was filed, are not entitled to common law immunity.[13]

2. Foreign Government Officials Are Not Immune For Actions That Exceed Their Authority.

Common law immunity does not protect foreign government officials from claims based on acts taken outside the scope of their lawful authority. *See, e.g.*, *Hilao v. Marcos*, 25 F.3d at 1472 (former head of state not entitled to immunity for acts, *inter alia*, of summary execution that violated his authority under domestic law); *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995) (former official of foreign government not immune from liability for "acts that were beyond the

[13] In *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003), cited by Defendants, AOB 51, the court granted head-of-state immunity to the defendant for acts committed during the brief period of time during which he had been head of state, but not for acts committed before or after. Plaintiffs in that case did not appeal the ruling on head-of-state immunity, which was, therefore, not addressed by the Seventh Circuit. *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005). The district court's theory in *Abiola* that head-of-state immunity is perpetual conflicts with the decisions cited above, and is at odds with the Supreme Court's ruling in *Dole Food* that immunity is an attribute of state sovereignty that is evaluated as of the time of the suit. In any event, there was no waiver of immunity in *Abiola*.

scope of the official's authority"); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (same); *see also Jimenez-Ramos v. United States*, No. 8:06-cr-384, 2008 WL 227975, at *2 (M.D. Fla. Jan. 25, 2008). *See generally Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). Here, Plaintiffs allege that Defendants' actions exceeded the scope of their authority under Bolivian and international law, R77-16 to R77-21, and thus common law immunity is inapplicable.[14]

Defendants state that a former U.S. government official would be immune from suit arising from the conduct in which Defendants are alleged to have engaged. AOB 57. Whether that is true or not is irrelevant: the immunity of former U.S. Government officials is a distinct doctrine from that of immunity of foreign government officials. As the Supreme Court has explained, the immunity of U.S. officials stems from concern over the effective administration of public affairs, while foreign sovereign immunity is "a gesture of comity between the United States and other sovereigns." *Dole Food*, 538 U.S. at 479; *see also Altmann*, 541 U.S. at 707 (Breyer, J., concurring) (distinguishing between comity-

[14] *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), cited by Defendants, AOB 51, is inapposite because there the foreign state affirmed that the defendant's actions were authorized by domestic law. *Id.* at 1282. Here, the criminal charges that Bolivia has brought against Defendants for violating Bolivian law plainly indicate that their actions were not authorized under domestic law.

based immunity of foreign governments and conduct-based immunity of U.S. officials).[15]

Defendants also argue that they are entitled to immunity because the complaint alleges that their actions were committed under color of Bolivian law and in the furtherance of their official duties. AOB 53 (citing R77-19). But, as is well-established under U.S. immunity principles, a government official may act under color of law and in furtherance of his duties yet still violate clearly established law; in such cases, the official is not entitled to immunity. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 27-28 (1991); *Bates v. Harvey*, 518 F.3d 1233, 1242 (11th Cir. 2008). Likewise, a foreign government official who acts under color of his state's law and in furtherance of his official duties yet violates established domestic or international law is not entitled to immunity. *See United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at *14 (S.D. Fla. Jul. 5, 2007).

[15] The absolute immunity of former U.S. presidents for acts taken in their official capacity rests on a rationale that is inapplicable to the immunity of foreign governments and foreign officials: the constitutional separation of powers. *Dole Food*, 538 U.S. at 479-80. Moreover, U.S. officials who are not absolutely immune from suit would not be immune from suits arising from the acts in which Defendants are alleged to have engaged. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974) (holding that governor can be held liable for unlawful killings in the context of protest and political unrest).

II. PLAINTIFFS' CLAIMS DO NOT PRESENT A NONJUSTICIABLE POLITICAL QUESTION.

The political question doctrine is a prudential limitation on federal jurisdiction that is intended to respect the separation of powers between the judicial and the political braches of the government. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009). In *Baker v. Carr*, the Supreme Court set forth the following factors, listed in decreasing order of importance, for determining whether a case presents a nonjusticiable question and thus should be dismissed: (1) whether the case involves an issue that is constitutionally committed to the political branches of government; (2) whether there is a lack of judicially discoverable and manageable standards for resolving the issue; (3) whether it is impossible to decide the case without making an initial policy determination of a kind that calls for political discretion; (4) whether it is impossible for the court to resolve the issue presented without expressing a lack of respect for the political branches of government; (5) whether there is an unusual need to adhere to a political decision that other branches have made; and (6) whether the case raises the specter of embarrassments to the United States as a result of multiple pronouncements by various branches of government on the issues presented. 369 U.S. at 217.

Defendants' argument that this case poses a political question is based on a misrepresentation of the allegations in the complaint. This case is about the

lawfulness of Defendants' conduct, the resolution of which is committed to the judiciary under well-established standards, not about a foreign policy decision that is committed to the political branches. Defendants' contention that the executive branch fully supported Defendants' actions at issue here, and thus the litigation would challenge diplomatic actions of the United States, is not true. Indeed, the executive's refusal to take a position on the merits of this case further reinforces the absence of a foreign policy concern that would trigger dismissal under the political question doctrine.

Defendants also contend that this case "should be dismissed under the political question doctrine because it challenges the military and political judgments of a foreign government. . . ." AOB 1. Whether a lawsuit calls on courts to assess decisions of foreign governments involves the act of state doctrine, the applicability of which this Court declined to certify for interlocutory review. The political question doctrine is fundamentally concerned with the maintenance of domestic separation of powers, not with the propriety of judicial review of acts by foreign states.

Moreover, Defendants' political question argument overlooks this Court's circumspect application of the *Baker* factors, even in cases that arise in the context of armed conflict overseas. In *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992), the Court held that the political question doctrine did not bar claims against

military officials for torture and extrajudicial execution of civilians during the Nicaraguan civil war because the claims challenged the lawfulness of the defendant's conduct in a specific incident. The same is true of Plaintiffs' claims against Defendants here.

A. Plaintiffs' ATS Claims Have Been Committed To The Judiciary For Resolution.

The first *Baker* factor seeks to ensure that courts do not exercise jurisdiction over "policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches." *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997). Defendants do not directly address this factor, and for good reason because it is not implicated here.[16] In enacting the ATS, Congress expressly empowered the federal courts to hear claims for violations of international law that are actionable under the statute. *Arce v. Garcia*, 434 F.3d 1254, 1261-62 (11th Cir. 2006). Resolution of those claims is thus committed to the judiciary and does not contravene the first *Baker* factor. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) ("[T]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary.")[17]

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[16] Defendants indirectly address the first *Baker* factor as part of their misapplication of the third through sixth factors. *See infra* at 39.

[17] The executive branch has long recognized the propriety of judicial review of claims alleging human rights abuses, noting that "the protection of fundamental

B. Plaintiffs' ATS Claims Can Be Resolved Through The Application Of Judicially Discoverable and Manageable Standards.

This case does not raise concerns addressed by the second *Baker* factor because Plaintiffs' ATS claims are based on clearly defined international norms—extrajudicial killing and crimes against humanity—that have been adjudicated in numerous prior ATS cases. As the Second Circuit has observed, these "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the [ATS]." *Kadic*, 70 F.3d at 249.

Indeed, this litigation is strikingly similar to a string of ATS cases in which this Court has reviewed claims of extrajudicial execution and other violations that occurred in the context of broader instability and held that the claims involved the application of judicially discoverable and manageable standards. *See, e.g.*, *Arce*, 434 F.3d at 1256 (upholding claims against former defense minister for human rights violations during civil war in El Salvador); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (affirming judgment against military officer for extrajudicial killing and other abuses following coup d'état in Chile); *Abebe-Jira*, 72 F.3d 844 (upholding verdict against Ethiopian military official for abuses

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human rights is not committed exclusively to the political branches of government." Brief for the United States as Amicus Curiae at 45, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.

committed during "a campaign of torture, arbitrary imprisonment, and summary executions against perceived enemies of the government."). As in those cases, this lawsuit simply asks the Court to apply well-established standards to evaluate the legality of specific incidents of targeted killings of unarmed civilians—for example, the killing of a child playing near her mother's bed or a woman peering over a balcony. R77, ¶¶ 40, 55

Defendants' contention that there are no judicially manageable standards to apply here rests on a mischaracterization of Plaintiffs' claims. Specifically, Defendants state that courts cannot assess the "gravamen" of Plaintiffs' case, which they characterize as one for a disproportionate use of force in a time of civil unrest. AOB 21, 36. But whether the Bolivian military used disproportionate force is not at issue. Plaintiffs' claims are for intentional killings of civilians in their homes or tending to the crops.

In any event, the cases relied upon by Defendants do not support their contention that judicially manageable standards are nonexistent in the context of civil unrest, military actions, or war. AOB 16, 17, 23, 44. In *Gilligan v. Morgan*, 413 U.S. 1 (1973), the Supreme Court stated that, in some cases, there are judicially manageable standards to review unlawful conduct even in a military context: "we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial

forum for violations of law for specific unlawful conduct by military personnel[.]" *Id.* at 11-12; *see also Laird v. Tatum*, 408 U.S. 1, 15-16 (1972) (courts are competent to consider claims by civilians injured by unlawful military activities).[18]

Aktepe and *Carmichael* lend no support to Defendants' cause on the second *Baker* factor. In contrast to those cases, adjudication of Plaintiffs' claims is possible "without determining the military's liability" for areas within its absolute discretion. *Carmichael*, 572 F.3d at 1289; *Aktepe*, 105 F.3d at 1404. Unlike areas of "personnel, discipline, and training," *Aktepe*, 105 F.3d at 1403, it is not within military discretion to commit extrajudicial killing and crimes against humanity. *See, e.g.*, *Linder*, 963 F.2d at 336 ("All of the authorities agree that torture and

[18] The Supreme Court in *Gilligan* expressed concern about the type of relief sought in that case: an injunction, as opposed to damages. *Gilligan*, 413 U.S. at 7, 11 (relief sought would require "continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, [and] would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government."). By contrast, damages actions arising from armed conflict are judicially manageable. *McMahon*, 502 F.3d at 1364 n.34 ("Damage actions are particularly judicially manageable. . . . In the instant case, McMahon does not request continuous judicial oversight of military activities. It is merely a suit for tort damages, and for this reason too, is less likely to implicate the second *Baker* factor.").

Defendants' reliance on *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981), is also misplaced. Unlike *Cannon*, this case does not ask courts to "formulate national policies" or "develop standards of conduct for matters not legal in nature." To the contrary, it asks the Court to evaluate the legality of alleged violations of international law, a task for which the judiciary is well-suited.

summary execution—the torture and killing of wounded non-combatant civilians—are acts that are viewed with universal abhorrence.").[19]

Defendants have little to say about *Linder*, and not surprisingly because it undermines their position on the second *Baker* factor. *Linder* arose out of far more politically sensitive circumstances than this one: acts of violence committed against civilians during the Nicaraguan civil war, a conflict in which the United States had a stake. *Linder*, 963 F.2d at 336. Nevertheless, this Court held that there were judicially discoverable and manageable standards to govern the treatment of civilians in an armed conflict. *Id.* at 337 (holding that "the common law of tort provides clear and well-settled rules on which the district court can easily rely"). *See also McMahon*, 502 F.3d at 1364 (federal courts are competent to develop standards to evaluate wrongs even when committed during wartime). Under those standards, this Court stated, "[t]here is no foreign civil war exception to the right to sue for tortious conduct that violates the fundamental norms of the

[19] *Carmichael* is also distinguishable by its procedural posture. This Court was able to determine that dismissal on political question grounds was warranted because the record had been "fully developed." *Carmichael*, 572 F.3d at 1291; *see also Aktepe*, 105 F.3d at 1404 (upholding dismissal at summary judgment). By contrast, in *McMahon*, this Court declined to dismiss at the pleading stage "in key part" because of the "limited nature of the factual record in the case." *Carmichael*, 572 F.3d at 1291 ("Given the lack of discovery [in *McMahon*] . . . it was simply too soon to tell whether the plaintiff's suit would implicate political questions."). Similarly, here, there has been no factual discovery, and it would be premature for the Court to dismiss based on this incomplete record.

customary laws of war." *Linder*, 963 F.2d at 336.[20] In *Linder*, there was "no allegation . . . that the torture and murder of Linder took place during 'a battle' or 'skirmish'. Rather it [was] specifically alleged that Linder was targeted, tortured and executed while he was a non-combatant civilian." *Id*. This Court stressed that the complaint was "narrowly focused on the lawfulness of the defendants' conduct in a single incident." *Id.* at 337. All of this is true of Plaintiffs' complaint as well.

Finally, Defendants' plea that this case should be dismissed because it may eventually present discovery hurdles is unsupported by *Baker* or any other case. AOB 24-25. The relevant question is whether courts are "capable of granting relief in a reasoned fashion," not whether there are "logistical obstacles." *Alperin v. Vatican Bank*, 410 F.3d 532, 553 (9th Cir. 2005). The presence of "litigation management difficulties . . . does not mean that courts 'lack . . . judicially discoverable and manageable standards' for resolving" the claims. *Id.* at 539 (quoting *Baker*, 369 U.S. at 217); *see also id.* ("[T]his spectre of difficulty down the road does not inform our justiciability determination at this early stage of the proceedings.").

[20] This Court described the "determinative question to be resolved" in *Linder* as follows: "Even though a civil war was in progress and 'the actions taken against Linder . . . were part of an overall design to wage attacks [against civilians] . . . as a means of terrorizing the population of Nicaragua,' does this immunize the defendants from tort liability for the torture and murder of Linder? We think not." 963 F.2d at 336.

Defendants' assertion that discovery in a foreign country like Bolivia could be difficult or dangerous, AOB 25, has been repeatedly rejected as irrelevant to the *Baker* inquiry. Defendants cite no case for the proposition that such considerations are germane, and, in fact, numerous cases have proceeded through discovery in significantly more hostile environments than Bolivia. *See, e.g.*, *McMahon*, 502 F.3d at 1364 (permitting discovery related to events in Afghanistan to proceed despite "less than hospitable environment"); *Lane v. Halliburton*, 529 F.3d 548, 555 (5th Cir. 2008) (declining to dismiss on political question grounds litigation centered on an area "under attack by Iraqi insurgents"). In sum, at this stage of the litigation, Defendants' invocation of potential discovery hurdles is purely speculative.

C. Resolution Of Plaintiffs' ATS Claims Will Not Require Judicial Review Of Any Actions Or Decisions Of The Political Branches.

Defendants group the first and third through sixth *Baker* factors together and argue that Plaintiffs' ATS claims "cannot be resolved in a matter that fully respects the coordinate branches." AOB 28. Defendants are wrong.

As the District Court correctly concluded, this case does not implicate any actions taken or decisions made by the executive or legislative branches. R135-16. Plaintiffs seek damages for the targeted killings of their peaceful, unarmed family members by Bolivian military personnel, including sharpshooters, under the command of the Defendants. Contrary to Defendants' suggestion, AOB 28-30, the

United States did not ratify the targeted killings of peaceful, unarmed civilians. In fact, the executive branch repeatedly recognized the importance of holding accountable those responsible for human rights abuses in Bolivia. Defendants selectively quote from a State Department report to Congress that stated that Bolivia's "'military and police acted with restraint and with force commensurate to the threat posed by protestors.'" AOB 8 (quoting R81-3-13). However, Defendants omit the very next sentence of the report stating that Bolivia had opened investigations into "instances where human rights violations may have occurred in response to large-scale unrest," R 81-3-13, as well as other portions of the record stating that that U.S. funding for Bolivia will be subject to a determination that the Bolivian "police and military are respecting human rights and cooperating with investigations and prosecutions of alleged violations of human rights," R89-1-11.

Defendants' argument that other government "statements," such as a review of Sánchez Berzaín's asylum application[21] or internal State Department cables,[22]

[21] Asylum decisions are "grounded principally in humanitarian, not foreign policy, judgments." Deborah E. Anker, *The Law of Asylum in the United States* 35 (2d ed. 1991); *see* Aliens & Nationality; Asylum & Withholding of Deportation Procedures, 55 Fed. Reg. 30674-01, at 30682 (July 27, 1990) (Final Rule) (codified at 8 C.F.R. §208.11-12) (removing mandatory State Department consultation as part of effort to eliminate political or foreign policy influence over asylum decisions); *see also American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) ("foreign policy . . . considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of

reflect official positions of the executive for purposes of the political question doctrine is incorrect. If Defendants were right, unofficial and inconsistent comments of a variety of lower-ranking officials would be sufficient to short-circuit a lawsuit on political question grounds. There is no authority for that notion. *See City of N.Y. v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 376 n.17 (2d Cir. 2006) (even where deference is due, executive branch views do not prevail if "largely vague and speculative" or not "raised with the level of specificity required to justify . . . a dismissal on foreign policy grounds.").

Defendants cite cases addressing "the constitutional commitment" of military decisions to the *U.S. executive and legislative branches*. *See, e.g., Gilligan*, 413 U.S. at 6 (noting that U.S. military decisions generally are constitutionally committed to the political branches); *see also Carmichael*, 572 F.3d at 1281 (same). Those cases are inapposite, however, because this lawsuit involves actions of a *foreign government and its armed forces*.

But even cases stemming from armed conflicts in which the U.S. Government played a role do not automatically pose nonjusticiable political

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persecution."). In other contexts, courts have held that executive decisions regarding asylum do not divest the courts of jurisdiction under the political question doctrine. *See, e.g., Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1503 (C.D. Cal. 1988).

[22] Internal State Department communications by low-level employees are not an official "decision" by a coordinate branch of government, and the fact that individuals in the executive branch may have commented on the events in Bolivia in 2003 does not transform this case into a nonjusticiable political question.

questions. *Linder* is again illustrative. As indicated, that case arose in the context of a conflict in which the United States had taken clear actions favoring one side, the Nicaraguan contras, over the other side in the conflict. Nevertheless, because "the complaint challenge[d] neither the legitimacy of the United States foreign policy towards the contras, nor . . . require[d] the court to pronounce who was right and who was wrong in the Nicaraguan civil war," this Court declined to dismiss on political question grounds. *Linder*, 963 F.2d at 337. In so holding, the Court highlighted that its inquiry was "narrowly focused on the lawfulness of the defendants' conduct . . . ." *Id.* The instant case arises from a conflict in which the United States was *not* involved, and thus poses far less a political question than *Linder* arguably did. The complaint in *Linder* was allowed to proceed because it was not concerned with the legitimacy of U.S. foreign policy. The same is true here. As in *Linder*, the claims are "narrowly focused on the lawfulness of the Defendants' conduct" related to targeted killings of unarmed civilians.

Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007), is of no utility to Defendants. In *Corrie*, plaintiffs brought suit against Caterpillar for selling bulldozers to the Israeli Defense Forces, a sale that had been "approved" and paid for by the U.S. executive branch pursuant to a congressionally-mandated program. *Id*. at 978. The Ninth Circuit held that the case should be dismissed under the political question doctrine because finding Caterpillar liable for the sales would

"necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel." *Id.* at 982; *see also Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72-73 (2d Cir. 2005) (dismissing case on political question grounds because executive branch had entered into "executive agreement" with Austria). In contrast, at no point did the political branches instruct, authorize, finance, advance, or approve the conduct of Defendants that is at issue here.

Finally, it is significant that the executive branch has declined to express a view on whether the case should proceed, despite an invitation to do so. R107-2. Defendants argue that the executive branch's silence amounts to a political "decision" that the judiciary should not review. AOB 31, 33. Defendants' argument is foreclosed by *McMahon*. There, this Court stated that the silence of the executive branch on whether a lawsuit should proceed does not signal the existence of a nonjusticiable political question, but rather just the opposite: "We have previously found the opinion of the United States significant in deciding whether a political question exists . . . . The apparent lack of interest from the United States to this point fortifies our conclusion that the case does not yet present a political question." *McMahon*, 502 F.3d at 1365; *see also Alperin*, 410 F.3d at 556-57 (executive silence did not implicate fourth *Baker* factor). Defendants' argument on the executive branch's silence is also at odds with the State

Department's own caution against reading a "position" into the executive branch's decision not to intervene in a particular case. As the State Department has put it, because the executive "does not routinely involve itself in district court cases to which the United States is not a party . . . no inference should be drawn about the Department's views regarding a particular case in which it has not participated." Letter from John B. Bellinger, Legal Adviser, Dep't of State, at 2, *Romero v. Drummond*, No. 03-0575, Dkt. No. 275-1 (N.D. Ala. Aug. 2, 2006).

III. PLAINTIFFS HAVE STATED CLAIMS FOR EXTRAJUDICIAL KILLING AND CRIMES AGAINST HUMANITY ACTIONABLE UNDER THE ALIEN TORT STATUTE.

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. The Supreme Court has held that the ATS extends to claims alleging violations of international law that have "definite content" and widespread "acceptance among civilized nations," a standard that is generally consistent with the "specific, universal, and obligatory" standard previously developed by lower courts. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (internal quotations omitted). Applying that standard, this Court has held that claims of extrajudicial killing and crimes against humanity fall within the ambit of the ATS. *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008) (extrajudicial killing); *Cabello*, 402 F.3d at 1151-52, 1161 (both);

Aldana v. Fresh Del Monte Produce N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (crimes against humanity), *dismissed on other grounds*, 2007 WL 3054986, *aff'd*, 578 F.3d 1283 (2010).

Based on the allegations in the complaint, and applying this Court's ATS precedents, the District Court held that Plaintiffs stated claims for extrajudicial killing and crimes against humanity that are plausible on their face. It thus denied Defendants' Rule 12(b)(6) motion. R135-25 to R135-34. To circumvent that decision, Defendants contest the truth of the allegations in the complaint. Defendants cannot do that at the Rule 12(b)(6) stage. *American Dental*, 605 F.3d at 1288 (in a Rule 12(b)(6) motion, the defendant must accept plaintiff's allegations as true). Defendants also lash out at phantom allegations that are not in the complaint. They offer an exegesis on whether a claim for disproportionate force is actionable under the ATS, and declare that it is not. AOB 36-43. But Plaintiffs assert no such claim. Defendants' musings on the subject are thus entirely irrelevant.[23]

[23] Even if a norm governing the use of military force did apply here, the correct norm would not be disproportionate force, as Defendants assert, but rather the rule of distinction, which requires that armed forces distinguish between civilian and military targets and protects civilians from being directly targeted regardless of the legitimacy of the overall mission. *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 278 (E.D.N.Y. 2007) (describing "principle of distinction" as "long-established norm of the customary law of armed conflict" that prohibits "attacks on innocent civilians" and discussing its application to extrajudicial killing of civilians).

At bottom, Defendants have flouted basic rules of civil procedure. They cannot "hijack the plaintiff's complaint and recharacterize its allegations so as to minimize [their] liability." *Limone v. Condon*, 372 F.3d 39, 46 (1st Cir. 2004). *See also Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 961 (11th Cir. 2009) (at Rule 12(b)(6) stage, neither parties nor courts can "rewrite" the complaint). The question before this Court is whether, in the complaint that Plaintiffs have filed—not the complaint of Defendants' imagination—the allegations state claims for extrajudicial killing and crimes against humanity. They do.

A. The Complaint States A Claim for Extrajudicial Killing.

Federal law defines an extrajudicial killing as "a deliberated killing" that is not authorized by a regularly constituted court. TVPA, §3A, 28 U.S. C. §1350 note. The District Court correctly concluded that the complaint contains plausible allegations that Plaintiffs' relatives were the victims of extrajudicial killing. Each was killed by shots fired by the military. Each was killed at a distance remote from any area of conflict between the military and protestors. None was engaged in any protest. R135-25 to R135-26 (citing R77, ¶¶ 40, 54-58, 70, 72, 73). And none of the killings was authorized by a regularly constituted Bolivian court.

For example, the complaint alleges that the father of Gonzalo Mamani Aguilar was shot by military personnel from a significant distance while he was high up a hill tending to his crops. R77, ¶ 72. There is nothing in the complaint

from which it could be inferred that he was a "bystander" to protests or that he was killed by a soldier acting in self-defense, as Defendants intimate. AOB 45 n.4.

As part of their impermissible counter narrative, Defendants conflate the time and place of events to suggest that all the military actions that Defendants ordered were aimed at rescuing travelers who were blocked by protestors. AOB 4-7. As alleged in the complaint, however, some killings occurred more than a month after the blockage of travelers, and most occurred in different locations. R77, ¶¶ 23-24, 57-74.

B. The Complaint States A Claim For Crimes Against Humanity.

This Court has held that the elements of a crime against humanity are "a widespread or systematic attack directed against any civilian population." *Cabello*, 402 F.3d at 1161. The allegations of the complaint satisfy those elements. As the District Court observed:

> [P]laintiffs allege that the attacks and killings were conducted over a period of four weeks . . . in several towns, resulting in 67 deaths and over 400 injuries. *See* Compl. ¶¶ 1, 8-16, 31, 74. These allegations are sufficient to survive a motion to dismiss because they serve as preliminary evidence of a large-scale attack involving a multiplicity of victims, thereby satisfying the definition of "widespread." Although I need not determine whether the acts were also systematic -- because the requirement that attacks be widespread or systematic is a disjunctive one -- the plaintiffs have also alleged sufficient facts to satisfy the "systematic" prong. They allege that the defendants planned and ordered the use of deadly force and mobilized military sharpshooters and officers with machine

> guns to kill dozens of civilians over a four-week period in order to terrorize the population.

R135-29 (citing R77, ¶¶ 30, 34, 36, 38, 39, 52, 69, 98).

Defendants argue that the scale of the killings alleged is insufficiently widespread to constitute a crime against humanity. AOB 46. They offer no support, however, for their assertion that an attack against a civilian population resulting in 67 deaths and over 400 injuries is insufficient. *Cabello* itself involved the killing of 72 civilians, 402 F.3d at 1161, and other cases have found that attacks resulting in fewer deaths constitute crimes against humanity. *See, e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1169, 1183 (C.D. Cal. 2005) (17 killed and 25 wounded by a car bomb); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 183, 230-233 (Int'l Crim. Tribunal for the Former Yugoslavia, Appeals Chamber July 15, 1999), *available at* 1999 WL 33918295 (5 killed). *See also Lizarbe v. Hurtado*, No. 07-21783, 2008 U.S. Dist. LEXIS 109517 (S.D. Fla. March 4, 2008) (involving the deaths of 60 persons).

Defendants also ignore that crimes against humanity include acts that are *either* widespread *or* systematic. *See Aldana*, 416 F.3d at 1247 (crimes against humanity "occur as a result of 'widespread *or* systematic attack' against civilian populations.") (emphasis added); *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 648 (Int'l Crim. Tribune for the Former Yugoslavia May 7, 1997), *available at* 1997 WL 33774656 ("either a finding of widespreadness, which refers

to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident," satisfies definition of crimes against humanity). The complaint alleges that Defendants planned and ordered a systematic attack involving the use of deadly force, mobilizing military sharpshooters and officers with machine guns to kill dozens of civilians in order to terrorize the population. R77, ¶¶ 30, 34, 36, 38, 39, 52, 69, 98.

Next, Defendants argue the allegations in the complaint are insufficient to state a claim for crimes against humanity because Plaintiffs do not allege that Defendants bore discriminatory animus toward a particular group and such animus is required. AOB 47. Defendants misstate the law. Discriminatory animus against a particular group is a required element of crimes against humanity only when the underlying crime is persecution on a proscribed ground; it is not a required element where, as here, murder is the underlying crime. *See Tadic*, Case No. IT-94-1-A, at ¶¶ 283, 292, 305; *Prosecutor v. Kordic/Cerkez*, Case No. IT-95-14-2-T, Judgment, ¶ 186 (Int'l Crim. Tribune for the Former Yugoslavia Feb. 26, 2001), *available at* 2001 WL 34712270; *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶¶ 244, 260 (Int'l Crim. Tribune for the Former Yugoslavia Mar. 3, 2000), *available at* 2000 WL 34467832; *Prosecutor v. Todorovic*, Case No. IT-95-9/1, Judgment, ¶ 113 (Int'l Crim. Tribune for the Former Yugoslavia July 31, 2001), *available at* 2001 WL 34712275. "[C]rimes against humanity can be committed against any

civilian group, regardless of nationality, ethnicity, or any other distinguishing feature." Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L.J. 237, 254 (2002).[24] As the District Court concluded, the allegations that Defendants intentionally targeted and killed dozens of civilians and injured hundreds more, in order to "silence opposition and intimidate the civilian population," R77, ¶ 23, are sufficient to state a claim of crimes against humanity.

C. Plaintiffs Have Sufficiently Pled That Defendants Are Liable for the Targeted Killings Alleged in the Complaint.

Plaintiffs allege that Defendants are liable for the deaths of their family members on the basis of command responsibility, aiding and abetting liability, and conspiracy. Each is recognized by Eleventh Circuit precedent and adequately pled in the complaint.

First, the application of command responsibility to ATS claims is well-established in this Circuit. *See Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d

[24] This point was emphasized in two recent decisions by international tribunals. *Popovic et al*. (Case IT-05-88), 10 June 2010, Full Judgment Pending, summary judgment available at http://www.icty.org/x/cases/popovic/tjug/en/100610summary.pdf; Kaing Guek Eav, alias Duch case (Case File No 001/18-07-2007/ECCC-TC), ¶ 325, 26 July 2010, http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf. To the extent that the District Court held that plaintiffs must prove that the decedents were targeted because they were Aymara civilians, rather than simply civilians, the District Court erred. R135-31.

1283, 1288-93 (11th Cir. 2002); *Arce*, 434 F.3d at 1259; *Cabello*, 402 F.3d at 1156-57; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 604 n.36 (2006). The essential elements of liability of command responsibility are:

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

Ford, 289 F.3d at 1288.

As alleged in the complaint, Defendants had command responsibility for the conduct of the military during the events at issue. R77, ¶¶ 7, 79-88. Defendant Lozada issued the orders that led to the killings and Defendant Sánchez Berzaín implemented them. *Id*. ¶ 36. The nature of the military actions was known to Defendants through extensive coverage of the events on television and meetings with human rights groups. *Id*. ¶¶ 42, 86-91. Defendant Sánchez Berzaín was personally present and directing the military during many of the killings. *Id*. ¶¶ 34, 38, 69. Defendant Lozada issued a decree establishing a state of emergency and providing indemnification for damages to persons and property resulting from the government's actions. R77, ¶¶ 47-50. Despite the outcry that followed the growing number of deaths, including the Bolivian Vice President's public criticism, Defendant Lozada did not order an end to the violence; instead, he went

on television to accuse protesters of being traitors and subversives and of attempting a coup funded by international financiers. *Id*. ¶¶ 59-60. The violence continued. *Id*. ¶¶ 61-74. Thus Defendants, with control over the military, had the requisite knowledge of attacks on the civilian population, and failed to investigate, prevent, or punish the abuses. These allegations belie Defendants' contention that the complaint does not establish their liability for the intentional killings of Plaintiffs' relatives. AOB 44. The District Court correctly found that Plaintiffs had sufficiently pled command responsibility. R135-31 to R135-34.

Second, Plaintiffs pled Defendants' liability based on aiding and abetting. RR77, ¶ 89. This Court has explicitly recognized such liability for claims under the ATS when a defendant "substantially assisted some person or persons who personally committed or caused the wrongful acts" and "knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance." *Cabello*, 402 F.3d at 1158. According to the allegations in the complaint, Defendants "substantially assisted" the persons who committed the wrongful acts by participating in planning and implementing the campaign of unlawful killings, R77, ¶¶ 36, 38, 47, 48, 69; by issuing an executive decree in the midst of the violence that claimed to establish a state of emergency and provided indemnification for damages to persons and property resulting from the government's actions, R77, ¶¶ 47-50; and by meeting with military leaders under

their command and other ministers in their government to plan widespread attacks involving the use of high-caliber weapons against protesters, R77, ¶¶ 78-81. In addition, after the early morning killing of civilians on September 20, 2003 Lozada ordered the Bolivian military to use "necessary force" to reestablish public order, knowing that those forces had already killed peaceful, unarmed civilians, R77, ¶¶ 36, 42, and Sánchez Berzaín, as Minister of Defense, was responsible for the implementation of this Directive, R77, ¶ 36. All told, Defendants' contention that there are not sufficient allegations that they "knowingly" and "substantially" aided in the violations simply ignores the pleadings.

Third, Plaintiffs adequately pled liability based on conspiracy, a theory that is also well-established in this Circuit. *See Cabello*, 402 F.3d at 1158 (holding that Defendant could be held "indirectly liable . . . on . . . conspiracy"); *Aldana*, 416 F.3d at 1248 (ATS liability extends to conspiracies). Conspiracy claims "require[] a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Here the allegations of the complaint are sufficient to "suggest that an agreement was made" and thus meet the requirements of *Twombly*. The complaint plausibly alleges that Defendants had command and control over the Bolivian armed forces and acquiesced in and permitted persons under their control to commit human rights abuses, R77, ¶¶ 79-80; met with military leaders and other ministers to plan

widespread attacks involving the use of high-caliber weapons against protesters, *id*. ¶ 81; authorized and executed military operations; *id*. ¶¶ 47-50; were aware of violence against civilians, but nevertheless escalated attacks and failed or refused to take necessary measures to investigate, punish, and prevent those abuses, *id*. ¶¶ 87-89; and that Sánchez Berzaín was personally present during attacks on civilians, *id*. ¶¶ 34, 38, 69. These allegations are sufficient to implicate Defendants in a conspiracy that resulted in the killings giving rise to this suit.

Defendants assert (AOB 45) that the allegations here are "indistinguishable" from the "conclusory allegations" that the Supreme Court held could not withstand a motion to dismiss in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Not so. In *Iqbal*, the bald allegation, with no factual support, that the defendants "knew of, condoned, and willfully and maliciously agreed to subject [plaintiff]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest" was insufficient to state a claim for purposeful and unlawful discrimination on a *respondeat superior* theory of liability. *Id*. at 1951. By contrast, the complaint here alleges a host of concrete actions taken by Defendants that demonstrate command responsibility, aiding and abetting liability, and conspiracy.

D. The ATS Reaches Claims Involving Conduct that Occurred Outside the United States.

Defendants err in arguing that the ATS applies only to acts that occurred within the United States. AOB 49. In a series of decisions that the Defendants overlook, this Court has repeatedly applied the ATS to claims arising outside the United States. *See Arce*, 434 F.3d 1254; *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005); *Aldana*, 416 F.3d 1242; *Cabello*, 402 F.3d 1148; *Abebe-Jira*, 72 F.3d 844.

These decisions are consistent with *Sosa*, where the Supreme Court explicitly endorsed lower court decisions that asserted jurisdiction over ATS claims for abuses committed outside the United States. *Sosa*, 542 U.S. at 731-32 (citing *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *Hilao v. Marcos*, 25 F.3d at 1475). *Sosa* itself involved an ATS claim arising in Mexico. The Supreme Court dismissed for failure to state a claim cognizable as a violation of the law of nations, not because the claims arose outside the United States. Furthermore, *Sosa*'s statement that "modern international law is very much concerned with" limits on a foreign government's treatment of its own citizens cannot be squared with Defendants' argument that the ATS is not intended to apply to extraterritorial claims. 542 U.S. at 727.[25]

[25] A territorial limit also would also be inconsistent with *Sosa*'s discussion of exhaustion of domestic remedies and of the possible need for case-specific deference to the political branches in cases arising abroad that might raise foreign policy concerns. 542 U.S. at 733 n.21.

Ignoring this line of authority, Defendants point to a variety of cases that considered whether Congress intended the extraterritorial application of U.S. *domestic* law in the absence of clear statutory instructions. *See* AOB 49 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010) (securities law); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (employment discrimination law); *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126 (11th Cir. 1999) (Federal Trade Commission regulations)). But the presumption against extraterritoriality discussed in those domestic law cases is irrelevant when it comes to the ATS, which explicitly instructs the federal courts to apply *international* law.[26]

CONCLUSION

For the reasons set forth above, the District Court order denying Defendants' motion to dismiss should be affirmed.

[26] Defendants assert that Plaintiffs' ATS claims should have been dismissed for failure to exhaust domestic remedies. AOB 47. As Defendants acknowledge, however, this Court has held that the ATS imposes no exhaustion requirement. *Id.* (citing *Jean*, 431 F.3d at 781). As support for the proposition that *Jean* was wrongly decided, Defendants cite the District Court's interlocutory ruling dismissing Plaintiffs' TVPA claims for failure to exhaust domestic remedies. *Id.* at 48 (citing R124). Plaintiffs disagree with that ruling and will consider appealing it when procedurally appropriate.

Respectfully submitted,

Dated: December 16, 2010

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 13,938 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4; and

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14 point Times New Roman font.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On December 16, 2010, I served the foregoing document(s) described as: Brief of Appellees on the interested party(ies) below, using the following means:

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