No.

In the Supreme Court of the United States

GONZALO SANCHEZ DE LOZADA SANCHEZ BUSTAMANTE, ET AL., PETITIONERS

v.

ELOY ROJAS MAMANI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether plaintiffs may pursue claims against the former head of state and defense minister of a foreign country under the Torture Victim Protection Act for alleged misconduct in that country when they have already recovered adequate remedies in the foreign country for their alleged losses.

PARTIES TO THE PROCEEDING

Petitioners are Gonzalo Sánchez de Lozada Sánchez Bustamante, the former president of Bolivia, and José Carlos Sánchez Berzaín, the former defense minister of Bolivia.

Respondents are Eloy Rojas Mamani, Etelvina Ramos Mamani, Sonia Espejo Villalobos, Hernán Apaza Cutipa, Teófilo Baltazar Cerro, Juana Valencia de Carvajal, Hermógenes Bernabé Callizaya, Gonzalo Mamani Aguilar, and Felicidad Rosa Huanca Quispe.

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Gonzalo Sánchez de Lozada Sánchez Bustamante and José Carlos Sánchez Berzaín respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 825 F.3d 1304. The court of appeals' order denying rehearing (App., *infra*, 19a-20a) is unreported. The order of the district court denying petition-

ers' motion to dismiss in pertinent part (App., *infra*, 21a-66a) is reported at 21 F. Supp. 3d 1353.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2016. A petition for rehearing was denied on September 6, 2016 (App., *infra*, 19a-20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(b) of the Torture Victim Protection Act (TVPA), 28 U.S.C. 1350 note, provides:

> A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

STATEMENT

This case involves an unprecedented effort to force a foreign head of state to stand trial in the United States under the Torture Victim Protection Act for his official actions. Petitioners are the former president and defense minister of Bolivia, staunch allies of the United States who were forced to resign after a civil uprising engineered by their political opponents. After petitioners came to the United States, respondents brought suit under the TVPA, alleging that petitioners were responsible for the deaths of their relatives due to decisions petitioners made as Bolivia's highest officials in response to the uprising.

This case presents a question of exceptional legal and practical importance: namely, whether plaintiffs may pursue claims against former foreign leaders under the TVPA for alleged misconduct in a foreign country when they have already recovered adequate remedies in the

foreign country for their alleged losses. The correct answer to that question, both as a matter of law and as a matter of common sense, is no. No plaintiff has ever been permitted to seek relief under the TVPA where he has already received adequate compensation. In permitting respondents' TVPA claim to go forward even though respondents have already recovered substantial relief in Bolivia for their alleged losses, the court of appeals grossly misinterpreted the TVPA.

If this lawsuit is permitted to proceed, it would be the first time that a foreign head of state has stood trial in the United States under the TVPA for his official actions. While there is no circuit conflict on the question presented, that question is so exceptionally important that it necessitates immediate review. At a minimum, in light of the significant foreign-policy implications of the court of appeals' holding, the Court should call for the views of the Solicitor General.

1. Petitioner Gonzalo Sánchez de Lozada Sánchez Bustamante was the democratically elected president of Bolivia from 1993 to 1997 and again from 2002 to October 2003; petitioner José Carlos Sánchez Berzaín was Bolivia's defense minister from August to October 2003. Petitioner Sánchez de Lozada was a staunch ally of the United States in eradicating drugs and in promoting democracy in the region. A principal opponent of the Sánchez de Lozada administration was Evo Morales, the leader of a socialist movement of growers of coca (the primary ingredient in cocaine) and the runner-up in the 2002 presidential election. App., *infra*, 2a-3a; Pet. C.A. Br. 3-4.

In 2003, Bolivia was rocked by a campaign of civil unrest that culminated in the overthrow of the government. Starting in September 2003, a group of individuals led by Morales formed a coalition to protest a plan to sell natural gas to the United States. Those protests quickly es-

calated into what became known as the "Gas War." Insurgents blocked a number of major highways, including the road to a remote tourist destination in the Bolivian mountains. As a result, hundreds of tourists, including many Americans, were taken hostage. Insurgents also blockaded La Paz, the capital, in an operation they dubbed "Plan Tourniquet." Ordinary citizens were forced to scramble for basic necessities, and three newborn babies died when their hospital ran out of oxygen. App., *infra*, 3a; Pet. C.A. Br. 5-7.

The Bolivian government dispatched soldiers and police in an effort to rescue the trapped travelers and to restore order throughout the country. Over the ensuing two months, dozens of people died on both sides of the conflict. As a result of the uprising, petitioners were forced to resign and to leave Bolivia; they now live in the United States. App., *infra*, 3a-4a; Pet. C.A. Br. 5-9.

In January 2004, Congress directed the State Department to submit a report on the Bolivian situation as part of a review of government funding for South American countries. See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2004, Pub. L. No. 108-199, Div. D, 118 Stat. 143. In its report, the State Department concluded that, "[d]espite [the] unrest" in Bolivia in 2003, "the military and police acted with restraint and with force commensurate to the threat posed by protestors" and "respected human rights." Pet. C.A. Br. 9-10.

After two successive presidents were also forced to resign as a result of violence sparked by Morales-led insurgents, Morales became president of Bolivia in 2005. The Morales-led government sought the extradition of petitioners from the United States to face charges relating to the 2003 events. The United States, however, has granted asylum to petitioner Berzaín and has to date

taken no action on the Bolivian government's pending request concerning petitioner Sánchez de Lozada. App., *infra*, 4a; Pet. C.A. Br. 9-10.

2. In 2007, respondents filed suit against petitioners in the United States District Court for the Southern District of Florida. As is relevant here, respondents brought claims under the TVPA and the Alien Tort Statute (ATS) on behalf of relatives who died during the 2003 uprising. Respondents alleged that petitioners had violated the international norm against extrajudicial killing by purportedly authorizing the use of disproportionate force in response to the uprising. App., *infra*, 4a-5a.

Petitioners moved to dismiss the complaint. They argued that the TVPA claim must be dismissed because respondents had failed to exhaust local remedies in Bolivia, as the TVPA requires. Petitioners further argued that respondents' allegations did not establish that they had violated an actionable international norm, as was required for jurisdiction to lie under the ATS.

In two separate orders, the district court granted the motion to dismiss in part and denied it in part. App., *infra*, 5a. The court agreed with petitioners on the exhaustion issue and dismissed respondents' TVPA claim without prejudice. 636 F. Supp. 2d 1326, 1332-1333 (S.D. Fla. 2009). But the court rejected petitioners' other contentions and refused to dismiss the ATS claims. App., *infra*, 5a. Noting the exceptional nature of the case, the court granted petitioners' motion to certify for interlocutory review its order denying the motion to dismiss in relevant part. *Id.* at 5a-6a.

3. The court of appeals granted petitioners' petition for certification for interlocutory review and reversed, holding that respondents had failed to state a valid claim for relief under the ATS. 654 F.3d 1148 (11th Cir. 2011). At the outset, the court of appeals emphasized that

courts "must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens." *Id.* at 1150, 1152. The court explained that, "in the face of significant conflict," petitioners had "ordered the mobilization of a joint police and military operation to rescue trapped travelers" and "reestablish public order." *Id.* at 1154. In such circumstances, the court continued, "even if some soldiers or policemen committed wrongful acts," international law does not "embrace[] strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one." *Ibid.*

The court of appeals further noted that there is "no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute extrajudicial killing under international law." 654 F.3d at 1155 (citation omitted). Indeed, the court concluded, "the criteria to judge what is lawful and what is not lawful, especially for national leaders facing thousands of people taking to the streets in opposition, is largely lacking." *Id.* at 1156.

4. While that appeal was pending, respondents applied for and received substantial relief in Bolivia. Respondents have obtained relief under two government schemes specifically designed to compensate individuals for losses in connection with the uprising. Each respondent has received payments totaling approximately 23 times the average annual income in Bolivia, as well as a free education at a public university. App., *infra*, 6a.

5. On remand, respondents obtained leave from the district court to amend their complaint. In the amended complaint, respondents again asserted claims for extra-

judicial killing under the TVPA and ATS. App., *infra*, 6a-7a.

Petitioners moved to dismiss the amended complaint. Petitioners argued that respondents' ATS claims should be dismissed in light of this Court's intervening decision in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), holding that the presumption against extraterritoriality applies to claims under the ATS. Petitioners further argued that the TVPA claim should be dismissed, first, because respondents had received adequate relief in Bolivia, and second, because respondents had failed sufficiently to allege secondary liability under the doctrine of command responsibility for the deaths of their decedents. App., *infra*, 7a.

The district court granted the motion to dismiss in part and denied in part. App., *infra*, 21a-66a. The court agreed with petitioners that the ATS claims should be dismissed under *Kiobel*. *Id.* at 36a-44a. But the court refused to dismiss the TVPA claim, holding, first, that the claim was not precluded by respondents' recovery in Bolivia, *id.* at 45a-53a, and second, that respondents had sufficiently alleged secondary liability under the doctrine of command responsibility for the deaths of their decedents, *id.* at 54a-64a.

The district court granted petitioners' motion to certify its order for interlocutory review. 07-22459 D. Ct. Dkt. 211 (Oct. 8, 2014). As is relevant here, on the issue of whether respondents' TVPA claim was precluded by their recovery in Bolivia, the court reasoned that "there is no case law directly on point" and that "there are substantial grounds for disagreement as to how the exhaustion provision should be interpreted." *Id.* at 5.

6. A panel of the court of appeals granted petitioners' petition for certification for interlocutory review. 14-90018 C.A. Order (Nov. 13, 2014). A different panel,

however, subsequently vacated the court's earlier order granting the petition for certification, affirmed in part, and denied the petition for certification in part. App., *infra*, 1a-20a. As is relevant here, in the portion of its opinion affirming the district court's order, the court of appeals held that respondents' TVPA claim was not precluded by their recovery in Bolivia. *Id.* at 8a-15a.

At the outset, the court of appeals acknowledged that "[n]o court of appeals has addressed th[e] issue" of whether a plaintiff who has already recovered adequate remedies in a foreign country may pursue a TVPA claim for alleged misconduct in that country. App., *infra*, 8a. The court proceeded to conclude, however, that the TVPA "does not bar a * * * suit by a claimant who has successfully exhausted her remedies in the foreign state." *Id.* at 13a. In its view, the text of the TVPA's exhaustion provision—which states that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred," 28 U.S.C. 1350 note—was dispositive. App., *infra*, 9a-10a. The court reasoned that, "[a]s written, the provision provides a prerequisite a plaintiff must satisfy before the court will hear his TVPA claim," but is silent as to whether plaintiffs who have successfully obtained local remedies may pursue claims under the TVPA. *Id.* at 9a-11a. Based on that silence, the court held that, once plaintiffs have sought relief in the foreign country, the provision "no longer bars their claims," even where they obtained adequate relief as a result of that effort. *Id.* at 9a-10a.

In so holding, the court of appeals rejected petitioners' argument that the TVPA should be interpreted to incorporate common-law principles of exhaustion, including the principle that a plaintiff who has successfully

obtained adequate local remedies is precluded from seeking further relief. App., *infra*, 10a-15a. The court determined that "the canon of imputed common-law meaning does not apply where the plain language of the statute provides an 'indication' that Congress did not intend to incorporate the common-law meaning that the [petitioners] advocate." *Id.* at 13a. In this case, the court reasoned, Congress's framing of the exhaustion provision as a "negative condition" supplied the requisite "indication." *Ibid.*

The court of appeals declined to address the other question on which certification for interlocutory review had initially been granted: namely, whether plaintiffs had sufficiently alleged secondary liability under the doctrine of command responsibility. App., *infra*, 15a-18a. Accordingly, the court of appeals let stand the district court's holding that national leaders may be liable under the doctrine of command responsibility for the acts of individual soliders and police officers during a time of severe unrest. *Ibid.*

7. The court of appeals subsequently denied petitioners' petition for rehearing. App., *infra*, 19a-20a.

REASONS FOR GRANTING THE PETITION

This is the rare case of exceptional importance where certiorari should be granted even in the absence of a circuit conflict. See S. Ct. R. 10. If this lawsuit proceeds, it would be the first time that a foreign head of state has stood trial in the United States under the TVPA for his official actions. And it would be the first time that plaintiffs have been permitted to seek relief under the TVPA where they have received adequate compensation for their alleged losses in their home country.

In permitting this case to go forward, the court of appeals badly misconstrued the TVPA, reaching a coun-

terintuitive result that Congress could not possibly have intended when it created the TVPA's narrow cause of action for extraterritorial misconduct. If the court's decision is left undisturbed, it will send a signal to the international community that American courts are ready and willing to pass judgment on the actions of foreign governments, even where those governments have already provided adequate relief for the plaintiffs' alleged grievances. The Court should grant review and reverse the court of appeals' dangerous holding. At a minimum, in light of the significant foreign-policy implications of the court of appeals' holding, the Court should call for the views of the Solicitor General.

A. The Court Of Appeals' Decision Is Erroneous

The court of appeals erred by holding that plaintiffs may pursue claims under the Torture Victim Protection Act for alleged misconduct in a foreign country when they have already recovered adequate remedies in the foreign country for their alleged losses. That error warrants the Court's review and correction.

1. The TVPA provides a civil cause of action against "[a]n[y] individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects an individual to torture or extrajudicial killing. 28 U.S.C. 1350 note. In enacting the TVPA in 1991, Congress recognized that it was creating an extraordinary cause of action in American courts that applies regardless of the nationality of the parties and regardless of where the alleged conduct took place. See S. Rep. No. 249, 102d Cong., 1st Sess. 3-5 (1991); H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1, at 3-4 (1991). For that reason, Congress took pains to emphasize that the cause of action it was creating was a narrow one, and it imposed strict limitations on it. See *Mohamad* v. *Palestinian Au-*

thority, 132 S. Ct. 1702, 1710 (2012); 137 Cong. Rec. 2671 (1991) (statement of Sen. Specter).

Of particular relevance here, Congress made clear that its overriding purpose was to provide a "means of civil redress to victims of torture" from countries whose "governments still engage in or tolerate torture of their citizens" and are thus unwilling (or unable) to provide a means of redress. H.R. Rep. No. 367, *supra*, pt. 1, at 3; see S. Rep. No. 249, *supra*, at 3. Consistent with that purpose, Congress included an exhaustion provision, which states that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. 1350 note.

2. In the decision under review, the court of appeals held that plaintiffs may pursue claims under the TVPA for alleged misconduct in a foreign country when they have already recovered adequate remedies in the foreign country for their alleged losses. App., *infra*, 8a-15a. In so holding, the court of appeals rested entirely on the text of the TVPA's exhaustion provision. *Id.* at 8a-10a. The court reasoned that, although the text of the provision requires a plaintiff to *exhaust* local remedies, it does not expressly state that a plaintiff who has successfully *obtained* such remedies is precluded from pursuing a TVPA claim. *Id.* at 9a-11a. Thus, the court held, plaintiffs who have received adequate local remedies may nevertheless pursue further relief in an American court under the TVPA. *Id.* at 9a-10a.

The text of the exhaustion provision by no means compels that bizarre result. To begin with, as this Court has explained, "[i]t is a settled principle of [statutory] interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the

common-law terms it uses.'" *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (quoting *Neder* v. *United States*, 527 U.S. 1, 23 (1999)). Put another way, the inclusion of a term in a statute necessarily "impl[ies] elements that the common law has defined [the term] to include." *Field* v. *Mans*, 516 U.S. 59, 69 (1995). With respect to the TVPA's exhaustion provision, therefore, the concept of "exhaust[ion]" necessarily incorporates the "cluster of ideas" that are "attached to [the term] in the body of learning from which it was taken." *Sekhar*, 133 S. Ct. at 2724 (citation omitted).

Significantly, the court of appeals did not challenge the background principle that, where a plaintiff has exhausted local remedies *and obtained adequate relief*, he is precluded from seeking further relief. As the legislative history reflects, the TVPA's exhaustion requirement is drawn not only from "common-law principles of exhaustion as applied by courts in the United States," but also from "general principles of international law." S. Rep. No. 249, *supra*, at 10. Both of those bodies of law illustrate the foregoing background principle.

With respect to domestic common-law principles: it is axiomatic that a plaintiff who has successfully obtained adequate remedies from a state or local government may not pursue further relief in a due-process claim under Section 1983. *Parratt* v. *Taylor*, 451 U.S. 527 (1981), illustrates the principle. In *Parratt*, a Nebraska prisoner sued two prison employees under 42 U.S.C. 1983, alleging that they had deprived him of certain items of property. See 451 U.S. at 529-530. The Court held that the plaintiff was still able to obtain an adequate state remedy, and therefore had not satisfied the exhaustion requirement for Section 1983 due-process claims, because Nebraska had a state tort-claims process through which the plaintiff might obtain relief. See *id.* at 533-534.

Of particular relevance here, the plaintiff in *Parratt* argued that the state process "d[id] not adequately protect [his] interests because it provides only for an action against the State as opposed to its individual employees." 451 U.S. at 543-544. But the Court flatly rejected that argument. It explained that, "[a]lthough the state remedies may not provide [the plaintiff] with all the relief which may have been available if he could have proceeded under [Section] 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Id.* at 544. "The remedies provided could have fully compensated the [plaintiff] for the property loss he suffered," the Court continued, and they were thus "sufficient" even though he would not receive compensation specifically from the individual employees. *Ibid.* Notably, the legislative history of the TVPA specifically cites *Parratt*'s exhaustion requirement for Section 1983 due-process claims as illustrative of the operation of the TVPA's exhaustion requirement. See S. Rep. No. 249, *supra*, at 10 & n.20.

With respect to general principles of international law: an individual who has sucessfully obtained local remedies is similarly precluded from pursuing a claim in international proceedings. See, *e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring) (noting that, under international law, "a plaintiff may have to show an absence of remedies in the foreign country"); *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 243 n.12 (1983) (Kozinski, C.J.) (noting that seeking relief in an international tribunal is "not generally appropriate" unless the plaintiff "has exhausted such local remedies as may be open to him and has sustained a denial of justice as that term is understood in international law" (internal quotation marks omitted)), aff'd, 765 F.2d 159 (Fed. Cir. 1985); Nsongurua J. Udombana, *So*

Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights, 97 Am. J. Int'l L. 1, 9 (2003).

Indeed, as explained in a law-review article cited in the TVPA's legislative history, see S. Rep. No. 249, *supra*, at 10 n.19, "[a]s long as an alien can receive adequate effective redress within the defendant state, no international claim arises." Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 Colum. Hum. Rts. L. Rev. 223, 233, 236-237 (1987); see also, *e.g.*, D.P. O'Connell, 2 *International Law* 1053 (2d ed. 1970) (noting that "the injury is not complete until the avenue [of local remedies] has been explored in vain"); Manley O. Hudson, *International Tribunals: Past and Future* 189-190 (1944) (explaining that a nation "will lack a basis for presenting and prosecuting the particular claim of its national so long as adequate remedies are available to him under the law of the respondent State"). In that respect, the exhaustion requirement under international law is akin to that for a Section 1983 due-process claim: a claim does not arise until there has been *both* an injury *and* a denial of an adequate means of relief. See Restatement (Third) of Foreign Relations Law § 703 reporters' note 6 (1987) (comparing those exhaustion requirements).

3. As noted above, in the decision under review, the court of appeals did not dispute the background principle that, where a plaintiff has successfully exhausted local remedies and obtained adequate relief, he is precluded from seeking further relief. App., *infra*, 12a-13a. Instead, the court of appeals concluded that there was affirmative evidence to rebut the presumption that the TVPA incorporated that principle. *Id.* at 13a. The court's purported affirmative evidence, however, consist-

ed of nothing more than the TVPA's silence on the issue: the court asserted that the TVPA's exhaustion provision, through its "negative condition," expressly precluded only "cases where the claimant ha[d] not exhausted her remedies in the foreign state," and was silent as to cases in which the claimant had exhausted local remedies and obtained adequate relief. *Ibid.*

As this Court has explained, however, the presumption that Congress intends to incorporate common-law principles is so strong that it applies even where, as here, a statute is silent on the relevant issue. Thus, in *Neder* v. *United States*, 527 U.S. 1 (1999), the Court held that materiality was an element of the federal fraud statutes despite the absence of any express reference to materiality, reasoning that "we must *presume* that Congress intended to incorporate materiality unless the statute otherwise dictates." *Id.* at 23 (internal quotation marks and citation omitted). And in *Microsoft Corp.* v. *i4i Limited Partnership*, 564 U.S. 91 (2011), the Court held that patent invalidity must be shown by clear and convincing evidence despite the absence of any reference to that standard in the relevant statute, noting that, "[u]nder the general rule that a common-law term comes with its common-law meaning, we cannot conclude that Congress intended to 'drop' the heightened standard [of] proof from the presumption simply because [the statute] fails to reiterate it expressly." *Id.* at 102. So too here. The court of appeals erred by refusing to interpret the TVPA in a manner consistent with the background principle that, where a plaintiff has exhausted local remedies and obtained adequate relief, he is precluded from seeking further relief.

4. The legislative history not just of the TVPA in general, but also of the TVPA's exhaustion provision in particular, strongly rebuts the court of appeals' interpre-

tation. Congress intended the exhaustion provision to "[s]trik[e] a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts." H.R. Rep. No. 367, *supra*, pt. 1, at 4. Thus, the provision was meant to ensure that the TVPA provides an American forum only to individuals who "are unable to obtain redress in the country where [the] torture took place." 134 Cong. Rec. 28,613-28,614 (1988) (statement of Rep. Fascell); see *id.* at 28,613 (statement of Rep. Mazzoli) (explaining that, "[u]nder the bill, only those who have no adequate recourse in the situs country could bring suit"); *id.* at 28,614 (Rep. Broomfield) (stating that the TVPA provides an American forum "as a last recourse to justice"); *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 65 (1990) (statement of Amnesty International official John Shattuck) (explaining that a TVPA claim may "only be brought when the victim has no remedy in the country where the torture occurs, and that is a very important limitation").

5. The court of appeals alleged that, under petitioners' interpretation, "when it comes to exhaustion, you're barred if you do and barred if you don't." App., *infra*, 2a. But that is simply incorrect. Under petitioners' interpretation, a plaintiff is permitted to proceed with a TVPA claim if he exhausts *but fails adequately to recover*. And in this case, there can be no serious dispute that respondents' recovery was adequate: each respondent has already obtained local remedies totaling approximately *23 times* the average annual income in Bolivia. See p. 6, *supra*. Accordingly, the district court determined that, if petitioners prevailed on the question presented here, "it would undoubtedly preclude [respon-

dents'] TVPA claim and would be dispositive of the case." 07-22459 D. Ct. Dkt. 211, at 5 (Oct. 8, 2014).

It is simply absurd to think that, where a plaintiff has already obtained adequate relief in a foreign country for alleged misconduct that took place in that country, Congress would have wanted to permit the plaintiff to seek additional remedies from an American court under the TVPA. Instead, Congress intended to provide remedies only where the intervention of an American court was necessary to ensure that the plaintiff obtains adequate relief in the first place. The court of appeals' contrary interpretation was based on a clear misapplication of the relevant canons of construction. That error cries out for the Court's review and correction.

B. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review

If the court of appeals' decision is left undisturbed, it will open the doors for American courts to sit in judgment on the actions of foreign governments, even where those governments have already provided adequate relief for the plaintiffs' alleged losses. Given the gravity of the foreign-relations concerns raised by the court of appeals' holding, further review is warranted.

1. While there is no conflict in the courts of appeals concerning the question presented, that is because this case is unprecedented. If this case proceeds, it would be the first time that a foreign head of state has stood trial in the United States under the TVPA for his official actions—much less a head of state who acted with the support of the United States government. And it would be the first time that plaintiffs have been permitted to seek relief under the TVPA where they have received adequate compensation for their alleged losses in their home country.

In addition, the lower courts and the parties alike agree that the question presented is an important and substantial one. In certifying its order for interlocutory appeal, the district court determined that there were "substantial grounds for disagreement" on the question presented. 07-22459 D. Ct. Dkt. 211, at 5 (Oct. 8, 2014). In its opinion, the court of appeals recognized that the question presented was one of first impression in the courts of appeals, and proceeded to analyze it at length. App., *infra*, 8a-15a. Even counsel for respondents stated in a press release that the court of appeals' decision "sets an important legal precedent because no federal appellate court had previously considered the defendants' argument on exhaustion of remedies abroad." Human Rights Program at Harvard Law School, Press Release (June 17, 2016) <tinyurl.com/harvardpress-release>.

2. Despite the absence of a circuit conflict, it is imperative that the Court grant certiorari because the court of appeals' interpretation of the TVPA "carries with it significant foreign policy implications." *Kiobel*, 133 S. Ct. at 1665. As noted above, the TVPA creates a private right of action in American courts for alleged acts of torture or extrajudicial killing regardless of the nationality of the parties and regardless of where the alleged conduct took place. See p. 10, *supra*. As such, the TVPA's private right of action comes with significant attendant costs, including burdening American courts with litigation unrelated to the United States and entangling them in politically sensitive disputes that require them to pass judgment on the actions of a foreign sovereign. See, *e.g.*, H.R. Rep. No. 367, *supra*, at 5.

Notably, in signing the TVPA, President George H.W. Bush cautioned that "[t]he expansion of litigation by aliens against aliens is a matter that must be ap-

proached with prudence and restraint," and he noted the "danger" that "U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States." Presidential Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. of Pres. Doc. 465, 466 (Mar. 12, 1992). "Such potential abuse of this statute," he continued, "undoubtedly would give rise to serious frictions in international relations and would also be a waste of our own limited and already overburdened judicial resources." *Ibid.* President Bush concluded by expressing the hope that "U.S. courts will be able to avoid these dangers by sound construction of the statute and the wise application of relevant legal procedures and principles." *Ibid.*

As this Court has emphasized in the closely related context of the Alien Tort Statute, "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). This case epitomizes precisely that danger—a danger the Congress that enacted the TVPA was eager to avoid. In light of the fact that respondents have already received adequate relief for their alleged losses, an American court has no business passing judgment on the decisions made by petitioners as Bolivia's highest officials in response to the severe unrest in that country. The court of appeals' expansive interpretation of the TVPA warrants this Court's review.

At a minimum, given the significant foreign-policy implications of the court of appeals' holding, this Court should call for the views of the Solicitor General. The Court routinely takes that action in cases that present questions of foreign policy, in light of the obvious interests of the State Department and other components of the federal government. See, *e.g.*, *Arab Bank, PLC* v. *Linde*, 134 S. Ct. 500 (2013); *Kingdom of Spain* v. *Estate of Cassirer*, 562 U.S. 1285 (2011); *Republic of Iraq* v. *Beaty*, 553 U.S. 1063 (2008). The United States has not taken a position to date on any of the questions presented in this litigation, though it did file a notice in the district court at an earlier stage indicating that the State Department's previous acceptance of a waiver of sovereign immunity by the current Bolivian government "should not be construed as an expression that the United States approves of the litigation proceeding in the courts of this country." Gov't Notice 2, 07-22459 D. Ct. Dkt. No. 107 (Oct. 21, 2008). In those circumstances, it would certainly be appropriate to call for the Solicitor General's views in the event the Court does not grant the petition outright.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should call for the views of the Solicitor General.

Respectfully submitted.

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DECEMBER 2016

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15128

Eloy Royas Mamani, Etelvina Ramos Mamani, Sonia Espejo Villalobos, Hernan Apaza Cutipa, Juan Patricio Quispe Mamani, et al., Plaintiffs-Appellees,

v.

Jose Carlos Sanchez Berzain, Gonzalo Sanchez de Lozada, Defendants-Appellants

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June 16, 2016

Before: CARNES, Chief Judge, TJOFLAT and SENTELLE,* Circuit Judges.

OPINION

CARNES, Chief Judge:

The plaintiffs who brought this Torture Victim Protection Act (TVPA) lawsuit are heirs to eight civilians

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia, sitting by designation.

killed in 2003 by Bolivian troops acting under the direction of the President and Minister of Defense at the time. The TVPA bars courts from hearing claims brought under it "if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). These plaintiffs have exhausted all of their available Bolivian remedies. They received some compensation through those remedies but not nearly as much as they claim is necessary to fully compensate them for their losses. The defendants contend that the fact the plaintiffs received some compensation through the local remedy bars them from any compensation under the TVPA. In other words, they would have us construe the TVPA so that when it comes to exhaustion, you're barred if you do and barred if you don't. We won't.

I.

Because this is an appeal from the denial of a Federal Rule of Civil Procedure 12(b)(6) motion, we take the facts as stated in the second amended complaint, accepting them as true and construing them in the light most favorable to the plaintiffs. *See United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 600 n.2 (11th Cir. 2014).

A.

Defendant Gonzalo Sánchez de Lozada Sánchez Bustamante (Lozada) was twice elected President of Bolivia, serving from 1993 to 1997 and again from August 2002 to October 2003. Defendant José Carlos Sánchez Berzaín (Berzaín) served as Minister of Defense of Boliv-

ia from August 2002 to October 2003. This case arises from actions they took during Lozada's second term to quash opposition to his administration.

Before they even took office, Lozada and Berzaín knew that certain economic programs they planned to implement, particularly their plan to export natural gas, would probably trigger political protests. They agreed that if their programs provoked widespread protest, they would use military force to kill as many as 2,000 or 3,000 civilians in order to squelch the opposition.

In mid-September 2003, Lozada announced that the government was finalizing a contract to sell natural gas to Mexico and the United States. As he and Berzaín anticipated, the announcement triggered widespread opposition and protest. The protestors, among other things, blocked roads by digging trenches in them or covering the roads with rocks or other impediments. One road they blocked ran between La Paz and Sorata, which is a small town in the mountains several hours from La Paz. Hundreds of foreign tourists were trapped in Sorata by the roadblocks. The Lozada government decided to use the foreign tourists as a justification for military force against the protestors blocking the roads. On September 19 in a meeting of military officials chaired by Berzaín, plans were made to use military force to carry out Lozada's order to clear the road and rescue the tourists. What followed was a series of operations in September and October 2003 designed to suppress opposition to the Lozada administration. In those operations, troops killed 58 civilians and injured over 400. Eight of those killed were relatives of the plaintiffs.

On October 17, 2003, the United States embassy issued a statement withdrawing support for Lozada and his administration. He resigned the presidency that

same day and fled, along with Berzaín, to the United States. That night the commander of the army "issued a statement in which he acknowledged that members of the Armed Forces had successfully complied with the orders of their superiors."

In November 2003 the new Bolivian government passed a "Humanitarian Assistance Agreement" that provided "humanitarian assistance compensation" to the heirs of those killed by the Lozada government's use of military force. The agreement provided payments of 55,000 bolivianos as general compensation and 5,000 bolivianos for funeral expenses. The total amount provided, 60,000 bolivianos, was equivalent to about eight times the average annual income in Bolivia. *See Mamani v. Berzain*, 636 F. Supp. 2d 1326, 1329 (S.D. Fla. 2009) ("*Mamani I*"). All the plaintiffs have received the full amount of compensation available under the agreement.

In 2007 the prosecutor for a specially convened Trial of Responsibilities filed a formal indictment charging the defendants and 15 other high-ranking former government officials with various crimes. The ones who had not fled Bolivia were all found "guilty of the crime of genocide through mass killings." Lozada and Berzaín had fled, the United States has refused to extradite them, and Bolivia does not permit trials in absentia. As a result, the two of them have not been tried. Bolivia has declared them fugitives from justice.

B.

The amended complaint sought relief under: (1) the Alien Tort Statute (ATS), 28 U.S.C. § 1350; (2) the Torture Victim Protection Act, Pub. L. No. 102-256, 106

Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes); and (3) state law.[1] It alleged that in the military operations of September and October 2003, Lozada and Berzaín caused disproportionate force to be used against civilians in order to quell opposition to their administration, which resulted in the extrajudicial killings of eight of the plaintiffs' relatives. Plaintiffs sought compensatory, punitive, and exemplary damages (in amounts to be determined at trial), as well as costs and attorney's fees. The defendants filed a motion to dismiss the amended complaint, which the district court disposed of in two separate orders.

The first order dismissed the plaintiffs' TVPA claims for failure to satisfy the exhaustion requirement in § 2(b) of that act. *Mamani I*, 636 F. Supp. 2d at 1332-33. The court reasoned that the plaintiffs had failed to exhaust a newly available local remedy created in 2008 by Bolivian Law No. 3955, which provided further compensation to the heirs of those killed by the Lozada government, and that they were required to exhaust that remedy before they could proceed with their TVPA claims. *Id.* at 1329-33. The second order dismissed some of the plaintiffs' ATS claims and one of their state-law claims but refused to dismiss others.

The district court granted the defendants' motion to certify an interlocutory appeal of that second order involving the issue of whether the complaint failed to state

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[1] The plaintiffs originally filed two suits, one against Berzaín in the Southern District of Florida, and one against Lozada in the District of Maryland. They later had their lawsuit against Lozada transferred to the Southern District of Florida. The district court consolidated the two cases, and the plaintiffs filed an amended complaint, followed by a second amended complaint.

ATS claims, and we granted them permission to appeal that order. *See* 28 U.S.C. § 1292(b). On appeal, we held that the plaintiffs had not alleged sufficient facts to make out claims for relief under the ATS, reversed the denial of the motion to dismiss, and remanded with instructions to dismiss. *Mamani v. Berzain*, 654 F.3d 1148, 1152-57 (11th Cir. 2011) ("*Mamani II*"). Which the district court did.

While their interlocutory appeal from the district court's second order was pending, the plaintiffs did what that court's first order on the motion to dismiss, which involved the TVPA claims, had required them to do. They sought compensation under Bolivian Law No. 3955. As heirs of the victims, they received the benefits they were entitled to under that law: (1) a free public university education to obtain a bachelor's degree; and (2) a payment of about 145,000 bolivianos. At the time, the 145,000 bolivianos, which equaled USD $19,905.56, was about 15 times the average annual income in Bolivia. *Mamani I*, 636 F. Supp. 2d at 1329-30. When the award under Bolivian Law No. 3955 was combined with the payment they had already received under the 2003 Humanitarian Assistance Agreement, each plaintiff received from their Bolivian remedies total compensation worth 205,000 bolivianos, which is about 23 times the average annual income in Bolivia. That is the equivalent of USD $28,264.17 (based on the 2008 exchange rate), not counting the value of the free education, which is not disclosed in the record. *See id.*

On remand from the interlocutory appeal of the second order, involving the ATS claims, the plaintiffs sought and received leave to amend their complaint again in light of this Court's decision in that appeal. Their second amended complaint added close to one hundred para-

graphs of allegations. It once again sought relief under the ATS, the TVPA, and state law; the defendants once again moved to dismiss; and the district court once again granted the motion to dismiss in part and denied it in part. *Mamani v. Berzaín*, 21 F. Supp. 3d 1353, 1364, 1379 (S.D. Fla. 2014) ("*Mamani III*"). The district court dismissed the ATS claims on the ground that, under the Supreme Court's *Kiobel* decision, it lacked subject matter jurisdiction over them. *Id.* at 1365-69 (applying *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S.___, 133 S. Ct. 1659 (2013)).

The district court, however, refused to dismiss the plaintiffs' TVPA and state-law claims. *Id.* at 1378-80. On the TVPA claims, the district court rejected the defendants' argument that the exhaustion requirement in § 2(b) of the TVPA barred those claims because the plaintiffs had already received substantial local remedies in Bolivia. *Id.* at 1369-73. The court also decided that the second amended complaint contained sufficient factual allegations to state plausible claims for relief under the TVPA based on the command-responsibility doctrine. *Id.* at 1373-78; *see generally Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1287-93 (11th Cir. 2002).

The defendants sought certification for an interlocutory appeal of the decision on two issues: (1) whether the exhaustion requirement in § 2(b) of the TVPA bars the plaintiffs' claims, and (2) whether the plaintiffs have failed to state claims for relief under the TVPA. After the district court certified both issues for appeal under 28 U.S.C. § 1292(b), the defendants filed in this Court a petition for permission to appeal the rulings on those two issues. A motions panel granted the petition as to both issues.

Although the motion panel's order granting permission to appeal pointed to the exhaustion issue as the reason for doing so, it also noted that interlocutory jurisdiction under § 1292(b) "applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619, 623 (1996). For that reason, the panel stated, "the parties may wish to address the other certified issue in their briefs to this Court, but we leave to the merits panel whether to address that issue on appeal." The last clause of that statement is appropriate, although not necessary. *See* 11th Cir. R. 27-1(g) ("A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it."); *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1253 (11th Cir. 2004); *Jones v. United States*, 224 F.3d 1251, 1256 (11th Cir. 2000).

II.

The defendants contend that the exhaustion requirement contained in § 2(b) of the TVPA bars a plaintiff from bringing a claim under the TVPA after obtaining some compensation through the remedies available in the foreign state where the wrongful conduct occurred. *See* Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). No court of appeals has addressed this issue.

"In construing a statute we must begin, and often should end as well, with the language of the statute itself." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) (quotation marks omitted); *accord*

Hartford Underwriters Ins. Co. v. *Union Planters Bank*, 530 U.S. 1, 6, 120 S. Ct. 1942, 1947 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (quotation marks omitted); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) ("We begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision.").

Subsection 2(b) of the TVPA plainly states: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). As written, the provision provides a prerequisite a plaintiff must satisfy before the court will hear his TVPA claim. The plaintiffs' failure to initially satisfy that prerequisite by exhausting their Bolivian remedies is why the district court dismissed the TVPA claims in the first amended complaint.

Since then the plaintiffs have exhausted all of their Bolivian remedies, so it can no longer be said of any of them that "the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id.* Plainly each of the

plaintiffs has fulfilled the exhaustion prerequisite. Plainly the § 2(b) bar no longer bars their claims. Plainly the defendants' contention to the contrary is wrong.

The defendants would render the plain unplain by reading the statutory language to say what it does not say and mean what it does not mean. They argue that we should read, interpret, and construe § 2(b) to say that a court must decline to hear a claim under the TVPA if the claimant has "sought *and obtained* adequate remedies" in the place where the conduct occurred and has received substantial compensation there. Putting aside the vagueness problem with the term "substantial compensation," what the defendants would have us do is not actually read, interpret, or construe statutory language but amend, modify, or revise it.

To conform the statutory language to the defendants' liking we would have to strike the words "has not" before "exhausted" and write in their place the words "has successfully," and we would also have to write in a clause about the claimant having received "substantial compensation." We could do all of that without any problem—if only we were Congress. But unless and until the first and third branches of government swap duties and responsibilities, we cannot rewrite statutes. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618, 112 S. Ct. 2160 (1992) ("The question . . . is not what Congress 'would have wanted' but what Congress enacted in the [statute]."); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, constructions must eschew interpolation and evisceration.").

Seeking to avoid the no-no of judicial revision of statutory language, the defendants argue that what they want § 2(b) to mean is nothing more than "the necessary import" of the language. Not so. The necessary import of "if plaintiffs don't do X they lose" is not "if plaintiffs do X and get Y, they also lose." The import of statutory language is what it says, not what it ought to say. Lawyers frequently argue for an "interpretation" of plain statutory language that would be better—better for one policy end or another and, not coincidentally, better for their clients as well. The Supreme Court's observation last year describes the flaw in that approach as "the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe [the statute's] silence as exactly that: silence." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. ___, 135 S. Ct. 2028, 2033 (2015); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it."). And as we have said in similar situations before, the "absence of legislative language restricts our interpretation, as we are not allowed to add or subtract words from a statute. Because our task is merely to apply statutory language, not to rewrite it." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1334 (11th Cir. 2013) (citation and quotation marks omitted). The text of § 2(b) speaks to the necessity of exhausting local remedies, not to whether exhausting local remedies and recoveries bars TVPA claims. *See Ebert v. Poston*, 266 U.S. 548, 554, 45 S. Ct. 188, 190 (1925) ("The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the Legislature

therein expressed. A casus omissus does not justify judicial legislation.").

Another way to look at it is that the defendants' reading of § 2(b) would nullify two words in the provision: "if" and "not." *See Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotation marks omitted). Subsection 2(b) states that it bars claims "*if* the claimant has *not* exhausted adequate and available remedies." Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes) (emphases added). The word "if" makes the clause a condition for applying the exhaustion bar, and the word "not" makes the condition a negative one. So § 2(b)'s plain language makes the exhaustion bar applicable only where a claimant fails to pursue her remedies in the foreign state. In contrast, the defendants' interpretation of § 2(b) would extend the exhaustion bar to exactly the opposite situation, making it applicable where the claimant has (successfully) exhausted her remedies in the foreign state. In effect, they would have us read § 2(b) to bar claims when there is a local remedy regardless of whether the plaintiff has exhausted it. It is that interpretation which would render superfluous the words "if" and "not" in § 2(b). Our duty to enforce the law as written by Congress prevents us from interpreting the TVPA in a manner that strikes out some of the words Congress wrote in. *See Duncan*, 533 U.S. at 174, 121 S. Ct. at 2125.

The defendants attempt to avoid the straightforward language of § 2(b) by asserting the canon of imputed common-law meaning. *See, e.g.*, *Sekhar v. United States*, 570 U.S. ___, 133 S. Ct. 2720, 272494 (2013) ("It is a set-

tled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.") (quotation marks omitted). They urge us to presume that Congress intended the term "exhausted" to import into § 2(b) the "common-law principles of exhaustion as applied by courts in the United States." Those common-law principles, according to the defendants, include a well-settled rule that, "where plaintiffs have successfully obtained local remedies, they are precluded from seeking further relief." But that is not what Congress said.

Putting aside the question of whether that is a well-settled rule, the canon of imputed common-law meaning does not apply where the plain language of the statute provides an "indication" that Congress did not intend to incorporate the common-law meaning that the defendants advocate. *See Sekhar*, 133 S. Ct. at 2724 (requiring the "absen[ce of] other indication" for the presumption to apply). Because Congress used the words "if" and "not" to frame § 2(b)'s exhaustion bar as a negative condition, the provision limits that bar to cases where the claimant has not exhausted her remedies in the foreign state. That is contrary to the meaning defendants advocate. *See Gilbert v. United States*, 370 U.S. 650, 655, 82 S. Ct. 1399, 1402 (1962) (stating that the canon applies only "in the absence of anything to the contrary"). We will not presume that Congress intended to imply a meaning that undercuts the explicit words it chose to use.

For these reasons, we conclude that § 2(b)'s exhaustion requirement does not bar a TVPA suit by a claimant who has successfully exhausted her remedies in the foreign state. Because the plain language is decisive, we will not resort to the TVPA's legislative history. *See Harris*, 216 F.3d at 976-77. Nor will we entertain the defendants'

attempts to use the legislative history to manufacture ambiguity in the text. *See id.* at 976 ("When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language."). We are a nation governed by the rule of law—not by legislative committee reports. *See Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 498 (C.C.D. Me. 1843) (No. 9,662) (Story, J.) ("What passes in congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed, that the opinions of a few members . . . are to be considered as the judgment of the whole house . . . ."). A court therefore must "read the statute according to its text." *Hui v. Castaneda*, 559 U.S. 799, 812, 130 S. Ct. 1845, 1855 (2010). As Justice Holmes put it: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean."[2]

Finally, we note the limited reach of our holding. We do not decide whether the recoveries the plaintiffs received in Bolivia have any preclusive effect under principles of res judicata. Neither claim preclusion nor issue preclusion was raised in this appeal. And we don't decide whether the defendants are entitled to have deducted from any compensation that may be awarded to the plaintiffs in this lawsuit the amount of compensation they received in Bolivia. What we do decide is that successful

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[2] *See* Frankfurter, *supra*, at 538 (quoting a letter from Oliver W. Holmes, Jr., to an unidentified recipient)

exhaustion of foreign remedies does not operate under § 2(b) to bar a TVPA claim.

III.

The defendants also urge us to reverse on the ground that the second amended complaint fails to state claims for relief under the TVPA. *See* Fed. R. Civ. P. 12(b)(6). They argue that the factual allegations (1) do not establish two of the three elements of the command-responsibility doctrine, and (2) fail to show that the eight decedents' deaths were the result of extrajudicial killings.[3] As the motions panel correctly noted, our jurisdiction under 28 U.S.C. § 1292(b) is discretionary, and we therefore are not obligated to consider this issue. *See McFarlin*, 381 F.3d at 1253. We have identified five conditions that generally must be met before we will consider an issue on interlocutory appeal under § 1292(b). *Id.* at 1264. They are: (1) the issue is a pure question of law, (2) the issue is "controlling of at least a substantial part

[3] To state a TVPA claim under the command-responsibility doctrine, a plaintiff must allege facts establishing that the defendant is culpable for the wrongdoing at issue and that the wrongdoing is the kind of action prohibited by the TVPA. The *Ford* decision identified three essential elements for culpability under the command-responsibility doctrine: (1) "a superior-subordinate relationship" with the wrongdoer, (2) knowledge of the wrongdoing, and (3) a failure to prevent or punish the wrongdoing. 289 F.3d at 1288. And the text of the TVPA requires that the wrongdoing for which the defendant is responsible qualify as "torture" or "extrajudicial killing" under the TVPA. *See* Pub. L. No. 102-256, 106 Stat. 73, § 2(a) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes); *cf. Mamani II*, 654 F.3d at 1155 (stating, in the context of reviewing an ATS claim, that "the minimal requirement for extrajudicial killing [is] that [the] plaintiffs' decedents' deaths were 'deliberate' in the sense of being undertaken with studied consideration and purpose").

of the case," (3) the issue was specified by the district court in its order, (4) "there are substantial grounds for difference of opinion" on the issue, and (5) "resolution may well substantially reduce the amount of litigation necessary on remand." *Id.*

The defendants' Rule 12(b)(6) issue fails to meet the first condition. To be a pure question of law for purposes of § 1292(b), an issue must be "an abstract legal issue" that "the court of appeals can decide quickly and cleanly." *Id.* at 1258 (quotation marks omitted). In *McFarlin*, which involved a proposed § 1292(b) appeal from a partial summary judgment, we drew the following distinction: A pure question of law is an issue the court can resolve "without having to delve beyond the surface of the record in order to determine the facts," as opposed to a case-specific question of "whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case." *Id.* at 1259.

Applying that distinction here in the Rule 12(b)(6) context, we conclude that this issue falls into the group of case-specific questions. While the issue of whether a complaint states a claim for relief is a legal determination, *see Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997), the issue raised here is not the kind of pure or abstract question of law contemplated in *McFarlin*. Instead of asking us to decide a pure or abstract question about the TVPA itself, the defendants ask us to decide whether the specific facts alleged by these particular plaintiffs state eight claims for relief under the TVPA. That is the Rule 12(b)(6) equivalent of deciding whether the district court properly applied settled law to facts, the facts being those alleged in the complaint. *See McFarlin*, 381 F.3d at 1259; *see also* 16

Charles Alan Wright et al., Federal Practice and Procedure § 3931, 526-27 (3d ed. 2012) (explaining that appeals under § 1292(b) are improper where they involve "a mere matter of properly pleading a claim sought to be brought within a recognized and generally sufficient legal theory"). And we could not decide that question "quickly and cleanly." *McFarlin*, 381 F.3d at 1258. The second amended complaint contains 224 paragraphs of allegations spanning 55 pages. To decide the Rule 12(b)(6) issue would require us not only to scrutinize the scores of factual allegations that support all the plaintiffs' claims, but also to assess the clusters of allegations that support each of the plaintiffs' individual claims to relief against the two defendants.

Deciding these Rule 12(b)(6) issues would require us to say much about these particular plaintiffs' allegations and little about the TVPA's general standard for liability.[4] For these reasons we exercise our discretion not to

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[4] The defendants do at one point attempt to dress up their Rule 12(b)(6) issue as raising a pure question of law. Though they dedicate the majority of their Rule 12(b)(6) argument to critiquing the factual allegations in the second amended complaint under *Ford*'s standard, *see supra* note 3, the defendants do spend a couple of pages of their opening brief arguing that the district court should have applied a heightened knowledge standard. They contend that *Ford* established the elements of a command-responsibility claim against *military* commanders, but not the elements of such a claim against *civilian* officials. They argue that, instead of alleging facts establishing that the defendants "knew or should have known" of the extrajudicial killings, the plaintiffs had to allege facts establishing that the defendants "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit" the extrajudicial killings. *See* Rome Statute of the International Criminal Court, art. 28, July 17, 1998, 2187 U.N.T.S. 90.

decide the second certified issue, which is actually a cluster of multiple issues involving the claims of multiple plaintiffs against the two defendants.

We answer the first certified question in the negative and affirm the part of the district court's order denying the defendant's motion to dismiss the TVPA claims on exhaustion grounds. We decline to answer the second certified question concerning the part of the district court's order denying the motion to dismiss the second amended complaint for failure to state a claim, vacate our previous order granting permission to appeal that part of the district court's order, and deny the petition for permission to appeal it.

Certified question no. 1 **ANSWERED**.

Certified question no. 2 **DECLINED**, order granting permission to appeal as to it **VACATED**, and petition for permission to appeal as to it **DENIED**.

The defendants' briefs to the district court in support of their motion to dismiss never presented the issue of what knowledge element is required to hold civilian officials liable under the TVPA. In fact, their briefs on the motion did not mention *Ford* or the knowledge element of the command-responsibility doctrine. The first time they raised the issue was in their reply brief filed in the district court in support of their motion to certify an interlocutory appeal—which was after the court had denied their motion to dismiss. Even assuming that this is an issue suitable for interlocutory appeal under § 1292(b), it would be inappropriate to permit review here given that it was raised at such a late hour in the district court. *Cf. Fils v. City of Aventura*, 647 F.3d 1272, 1284 (11th Cir. 2011) ("To prevail on a particular theory of liability, a party must present that argument to the district court.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15128

Eloy Royas Mamani, Etelvina Ramos Mamani, Sonia Espejo Villalobos, Hernan Apaza Cutipa, Juan Patricio Quispe Mamani, et al., Plaintiffs-Appellees,

v.

Jose Carlos Sanchez Berzain, Gonzalo Sanchez de Lozada, Defendants-Appellants

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September 6, 2016

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: CARNES, Chief Judge, TJOFLAT and SENTELLE,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are **DENIED** and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia, sitting by designations.

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

/s/ Ed Carnes
CHIEF JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 07-22459-CIV-COHN

Eloy Royas Mamani, et al., Plaintiffs,

v.

Jose Carlos Sanchez Berzain, Defendant

Eloy Royas Mamani, et al., Plaintiffs,

v.

Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante, Defendant

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May 20, 2014

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT MOTION TO DISMISS

COHN, District Judge.

THIS CAUSE is before the Court on Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint [DE 183 in Case No. 07-22459

and DE 167 in Case No. 08-21063] ("Motion"). The Court has carefully reviewed the Motion, Plaintiffs' Response and Defendants' Reply thereto, and is otherwise duly advised in the premises. For the reasons below, Defendants' Motion is granted in part and denied in part.

I. INTRODUCTION

This consolidated case concerns the Bolivian government's alleged massacre of its own civilians during a period of civil unrest in Bolivia in 2003. Plaintiffs—nine Bolivian residents and citizens—are the relatives of eight Bolivian civilians allegedly deliberately killed by Bolivian soldiers in Bolivia.[1] The crux of Plaintiffs' claims is that two former high-ranking Bolivian government officials—the former President, Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante ("Defendant Lozada"), and the former Minister of Defense, José Carlos Sánchez Berzaín ("Defendant Berzaín")—masterminded the violent military campaign that led to Plaintiffs' relatives' deaths, all in an effort to quell public opposition to their unpopular political agenda. Plaintiffs thus seek to hold Defendants personally liable for compensatory and punitive damages under the Alien Tort Statute ("ATS"), 28

[1] Plaintiffs Eloy Rojas Mamani and Etelvina Ramos Mamani sue on behalf of their daughter, Marlene Nancy Rojas Ramos. Plaintiff Sonia Espejo Villalobos sues on behalf of her husband, Lucio Santos Gandarillas Ayala. Plaintiff Hernán Apaza Cutipa sues on behalf of his sister, Roxana Apaza Cutipa. Plaintiff Teófilo Baltazar Cerro sues on behalf of his wife, Teodosia Morales Mamani. Plaintiff Juana Valencia de Carvajal sues on behalf of her husband, Marcelino Carvajal Lucero. Plaintiff Hermógenes Bernabé Callizaya sues on behalf of his father, Jacinto Bernabé Roque. Plaintiff Gonzalo Mamani Aguilar sues on behalf of his father, Arturo Mamani Mamani. Plaintiff Felicidad Rosa Huanca Quispe sues on behalf of her father, Raúl Ramón Huanca Márquez.

U.S.C. § 1350, the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 Note, and state law.

Defendants now move to dismiss Plaintiffs' Second Amended Consolidated Complaint ("Complaint") in its entirety. First, Defendants argue that Plaintiffs' ATS claims for "extrajudicial killings" and "crimes against humanity" are barred by the Supreme Court's opinion in *Kiobel v. Royal Dutch Petroleum, Co.*, ___ U.S. ___, 133 S. Ct. 1659 (2013) because all the alleged relevant conduct occurred in Bolivia. Second, Defendants contend that Plaintiffs' TVPA claims for "extrajudicial killings" fail to overcome the Act's exhaustion-of-local-remedies requirement and thus should also be dismissed. Third, Defendants maintain that—even if Plaintiffs' claims survive these initial challenges—the underlying factual allegations fail to state a plausible claim under either the ATS or the TVPA. Fourth and finally, Defendants urge the Court to decline supplemental jurisdiction over Plaintiffs' state-law claims for "wrongful death" because they involve "novel or complex issues" of Bolivian law.

II. FACTUAL BACKGROUND[2]

A. The "Water War"

The tale of this case, as Plaintiffs tell it, begins in December 1999 during the so-called "Water War" in Bolivia. Compl. ¶ 29.[3] At that time, the Bolivian government

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[2] This background is derived from the non-conclusory factual allegations in the Complaint, which the Court accepts as true and construes in the light most favorable to Plaintiffs in reviewing Defendants' Motion. *World Holdings, LLC v. Fed. Republic of Germany,* 701 F.3d 641, 649 (11th Cir. 2012) (citation omitted)

[3] All docket citations in this Order refer to Case No. 07-22459-CIV-COHN.

faced widespread protests against its decision to privatize the water supply in a region of Bolivia. *Id.* To quash the public opposition, the government used force against the protestors, leading to several deaths and hundreds of injuries. *Id.* As a result of escalating protests over the violence, the government ultimately abandoned its privatization project. *Id.*

B. The "Gas War"

Several years later, in June 2002, Defendant Lozada was elected to a second term as President of Bolivia with 22% of the vote.[4] *Id.* ¶ 32. He initially appointed Defendant Berzaín as Minister of the Presidency. *Id.* One of their administration's objectives was to export Bolivia's natural gas to the United States and Mexico through Chile—another widely unpopular idea. *Id.* ¶¶ 33-34. Both Defendants anticipated that this goal, like the prior administration's attempt to privatize the water supply, would likely trigger widespread public protests. *Id.* ¶ 34.

That is why before taking office Defendants met and discussed "a plan to systematically use unlawful, lethal force against civilians" to quash and deter public opposition to their political agenda. *Id.* ¶ 30. In 2001, for instance, Defendants met with members of their political party to strategize as to how they could avoid another "Water War." *Id.* They discussed using "overwhelming force" to quell protests. *Id.* Defendant Berzaín, for his part, proposed using "highly trained military troops from Beni in the east of Bolivia, who would be willing and able to kill large numbers of civilians." *Id.* In his estima-

[4] Defendant Lozada previously served as President from August 1993 to August 1997. Compl. ¶ 13.

tion, "they would have to kill 2,000 or 3,000 people." *Id.* Defendant Lozada "explicitly agreed" with him. *Id.*

After assuming power in August 2002, Defendants continued to strategize with their political and military colleagues about the need to kill civilians to overcome opposition to their plans. *Id.* ¶ 31; *see also* ¶¶ 50, 71, 78, 80-81, 83-85, 93, 95, 100-02, 108, 125-26, 130. Defendants also began laying the foundation to implement their strategy. *Id.* ¶ 35. Defendant Lozada appointed a new Army Commander, who issued a secret "Manual on the Use of Force." *Id.* ¶¶ 36-37. By its own terms, the Manual was prepared because Bolivia was "in a constant state of convulsion and social conflict and the Army, in order to carry out its constitutionally mandated mission, must be charged with maintaining legally constituted rule of law." Manual on the Use of Force [DE 183-3] at 2.[5] To this end, the Manual prescribed, among other things, the circumstances under in the military could use "force" in response to "acts of vandalism, crimes, roadblocks, marches, demonstrations, etc. carried out by subversive criminals." *Id.* at 13.

Defendant Lozada then promulgated a two-page secret "Republic Plan." Compl. ¶ 38. Its mission was to engage the military "in support operations to ensure the stability of the Republic, on orders, in their jurisdiction,

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[5] As a general rule, courts may not consider anything beyond the four corners of the complaint and any documents attached thereto in reviewing a motion to dismiss. *Financial Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). There is an exception, however, "in cases in which a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss." *Id.* (citations omitted). This is such a case.

in order to guarantee the rule of law and the exercise of constitutional rights." Republic Plan [DE 183-4] at 1. To achieve this mission, the Republic Plan instructed the military to apply "Principles of Mass and Shock"[6] to, among other things, control civil disturbances, support the national police, and remove roadblocks.[7] *Id.*

1. Defendants' Plan in Action

Several protests began around Bolivia in early 2003. Compl. ¶¶ 42-46. But instead of pursuing peaceful solutions, Defendants deployed the military to defeat the protests with force, resulting in about 40 deaths and over 200 injuries. *Id.* On February 13, 2003, for instance, military sharpshooters shot and killed a bricklayer working on a roof, as well as the nurse who went to assist him, before shooting a doctor wearing a Red Cross vest who tried to treat them both. *Id.* ¶ 46. In response to public outrage over the violence, Defendant Berzaín and others resigned from the Cabinet. *Id.* ¶ 47.

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[6] Plaintiffs explain, and Defendants do not dispute, that "Principles of Mass and Shock" are war tactics that call for the "application of the maximum combat force . . . to obtain superiority over the enemy." Response at 6.

[7] While Plaintiffs allege that the Republic Plan explicitly authorized the military "to shoot and kill unarmed civilians on sight, independent of any legitimate law enforcement needs," Compl. ¶ 38, this allegation contradicts the Republic Plan's text. The Court, therefore, does not accept this specific allegation as true in reviewing Defendants' Motion. *See Griffin Indus., Inc. v. Irvin,* 496 F.3d 1189, 1206 (11th Cir. 2007) ("[W]hen the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."). As explained below in footnote 25, however, the Republic Plan's text in general does not necessarily contradict (and thus does not control over) Plaintiffs' larger theory of this case.

Over the following months, numerous people inside and outside the government warned Defendant Lozada that the use of force against protestors was unlawful and would lead to many deaths. *Id.* ¶ 48. They urged him to employ non-lethal responses instead; for example, Ricardo Calla, a Bolivian anthropologist, specifically warned Defendant Lozada that he was about to "taint his hands with blood," and that his "trigger happy" associates would lead to a massacre if he continued to give them power. *Id.* But Defendant Lozada was unmoved. *Id.* ¶ 50. Instead, Defendants and other government officials once again debated how many Bolivians would have to die to suppress popular movements. *Id.* Defendant Berzaín surmised that "999 deaths were not enough, but that 1,000 would be sufficient." *Id.*

In August 2003, Defendant Lozada officially brought Defendant Berzaín back into his Cabinet as the Minister of Defense.[8] *Id.* ¶ 55. The next month, farmers, union members, and students began peaceful protests around the country, asserting various demands. *Id.* ¶ 56. Yet again the government refused to negotiate. *Id.* Rather, on September 9, 2003, Defendant Berzaín set up a "war room" to direct responses to the growing protests. *Id.* ¶ 57. Two days later, the Commander in Chief of the Armed Forces declared a "Red Alert" in Bolivia—the equivalent of a state of war in which the military is authorized to shoot and kill "enemy combatants." *Id.* ¶ 58.

[8] As the President and Minister of Defense, Defendants were the highest commanders of (and had the ultimate authority over) the Bolivian military. Compl. ¶ 36.

No actual "enemy combatants," however, were present in Bolivia at that time.[9] *Id.* ¶ 79.

a. Warisata

By mid-September, protestors had blocked the road to Sorata, a small town several hours from Bolivia's capital city of La Paz. *Id.* ¶¶ 58, 62. The roadblock stranded many people, including foreign tourists. *Id.* ¶ 62. In response, Defendant Berzaín, acting pursuant to Defendant Lozada's orders, directed the military to clear the road and rescue the foreign tourists. *Id.* ¶ 63. Defendants remained in telephone contact throughout the ensuing military operation. *Id.* ¶ 65.

Early on the morning of September 20, a military convoy heading to the roadblock in Sorata entered the town of Warisata. *Id.* ¶ 66. While there, soldiers shot and beat villagers even though no one was shooting at the soldiers. *Id.* The convoy then continued on to Sorata, arriving at the roadblock around the same time as a helicopter carrying Defendant Berzaín. *Id.* ¶ 67. As a crowd gathered, Defendant Berzaín shouted, "Get those Indians off the roads or I'm going to put a bullet in them." *Id.* After loading the tourists onto buses, the convoy then headed back to Warisata, shooting at and killing several civilians as they ran for safety. *Id.* ¶ 69. Around 3:00 p.m., a second military contingent entered Warisata and began shooting in all directions. *Id.* ¶ 70. Two policemen were injured, and one soldier was killed. *Id.*

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[9] According to Plaintiffs, at all relevant times, Defendants repeatedly justified their use of military force against civilians by knowingly making the false claim that the government was facing an organized armed rebellion supported by foreign organizations. *See, e.g.*, Compl. ¶¶ 41, 52, 72, 84.

Around 4:00 p.m., Defendants ordered the military "to take Warisata." *Id.* ¶ 71. Defendant Lozada signed a written order dictated by Defendant Berzaín, directing the military to use "necessary force" to restore order "[i]n light of the grave aggression by a guerilla group against the forces of public order in Warisata." *Id.* ¶ 72. Defendants knew at that time, however, that their claim of an insurgency was false. *Id.* ¶ 79.

Multiple Special Forces units participated in "taking" Warisata that afternoon, including units that Defendant Lozada had under his direct command. *Id.* ¶ 74. Soldiers were ordered to use lethal munitions and to shoot "at anything that moved." *Id.* ¶ 73. When eight-year-old Marlene Nancy Rojas Ramos moved to look out a window in her home, far from the site of any protests, a sharpshooter fatally shot her from a distance of about 75 yards. *Id.* ¶ 75. No other bullets hit the house either before or after the shooting. *Id.*

At a Cabinet meeting that evening—and after hearing a report on that day's military operations—Defendant Lozada took full responsibility for the violence. *Id.* ¶ 80. Vice-President Carlos Mesa, for his part, criticized the civilian deaths and urged Defendants to negotiate with the protestors instead of using force. *Id.* ¶ 81. But Defendants refused. *Id.* Instead, during a meeting the following day, they agreed to falsely blame the violence on "subversives." *Id.* ¶ 83. They also agreed that the military would take additional actions against "subversion" to obtain "military control" over certain areas in Bolivia. *Id.* Defendant Berzaín said that he would take full responsibility for the operations. *Id.*

Triggered in part by the violence in Warisata, more protests began around the country. *Id.* ¶¶ 86, 89. The protestors demanded an end to both the violence and the

government's plan to export Bolivia's natural gas. *Id.* ¶ 86. But the government instead responded by deploying more troops. *Id.* ¶¶ 89, 91-92. In early October 2003, government officials and community leaders pleaded with Defendant Lozada to resolve the escalating protests peacefully. *Id.* ¶ 90. Yet again he refused. *Id.* Instead, he instructed Defendant Berzaín not to "lower his arms" against the protesters, assuring him he had full presidential support. *Id.* ¶ 93. So when the governor of La Paz later negotiated a truce with the protesters, Defendant Lozada became livid, rejected the truce, and refused to cease military operations. *Id.* ¶ 88. Defendant Berzaín, in turn, told business and military leaders that "there will be deaths, but there will also be gasoline." *Id.* ¶ 95.

On October 11, 2003, several religious leaders met with Defendant Lozada and volunteered to act as peacemakers. *Id.* ¶ 102. Defendant Lozada's message for the protesters was: "if they want dialogue for gas, they'll have dialogue, but if they want war for the gas, they'll have war, and we will shoot all the violent people in El Alto." *Id.* Continuing to rely on a knowingly false justification that Bolivia was rife with insurgents, Defendant Lozada then issued two directives authorizing the military to combat "subversion" in El Alto and La Paz. *Id.* ¶ 108.

b. El Alto

In accordance with those directives, the military conducted operations in El Alto on October 12, 2003, during which officers ordered soldiers to shoot civilians. *Id.* ¶¶ 104-11. Soldiers thus marched through residential neighborhoods, firing at people without warning. *Id.* ¶ 111. Thirty individuals died that day, including four of Plaintiffs' relatives even though none were involved in any demonstration or posed any threat. *Id.* ¶ 104.

On one side of the city, far from any protests, thirty-nine-year-old and pregnant Teodosia Morales Mamani was visiting her sister's home. *Id.* ¶ 112. Several family members looked out the window inside the home and saw soldiers marching down the street, yelling at people looking out of their windows: "What are you looking at? I'll kill you!" and "Shoot them, damn it!" *Id.* Morales was sitting next to that window when a soldier fired at the apartment. *Id.* ¶ 113. The bullet hit Morales in the abdomen, killing her and her unborn child. *Id.* A soldier also fatally shot nineteen-year-old Roxana Apaza Cutipa while she was on the roof of her house, far from any protests. *Id.* ¶ 115. Another soldier fatally shot fifty-nine-year-old Marcelino Carvajal Lucero from a distance of 19 yards as he went to close a window in his house. *Id.* ¶ 116. Across the city near the gas plant, a soldier fatally shot Lucio Santos Gandarillas Ayala as he ran for cover. *Id.* ¶ 120.

Later that day, Vice President Carlos Mesa told Defendant Lozada, "These deaths are going to bury you." *Id.* ¶ 125. Defendant Lozada replied, "I'm too old to change." *Id.* That evening, Defendant Berzaín told military leaders that they were bound to obey orders from Defendant Lozada, who was responsible for the military's actions. *Id.* ¶ 126.

c. South of La Paz

On October 13, 2003, the military conducted operations in an area south of La Paz to prevent protestors from entering the capital. *Id.* ¶ 131. Soldiers were ordered to "shoot at any head that you see." *Id.* ¶ 136. They did as ordered but eventually ran out of ammunition. *Id.* ¶ 137. Defendant Berzaín then flew into the area in a helicopter, ordering soldiers in the helicopter to shoot at people below on the ground. *Id.* The helicopter circled

the area twice, firing at civilians. *Id.* It then landed to offload ammunition for the soldiers. *Id.* The soldiers then resumed shooting with renewed intensity. *Id.* At some point that morning, one soldier was killed by a sharpshooter. *Id.* ¶ 135.

Soldiers were then ordered to chase unarmed civilians into the hills with gunfire. *Id.* ¶ 138. They killed seven civilians over the next several hours, including three of Plaintiffs' relatives. *Id.* A soldier fatally shot Jacinto Bernabé Roque as he tried to hide in the hills. *Id.* ¶ 140. Similarly, Arturo Mamani Mamani was also in the hills when a soldier fatally shot him. *Id.* ¶ 141. Later that afternoon, as the convoy moved through a nearby village, the soldiers continued to shoot at unarmed civilians. *Id.* ¶ 144. A soldier fatally shot Raúl Ramón Huanca Márquez as he tried to take cover behind a building. *Id.* ¶ 145.

2. Defendants Flee to the United States

During the military operations in September and October 2003, Bolivian soldiers killed 58 people, including women and children, and injured over 400 others. *Id.* ¶ 6. In light of the mounting civilian death toll, various government officials, including Vice President Carlos Mesa, denounced Defendants' policies. *Id.* ¶¶ 146-47. Vice President Carlos Mesa stated that he could not return to the government because "the defense of ethical principles, a moral vision, and a basic concept of the defense of life, prevent me from returning to be part of the current government of the nation." *Id.* ¶ 159. The mayor of La Paz, for his part, said that "a death machine has been installed in the government, and only the resignation of the head of state can stop it." *Id.* ¶ 149. But Defendant Lozada appeared on television and said that he would not resign; instead, he falsely claimed that Bolivia was

"threatened by a massive subversive project, organized and financed by foreign sources in order to destroy Bolivian democracy." *Id.* ¶ 148.

On October 15, 2003, Defendant Berzaín commended the military for strictly following Defendants' orders. *Id.* ¶ 156. Two days later, however, the United States Embassy withdrew its support for Defendant Lozada and his government. *Id.* ¶ 164. He resigned later that day. *Id.* Both Defendants then fled to the United States, where they currently reside.[10] *Id.* ¶¶ 13-15, 164.

III. PROCEDURAL HISTORY

Plaintiffs initially sued Defendant Berzaín in this District but sued Defendant Lozada in the District of Maryland. The District of Maryland subsequently transferred its case to this Court, which consolidated the two cases for pretrial purposes. Plaintiffs then filed a seven-count consolidated complaint against Defendants for (1) extrajudicial killings under the TVPA and ATS; (2) crimes against humanity and (3) violation of the rights to life, liberty and security of person and freedom of assembly

[10] In their Motion, Defendants paint a different portrait of the facts, relying on documents incorporated by reference in the Complaint as well as additional documents attached to their Motion (such as Department of State Reports, State Department Communications, Department of Defense Rules, and certain media materials). Defendants also filed a motion asking the Court to take judicial notice of these additional documents. *See* DE 184. The Court, however, did not consider or rely upon the additional documents submitted by Defendants in ruling on their Motion (except for the ones incorporated by reference in the Complaint). That said, even if the Court had taken judicial notice of the additional documents, they would not have altered the Court's conclusion herein because a veritable dispute exists as to the factual circumstances of this case. The Court, therefore, denies Defendants' motion for judicial notice as moot.

and association under the ATS; and (4) wrongful death, (5) intentional infliction of emotional distress, (6) negligent infliction of emotional distress, and (7) negligence under state law. *See* DE 77. Defendants moved to dismiss. *See* DE 81.

This Court—per then-District Judge Adalberto Jordan—issued two separate orders on Defendants' motion. In the first order, the Court dismissed without prejudice Plaintiffs' TVPA claims for failure to exhaust "adequate and available" remedies in Bolivia. *See* DE 124. In the second order, the Court rejected Defendants' jurisdictional challenges under the political question doctrine, the act-of-state doctrine, and head-of-state immunity. *See* DE 135. It also found that Plaintiffs had stated plausible claims for extrajudicial killings and crimes against humanity under the ATS, but had not done so for their remaining ATS claims. *Id.* at 21-34. The Court further found that Plaintiffs' wrongful death claims were timely, but rejected the remaining state-law claims as barred by the Bolivian statute of limitations. *Id.* at 34-39.

As relevant here, Defendants were then granted leave to pursue an interlocutory appeal of the legal sufficiency of Plaintiffs' ATS claims. This Court stayed these proceedings pending the outcome. In the end, the Eleventh Circuit reversed and remanded with instructions to dismiss, holding that Plaintiffs had not alleged facts sufficient to state a plausible claim under the ATS. *See Mamani v. Berzaín*, 654 F.3d 1148 (11th Cir. 2011).

On remand, this Court stayed further proceedings pending the Supreme Court's opinion in *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S. Ct. 1659 (2013). After *Kiobel* was decided on April 17, 2013, the Court lifted the stay and granted Plaintiffs leave to amend. Plaintiffs then filed the four-count Complaint that is presently be-

fore the Court, asserting claims for extrajudicial killings under the ATS (Count I) and the TVPA (Count II), crimes against humanity under the ATS (Count III), and wrongful death (Count IV) under state law. Defendants now challenge the Complaint on both jurisdictional and substantive grounds under Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

IV. LEGAL STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1)

Defendants move to dismiss Plaintiffs' TVPA claims for failure to exhaust local remedies. The Court reviews this aspect of Defendants' Motion as a jurisdictional challenge under Rule 12(b)(1). *See Mohammed v. Rumsfeld*, 649 F.3d 762, 775 (D.C. Cir. 2011) ("[W]e view the failure to exhaust administrative remedies as jurisdictional."); *see also Escarria-Montano v. U.S.*, 797 F. Supp. 2d 21, 22 (D.D.C. 2011) (granting motion to dismiss TVPA claims for failure to exhaust local remedies under Rule 12(b)(1)). Jurisdictional challenges may be either "facial" or "factual." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009) (citation omitted). A "facial" challenge is "based solely on the allegations in the complaint." *Id.* A "factual" challenge, on the other hand, permits courts to "consider extrinsic evidence." *Id.* In doing so, courts are "free to weigh the facts and [are] not constrained to view them in light most favorable to [the plaintiff]." *Id.*

Additionally, Defendants also move to dismiss Plaintiffs' ATS claims for lack of subject-matter jurisdiction. In reviewing this aspect of Defendants' Motion, the Court merges "Rule 12(b)(1) scrutiny with that of Rule 12(b)(6)" to determine whether Plaintiffs have stated a plausible claim. *Best Med. Belgium, Inc. v. Kingdom of*

Belgium, 913 F. Supp. 2d 230, 236 (E.D. Va. 2012). If Plaintiffs fail to state a plausible claim under the ATS, then the Court lacks subject-matter jurisdiction. *Id.; see also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1269 (11th Cir. 2009) (affirming dismissal of ATS claims for lack of subject-matter jurisdiction because plaintiffs failed to state plausible claim), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).

B. Federal Rule of Civil Procedure 12(b)(6)

To state a plausible claim for relief, Plaintiffs' Complaint must contain sufficient non-conclusory factual allegations to allow the Court "to draw the reasonable inference that [Defendants are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This requires "more than a sheer possibility" that Defendants have "acted unlawfully." *Id.* While Plaintiffs need not include "'detailed factual allegations,'" they must plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' " *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

V. DISCUSSION

A. The Alien Tort Statute

The First Congress enacted the ATS as part of the Judiciary Act of 1789. The ATS vests "original jurisdiction" in federal district courts over "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. Here, Plaintiffs claim that Defendants violated the law of nations by orchestrating extrajudicial killings and crimes against humanity as part of a violent military campaign designed to quell public opposition to their political agenda in Bolivia. Defendants, however, argue that the Court lacks subject-matter jurisdiction over Plaintiffs' ATS claims under the Supreme Court's opinion in *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659, (2013), because all the relevant conduct occurred in Bolivia. After careful consideration, the Court agrees with Defendants.

In *Kiobel,* a group of Nigerians residing in the United States brought ATS claims against foreign corporations for allegedly aiding and abetting the Nigerian government in violating the law of nations in Nigeria. 133 S. Ct. at 1662-63. At issue was "whether and under what circumstances courts may recognize a cause of action under the [ATS], for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Id.* at 1662. After examining the historical and jurisprudential context of the statute, the Supreme Court held that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."[11] *Id.* at

[11] The presumption against extraterritoriality is a "canon of statutory interpretation" that provides "'[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'" *Kiobel,* 133 S. Ct. at 1664 (quoting *Morrison v. Nat'l Australia Bank, Ltd.,* 561 U.S. 247, 130 S. Ct. 2869, 2878 (2010)). That canon "reflects the 'presumption that United States law governs domestically but does not rule the world.'" *Id.* (quoting *Microsoft Corp. v. AT & T Corp.,* 550 U.S. 437, 454 (2007)). It also "'serves to protect against unintended clashes between our laws and those of other nations which could

1669. The presumption applies, in part, because it "guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Id.* Applying the presumption to the Nigerians' ATS claims, the Supreme Court concluded that their claims were barred because "all the relevant conduct took place outside the United States." *Id.* Yet the Supreme Court also left the proverbial door ajar, recognizing that some ATS "claims [may] touch and concern the territory of the United States . . . with sufficient force" to displace the presumption against extraterritoriality.[12] *Id.*

Following *Kiobel*, courts have consistently rejected ATS claims where all the relevant conduct occurred abroad. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 750-51, 762-63 (2014) (explaining that ATS claims based on

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result in international discord.'" *Id.* (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). As the Supreme Court explained:

> For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.

Id. (citation and internal quotation marks omitted).

[12] The Nigerians' claims did not displace the presumption because their only connection to the United States was the defendants' domestic corporate presence. *Kiobel*, 133 S. Ct. at 1669. "[A]nd it would reach too far to say that mere corporate presence suffices." *Id.*

conduct "occurring entirely outside the United States" were rendered "infirm" by *Kiobel*); *see also Balintulo v. Daimler AG,* 727 F.3d 174, 189 (2d Cir. 2013) (interpreting *Kiobel* as "bright-line" barring ATS claims based on entirely extraterritorial conduct); *Ben-Haim v. Neeman,* 543 Fed. Appx. 152, 155 (3d Cir. 2013) (affirming dismissal of ATS claims because alleged tortious conduct "took place in Israel") (per curiam); *Kaplan v. Cent. Bank of Islamic Republic of Iran,* 961 F. Supp. 2d 185, 205 (D.D.C. 2013) (barring ATS claims based on "actions that took place in Israel and Lebanon"); *Mohammadi v. Islamic Republic of Iran,* 947 F. Supp. 2d 48, 71 (D.D.C. 2013) (dismissing ATS claims where alleged tortious conduct "occurred entirely within the sovereign territory of Iran"); *Chen Gang v. Zhao Zhizhen,* No. 04-cv-1146-RNC, 2013 WL 5313411, at *3 (D. Conn. Sept. 20, 2013) (dismissing ATS case as "paradigmatic 'foreign cubed' case" involving "foreign defendant, foreign plaintiff, and exclusively foreign conduct," because parties were present in China and all relevant conduct occurred in China); *Tymoshenko v. Firtash,* No. 11-cv-2794 (KMW), 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) (dismissing ATS claims as "impermissibly extraterritorial" where plaintiffs were foreigners, defendant was foreign corporation, and alleged tortious conduct occurred on foreign soil); *Muntslag v. Beerens,* No. 12-cv-07168 (TPG), 2013 WL 4519669, at *3 (S.D.N.Y. Aug. 26, 2013) ("Simply put, the conduct plaintiff alleges clearly occurred overseas and it is therefore not covered by the ATS."); *Adhikari v. Daoud & Partners,* No. 09-cv-1237, 2013 WL 4511354, at *7 (S.D. Tex. Aug. 23, 2013) ("Since all relevant conduct by [the defendants] occurred outside of the United States, summary judgment on Plaintiffs' ATS claim must be granted for [the defendants]."); *Hua Chen v. Honghui Shi,* No. 09-cv-8920 (RJS), 2013 WL

3963735, at *7 (S.D.N.Y. Aug. 1, 2013) (dismissing ATS claims brought by members of Falun Gong movement residing in United States against Chinese government official because "all of the abuses took place in China").

A few courts, on the other hand, have sustained ATS claims as "touching and concerning" the United States with "sufficient force" to displace the *Kiobel* presumption, but only in cases where at least some—if not a substantial portion—of the relevant conduct occurred domestically. *See Sexual Minorities Uganda v. Lively,* 960 F. Supp. 2d 304 (D. Mass. 2013); *Mwani v. Laden,* 947 F. Supp. 2d 1 (D.D.C. 2013); *Du Daobin v. Cisco Sys., Inc.,* 2 F. Supp. 3d 717, 2014 WL 769095 (D. Md. Feb. 24, 2014); *Krishanti v. Rajaratnam,* No. 2:09-cv-05395 (JLL)(JAD), 2014 WL 1669873 (D.N.J. Apr. 28, 2014). For example, the *Lively* court concluded that the presumption against extraterritoriality was displaced because (1) not only was the defendant an American citizen residing in Massachusetts, but (2) his alleged tortious conduct also occurred "to a substantial degree within the United States, over many years, with only infrequent actual visits to Uganda." 960 F. Supp. 2d at 321-23. Likewise, the *Mwani* court reached the same conclusion because the defendants' alleged terrorist attack "1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees." 947 F. Supp. 2d at 5. The *Du Daobin* court similarly assumed, without deciding, that the plaintiffs' claims overcame the presumption against extraterritoriality because (1) the defendant was an American company with offices nationwide, and (2) the alleged conduct "took place predominantly, if not entirely, within the United States." 2 F. Supp. 3d at 728, 2014 WL 769095 at *9. Lastly, the *Krishanti* court also found that subject-matter jurisdiction existed under the ATS because the plaintiffs were

suing American citizens "for their alleged actions that occurred in the United States." 2014 WL 1669873 at *11.

Unlike those cases, however, none of the alleged tortious conduct in this case occurred in this country. Indeed, all the relevant conduct took place thousands of miles away in Bolivia. According to the Complaint, Defendants were citizens and residents of Bolivia at the time that they allegedly planned and executed the violent military campaign that led to the shooting deaths of Plaintiffs' relatives in Bolivia. Nowhere do Plaintiffs allege—let alone suggest—that any part of the campaign was planned or executed in the United States, much less directed at the United States, its employees, or its citizens. The circumstances of this case, therefore, are nothing like the circumstances in *Lively, Mwani, Du Daobin,* and *Krishanti* that the courts deemed sufficient to displace the presumption against extraterritoriality. In fact, it was not until *after* all the alleged tortious conduct occurred—when Defendants fled to the United States—that this case could even first be said to "touch" or "concern" our nation.

Even so, Plaintiffs insist that the purportedly "unique" circumstances of this case are sufficient to displace the *Kiobel* presumption—namely, "a suit against U.S. permanent residents, who cannot face trial elsewhere, where the foreign state has supported litigation in the United States."[13] Response at 18. Having carefully

[13] The Court notes that a minority in *Kiobel* opined that ATS jurisdiction should exist where "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for

considered these circumstances in light of the growing body of post-*Kiobel* case law, however, the Court cannot agree.

Many courts have found in the wake of *Kiobel* that a defendant's presence or residence in the United States at the time of the litigation—whether as a corporate entity or natural person—does *not* displace the *Kiobel* presumption.[14] *See Balintulo,* 727 F.3d at 189-90 (concluding

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a torturer or other common enemy of mankind." 133 S. Ct. at 1671 (Breyer, J., concurring). But that opinion is not binding.

[14] Plaintiffs cite only one case where a defendant's residence in the United States, standing alone, was sufficient to displace the *Kiobel* presumption. *See Ahmed v. Magan,* No. 10-cv-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013), *report and recommendation adopted,* 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013). In *Magan,* the plaintiff, a Somali citizen, brought ATS claims against a fellow Somali citizen residing in the United States for egregious conduct occurring entirely in Somalia. 2013 WL 4479077 at *1-4. After the defendant's counsel withdrew, the defendant stopped defending himself in the lawsuit. *Id.* at *1. The district court subsequently granted the plaintiff's unopposed motion for summary judgment on liability, and referred the case to a magistrate judge for a report and recommendation on damages. *Id.* In the report, the magistrate judge concluded that, because the defendant had not moved to dismiss the plaintiff's claims or opposed the motion for summary judgment, he had "waived any merits argument he may have raised based on the *Kiobel* decision." *Id.* at *2. Without elaborating further, the magistrate judge then found that because the defendant was "a permanent resident of the United States, the presumption of [sic] against extraterritoriality has been overcome." *Id.* The magistrate judge also specifically advised that failure to object to the report "will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgment of the District Court." *Id.* at *7. Consequently, when the defendant failed to object, the district court summarily adopted the report. *Magan,* 2013 WL 5493032 at *1. Given these circumstances, the Court agrees with Defendants that it is difficult "to attach any meaningful weight to

that "if all the relevant conduct occurred abroad, that is simply the end of the matter," even when "the defendants are American nationals"); *see also Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 (2d Cir. 2014) (reversing ATS judgment against Bangladeshi citizen with U.S. permanent resident status because "all the relevant conduct" occurred in Bangladesh); *Al Shimari v. CACI Intern., Inc.*, 951 F. Supp. 2d 857, 858 (E.D. Va. 2013) (dismissing ATS claims against United States military government contractor headquartered in Virginia because alleged tortious conduct "occurred exclusively in Iraq"); *Sikhs for Justice Inc. v. Indian Nat'l Congress Party*, 17 F. Supp. 3d 334, 344-45, 2014 WL 1683798, at *10 (S.D.N.Y. Apr. 25, 2014) (concluding that *Kiobel* presumption was not displaced even though defendant conducted ongoing business in United States, established subsidiary here "as a safe harbor to escape justice," and continued to direct its "campaign of terror" at "those plaintiffs who have sought refuge in the United States") (internal quotation marks omitted); *Adhikari*, 2013 WL 4511354 at *7 (granting summary judgment for corporate defendants on ATS claims even though they were U.S. nationals because "mere corporate presence" was insufficient); *Mwangi v. Bush*, No. 12-373-KKC, 2013 WL 3155018, at *4 (E.D. Ky. June 18, 2013) (dismissing *pro se* plaintiff's ATS claims against former President George H.W. Bush and his family because all relevant conduct occurred in Kenya); *Ahmed-Al-Khalifa v. Queen Elizabeth, II,* No. 13-cv-103-RS-CJK, 2013 WL

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the magistrate judge's opinion, which made no effort to come to grips with the relevant language in *Kiobel* (much less the post-*Kiobel* case law rejecting claims against individuals in the United States)." Reply at 5.

2242459, at *1 (N.D. Fla. May 21, 2013) (dismissing plaintiff's ATS claims against President Barack Obama, among others, "because the violations at issue all occurred outside of the United States, and the South African apartheid does not 'touch' or 'concern' the United States in such a way that would overcome the ATS's presumption against extraterritoriality"). And, at least one court has held that a foreign government's support of the litigation is insufficient to defeat the *Kiobel* presumption, even when the defendant is present in the United States. For instance, in *Balintulo,* the corporate defendants were present in the United States, and the South African government supported the litigation in the Southern District of New York. 727 F.3d at 184-89. Yet the Second Circuit still held that the plaintiffs' ATS claims were barred because all the relevant conduct occurred abroad. *Id.* at 190-92.

The same is true here. Although Defendants reside in the United States and the Bolivian government supports this litigation (an unsurprising fact given that the current administration is led by Defendant Lozada's longtime political opponent), Plaintiffs have not alleged that any relevant conduct took place in the United States. Rather, like *Balintulo* and the bevy of post-*Kiobel* cases cited above, all the relevant conduct underlying Plaintiffs' ATS claims occurred on foreign soil. The Court, therefore, lacks subject-matter jurisdiction over them.[15]

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[15] The Court is also unpersuaded by Plaintiffs' policy arguments—to wit, that dismissal of their ATS claims would render the United States a "safe haven" for human rights violators and negatively impact the United States' foreign relations with Bolivia. These policy arguments are similar to the ones the Second Circuit rejected in *Balintulo.* There, the plaintiffs argued that *Kiobel* did not bar their

B. The Torture Victim Protection Act

Defendants next challenge Plaintiffs' claims for extrajudicial killings under the TVPA. Congress enacted the TVPA in 1992 in response to our nation's obligations under the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. *See* S. Rep. 102-249, at 3 (1991). According to the Senate Report to the TVPA, those obligations included adopting measures to ensure that "torturers and death squads . . . no longer have a safe haven in the United States" and instead "are held legally accountable for their acts." *Id.; see also* 134 Cong. Rec. H9692-02, 1988 WL 177020 (Oct. 5, 1988) (remarks of Rep. Rodino) (The TVPA will "send a message" to government officials worldwide "that coming to the United States will not provide them with an escape from civil accountability for their violations of the international law of human rights. . . . [N]o matter where the official torturer runs, he can not hide.").

To this end, § 2(a) of the TVPA creates a federal cause of action against anyone who, under authority or color of law of any foreign nation, subjects an individual to torture or extrajudicial killing. 28 U.S.C. § 1350 Note, § 2(a). Section 2(b), for its part, establishes an affirmative defense of "exhaustion of remedies." *Id.* § 2(b); *see*

ATS claims "because of the compelling American interests in supporting the struggle against apartheid in South Africa." *Balintulo,* 727 F.3d at 191. But the Second Circuit was not swayed by the plaintiffs' "case-specific policy arguments," explaining that "[i]n *all* cases, . . . the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign." *Id.* at 191-92.

also Jean v. Dorelien, 431 F.3d 776, 781 (11th Cir. 2005) (exhaustion requirement is "affirmative defense"). Specifically, § 2(b) provides that "[a] court shall decline to hear a [TVPA] claim . . . if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." § 1350 Note, § 2(b). The burden of proving an exhaustion-of-local-remedies defense is on the defendant, and it is a "substantial" one.[16] *Jean*, 431 F.3d at 781 (citations omitted).

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[16] As the Eleventh Circuit emphasized, the Senate Report to the TVPA specifically stated:

> "*[T]he committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.*
>
> More specifically, . . . [the exhaustion requirement] should be informed by general principles of international law. The procedural practice of *international* human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant."

Jean, 431 F.3d at 781-82 (quoting S. Rep. No. 102-249, at 9-10 (1991)) (citations omitted).

In this case, Defendants raise two exhaustion-of-local-remedies arguments. Defendants first argue that Plaintiffs have already been "adequately" compensated in Bolivia under two different governmental schemes—namely, the 2003 Humanitarian Assistance Agreement; and the 2008 Law for the Victims of the Events of February, September, and October 2003 (also known as "Law No. 3955")—and thus Plaintiffs are precluded from bringing their TVPA claims. Failing that, Defendants next contend that Plaintiffs' claims still should be dismissed because Plaintiffs have not yet exhausted all "adequate and available" remedies in Bolivia. Each argument is examined in turn below.

1. Plaintiffs' prior recoveries from the Bolivian government do not preclude their TVPA claims against Defendants

Before discussing the merits of Defendants' first argument, a little history is necessary. In 2009, this Court—per Judge Jordan—dismissed Plaintiffs' TVPA claims without prejudice for failure to exhaust "adequate and available" remedies in Bolivia. *Rojas Mamani v. Sánchez Berzaín,* 636 F. Supp. 2d 1326, 1332 (S.D. Fla. 2009). At that time, Plaintiffs had already received B$60,000 (Bolivianos) from the Bolivian government for "humanitarian assistance compensation" and "emergency and funeral expenses" under the 2003 Humanitarian Assistance Agreement.[17] *Id.* at 1329 (internal quotation

[17] The Bolivian government passed the Humanitarian Assistance Agreement in November 2003 "to provide compensation to the 'widows and legitimate heirs' of those who were killed during the so-called 'Gas War' in September and October of 2003." *Rojas Mamani,* 636 F. Supp. 2d at 1329. The compensation, however, was not determined on an individual basis and did not waive any rights

marks omitted). That sum was "equivalent to USD $7,180.90, or almost 8 times the 2003 annual average per capita income" in Bolivia. *Id.* But at the same time, Plaintiffs had *not* sought compensation from the Bolivian government under Law No. 3955, which was passed in 2008 to provide "the heirs of each deceased person a payment equal to 250 'national minimum salaries,' as well as free public university educations to obtain bachelors' degrees."[18] *Id.* (citation omitted). That sum was equivalent to USD $19,905.56, or roughly 14-15 times the 2008 annual average per capita income in Bolivia. *Id.* at 1330-31. The Court, therefore, dismissed Plaintiffs' TVPA claims without prejudice to renew once Plaintiffs had exhausted their remedies under Law No. 3955. *Id.* at 1331-32. In reaching this conclusion, however, the Court was careful not to express a "view on what preclusive effect, if any, such compensation—when combined with the 2003 payments—may have on [Plaintiffs'] TVPA claims." *Id.* at 1333.

Because Plaintiffs have since exhausted their remedies under Law No. 3955, that question is now ripe before the Court. To answer it, the Court looks to the TVPA's text and its legislative history, as well as general principles of international and United States law. *See*

Plaintiffs had to "seek compensation through other available means and from the persons responsible." *Id.* (citation and internal quotation marks omitted).

[18] Like the 2003 Humanitarian Assistance Agreement, Law No. 3955 did "'not release those individuals who have been identified as perpetrators or persons responsible before Bolivian or foreign authorities . . . from liability for criminal, civil, or any other nature of responsibility for the events [in question].'" *Rojas Mamani*, 636 F. Supp. 2d at 1329-30 (citations omitted).

Barrueto v. Larios, 291 F. Supp. 2d 1360, 1365-66 (S.D. Fla. 2003) (stating that the exhaustion requirement "'should be informed by general principles of international law'" as well as "'common-law principles of exhaustion as applied by courts in the United States' " (quoting S. Rep. No. 102-249, at 9-10 (1991))). Turning first to the TVPA's text, § 2(a) creates specific *individual* liability for damages; to be clear, it provides that "[a]n *individual* who, under actual or apparent authority, or color of law, of any foreign nation" subjects someone "to extrajudicial killing shall, in a civil action, be *liable for damages.*" § 1350 Note, § 2(a) (emphases added). The goal of the statute on its face, then, is to redress specific individuals' wrongdoings by ensuring that their actions have legal consequences—to wit, that they literally "pay the price" for their wrongs. This reading of the statute, moreover, comports with the congressional intent behind the TVPA of ensuring that human rights violators do not have a "safe haven" in this country and instead "are held legally accountable for their acts." S. Rep. 102-249, at 3 (1991); *see also* W. Castro, *The New Federal Common Law of Tort Remedies for Violations of International Law,* 37 Rutgers L.J. 635, 660 (Spring 2006) ("The principle of exhaustion might be interpreted as barring a remedy rather than requiring exhaustion, but such an interpretation would be a flat contradiction of the statutory language and the sparse legislative history in the Senate."). Construing § 2(b) against this backdrop, the Court concludes that the exhaustion-of-local-remedies requirement does not have any preclusive effect under the circumstances of this case; rather, it is merely a procedural hurdle that Plaintiffs must clear before seeking

relief under the TVPA.[19] *See Gozlon-Peretz v. United States,* 498 U.S. 395, 407 (1991) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.") (citation and internal quotation marks omitted)

Customary international law also compels this conclusion. The international exhaustion-of-local-remedies rule prescribes that before resorting to an international court, "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." *Interhandel (Switzerland v. United States),* 1959 I.C.J. 6, 27 (March 1959). Here, however, it does not appear that Bolivia will have the opportunity to specifically redress Defendants' alleged human rights violations within its own judicial system anytime soon, if at all. This is because, according to the parties, Defendants must first be criminally convicted in Bolivia before Plaintiffs can bring a civil suit against them in Bolivian court. *See* Verástegui Decl. [DE 191-5] ¶¶ 6, 19. Yet Defendants had the wherewithal to flee Bolivia, there is no indication that they intend to return, and Bolivian law prohibits criminal prosecutions in absentia. *Id.* In other words, unless Defendants are extradited or voluntarily return to their homeland, Bolivia will not have any meaningful oppor-

[19] Any concern about a plaintiff using the TVPA to pursue a double recovery from a defendant—e.g., obtaining and recovering on a foreign judgment against a defendant, and then seeking to obtain a second judgment against that defendant under the TVPA—is assuaged by the incorporation of res judicata principles into the statute. *See* S. Rep. No. 102-249, at 10 (1991) ("In such a case, the usual principles of res judicata apply.").

tunity to redress *their* alleged human rights violations. Rather, as things stand, the United States appears to be the only forum where Plaintiffs may seek to hold Defendants liable for their alleged wrongs.

In addition to customary international law, general principles of United States law also compel the conclusion that Plaintiffs' prior recoveries from the Bolivian government do not preclude their TVPA claims against Defendants. For instance, the traditional concept of exhausting remedies typically does *not* preclude judicial relief, but rather postpones it until the prescribed alternative remedy has been exhausted. *See, e.g., Woodford v. Ngo,* 548 U.S. 81, 88-89 (2006) ("The doctrine [of exhaustion of administrative remedies] provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.") (citations and internal quotation marks omitted); Castro *supra,* at 660 ("A citation in the Senate Report indicates that the TVPA's exhaustion requirement is intended to be analogous to the traditional concept of exhausting administrative remedies, which of course does not result in a complete bar.") (footnote omitted). Furthermore, under the "collateral-source rule," any compensation that a plaintiff receives for his or her loss from a collateral source is not credited against the defendant's liability for damages resulting from his wrongful act. Restatement (Second) of Torts § 920A(2) (1979); *see, e.g., Manderson v. Chet Morrison Contractors, Inc.,* 666 F.3d 373, 381 (5th Cir. 2012) ("'The collateral-source rule . . . bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the *tortfeasor.*'") (citation omitted); *Westchester Specialty Ins. Servs., Inc. v. U.S. Fire Ins. Co.,* 119

F.3d 1505, 1513 n. 13 (11th Cir.1997) ("In tort cases, Georgia's collateral source rule prevents the reduction of a party's liability by payments or benefits that the injured party received from collateral sources."); *Robert E. Owen & Assocs., Inc. v. Gyongyosi*, 433 So.2d 1023, 1025 (Fla. 4th DCA 1983) ("The law appears well settled in Florida that a tortfeasor may not avail himself of payments from collateral sources such as . . . social legislation benefits.") (citations omitted). This rule ensures not only that victims are compensated for their losses, but also that wrongdoers are held accountable for their harmful actions. *See* 74 Am. Jur. 2d *Torts* § 2 (2014) (American tort compensation system serves to shift the loss to responsible parties and deter wrongful conduct). Applying this principle here, it would be absurd to conclude that Defendants could avoid liability for their alleged wrongs merely because the Bolivian government saw fit to render some humanitarian assistance to Plaintiffs. To do so would, in effect, inappropriately shift the benefit of the Bolivian government's payments from Plaintiffs to Defendants. *See Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983) ("There is no reason why the benefit [from a collateral source] should be shifted to the defendant, thereby depriving the plaintiff of the advantage it confers.") (citation omitted). This, the Court declines to do.

In sum, because the TVPA was enacted to ensure that human rights violators do not have a "safe haven" in our country and instead "are held legally accountable," S. Rep. 102-249, at 3 (1991), and because principles of both international and United States law compel the conclusion that Plaintiffs' claims are not barred in this instance, the Court concludes that Plaintiffs' prior recoveries from the Bolivian government—even if arguably "adequate" compensation for their losses—do not preclude

them from seeking to hold Defendants liable under the TVPA.

2. Defendants have not met their "substantial" burden of proving the availability of additional adequate remedies in Bolivia

Defendants next contend that Plaintiffs' TVPA claims should be dismissed because Plaintiffs purportedly have *other* "adequate and available" remedies in Bolivia that they have not yet exhausted. Specifically, Defendants contend that Plaintiffs may pursue civil lawsuits in Bolivia against seven of Defendants' subordinates convicted in Bolivia in 2011 of the "crime of genocide through mass killings" in connection with the tragic events in 2003. Compl. ¶¶ 166-70. As the Court previously observed, because these individuals have been criminally convicted, they are now amenable to civil suit in Bolivia.

Attempting to meet their "substantial" burden of proving the availability of additional adequate remedies in Bolivia, *see Jean*, 431 F.3d at 781, Defendants point to various media reports purportedly showing that "at least *some* of those injured and the legal representatives of at least *some* of the injured have filed a civil action" in Bolivia. Motion at 28 (emphases added). As an initial matter, the Court doubts that media reports, standing alone, are sufficient to satisfy Defendants' substantial burden. But even if mere media reports were sufficient, none indicate which of the nine Plaintiffs, if any, have the right to pursue civil actions against the seven subordinates. Nor do the media reports indicate whether such civil suits could result in enforceable judgments against anyone—much less these Defendants. The Court thus doubts whether such civil actions are, in fact, additional "adequate and available" remedies in Bolivia. Resolving

this doubt in Plaintiffs' favor, the Court declines Defendants' invitation to once again dismiss Plaintiffs' TVPA claims for failure to exhaust additional remedies in Bolivia. *See Enahoro v. Abubakar,* 408 F.3d 877, 892 (7th Cir. 2005) (Cudahy, J., dissenting) ("[T]o the extent that there is any doubt . . . , both Congress and international tribunals have mandated that . . . doubts [about exhaustion of remedies are to] be resolved in favor of the plaintiffs."); *cf. In re Wal-Mart Wage & Hour Emp't Practices Litig.,* 490 F. Supp. 2d 1091, 1119 (D. Nev. 2007) (stating that doubts about whether legal remedy is adequate "should be resolved in favor of the equitable jurisdiction") (citation and internal quotation marks omitted).

C. Legal Sufficiency of Plaintiffs' Claims for Extrajudicial Killings

Having determined that the TVPA's exhaustion-of-local-remedies requirement does not impede Plaintiffs' TVPA claims for extrajudicial killings, the Court now turns to Defendants' contention that the claims are legally insufficient. The TVPA defines an "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 28 U.S.C. § 1350 Note, § 3(a).

In *Mamani v. Berzaín,* 654 F.3d 1148 (11th Cir. 2011), the Eleventh Circuit reversed this Court's denial of Defendants' prior motion to dismiss Plaintiffs' claims for extrajudicial killings.[20] Specifically, the fatal flaw in

[20] Although the Eleventh Circuit reviewed the legal sufficiency of Plaintiffs' claims for extrajudicial killings under the ATS (and not the TVPA), it relied on the TVPA's definition of "extrajudicial kill-

Plaintiffs' prior formulation of their claims was the lack of factual allegations sufficient to plausibly suggest that their relatives' deaths had been "'deliberate' in the sense of being undertaken with studied consideration and purpose." *Id.* at 1155. Rather, each of their relatives' deaths "could plausibly have been the result of precipitate shootings during an ongoing civil uprising." *Id.* Each death, for instance, was just as "compatible with accidental or negligent shooting (including mistakenly identifying a target as a person who did not pose a threat to others)" as with an extrajudicial killing. *Id.* The Eleventh Circuit therefore concluded that Plaintiffs had not pled "facts sufficient to show that anyone—especially *these defendants,* in their capacity as high-level officials—committed extrajudicial killings." *Id.*

Defendants contend that Plaintiffs' new formulation of their claims fares no better. They argue that the Complaint does not cure any of the pleading defects identified by the Eleventh Circuit and thus still fails to state plausible claims for extrajudicial killings. Plaintiffs, obviously, disagree. To resolve this debate and determine whether Plaintiffs' claims are legally sufficient, the Court follows the Eleventh Circuit's two-step approach in *Mamani:* (1) do the non-conclusory factual allegations in the Complaint plausibly suggest that Plaintiffs' relatives' deaths were extrajudicial killings; and (2) if so, do they also plausibly suggest that Defendants are secondarily liable for the killings?

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ing" for guidance. *Mamani*, 654 F.3d at 1154. Its holding thus applies to Plaintiffs' TVPA claims.

1. Plaintiffs have alleged facts plausibly suggesting that their relatives' deaths were extrajudicial killings

To begin, Plaintiffs allege that eight-year-old Marlene Nancy Rojas Ramos was killed on September 20, 2003, during military operations in Warisata. According to Plaintiffs, Defendants ordered the military "to take Warisata" as part of their campaign to quell public opposition to their political agenda. Plaintiffs allege that soldiers were ordered to shoot "at anything that moved."[21] Plaintiffs further allege that Marlene was on the second floor of her home that afternoon, far from any protests, when she moved to look out a window. At that time, a sharpshooter fatally shot her from a distance of about 75 yards. No other bullets hit the house either before or after the shooting. Construing these allegations in Plaintiffs' favor, the Court finds that they give rise to a reasonable inference that the sharpshooter saw Marlene "move" and deliberately killed her.

The same goes for the deaths of Roxana Apaza Cutipa, Marcelino Carvajal Lucero, Santos Gandarillas Ayala, and Teodosia Morales Mamani—four of Plaintiffs' family members killed on October 12, 2003, during military operations in El Alto. According to the Complaint,

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[21] Defendants argue that Plaintiffs' use of the passive voice in pleading this "order" and others is significant at this stage of the proceedings. Motion at 32, n.16. But the Court is not persuaded. Viewing such allegations and the Complaint as a whole in the light most favorable to Plaintiffs, as required, it is reasonable to infer that these orders stemmed from Defendants' directives to use lethal force, which were repeatedly disseminated down the chain of command. *See, e.g.,* Compl. ¶¶ 30, 31, 36, 50, 63, 68, 71, 78, 80-81, 83-85, 93, 95-96, 106-08, 125-26, 130.

soldiers swept through the city shooting at unarmed civilians. In particular, Plaintiffs allege that thirty-nine-year-old and pregnant Teodosia Morales Mamani was inside her sister's home when several family members looked out the window. They saw soldiers marching down the street and yelling at people looking out of windows: "What are you looking at? I'll kill you!" and "Shoot them, damn it!" Morales was sitting next to the window when a soldier fired at the apartment, killing Morales and her unborn child. Similarly, when fifty-nine-year-old Marcelino Carvajal Lucero went to close a window in his house, a soldier fatally shot him from a distance of about 19 yards. In addition, Plaintiffs allege that nineteen-year-old Roxana Apaza Cutipa was on the roof of her house, far from any protests, when a soldier fatally shot her. Plaintiffs also allege that a soldier fatally shot Lucio Santos Gandarillas Ayala as he ran for cover. Viewing these allegations and the Complaint as a whole in the light most favorable to Plaintiffs, the Court finds that they plausibly suggest that these killings were deliberate.

The same is true of the deaths of Jacinto Bernabé Roque, Arturo Mamani Mamani, and Raúl Ramón Huanca Márquez—three of Plaintiffs' relatives killed on October 13, 2003, during military operations near La Paz. According to the Complaint, soldiers were ordered to "shoot at any head that you see." Plaintiffs allege that soldiers chased unarmed civilians into the surrounding hillside with gunfire. Specifically, Plaintiffs allege that sixty-one-year-old Jacinto Bernabé Roque was trying to hide in the hills when a soldier fatally shot him. Plaintiffs similarly allege that forty-two-year-old Arturo Mamani Mamani was also in the hills when a soldier fatally shot him. Later that same day, as the military moved through a nearby village, Plaintiffs further allege that a soldier

fatally shot Raúl Ramón Huanca Márquez as he tried to take cover behind a building. Viewing these allegations and the Complaint as a whole in the light most favorable to Plaintiffs, the Court finds that they plausibly suggest that these killings were also deliberate.

2. Plaintiffs have alleged facts plausibly suggesting that Defendants are secondarily liable under the doctrine of command responsibility

Having concluded that the Complaint plausibly suggests that Plaintiffs' relatives' deaths were extrajudicial killings, the Court next considers whether it also plausibly suggests that Defendants are secondarily liable for the killings under the doctrine of "command responsibility."[22] This doctrine "makes a commander liable for acts of his subordinates, even where the commander did not order those acts, when certain elements are met."[23] *Ford*

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[22] Plaintiffs also allege that Defendants are vicariously liable under agency and conspiracy theories. However, because the Complaint meets the standard for command responsibility, the Court need not address Plaintiffs' other theories at this time.

[23] According to the Senate Report to the TVPA:

> [A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them. In *Forti v. Suarez-Mason,* the court found Suarez Mason liable as Commander of the First Army Corps under the theory that the alleged acts of torture and summary execution were committed by personnel under his command "acting pursuant to a 'policy, pattern and practice' of the First Army Corps." *Suarez Mason,* [672

v. Garcia, 289 F.3d 1283, 1286 (11th Cir. 2002). Those elements 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." *Id.* This doctrine applies not only in "wartime," but also in "peacetime." *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996).

a. Superior-Subordinate Relationship

To establish the "superior-subordinate relationship" element, Plaintiffs must allege facts plausibly suggesting that Defendants had "effective control" over the Bolivian soldiers who killed Plaintiffs' relatives. *Ford*, 289 F.3d at 1290. This concept of "effective control" includes "a ma-

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F. Supp. 1531, 1537-38 (N.D. Cal. 1987)]. Thus, although Suarez Mason was not accused of directly torturing or murdering anyone, he was found civilly liable for those acts which were committed by officers under his command about which he was aware and which he did nothing to prevent.

Similarly, in *In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court held a general of the Imperial Japanese Army responsible for a pervasive pattern of war crimes committed by his officers when he knew or should have known that they were going on but failed to prevent or punish them. Such "command responsibility" is shown by evidence of a pervasive pattern and practice of torture, summary execution or disappearances.

S. Rep. 102-249, at 9 (1991) (footnotes omitted).

terial ability to prevent or punish criminal conduct," regardless of how that control is exercised. *Id.* (citation and internal quotation marks omitted). Effective control, for instance, may be "*de facto* or *de jure*." *Id.* at 1291 (citation omitted). Where a commander has "*de jure* authority" over the perpetrators of the underlying crime, such authority is "*prima facie* evidence of effective control." *Id.* (citation omitted).

In this case, Plaintiffs allege that Defendants were the President and Minister of Defense of Bolivia at the time of Plaintiffs' relatives' deaths. As the President and Minister of Defense, Defendants were the highest commanders of the Bolivian military. As the highest commanders of the Bolivian military, Defendants had ultimate authority over the military, including the Bolivian soldiers who killed Plaintiffs' relatives. At the motion-to-dismiss stage, these allegations plausibly suggest that Defendants had, at a minimum, *de jure* authority over the soldiers who fired the fatal shots. Because *de jure* authority is *prima facie* evidence of "effective control," it is sufficient to establish the requisite "superior-subordinate relationship." *See id.; cf. Doe v. Qi*, 349 F. Supp. 2d 1258, 1331-32 (N.D. Cal. 2004) (superior-subordinate relationship was established where one defendant had supervisory authority over perpetrators, and another defendant "played a major policy-making and supervisory role in the policies and practices that were carried out") (internal quotation marks omitted); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1537-38 (N.D. Cal. 1987) (concluding that military general could be held liable for his subordinates' brutal actions because he "held the highest position of authority" and "authorized, approved, directed and ratified" the brutality) (citations and internal quotation marks omitted), *superseded by*

statute on other grounds as stated in Papa v. United States, 281 F.3d 1004 (9th Cir. 2002).

b. Knowledge

To establish the knowledge element of command responsibility, Plaintiffs must allege facts plausibly suggesting that Defendants "knew or should have known, owing to the circumstances at the time," that their soldiers "had committed, were committing, or planned to commit" extrajudicial killings. *Ford,* 289 F.3d at 1288. Here, the gist of Plaintiffs' allegations is that—even before taking office—Defendants met and discussed a plan to use lethal force to quell public opposition to their political agenda.[24] They explicitly agreed at that time that thousands of Bolivians would have to die. After assuming power, Defendants continued to strategize about the need to kill Bolivian civilians to pave the way for their governmental goals. In furtherance of their plan, Defendants then issued a series of decrees authorizing the military to use force against roadblocks, marches, and demonstrations.[25] *See* Manual on the Use of Force [DE

[24] While the Eleventh Circuit previously deemed the unsupported allegation that Defendants "met with military leaders . . . to plan widespread attacks . . . against protestors" to be a legal conclusion rather than a factual allegation, *Mamani,* 654 F.3d at 1153, the Court finds that Plaintiffs have cured the conclusory nature of that allegation. To be sure, Plaintiffs' new Complaint is rife with detailed factual allegations—beyond what the federal pleading standard requires, *see Twombly,* 550 U.S. at 579—as to when specific communications or meetings took place, who was involved, and what was communicated or transpired. *See, e.g.,* Compl. ¶¶ 30, 31, 50, 71, 78, 80-81, 83-85, 93, 95-96, 100-02, 106-08, 125-26, 130.

[25] It is true that these decrees—the Manual on the Use of Force and the Republic Plan—also espoused human rights principles. But that does not mean, as Defendants insist, that their texts necessarily

183-3] at 13 (authorizing use of force against "acts of vandalism, crimes, roadblocks, marches, demonstrations, etc. carried out by subversive criminals"); *see also* Republic Plan [DE 183-4] at 1 (directing army to "apply Principles of Mass and Shock" to remove roadblocks and control civil disturbances). Defendants closely supervised the ensuing military operations, staying in frequent contact with each other and other military commanders, and receiving regular and contemporaneous reports. During those operations, Bolivian soldiers killed many Bolivian civilians, including Plaintiffs' family members. When people both inside and outside the government urged Defendants to end the violence and pursue peaceful solutions, they refused. Instead, Defendants praised the military for following their orders and took full responsibility for its actions.

These allegations, viewed in the light most favorable to Plaintiffs, are sufficient to plausibly suggest that Defendants knew or should have known, owing to the circumstances at the time, that their soldiers were committing extrajudicial killings. *See, e.g., Lizarbe v. Rondon,*

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contradict (and thus control over) the allegations in the Complaint. Plaintiffs' case theory is that Defendants orchestrated a violent military campaign to quash public opposition to their political agenda. That Defendants may have tried to conceal or legitimize their campaign by authorizing it via decrees containing both militant and human rights principles does not mean that Plaintiffs' case theory is negated. As the old adage goes, actions speak louder than words. *See, e.g., Xuncax v. Gramajo,* 886 F. Supp. 162, 171-73 (D. Mass. 1995) (human rights violator defended his actions of "ordering and directing the implementation of a program of persecution and oppression" that resulted in "brutal and barbarous practices" as "involving the use of flexible and humanitarian tactics") (internal quotation marks omitted).

642 F. Supp. 2d 473, 491 (D. Md. 2009) (defendant had requisite knowledge of his troops' alleged atrocities where he attended meeting about operations, oversaw firing on villagers and burning of homes, and set up blockade of escape routes); *Qi*, 349 F. Supp. 2d at 1332-33 (defendants had requisite knowledge of their subordinates' alleged human rights violations where "repression and abuse were widespread, pervasive, and widely reported," and both defendants "actively encouraged and incited the crackdown" on victims); *Xuncax*, 886 F. Supp. at 173 (defendant had requisite knowledge where "[w]hen confronted with the murder of innocent civilians by soldiers under his command," defendant did not deny facts but instead said actions were "appropriate") (internal quotation marks omitted).

c. Failure to Act

To establish the failure-to-act element of command responsibility, Plaintiffs must allege facts plausibly suggesting that Defendants "failed to prevent" the extrajudicial killings or "failed to punish" the soldiers afterwards. *Ford*, 289 F.3d at 1288. According to the Complaint, not only did Defendants direct the violent military campaign that led to Plaintiffs' relatives' deaths, but they also repeatedly ignored pleas to find peaceful solutions to the protests in the face of a mounting civilian death toll. Instead of investigating or punishing the death of the eight-year-old girl in Warisata, for example, Defendants praised the military for its operations and accepted full responsibility for the resulting violence. They then authorized further military operations in El Alto and south of La Paz, resulting in even more civilian deaths. Viewing these allegations and the Complaint as a whole in Plaintiffs' favor, they are sufficient to plausibly suggest that, at a minimum, Defendants failed to prevent

Plaintiffs' relatives' deaths. *See Qi,* 349 F. Supp. 2d at 1333-34 (defendants failed to prevent alleged abuses where they "actively encouraged and incited the repression").

At bottom, because the Complaint's factual allegations plausibly suggest that Plaintiffs' relatives' deaths were extrajudicial killings for which Defendants are secondarily liable under the doctrine of command responsibility, the Court finds that Plaintiffs have stated claims under the TVPA. *Cf. Arce v. Garcia,* 434 F.3d 1254, 1259 (11th Cir. 2006) (affirming judgment holding Minister of Defense and Director General of El Salvador National Guard liable for torture committed by their soldiers under the command responsibility doctrine); *Paul v. Avril,* 901 F. Supp. 330, 335 (S.D. Fla. 1994) (finding military ruler personally liable for "systematic pattern of egregious human rights abuses" carried out "under his instructions, authority, and control").

D. Plaintiffs' State-Law Claims

Finally, the Court must decide whether to exercise supplemental jurisdiction over Plaintiffs' state-law claims for wrongful death. *See* 28 U.S.C. § 1367(a). At this juncture, Plaintiffs insist that their state-law claims "arise under Bolivian law" because "this Court has already determined that the claims are governed by Bolivian law." Response at 50. In response, Defendants argue that assuming Bolivian law applies, Plaintiffs' wrongful death claims raise numerous "novel or complex" issues of foreign law and thus the Court should decline to exercise supplemental jurisdiction. Reply at 25. An example of a "novel or complex" issue, in Defendants' view, is "whether government officials responding to a civil uprising may be held liable for actions of an individual member of the military" under Bolivian law. *Id.* Beyond these bare

assertions, however, Defendants do not cite (and the Court is unaware of) any record evidence supporting Defendants' contention that applying Bolivian law to Plaintiffs' state-law claims would involve "novel or complex" issues. *Cf. Romero v. Drummond Co. Inc.,* 552 F.3d 1303, 1318 (11th Cir. 2008) (affirming decision to decline supplemental jurisdiction over plaintiffs' Colombian-law claims because "the district court was unable to reconcile conflicting translations of Colombian legal precedents, to navigate the complexities of the parties' submissions, or to discern . . . the Colombian law requisites for a wrongful death claim") (internal quotation marks omitted). Without adequate record support, the Court declines Defendants' invitation to forgo exercising supplemental jurisdiction over Plaintiffs' state-law claims on the ground that they involve "novel or complex" issues of Bolivian law.

VI. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint [DE 183 in Case No. 07-22459 and DE 167 in Case No. 08-21063] is **GRANTED in part and DENIED in part.** Plaintiffs' claims for extrajudicial killings (Count I) and crimes against humanity (Count III) under the Alien Tort Statute are **DISMISSED** for lack of subject-matter jurisdiction.

It is hereby further **ORDERED AND ADJUDGED** that Defendants' Motion for Judicial Notice of Documents Incorporated in the Complaint and Other Documents [DE 184 in Case No. 07-22459 and DE 168 in Case No. 08-21063] is **DENIED AS MOOT.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 20th day of May, 2014.

/s/ James I. Cohn
JAMES I. COHN
United States District Judge