No. 18-12728

United States Court of Appeals

for the

Eleventh Circuit

ELOY ROYAS MAMANI, Warisata, Bolivia, ETELVINA RAMOS MANANI, Warisata, Bolivia, SONIA ESPEJO VILLALOBOS, El Alto, Bolivia, JAUN PATRICIO QUISPE MANANI, El Alto, Bolivia, TEOFILO BALTAZAR CERRO, JUANA VALENCIA DE CARVAJAL, El Alto, Bolivia, HERMOGENES BERNABE CALLIZAYA, El Alto, Bolivia, MAMANI GONZALO AGUILAR, El Alto, Bolivia, FELICIDAD ROSA HUANCA QUISPE, Ovejuyo, Bolivia, HERNAN APAZA CUTIPA,

Plaintiffs-Appellants,

– v. –

JOSÉ CARLOS SÁNCHEZ BERZAÍN,

Defendant-Appellee.

(For Continuation of Caption See Inside Cover)

ON APPEAL IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA IN NOS. 1:07-CV-22459-JIC-BSS AND 1:08-CV-21063-JIC HONORABLE JAMES I. COHN, U.S. DISTRICT JUDGE

BRIEF OF *AMICI CURIAE* RETIRED U.S. MILITARY COMMANDERS AND LAW OF WAR SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

ALEXANDRA V. FILIPPOVA
MARK LANPHER
SHEARMAN & STERLING LLP
401 9th Street NW, Suite 800
Washington, DC 20004
Tel.: (202) 508-8000
Fax: (202) 508-8100

DANIEL MCLAUGHLIN
CENTER FOR JUSTICE & ACCOUNTABILITY
One Hallidie Plaza, Suite 406
San Francisco, California 94102
Tel.: (415) 544-0444
Fax: (415) 544-0456

Counsel for Amici Curiae

ELOY ROYAS MAMANI, Warisata, Bolivia, ETELVINA RAMOS MANANI, Warisata, Bolivia, SONIA ESPEJO VILLALOBOS, El Alto, Bolivia, JAUN PATRICIO QUISPE MANANI, El Alto, Bolivia, TEOFILO BALTAZAR CERRO, JUANA VALENCIA DE CARVAJAL, El Alto, Bolivia, HERMOGENES BERNABE CALLIZAYA, El Alto, Bolivia, MAMANI GONZALO AGUILAR, El Alto, Bolivia, FELICIDAD ROSA HUANCA QUISPE, Ovejuyo, Bolivia, HERNAN APAZA CUTIPA,

Plaintiffs-Appellants,

– v. –

GONZALO DANIEL SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendant-Appellee.

Eloy Royas Mamani, et al. v. Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante, et al., No. 18-12728

CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

Amici Curiae state that they have no disclosures to make under Federal Rule of Appellate Procedure 26.1.

Further, undersigned counsel certify that, in addition to those individuals and entities already identified in Appellants' and Appellees' Certificates of Interested Persons, the following individuals and entities have or may have an interest in the outcome of this case:

1. Center for Justice & Accountability (counsel for *Amici*)
2. Filippova, Alexandra V. (counsel for *Amici*)
3. Guter, Donald J. (*Amicus Curiae)*
4. Hutson, John D. (*Amicus Curiae)*
5. Irvine, David R. (*Amicus Curiae)*
6. Lanpher, Mark (counsel for *Amici*)
7. McLaughlin, Daniel (counsel for *Amici*)
8. Shearman & Sterling LLP (counsel for *Amici*)

Dated: October 12, 2018

Respectfully submitted,

/s/ Alexandra V. Filippova

Alexandra V. Filippova
sasha.filippova@shearman.com
Mark Lanpher
mark.lanpher@shearman.com
SHEARMAN & STERLING LLP
401 9th Street, NW, Suite 800
Washington, DC 20004
(202) 508-8000 (telephone)

Daniel McLaughlin
dmclaughlin@cja.org
CENTER FOR JUSTICE & ACCOUNTABILITY
One Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444 (telephone)

Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

Amici Curiae Retired U.S. Military Commanders and Law of War Scholars respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29 in support of Plaintiffs-Appellants and reversal.[1] All parties have consented to the participation of *Amici* in this case.[2]

Amici, Rear Admiral John D. Hutson (Ret. U.S. Navy),[3] Rear Admiral Donald J. Guter (Ret. U.S. Navy),[4] and Brigadier General David R. Irvine (Ret. U.S. Army),[5] are retired U.S. military commanders and law of war scholars. In

[1] No counsel for a party authored this brief in whole or in part, and no persons other than *Amici* or their counsel contributed money to preparing or submitting this brief.

[2] Leave of Court is therefore not required. FED. R. APP. P. 29(a)(2).

[3] Rear Admiral Hutson served in various legal advocacy roles and in the Office of Legislative Affairs for the Navy for 30 years, ultimately rising to the role of Judge Advocate General ("**JAG**") for the Navy, and spent the next decade as Dean and President of the University of New Hampshire School of Law.

[4] Rear Admiral Guter, JAGC, USN (Ret.), served in the U.S. Navy for 32 years, concluding his career as the Navy's JAG from 2000 to 2002. Rear Admiral Guter currently serves as President and Dean of the South Texas College of Law Houston, in Houston, Texas.

[5] Brigadier General Irvine served in the U.S. Army Reserve for 40 years, including for five years as a private. He was commissioned as a strategic intelligence officer, and served in field grade command positions for ten years as a lieutenant colonel and colonel, and four years as the Deputy Commander for the 96th Regional Readiness Command. He also maintained a faculty position for 18 years with the Sixth U.S. Army Intelligence School, teaching prisoner of war interrogation and military law. He served four terms in the Utah House of Representatives. Brigadier General Irvine is an attorney in private practice.

light of their background and experience, *Amici* are uniquely placed to address the importance of the doctrine of command responsibility to promoting the lawful use of force, and have a strong interest in ensuring its correct application and continued relevance in this Circuit. As the judgment on appeal threatens to undermine this principle of liability, *Amici* respectfully provide the Court with their additional perspective on this issue so as to assist the Court in its deliberations.

STATEMENT OF THE ISSUE

Whether the district court erred by addressing Defendants-Appellees' potential liability in a manner that threatens to eviscerate the command responsibility doctrine as established by the Supreme Court and endorsed by this Circuit.

SUMMARY OF THE ARGUMENT

The doctrine of command responsibility is a fundamental tenet of U.S. and international law that imposes liability on civilian and military commanders who "neglect to take reasonable measures for the[ ] protection" of "civilian populations . . . from brutality." *In re Yamashita*, 327 U.S. 1, 15 (1946) ("***Yamashita***"). It is a theory of liability that – as affirmed by the Supreme Court and this Circuit – does not depend on a commander's complicity in the underlying unlawful act. *Id.* at 14–15; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 604 n.36 (2006) (noting with approval the *Yamashita* reading of the "Fourth Hague Convention of 1907" as

"impos[ing] 'command responsibility' on military commanders for acts of their subordinates"); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002) ("***Ford***"). Instead, command responsibility encourages disciplined military action and mitigates unnecessary civilian harms (and thus promotes national and international security) by holding liable commanders who fail to adequately instruct and supervise military or police forces under their control. *See Yamashita* at 15.

The district court's judgment threatens to gut the command responsibility doctrine. While it purports to address only whether the civilian deaths at issue were sufficiently "deliberate" to constitute "extrajudicial killings" under the Torture Victim Protection Act (the "**TVPA**"),[6] *Mamani v. Berzain*, 2018 WL 2435173, at *12 n.10 (S.D. Fla. May 30, 2018) ("***Mamani II***"), the district court's reasoning on that distinct issue so encroaches upon the command responsibility doctrine as to potentially displace it entirely. As the brief overview above shows, it is well established that commanders can be held liable for extrajudicial killings by their subordinates if those commanders knew or should have known that such criminal acts had taken or would take place, but failed to prevent or punish them. *Ford* at 1288–89. The district court nevertheless held that to establish the "deliberate" nature of the underlying killings committed by soldiers under

[6] Torture Victim Protection Act, 28 U.S.C. § 1350 note (1991).

Defendants' command, Plaintiffs were required to prove that "their relatives were killed pursuant to a plan, conceived and implemented *by Defendants*, to deliberately kill civilians." *Mamani II* at *13 (emphasis added). That is not the correct standard.

Amici support the Plaintiffs-Appellants' argument that the district court's proposed requirement misconstrued the elements of extrajudicial killing under the TVPA. *See* Brief for Plaintiffs-Appellants at 35–41, *Mamani v. Bustamante*, No. 18-12728 (11th Cir. Oct. 5, 2018) ("**Appellants' Br.**"). Further compounding that error – and of particular concern to *Amici* – is that the district court's approach risks rendering meaningless this Circuit's established jurisprudence on command responsibility as a theory of liability that does *not* require a commander's involvement. *See Ford* at 1286 (commander may be liable "even where the commander did not order those acts" if he knew or had reason to know of the acts); *Doe v. Drummond Co.*, 782 F.3d 576, 609–10 (11th Cir. 2015) (citing *Ford* standard with approval); *Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006) (affirming TVPA liability under command responsibility doctrine for former Minister of Defense and Director General of the National Guard who "neither ordered nor participated in" the predicate crimes). The district court's judgment effectively incorporates a requirement that commanders be directly involved in or otherwise have a preconceived plan to commit or encourage the predicate TVPA

violation. This is a major departure from precedent that – if uncorrected by this Court – risks narrowing the scope of TVPA liability made available by Congress, *cf. Ford* at 1286 (discussing legislative history), and undermining the efficacy of the command responsibility doctrine as a distinct means of maintaining disciplined military actions and constraining abuses against civilians, *cf. Yamashita* at 66 (commanders may not "with impunity neglect to take reasonable measures" to prevent or punish crimes of subordinates as this would defeat the goal of protecting civilian populations from brutality). *Amici* respectfully submit that this Court should reverse the district court's error.

ARGUMENT

A. THE COMMAND RESPONSIBILITY DOCTRINE IS CRITICAL TO ENSURING DISCIPLINED MILITARY ACTION AND MITIGATING UNNECESSARY CIVILIAN HARMS

The Supreme Court's *Yamashita* decision sets out what has become an established principle of U.S. and international law: a civilian or military commander must be held responsible for the unlawful acts of his or her subordinates even if that commander "[n]either committed [n]or directed the commission of such acts," on the principle that such a failure of command "would almost certainly result in" humanitarian tragedies. *Yamashita* at 14–15.

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations

> and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.

Id. at 15. Congress expressly contemplated such commander liability for violations of the TVPA. *See Ford* at 1286 (citing S. REP. 102-249, at 8–9 (1991)).

As retired military professionals, *Amici* have personal experience with the importance and utility of imposing on commanders a greater obligation than merely eschewing criminal conduct themselves. Individuals with authority over military personnel – who often wield extraordinary destructive force – must be held to a higher standard: they must be responsible for articulating objectives, selecting tactics, and establishing discipline and norms in a manner that assures responsible behavior by those under their command.[7] Failure to do so not only

[7] "Permitting unchecked behavior of soldiers in war-time creates a substantial risk of humanitarian violations." Amy H. McCarthy, *Erosion of the Rule of Law as a Basis for Command Responsibility under International Humanitarian Law*, 18 CHI. J. INT'L L. 553, 583–84 (2018) (arguing that "military leaders and scholars have consistently espoused the importance of maintaining a high level of discipline among troops," not only for purposes of "battlefield success," but also for ensuring that soldiers "obey humanitarian precepts," as "[u]naddressed misconduct can nurture an atmosphere of lawlessness, negatively affecting the behavior of other unit members," and in some cases, encouraging the mistreatment of civilians); *see also, e.g.*, Joe Doty & Chuck Doty, *Command Responsibility and Accountability*, MIL. REV., Jan.–Feb. 2012, at 38 ("There is no such thing as a neutral or noncommand climate. *Something* is going to happen based on the words and actions of the commander.") (emphasis in original); Peter Rowe, *Military Misconduct during International Armed Operations: Bad Apples or Systemic Failure?*, 13 J. CONFLICT & SEC. L. 165, 185–88 (2008) (arguing that command failures and signals that military code is not seriously enforced can generate feelings of impunity and contribute to soldier abuses against civilians); Michael L.

risks humanitarian tragedy, but, in *Amici's* experience, also interferes with the core of any justifiable military action: the restoration of peace and security.[8] Impunity for command failures undermines these important goals. *Cf. Yamashita* at 15.[9]

Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 166, 233 (2000) ("Mankind must . . . rely on commanders to use their authority to control both a military force's organic capacity for destruction and the conduct of their subordinates. . . . The most important factor in the reduction of war crimes is an assertive and proactive command structure that aggressively seeks to prevent its subordinates from committing atrocities. Recognizing this fact, the international community seeks to hold commanders personally liable for the crimes committed by subordinates if the commander 'knows or should know' that the subordinates are involved in criminal conduct and the commander fails to take action to stop the more junior troops.") (emphasis added).

[8] *See* Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 414 (2010) (emphasizing the importance of commanders imposing appropriate constraints to avoid the emergence of harmful practices by troops in the heat of battle or other exigency, as "war without limits is antithetical to the concept of disciplined military operations" and "undermines the strategic impetus for war itself: the restoration of peace").

[9] This role of the doctrine has also been recognized by members of Congress on a bipartisan basis. *See, e.g.*, 140 Cong. Rec. 7673, 7729 (1994) (statement of Senator Gorton III, emphasizing the doctrine as fundamental and reaching "all the way up through the chain of command . . . being diminished in no way whatsoever by the time it reaches the highest military authority"); Extensions of Remarks, *Fly Like An Eagle*, 150 Cong. Rec. 12615, 12616 (2004) (statement of Rep. Lofgren, quoting human rights scholar's description of doctrine as "charg[ing] both military and civilian authorities with an affirmative duty to prevent crimes, to control their troops, to act when a crime is discovered, and to punish those found guilty of committing the actual crime—no matter how high responsibility may reach in the chain of command").

Indeed, the U.S. military has consistently recognized and enforced this "responsibility" side of "command." For example, the U.S. Army Field Manual has long stated that "[t]he commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof." FM 27-10, U.S. DEP'T OF ARMY FIELD MANUAL, *The Law of Land Warfare*, Section II.501 at 178 (July 1956). Similarly, the U.S. Department of Defense's *Law of War Manual* states, citing *Yamashita*, that "[m]ilitary commanders have a duty to take appropriate measures as are within their power to control the forces under their command for the prevention of violations of the law of war." U.S. DEP'T OF DEFENSE, *Law of War Manual* Section 18.4 (June 2015).[10] U.S. military courts consistently endorse these principles.[11]

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[10] *See also, e.g.,* U.S. DEP'T OF ARMY, Reg. 600-20, *Army Command Policy*, ch. 2-1.b (Nov. 6, 2014) (commanders are "responsible for everything their command does or fails to do").

[11] *See, e.g.*, *United States v. Blanks*, 77 M.J. 239, 243 (C.A.A.F. 2018) (emphasizing importance of assuring "commander's ability to enforce accountability of military members' responsibility to perform their duties"); *United States v. Kittle*, 56 M.J. 835, 837 (A.F. Ct. Crim. App. 2002) (stressing "commander's responsibility for good order and discipline within his or her organization"); *United States v. Blaylock*, 15 M.J. 190, 194 (C.M.A. 1983) ("Under the law of war, commanders may be held responsible for failure to control their

Each of these authorities has recognized that command responsibility is a critical mechanism for limiting the collateral harms of armed conflict by preventing leaders from hiding behind ignorance or tactical exigency where evidence shows they failed to take reasonable measures to protect civilian populations from "uncontrolled soldiery." *See Yamashita* at 14–15. This Court should give the doctrine great weight in considering the appeal before it.

B. THE ELEMENTS OF COMMAND RESPONSIBILITY SET OUT IN *FORD* ARE CRITICAL TO ITS EFFICACY AS A MEANS OF PROMOTING THE LAWFUL USE OF FORCE AND SHOULD BE REAFFIRMED BY THE COURT

In its *Ford* decision, this Court acknowledged both the applicability of the command responsibility doctrine to TVPA cases and its commonly accepted elements:

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

Ford at 1288–89; *see also, e.g.*, *Arce*, 434 F.3d at 1254 (affirming TVPA liability under command responsibility doctrine). *Ford's* formulation of the doctrine's elements – each met by Plaintiffs – is essential to its above-described purpose.

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troops and to maintain discipline.") (citing *Yamashita*); *United States v. Drayton*, 39 M.J. 871, 874 n.6 (A.C.M.R. 1994) (quoting *Blaylock*), *aff'd*, 45 M.J. 180 (C.A.A.F. 1996).

The district court's *Mamani II* judgment improperly sidestepped these issues by interpreting this Court's 2011 holding in this case, *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011) ("***Mamani I***"), to mean that commanders can *only* be liable for extrajudicial killings when they personally direct them. *See Mamani II* at *2, *12–13 (relying on *Mamani I*).[12] But a prior panel of this Court could not have intended such a broad holding, as it would have been inconsistent with the command responsibility jurisprudence previously embraced by both the Supreme Court and this Circuit, and would harm the important goals this doctrine serves to promote. *Ford* continues to govern the command responsibility doctrine in this Court. *See, e.g.*, *Drummond*, 782 F.3d at 609–10. *Amici* thus respectfully submit that in reaching a decision on appeal, this Court should reaffirm the continuing application of the command responsibility doctrine and should recognize that Plaintiffs' evidence satisfied its elements.

1. Commanders with a superior-subordinate relationship to the perpetrator of an extrajudicial killing may be held liable for that crime if they failed to exercise their authority to prevent or punish it

Command responsibility is predicated on the existence of a superior-subordinate relationship, as measured not by the official trappings of authority, but by whether Defendants had "effective control" over the individuals who committed

[12] As noted below, this Court's *Mamani I* decision did not address, let alone alter, the command responsibility doctrine. *See infra* note 25 and associated text.

the predicate crime.[13] *See, e.g.*, *Ford* at 1290–91. Such control may be "*de facto* or *de jure*." *Id.* Where a commander has "*de jure* authority," it is "*prima facie* evidence of effective control," which may be rebutted only with sufficient proof of its lack. *Id.* (relying on *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment on Appeal (Feb. 20, 2001)); *see also id.* at 1299 (Barlett, J. concurring) ("[C]ase law consistently asserts that commanders with executive responsibility who know or should know of a pattern or practice of abuse face a high presumption of liability . . . .").

The threshold to rebut the presumption of effective control by a *de jure* commander like Defendants is high. *See Yamashita* at 32–33 (Murphy, J., dissenting) (arguing that the Supreme Court majority reached its decision in spite of extensive evidence that defendant lacked actual ability to control the offending troops). That is in part because "the degree of 'effective control' needed to apply the doctrine of command responsibility is flexible. Not only does it encompass *de facto* as well as *de jure* powers, it also extends to situations where the commander has less than absolute power," "has a degree of 'influence' not amounting to 'formal powers of command,'" or shares responsibilities of command with others. *See Doe v. Qi*, 349 F. Supp. 2d 1258, 1331–32 & n.47 (N.D. Cal. 2004) (holding

[13] There is no need to demonstrate that a commander with control exercised that authority to direct or otherwise further the misconduct. *See infra* Section B.3.

liable defendants who participated in governing bodies supervising the complained-of conduct or played a policy-making or supervisory role in related policies and practices); *see also Ford* at 1290–91 (defining "effective control over a subordinate" as "a material ability to prevent or punish criminal conduct, *however that control is exercised*") (emphasis added) (quoting *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment on Appeal ¶ 256 (Feb. 20, 2001)); *Drummond*, 782 F.3d at 610 (articulating equivalent standard).

For the same reasons, Defendants cannot escape liability under the TVPA by virtue of their civilian – rather than military – status.[14] "There is extensive support from international law and in the text, legislative history, and jurisprudence of the TVPA for civilian liability under the command responsibility doctrine." *Drummond*, 782 F.3d at 609–10 (emphasizing that even a corporate officer of a private entity might be liable under the TVPA if possessing effective control over a perpetrator); *see also Qi*, 349 F. Supp. 2d at 1331 (finding that the text and legislative history of the TVPA, as well as corresponding international jurisprudence, "appl[y] the doctrine of commander responsibility to civilian

[14] No U.S. case law supports imposing a different standard of liability or proof because Defendants' authority arose in the civilian – rather than the military – hierarchy. Nor is there authority for the proposition that a different knowledge requirement might apply. *See infra* note 21 and associated text. Indeed, such a requirement would be antithetical to the predicate underlying command responsibility: that superiors with the authority to control subordinate behavior so as to keep it within the bounds imposed by the laws of war must actually do so.

superiors as well as military commanders").[15] Because the goal of imposing command responsibility liability is to encourage those capable of restraining improper use of armed force to do so, individuals with such authority, regardless of its precise nature or manifestation, may not with impunity neglect using that power to protect civilians from military brutality.[16]

The positions of President and Minister of Defense carry with them enormous power over the Bolivian military[17] and are of the type previously held

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[15] It is likewise clear that liability can arise in the absence of a formal declaration of war. *See Ford* at 1283; *see also Drummond*, 782 F.3d at 609–10; *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) ("United States has moved toward recognizing similar 'command responsibility' for torture that occurs in peacetime, perhaps because the goal of international law regarding the treatment of non-combatants in wartime—to protect civilian populations and prisoners . . . from brutality, is similar to the goal of international human-rights law.") (quoting *Yamashita* at 15).

[16] *See, e.g.*, *Qi*, 349 F. Supp. 2d at 1331–32 (superior-subordinate relationship established where one defendant had "power not only to formulate all important provincial policies and policy decision, but also to supervise, direct and lead the executive branch of the city government, which include[d]" a bureau housing the offending military forces, and another defendant "served on general governance bodies that supervised the policies" at issue, even though that responsibility was "shared collectively with others"); S. REP. 102-249 at 8–9 (1991) (citing with approval *Forti v. Suarez–Mason*, 672 F. Supp. 1531, 1537–38 (N.D. Cal. 1987) (denying defendant-commander's motion to dismiss where he "held the highest position of authority" and "authorized, approved, directed and ratified" brutal conduct by military and police).

[17] The President of Bolivia serves as the Captain General of the Armed Forces, with formal command over the Bolivian military. *See* 1967 Bolivian Const., arts. 97, 210; Fundamental Law of The National Armed Forces "Commanders of Bolivian Independence" No. 1405 (the "**Organic Law**"), arts. 8, 18 (1992). The Bolivian Minster of Defense is granted *de jure* authority over military planning and

subject to liability under the command responsibility doctrine. *See Qi*, 349 F. Supp. 2d 1331 (holding defendants with positions of (i) Mayor of Beijing and (ii) Deputy Mayor, Member of the City Council, and Deputy Provincial Governor, but no military titles, liable); *Yousuf v. Samantar*, 2012 WL 3730617, at *11–12 (E.D. Va. Aug. 28, 2012) (First Vice President and Minister of Defense liable as persons "with higher authority"); *see also Ford* at 1288–94 (accepting that defendants, former Salvadoran Ministers of Defense, could have been held liable under the doctrine of command responsibility). There is no suggestion in the record that Defendants were at any point prevented from exercising the authorities and controls to which they were entitled by virtue of their *de jure* positions. Indeed, Plaintiffs presented abundant additional evidence that Defendants both possessed and actually exercised authority capable of preventing or punishing the complained-of killings.[18]

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organization. *See* Organic Law, art. 22 (empowering the Minister of Defense to, *inter alia*, "plan, organize, direct and supervise Civil Defense in the National Territory" and to participate in the preparation of a plan for war); *see also id.* art. 25 (charging the Minister of Defense with responsibility over the territorial military organization).

[18] *See* Appellants' Br. at 6 (describing Defendant Lozada's authorizing the use of military force against "subversive elements" that were in reality unarmed civilians); *id*. at 16 (noting that "[i]n September 2003, Lozada directed the military to 'mobilize and immediately use the force necessary to restore public order and respect for the rule of law in the region' in response to demonstrations") (citations omitted); *id.* at 16–17 (describing Defendant Berzain as "declaring his authority over the military deployed" in Sorata and "dictat[ing] a letter to [Defendant]

2. Commanders cannot escape liability through purported ignorance if they should have known of their subordinates' crimes

As this Court has acknowledged, a defendant commander may be liable not only when he had actual knowledge of a crime, but also when he "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." *Ford* at 1288; *see also, e.g.*, *Drummond*, 782 F.3d at 609–10 (recognizing the "should have known" standard as equally applicable to civilian superiors); *Hilao*, 103 F.3d at 777 (commanders liable "if they knew, or had information which should have enabled them to conclude in the circumstances at the time" that the predicate crime was taking place) (quoting Protocol I to the Geneva Conventions of Aug. 12, 1949, *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1391, 1429 (1977)); *Qi*, 349 F. Supp. 2d at 1333 n.48 (noting that the "should have known" standard has been accepted in the criminal context, such that "at least as broad a standard should apply in the context of establishing civil liability" and referencing *Ford*).

Lozada's chief of staff that Berzain insisted was necessary to order the movement of the armed forces") (citations omitted); *id*. at 17 (identifying a Supreme Decree issued by Defendants, which authorized the military to continue operations and for Berzain's ministry to "establish the mechanisms necessary for execution" of military operations weeks after the first innocent civilian deaths were reported) (citations omitted). Further, Defendants themselves appear to have acknowledged that Defendant Lozada's high-level orders were carried out by lower-level commanders. Defs.' Suppl. Mem. in Supp. Mot. J. at 13, *Mamani v. Bustamante*, No. 08-CV-21063-JIC (S.D. Fla. Apr. 11, 2018), ECF No. 475.

Congress expressly clarified that it did not intend for courts to require actual knowledge for liability to attach under the TVPA when it enacted the statute. *See* S. REP. 102-249, at 8–9 (1991) (citing with approval conviction of a general in *Yamashita* for the crimes committed by his officers "when he knew or should have known that they were going on but failed to punish them"). This is also the standard adopted under international law, *see Ford* at 1289 & n.7 (citing statutes of the International Criminal Tribunals for Former Yugoslavia and Rwanda),[19] and reflected in U.S. military jurisprudence regarding commander responsibilities, *see, e.g.*, *Cooke v. Orser*, 12 M.J. 335, 354 & n.5 (C.M.A. 1982) (Everett, C.J., concurring) ("At some point, a commander must be charged with notice of facts whereof reasonable persons would anticipate that he should have known, regardless of the actual circumstances.").[20]

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[19] *See also, e.g.*, *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment ¶ 383 (Nov. 16, 1998) ("[U]nder customary international law as it existed when the offenses occurred, the necessary *mens rea* exists where [the superior] (1) had actual knowledge . . . or (2) possessed information that at the least would put him on notice of the risk of such offenses by indicating the need for additional investigation to determine whether crimes had been or were about to be committed.").

[20] That commanders must be charged with the obligation to learn of conduct "committed by subordinate members of the armed forces or other persons subject to their control" has also been enshrined in U.S. military codes. *See, e.g.*, FM 27-10 U.S. ARMY FIELD MANUAL, *The Law of Land Warfare*, Section II.501 (July 1956) ("The commander is also responsible if he has actual knowledge, *or should have knowledge, through reports received by him or through other means*, that troops or other persons subject to his control are about to commit or have

Imposing liability on commanders in circumstances where they should have known that a crime had or would take place is critical to the effectiveness of the command responsibility doctrine as a means of ensuring that commanders do not "neglect to take reasonable measures" to protect civilians. *Yamashita* at 15.[21] If commanders could turn a blind eye to circumstances likely to result in civilian harm and then hide from liability behind a lack of actual knowledge, the Supreme Court's clear edict against such impunity, now recognized as customary international law, would become meaningless. *See id.*

Knowledge may be imputed to commanders where "crimes are notorious, numerous and widespread" or "pervasive." S. REP. 102-249, at 9 & n.18. For instance, if a court determines that civilians were being harmed in violation of laws governing armed conflict and that Defendants received reports of such violence or otherwise should have been aware of the crimes at issue due to widespread

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committed a war crime . . .") (emphasis added); Army Reg. 600-20, ch. 1-5.d.2.-.3 (requiring commanding officers to inspect conduct of personas placed under their command and to guard against, suppress, and correct any improper practices).

[21] Defendants previously argued that civilian commanders should be subject to a higher knowledge requirement. *See Mamani v. Berzain*, 825 F.3d 1304, 1312 n.4 (11th Cir. 2016). *Amici* are aware of no support for this proposition in U.S. jurisprudence. *See, e.g.*, *Drummond*, 782 F.3d at 609–10 (stressing that this Circuit recognizes no difference between civilian and military commanders so long as the requisite authority and control are established); *see also Qi*, 349 F. Supp. 2d at 1333 n.48 (expressly declining to recognize the Rome Statute's heightened knowledge standard as applicable to command responsibility liability under the TVPA and emphasizing that civil liability is broader than criminal).

reporting, the knowledge element is satisfied. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 172–73 (D. Mass. 1995) (defendant may be deemed to have been aware of widespread acts of brutality where publicly confronted and the course of conduct continued in spite of public outcry); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 17 (D.D.C. 1998) ("course of indiscriminate brutality, known to result in deaths" sufficient to establish requisite knowledge such that TVPA liability for extrajudicial killings could attach via command responsibility doctrine); *Qi*, 349 F. Supp. 2d at 1332–33 (knowledge element of command responsibility satisfied where "patterns of repression and abuse were widespread, pervasive, and widely reported").

Here, there can be no serious debate as to whether the knowledge element was met. There was ample evidence that Defendants were on notice that civilian deaths were likely given orders they were issuing. *See, e.g.*, Appellants' Br. at 45–47 (describing how Defendants rejected peaceful negotiations and instead instructed the military to launch the "Republic Plan" that instructed soldiers to apply the "Principles of Mass and Shock" to control public demonstrations). It is not materially in dispute that a large number of unarmed civilians were killed or otherwise harmed by Bolivian troops, and that Defendants were well aware of this fact in real time. *See Mamani*, 825 F.3d at 1306 ("[Military] operations from September and October 2003 . . . killed 58 civilians and injured over 400."); *see*

also, e.g., Order Den. Defs.' Joint Mot. for Summ. J. at 13–14, 51 *Mamani v. Berzain*, No. 08-CV-21063-JIC (D. Fla. Feb. 14, 2018), ECF No. 382 (describing Defendant Berzain as playing a "hands-on role" in the events of September with Defendant "Lozada's authorization," as well as Defendants' early October meetings with military officers and civilian leaders to discuss civilian deaths); *see also*, *e.g.*, Appellants' Br. at 17–18 (describing Defendants' receipt of "personal reports of civilian casualties," "widespread media accounts of the deaths," and public demonstrations in response to the killings). That is enough.[22]

3. Commanders need not have been involved in the commission of their subordinates' crimes to be liable

Finally, as this Court made clear in *Ford*, where the authority and knowledge requirements are met, the failure to prevent or punish the unlawful acts of individuals under his or her authority "makes a commander liable for acts of his subordinates, *even where the commander did not order those acts*." *Ford* at 1286

[22] Plaintiffs were not required to show that Defendants knew about any specific killings or the identity of a specific perpetrator subject to Defendants' authority, but only that they had information that would put them on notice of such crimes (such as the types of reports from other officials or the media that Defendants clearly had). *See Hilao*, 103 F.3d at 776–80 (plaintiffs not required to prove that former president of the Philippines was aware of each individual act of violence or victim in a class action lawsuit); *see also Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment on Appeal ¶¶ 230, 236–38 (Feb. 20, 2001) (affirming that the information received "need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.").

(emphasis added); *see also id.* at 1286 & n.2 ("[A] higher official need not have personally performed or ordered the abuses in order to be held liable [under the TVPA]. Under international law, responsibility for [the predicate crime] 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.") (quoting S. REP. 102-249, at 9 (1991)). This is the central principle that ensures commanders exercise their authority to restrain violations of the laws of armed conflict. *See Yamashita* at 14–15 (commanders may not "with impunity" neglect to do so).

Another way of articulating this principle, which the district court appears to have ignored, is that a showing of proximate cause between a commander's conduct and the predicate crime is not required for command responsibility liability to attach. *See, e.g.*, *Hilao*, 103 F.3d at 779; *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009) ("The law of command responsibility does not require proof that a commander's behavior proximately caused the victim's injuries."). As this Circuit's Judge Barkett emphasized in his concurrence in *Ford*, "the concept of proximate cause is not relevant to the assignment of liability under the command responsibility doctrine [because] the doctrine does not require a *direct* causal link between a plaintiff victim's injuries and the acts or omissions of a commander."

Ford at 1298 (emphasis in original).[23] This is because conduct that renders a commander culpable under the doctrine is a failure to exercise the responsibilities of that command in a manner that prevents or punishes brutalities against civilians. *See further supra* Section A (discussing principles underlying command responsibility doctrine).

The district court appears to have misread *Mamani I*, in which a panel of this Court questioned how "these defendants" could be held liable absent "facts connecting what these defendants personally did to the particular alleged wrongs." *Mamani I* at 1154–55 & n.8 (emphasis in original). But that discussion arose at the pleading stage and while addressing a different statute.[24] Indeed, neither command responsibility nor *Ford* were mentioned in that decision. Nevertheless, the district court appears to have misinterpreted that discussion as requiring Plaintiffs to prove that Defendants personally formed a plan to kill civilians. *See Mamani II* at *9.[25]

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[23] The majority held this issue to have been waived in the specific circumstances of the case. *See Ford* at 1294.

[24] The Eleventh Circuit has recognized that "neither Congress nor the Supreme Court has urged us to read the TVPA as narrowly as we have been directed to read the Alien Tort Act[, which was at issue in the district court judgment reviewed in *Mamani I*] generally." *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1252 (11th Cir. 2005); *see also Mamani I* at 1154 (quoting same).

[25] Notably, this Court expressly held that Plaintiffs' complaint "include[d] factual allegations that seem consistent with ATS liability for extrajudicial killing for *someone*: for example, the shooters." *Mamani I* at 1155 n.8 (emphasis added). Under the command responsibility doctrine, Defendants' liability for those

That reading would extinguish the command responsibility doctrine as a means of holding leaders accountable for failures of command. It would displace this independent and well-established theory of liability in favor of something resembling the type of direct or conspiracy liability for the predicate crime rejected by the Supreme Court in *Yamashita*.

The record before this Court clearly indicates that Defendants, who knew from the outset about the civilian killings being perpetrated by the Bolivian military, *see supra* note 22 and associated text, at minimum failed to take "reasonable measures" to prevent further brutalities. *Cf. Yamashita* at 14–15. Under entrenched Supreme Court precedent, this Circuit's own rulings, and established international law expressly cited in the TVPA's legislative history, that is sufficient. And Plaintiffs presented the jury with far more evidence that Defendants not only failed to prevent or punish military abuse, but may have purposefully ordered those crimes.[26] This Court should therefore make clear that

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shootings depends on the *Ford* elements – which were not discussed in *Mamani I* and which Plaintiffs established at trial.

[26] The jury was presented with several witnesses who attested that Bolivian soldiers were, in fact, *under orders* to shoot civilians – orders that ultimately emanated from military commanders reporting to, and under the direction of, Defendants. For example, Edwin Aguilar Vargas testified that he was ordered to "shoot anything that moved" in Warisata on September 20, 2003, despite never seeing an armed civilian, and that similar instructions to shoot at civilians with lethal munitions were given again three weeks later, on October 12, 2003 in Senkata. *See* Opp. to Defs.' Mot. J. at 3, *Mamani v. Bustamante*, No. 08-CV-

Defendants are at minimum subject to liability under the command responsibility doctrine.

CONCLUSION

For all the reasons stated above, *Amici* respectfully submit that the district court erred by addressing Defendants' potential liability in a manner that contravenes this Circuit's command responsibility jurisprudence. Command responsibility is the essence of command itself. Here, Defendants failed in their duty as commanders. Indeed, the record shows they purposefully did far worse.

Amici thus request that this Court reverse the district court's decision and, in so doing, give careful consideration to the important goals underpinning the command responsibility doctrine and reaffirm its continued relevance in this Circuit.

21063-JIC (D. Fla. Apr. 26, 2018), ECF No. 484 (quoting Aguilar Dep. Tr.). Similarly, Jorge Limber Flores Limachi testified that the military was under orders to assault and kill civilians in the October incidents in the Animas Valley, and Ovejuyo, where they were likewise unarmed. *See id.* at 9 (quoting Jorge Limber Flores Limachi 3/12/18 Tr.). The jury also heard testimony from Ela Trinidad Ortega who witnessed a superior shoot and kill a soldier for disobeying his orders to shoot civilians and that soldiers explicitly told her that the military had orders to kill civilians. *Id.* at 25 (quoting Ela Trinidad Ortega 3/13/2018 Tr.). In fact, the record shows that the military did not act absent orders authorized by Defendants. *See, e.g.*, Appellants' Br. at 17 (describing how in October 2003 Defendant Berzain "personally composed the letter signed by Lozada that he stressed was 'very important, because the military were not going to move' without it") (citation omitted); *see also supra* note 18.

Dated: October 12, 2018

Respectfully submitted,

/s/ Alexandra V. Filippova

Alexandra V. Filippova
sasha.filippova@shearman.com
Mark Lanpher
mark.lanpher@shearman.com
SHEARMAN & STERLING LLP
401 9th Street, NW, Suite 800
Washington, DC 20004
(202) 508-8000 (telephone)

Daniel McLaughlin
dmclaughlin@cja.org
CENTER FOR JUSTICE & ACCOUNTABILITY
One Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444 (telephone)

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that the attached brief filed on behalf of *Amici Curiae* Retired U.S. Military Commanders And Law of War Scholars in Support of Plaintiff-Appellants and Reversal, is proportionately spaced, has a typeface of 14 points or more, and contains 6,422 words.

Dated: October 12, 2018

Respectfully submitted,

/s/ Alexandra V. Filippova

Alexandra V. Filippova
sasha.filippova@shearman.com
Mark Lanpher
mark.lanpher@shearman.com
SHEARMAN & STERLING LLP
401 9th Street, NW, Suite 800
Washington, DC 20004
(202) 508-8000 (telephone)

Daniel McLaughlin
dmclaughlin@cja.org
CENTER FOR JUSTICE & ACCOUNTABILITY
One Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444 (telephone)

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system.

Dated: October 12, 2018

Respectfully submitted,

/s/ Alexandra V. Filippova

Alexandra V. Filippova
sasha.filippova@shearman.com
Mark Lanpher
mark.lanpher@shearman.com
SHEARMAN & STERLING LLP
401 9th Street, NW, Suite 800
Washington, DC 20004
(202) 508-8000 (telephone)

Daniel McLaughlin
dmclaughlin@cja.org
CENTER FOR JUSTICE & ACCOUNTABILITY
One Hallidie Plaza, Suite 406
San Francisco, CA 94102
(415) 544-0444 (telephone)

Counsel for *Amici Curiae*