No. 14-15128

IN THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ELOY ROJAS MAMANI, ET AL.,
Plaintiffs and Appellees
v.

JOSE CARLOS SÁNCHEZ BERZAÍN AND GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMENTE,
Defendants and Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
THE HON. JAMES I. COHN
CASE NOS. 07-CV-22459 & 08-CV-21063

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Counsel for Plaintiffs-Appellees certifies that all parties to this appeal are natural persons, and thus no entity owns 10% or more of the stock of any party. Pursuant to 11th Cir. R. 26.1-1, the following persons have or may have an interest in the outcome of this case or appeal:

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STATEMENT REGARDING ORAL ARGUMENT

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

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STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§1331, 1332, and 1350. After denying in relevant part Defendants-Appellants' (collectively, "Defendants") motion to dismiss, the District Court granted Defendants' petition for certification for interlocutory appeal under 28 U.S.C. §1292(b). Pursuant to 28 U.S.C. §1292(b), a motions panel of this Court certified one issue for appeal: whether the District Court properly denied Defendants' motion to dismiss the claims of the Plaintiffs-Appellees (collectively, "Plaintiffs") under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 note, for failure to exhaust remedies in their home country. The motions panel left it to a merits panel of this Court to decide whether to address an additional issue on which Defendants petitioned for interlocutory review under 28 U.S.C. §1292(b): whether Plaintiffs adequately alleged that Defendants are liable under the doctrine of command responsibility.

STATEMENT OF THE ISSUES

1. Section 2(b) of the TVPA 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." 28 U.S.C. §1350 note. The issue in this appeal is whether Section 2(b) precludes TVPA claims by plaintiffs who received humanitarian assistance payments from the government of the country where the alleged abuses occurred, despite the lack of

any provision for preclusion in the text of the TVPA, when the individuals responsible for the violations have sought safe haven in the United States and cannot be held liable in their home country, and the programs establishing the payments neither released those individuals from liability nor waived Plaintiffs' right to seek compensation from them through other available means.

2. A. Whether this Court should decline to review the District Court's holding that the Second Amended Consolidated Complaint (hereinafter "Complaint") states a claim that Defendants can be held liable under the doctrine of command responsibility for the unlawful killings of Plaintiffs' family members, given that resolution of this issue involves the application of settled law to disputed facts thus rendering the issue an inappropriate subject for interlocutory review.

B. If the Court chooses to address command responsibility issues, whether the Complaint states a claim that Defendants bear command responsibility for the extrajudicial killings of Plaintiffs' family members.

STATEMENT OF THE CASE

A. Introduction

The Complaint in this case alleges that Defendants Gonzalo Sánchez de Lozada ("Lozada"), the former President of Bolivia, and José Carlos Sánchez Berzaín ("Berzaín"), the former Minister of Defense, came to power in Bolivia in 2002 with a pre-conceived plan to use military force to kill thousands of civilians

to quash public opposition to their economic programs. As a result of Defendants' plan, in 2003, soldiers acting under their command intentionally fired at unarmed civilians, killing 58 and injuring hundreds more. Plaintiffs are the relatives of eight of the deceased. They sued the Defendants in the United States because the Defendants fled Bolivia to avoid accountability there for their wrongs and sought refuge in the United States. Plaintiffs' suit arises under Section 2(a) of the TVPA, which establishes civil liability in U.S. courts for individuals who committed acts of extrajudicial killings.

Defendants argued to the District Court, and now on interlocutory review before this Court, that humanitarian assistance payments that Plaintiffs received from the Bolivian government have preclusive effect under Section 2(b) and therefore bar Plaintiffs' Section 2(a) claim, notwithstanding that the text of the TVPA makes no provision for preclusion; Defendants have sought safe haven in the United States and cannot be held liable in Bolivia; and the programs establishing the humanitarian assistance did not release Defendants from liability or waive Plaintiffs' rights. Defendants are profoundly mistaken. In light of the text and purpose of the TVPA and general principles of comity to foreign governments and exhaustion of remedies, Plaintiffs' TVPA claim is not precluded. As the District Court correctly stated in rejecting Defendants' preclusion argument, "[i]t would be absurd to conclude that the Defendants could avoid liability for their

alleged wrongs merely because the Bolivian government saw fit to render some humanitarian assistance to the Plaintiffs." R.203-29.

In accepting interlocutory review of the preclusion question, the motions panel of this Court left it to the merits panel to decide whether to review the District Court's ruling that the Complaint plausibly alleges that Defendants bear command responsibility for extrajudicial killings by their troops. This Court should decline to review that ruling because Defendants' challenge to it is not based on questions of law, but rather on contesting the facts alleged, and thus is an inappropriate subject for interlocutory appeal. If this Court chooses to address the issue, it should affirm because the Complaint contains factual allegations that satisfy the well-settled command responsibility doctrine adopted by this Court in *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289-93 (11th Cir. 2002).

B. Factual Background

This brief's recitation of the factual background of the case is largely drawn from the fact section of the District Court order that is the subject of interlocutory review here, R.203-3 to R.203-11, which the District Court, in turn, "derived from the non-conclusory factual allegations in the Complaint, . . . accept[ed] as true" for the purposes of the resolution of Defendants' Motion to Dismiss. R.203-3 n.2. Additional factual background is drawn from the allegations in the Complaint itself.

Shortly before taking office as President (Defendant Lozada) and Defense Minister (Defendant Berzaín) of Bolivia in August 2002, Defendants discussed how prior Bolivian governments had relented when faced with widespread civilian protests against unpopular economic proposals. R.203-3 to R.203-4. Defendants explicitly agreed in advance to use massive military force against civilians, not to combat an armed insurgency, but rather as an unlawful means to deter opposition to their policies, and they also agreed that they would need to kill as many as 3,000 people to quash protests. R.203-4 to R.203-5.

Once in office, Defendants adopted military regulations that authorized the use of "Principles of Mass and Shock" against civilian protesters, which include the "application of maximum combat force . . . to obtain superiority over the enemy." R.203-5 n.6. Defendants designated civilian protests as subversion, labeled protesters the "enemy," and authorized the military to attack protesters as if they were enemy combatants. R.174, ¶¶37, 38, 40.

When protests began in January 2003, Defendants responded with military combat force, leading to dozens of deaths and hundreds of injuries. R.203-5 to R.203-6. Over the ensuing months, numerous people warned Defendants that this use of military force would lead to civilian deaths and a "massacre." R.203-6. Defendants refused to change course, however, and continued to debate whether it would be necessary to kill hundreds or thousands of civilians to quell popular

protests. *Id*. As they had discussed before taking office, Defendants transferred troops from across the country who they thought would be more willing to kill civilians, R.174, ¶¶30, 97.

In early September 2003, in response to hunger strikes, marches, and other peaceful protests, Berzaín set up a "war room" and the army declared a "Red Alert," the equivalent of a state of war against enemy combatants. R.203-6 to R.203-7. At that time, and throughout the period of the killings that followed, Defendants repeatedly and purposely mislabeled peaceful civilian protesters as armed insurgents as pretext to use military force against them. R.203-7 to R.203-9; R.203-11 to R.203-12.

On September 20, 2003, the first killing at issue in this lawsuit occurred. Defendants were personally involved in supervising and implementing the military operations that led to the killings and were in telephone contact with each other. R.203-7 to R.203-8. During an operation ostensibly aimed at clearing roadblocks and escorting foreigners, the military repeatedly used combat force, shooting at villagers in their homes and fields and as they attempted to run for safety. R.203-7. After speaking to Berzaín, Lozada gave an order "to take" Warisata, a small Bolivian town. R.174, ¶71. Defendants knew that there was no guerilla group or armed insurrection in Warisata or anywhere else in Bolivia, *id*. at ¶¶41, 52, 72, 84, but they claimed falsely that a "guerrilla group" had attacked security forces, *id*. at

¶¶72, 84. In Warisata, an officer gave the order to shoot "at anything that moved." R.203-8. Shortly afterward, and as part of Defendants' military operation, eight-year-old Marlene Nancy Rojas Ramos, the daughter of Plaintiffs Eloy and Etelvina Ramos Mamani, was killed by a military sharpshooter as she looked out a window in her home, far from the site of any protests. *Id.*

Lozada took full responsibility for the military's actions that day and falsely blamed the violence on "subversives." R.203-8. The killings were widely reported in the Bolivian media and were criticized by the Vice President at a Cabinet meeting that evening. R.174, ¶¶80-83. Defendants' response was not to stop or investigate the killings, but to craft a media strategy to counter public outrage. *Id*. at ¶81. Defendants also expanded the military operation, falsely claiming that it was justified by an armed insurrection. *Id*. at ¶¶78-80.

Over the next few weeks, Defendants rebuffed repeated efforts by colleagues and community leaders who sought a peaceful resolution and expressed concern about civilian bloodshed. R.203-8 to R.203-9. Instead, Defendants expanded military combat operations against civilians and repeated the knowingly false claim that they were fighting subversion. *Id*. As a result, dozens more civilians were killed between September 20 and October 11. R.174, ¶¶87-102.

On October 12, dozens of additional civilians were killed in El Alto when military officers operating under Defendants' command ordered soldiers to shoot

civilians and sharpshooters targeted civilians in residential neighborhoods without justification. R.203-9. Four of Plaintiffs' relatives were killed by the military on that day, none of whom was involved in demonstrations or posed any threat to the military. *Id*. The Defendants stated that the armed forces were acting under their control and falsely blamed the violence on "subversive delinquents." R.174, ¶¶125-127. The following day, military units south of La Paz were ordered to "shoot at any head that you see." R.203-10. Berzaín was personally present and issuing orders while soldiers fired at people cowering for cover or trying to flee. R.203-10 to R.203-11. Three of Plaintiffs' relatives were among the seven civilians killed by the military on that day. R.203-11. Top government officials again criticized the mounting civilian death toll. *Id*. A million people joined peaceful marches in Bolivia to protest the killings. R.174, ¶152. Defendants were unmoved, however, and they vowed to maintain their policies and commended the military for following Defendants' orders. R.203-11 to R.203-12.

On October 17, after the U.S. Embassy withdrew its support for their government, Defendants resigned from office and fled to the United States, where they have remained since. R.203-12. Defendants have refused to return to Bolivia to stand trial. R.203-27 to R.203-28.

The Bolivian government indicted Defendants and fifteen other high-level government officials for the civilian deaths and injuries. R.174, ¶169. Bolivia

does not permit trials in absentia, however. *Id*. at ¶171. The criminal defendants who remained in Bolivia were convicted for the crime of mass murder. *Id*. at ¶170.

In 2003, Plaintiffs received humanitarian assistance through a Bolivian government program that was established for the families of those killed by the military. By its terms, this program did not release Defendants from liability or waive Plaintiffs' rights to pursue other remedies against Defendants. R.203-25 n.17.

C. Procedural History

Plaintiffs sued Defendants in 2007, asserting claims under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, the TVPA, and state law. R.77. In 2008, the Bolivian government waived any immunity that Defendants might claim, and the U.S. government accepted that waiver. *Mamani v. Sanchez-Berzain,* 654 F.3d 1148, 1151 n.4 (11th Cir. 2011).

In 2009, the District Court (per then-district court Judge Jordan) dismissed without prejudice Plaintiffs' TVPA claims on the ground that Plaintiffs had failed to exhaust newly-available, additional humanitarian assistance provided by a 2008 Bolivian statute known as Law Number 3955. *Mamani v. Sanchez-Berzain*, 636 F. Supp. 2d 1326, 1332-33 (S.D. Fla. 2009). Like the 2003 humanitarian assistance program, Law Number 3955 neither released Defendants from liability nor waived Plaintiffs' rights to pursue remedies from Defendants. R.203-25 nn.17, 18, R.191-

5.[1] In its 2009, ruling, the District Court declined to decide whether payments to Plaintiffs would preclude Plaintiffs' TVPA claim. 636 F. Supp. 2d at 1333.

In a separate ruling in 2009, the District Court denied in part Defendants' motion to dismiss the ATS and state law claims, ruling that Plaintiffs had made plausible allegations that Defendants bore responsibility for targeted killings. R.135-21 to R.135.40. The District Court also rejected Defendants' argument that they were immune from suit. R.135-19 to R.135-21.

Defendants appealed as of right the denial of their claim to immunity. R.155-2. The District Court then certified additional issues for interlocutory review under 28 U.S.C. §1292(b), R.155-2 to R.155-5, and this Court agreed to decide those issues. 654 F.3d at 1151. In 2011, this Court reversed and held, in pertinent part, that Plaintiffs' complaint failed to allege a sufficient connection between the deaths of their family members and Defendants' actions. *Id*. at 1153.

On remand, the District Court granted Plaintiffs' unopposed motion for leave to amend the complaint, ECF No. 173, and Plaintiffs filed the current operative Complaint. The Complaint includes detailed factual allegations that were not included in the prior complaint and that Plaintiffs assert directly link

[1] The Declaration of Paulino L. Verástegui Palao in Support of Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss Second Amended Complaint is included in Appellees' Supplemental Appendix as R.191-5, filed concurrently.

Defendants to the planning, implementation, and supervision of the extrajudicial killings of Plaintiffs' family members. R.203-31 to R.203-40.

As relevant here, on remand Defendants moved to dismiss Plaintiffs' TVPA claim on that ground that it was precluded by the humanitarian assistance payments Plaintiffs received in satisfying Section 2(b)'s requirement. The District Court (per Judge Cohn) denied the motion, holding that Section 2(b) had no "preclusive effect under the circumstances of this case." R.203-27. Defendants also moved to dismiss for failure to state a TVPA claim. The District Court denied that motion as well, holding that Plaintiffs had plausibly alleged that Defendants were liable for extrajudicial killings in violation of the TVPA. In particular, the District Court ruled that Plaintiffs' allegations gave rise to a "reasonable inference" that military sharpshooters "deliberately" killed each of the decedents and that the deaths constituted extrajudicial killings. R.203-33 to R.203-34. The District Court then applied the doctrine of command responsibility as articulated in *Ford ex rel. Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), and held that the Complaint alleged facts plausibly showing that: (1) as the Bolivian military's highest commanders, Defendants had ultimate authority and effective control over that military, R.203-36 to R.203-37; (2) Defendants had knowledge of the extrajudicial killings, which were part of Defendants' own plan to use lethal force to quell

opposition, R.203-37 to R.207-39; and (3) Defendants failed to prevent the extrajudicial killings or to punish soldiers afterwards. R.203-39 to R.203-40.

The District Court certified two issues for interlocutory appeal under 28 U.S.C. §1292(b): first, "whether receiving any compensation at all from the Bolivian government precludes [Plaintiffs] from holding Defendants liable under the TVPA['s]" exhaustion provision, Section 2(b), R.211-5, and second, "what type of facts are necessary to satisfy the[] . . . elements [of knowledge and failure to prevent or punish] of the command responsibility doctrine," R.211-7. A motions panel of this Court accepted appellate jurisdiction over the TVPA preclusion issue, but deferred to the merits panel whether the Court should reach and resolve the command responsibility question as well. *See* Order Granting Petition for Permission to Appeal, No. 14-90018 (11th Cir. Nov. 13, 2014).

D. Standard of Review

Whether Plaintiffs' claims are precluded by the TVPA's exhaustion provision is a legal question subject to *de novo* review. This Court reviews *de novo* the denial of a motion to dismiss based on claim preclusion. *Aquatherm, Inc. v. Florida Power & Light Co.*, 84 F.3d 1388, 1391 (11th Cir. 1996).

This Court reviews the denial of a motion to dismiss for failure to state a claim *de novo*. *Clark v. Riley*, 595 F.3d 1258, 1264 (11th Cir. 2010). Review is, however, limited to the allegations in the complaint, *Grossman v. Nationsbank*,

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

SUMMARY OF ARGUMENT

I. Section 2(b) of the TVPA requires a claimant to exhaust available remedies in the country in which the conduct giving rise to the claim took place. There is no dispute that Plaintiffs have obtained the only assistance available to them in Bolivia: humanitarian assistance payments from the Bolivian government to the heirs of those killed during the events at issue in this case. These payments do not preclude Plaintiffs' TVPA claim.

The text of the TVPA compels that conclusion. The language of Section 2(b) merely requires exhaustion and thus establishes a procedural hurdle that claimants must overcome before proceeding in U.S. courts – a hurdle that Plaintiffs in this case have indeed overcome. It does not state that a claim will be precluded by the exhaustion of local remedies. Looking then to the rest of the statute for guidance, a finding of preclusion would do violence to the text of the TVPA as a whole. Section 2(a) imposes liability on individual perpetrators. The humanitarian

assistance that Plaintiffs received does not redress the wrongs of Defendants to which Section 2(a) is directed.

Contrary to Defendants' argument, the District Court did not hold (and Plaintiffs are not asserting) that an exhausted remedy is never preclusive unless obtained from the defendants themselves. The District Court simply held that, under the circumstances of this case, the exhaustion of remedies in Bolivia under Section 2(b) did not have any preclusive effect. The circumstances to which the District Court pointed were the facts that Defendants fled Bolivia to avoid accountability for their wrongs, sought refuge in the United States and cannot be held liable in Bolivia, and that the remedies that Plaintiffs exhausted in Bolivia did not preclude Plaintiffs from pursuing other remedies against Defendants.

The District Court's conclusion is amply supported by the legislative history of the TVPA, which shows unequivocally that the statute was aimed at ensuring that individuals would be held accountable for torture and extrajudicial killings they committed and denying perpetrators of such acts a safe haven in the United States. The TVPA's purpose would be undermined if the humanitarian assistance payments that Plaintiffs received were deemed to have extinguished Defendants' liability, thus enabling them to live out their days in U.S. territory without the prospect of ever being held accountable for their wrongdoing.

Likewise, general principles of comity under international law, which call on U.S. courts to respect the acts of foreign States, would be turned on their head if Defendants could escape liability under the TVPA merely because the Bolivian government chose to render humanitarian assistance to Plaintiffs that did not release Defendants from liability or waive Plaintiffs' rights. As the District Court correctly observed, such a turn of events would be patently absurd.

General principles of exhaustion under U.S. law, which are incorporated into the TVPA, do not countenance that outcome either. Those principles teach that the exhaustion of remedies does not invariably lead to preclusion of other remedies, but that would be the upshot of Defendants' interpretation of the TVPA's exhaustion provision.

The adequacy of the humanitarian assistance payments that Plaintiffs received is not before this Court because the District Court did not certify that question for interlocutory review. But even if humanitarian assistance were considered a remedy that, if adequate, would preclude a TVPA suit, Defendants have failed to carry their heavy burden of demonstrating that the payments Plaintiffs received constitute an adequate remedy for the injuries they have suffered.

II. A. This Court should not reach Defendants' argument that the Complaint fails to plausibly plead their command responsibility for the intentional

killings of Plaintiffs' family members, because the law governing command responsibility, which was established over two decades ago by this Court's decision in *Ford*, is well-settled. Defendants merely contest the application of this clear and controlling law to the disputed allegations of this case. Thus, their challenge to the District Court's command responsibility ruling presents only an issue of fact that is not properly raised through a Rule 12(b)(6) motion to dismiss and is not the proper subject of an interlocutory appeal.

B. On review of a motion to dismiss for failure to state a claim, the allegations in the complaint must be accepted as true, and the motion to dismiss denied if the allegations state a claim for relief that is plausible on its face. Under that standard, the Complaint contains plausible allegations that are more than sufficient to show Defendants' command responsibility for the unlawful killings of Plaintiffs' family members.

The Complaint begins with a detailed description of Defendants' plan, even before they took office, to employ massive and unlawful military force to kill thousands of civilians in order to deter political opposition to their economic programs. After months of planning and preparation, Defendants ordered and closely supervised military operations in which hundreds of civilians were shot by military sharpshooters and dozens were intentionally targeted and killed, including Plaintiffs' family members. Defendants were told that civilians had been killed,

and multiple people inside and outside their government implored them to stop the violence against civilians, including warning that a civilian "massacre" was likely. Despite these warnings, Defendants continued apace with their plan to use massive military force against civilians, praised the military, and repeatedly stated that they were responsible for the military's actions. Defendants took no steps to investigate the civilian deaths or to punish any of the military forces engaged in the killings. These allegations are sufficient to support the plausible conclusion that Defendants bear command responsibility for the extrajudicial killings of Plaintiffs' family members because Defendants were the highest military commanders in Bolivia, with effective command over the troops who killed the decedents, knew or should have known that their subordinates had committed and were committing unlawful killings, and failed to prevent the commission of the crimes or punish the perpetrators.

Defendants seek to refute this conclusion by referring to documents outside the Complaint to defeat Plaintiffs' allegations. But on review of a motion to dismiss, the allegations of the Complaint must be taken as true. Moreover, the documents Defendants submitted with their brief that were not incorporated by reference into the Complaint are improper subjects of judicial notice because they do not allege undisputed facts. The documents contain un-sourced hearsay claims that are disputed by the detailed allegations of the Complaint.

Defendants also rely heavily on this Court's earlier decision that a prior complaint in this case did not state a plausible claim for relief. *Mamani v. Sánchez-Berzaín*, 654 F.3d 1148 (11th Cir. 2011). But that decision has no bearing on the assessment of the operative Complaint, which contains extensive, detailed allegations that were not included in the earlier, now-superseded complaint.

ARGUMENT

I. THE HUMANITARIAN ASSISTANCE THAT PLAINTIFFS RECEIVED FROM THE BOLIVIAN GOVERNMENT DOES NOT PRECLUDE THEIR TVPA CLAIM.

Captioned "Exhaustion of Remedies," Section 2(b) of the TVPA 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." 28 U.S.C. §1350 note, §2(b). There is no dispute that Plaintiffs "exhausted . . . available remedies" in Bolivia: they applied for and received payments from the Bolivian government under humanitarian assistance programs that were established for the heirs of persons killed in Bolivia during the events that give rise to Plaintiffs' claims against Defendants. R.203-25.[2] The TVPA issue certified to this Court is whether, having exhausted their available remedies in Bolivia, Plaintiffs are now precluded by Section 2(b) from pursing TVPA claims against Defendants. R.211-5.

[2] Defendants have abandoned their argument that judicial remedies are available to Plaintiffs in Bolivia. *See* AOB at 16 n.4.

The District Court's answer to that question was that Plaintiffs' exhaustion of remedies under Section 2(b) of the TVPA "does not have any preclusive effect under the circumstances of this case . . . ." R.203-27. The text of the TVPA and its legislative history, as well as general principles of comity and exhaustion, confirm that the District Court was correct.

A. The Text and Legislative History of the TVPA Support The District Court's Ruling That Plaintiffs' TVPA Claim Is Not Precluded.

1. The TVPA's Text

Elemental canons of statutory interpretation make clear that, having exhausted their available remedies in Bolivia, Plaintiffs are not precluded by Section 2(b) of the TVPA from pursing claims against Defendants.

First, the text of Section 2(b) refers only to the exhaustion of available and adequate local remedies. It does not speak to whether or under what circumstances the exhaustion of remedies will preclude a TVPA claim. This is hardly surprising because exhaustion and preclusion are distinct concepts in U.S. law. *See Sundar v. INS*, 328 F.3d 1320, 1324 (11th Cir. 2003). Because Section 2(b) is an exhaustion provision, it erects "merely a procedural hurdle" that Plaintiffs had to clear in order to proceed with their TVPA claim. R.203-27. Its text does not support Defendants' transformation of the exhaustion requirement into an automatic preclusion device.

Second, Section 2(b) must be read in conjunction with Section 2(a).[3] Both provisions fall under the caption "Establishment of Civil Action." Section 2(a)'s sub-caption is "Liability." It states that "[a]n *individual* who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages . . . ." 28 U.S.C. §1350 note, §2(a) (emphasis added). As the District Court correctly recognized, by its terms, Section 2(a) seeks "to redress specific individuals' wrongdoings by ensuring that their actions have legal consequences -- to wit, that they literally 'pay the price' for their wrongs." R.203-26. The payments that Plaintiffs received under the Bolivian government's humanitarian assistance programs in satisfaction of Section 2(b)'s exhaustion requirement do not redress the wrongdoings of Defendants. Neither program relieves Defendants of their own liability to pay for their wrongs or waive Plaintiffs' rights to seek redress against Defendants. R.203-25 nn.17-18. Together, Sections 2(a) and 2(b) in no way

[3] *See United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994) ("In interpreting the language of a statute . . . we do not look at one word or one provision in isolation, but rather look to the statutory scheme for clarification and contextual reference."). Defendants' criticism of the District Court for "look[ing] to other provisions of the TVPA to intuit the purpose behind the exhaustion provision" (AOB at 27) ignores the fact that the statute itself says nothing about preclusion: they themselves base their argument on a convoluted reading of the statute as a whole. *Mohammad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), lends no support to Defendants' cause. There, the Supreme Court held that the word "individual" in Section 2(a) of the TVPA connotes suits only against natural persons. *Id*. at 1706. The Court did not state (as Defendants would have it) that the two provisions of the TVPA must be read in isolation.

suggest that exhausting a remedy from a foreign government precludes a TVPA claim against the individuals responsible for the violations, particularly when, as here, that remedy does not involve individual accountability and preserves the claimant's right to pursue a separate civil action against them.

Defendants contend that the District Court erroneously read into the TVPA an "atextual limitation" that the exhaustion of available local remedies does not preclude a TVPA claim unless "the remedies have been obtained from the specific defendant[s]." AOB at 25-26. That distorts the District Court's decision. While correctly observing that the TVPA's goal is "to redress specific individuals' wrongdoings," R.203-26, the District Court held only that Section 2(b) "has no preclusive effect under the circumstances of this case, " R.203-27 – circumstances that include that Defendants have sought safe haven in the United States and cannot be held accountable in Bolivia, and that the programs establishing the humanitarian assistance did not involve individual accountability and neither released from liability the persons responsible for Plaintiffs' injuries nor waived Plaintiffs' right to pursue claims against those individuals. R.203-25 nn.17-18. This Court thus need not decide whether the availability of local assistance under other circumstances would preclude a TVPA claim.[4]

[4] Defendants refer to the principle of statutory construction that "[w]here Congress includes particular language in one section of a section of a statute but omits it in another section of the same Act, it is generally presumed that Congress

2. The TVPA's Legislative History

Given that the text of the TVPA does not specify when, if ever, domestic remedies preclude a TVPA claim, the District Court properly considered the legislative history of the statute, which clearly demonstrates that the exhaustion of remedies under the circumstances of this case does not require preclusion. *See Lindley v. FDIC*, 733 F.3d 1043, 1055 (11th Cir. 2013) (courts may consider legislative history in interpreting an ambiguous law).

As set forth in a critical passage of the Senate Report on the TVPA, the central purpose of the statute was to ensure accountability of individual human rights violators for their actions by preventing the U.S. from becoming a safe haven for them:

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acts intentionally and purposely in the disparate inclusion or exclusion"; from there, Defendants posit that Congress must have intentionally excluded language from Section 2(b) specifying that the remedy be against the individual human rights violator for it to have preclusive effect because Congress included individual liability language in Section 2(a). AOB at 27 (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296 (1983)). Defendants first ignore the fact that Section 2(b) says *nothing* about preclusion. They also ignore that "the [*Russello*] presumption that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection." *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 436, 122 S. Ct. 2226 (2002). Here, the "formulations" in Sections 2(a) and 2(b) are very different. The former speaks to individual liability in a civil action for acts of torture or extrajudicial killing; the latter speaks to the exhaustion of available and adequate local remedies before such an action can be maintained. When the provisions are read together, one cannot presume that Congress intended to render irrelevant to the exhaustion equation whether individual wrongdoers are themselves liable under remedies available in the country in which the wrongs occurred.

> The purpose of this legislation is to provide a Federal cause of action against any *individual* who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing. This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The convention obligates state parties to adopt measures *to ensure that torturers within their territories are held legally accountable for their acts*. This legislation will do precisely that–by *making sure that torturers and death squads will no longer have a safe haven in the United States*.

S. Rep. No. 102-249, at 3 (1991) (emphasis added).

Turning a blind eye to this passage, Defendants contend that the legislative history shows instead that TVPA's "overriding purpose" was simply 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 thus are unwilling (or unable) to provide a means of redress." AOB at 28 (citing S. Rep. No. 102-249, at 3). The language that Defendants quote precedes the critical passage (quoted in full above) stating that the law's objective is to hold individual perpetrators accountable for their acts and make sure that the U.S. does not shield them from liability. In context, Defendants' quote underscores that the statute's goals include providing remedies when a government is "unable" to provide redress to victims because, as here, the perpetrators cannot be held accountable in the country where the abuses occurred.

Defendants also selectively quote comments of certain members of the House of Representatives to suggest that Congress intended to limit the exercise of the TVPA to "*only* where it is necessary to ensure that victims obtain adequate relief." AOB at 30 & n.7 (original emphasis). But no such meaning can be gleaned from those members' words when they are considered in full. Rather, it is plain that each one of them supported the legislation precisely so that "[n]o longer can torturers find safe haven from their crimes in the United States." 134 Cong. Rec. H9692-02, 1988 WL 177020 (1988) (Rep. Fascell); *see also id*. (Rep. Mazzoli stating that victims will "no longer . . . have to stand by helplessly while their torturers enter and leave the jurisdiction of the United States untouched"); *id*. (Rep. Broomfield stating that the bill provides the "last recourse to justice" for those victims whose torturers attempt to seek a "safe haven" in the U.S.).[5]

[5] Defendants' selective presentation of the legislative history also ignores the chorus of other members of Congress who stated that the central purpose of the TVPA is to hold human rights violators responsible for their acts. *See* Hearing and Markup Before the Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations of the House of Representatives, 100th Cong., 2d Sess. on H.R. 1417, at 1 (1988) (Rep. Yatron) ("At least we can insure through H.R. 1417 that in the United States, the individuals who have tortured will be held accountable . . . ."); 134 Cong. Rec. H9692-02, 1988 WL 177020 (1988) (Rep. Rodino) ("this legislation would send a message . . . 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. This approach will help assure that no matter where the official torturer runs, he can not hide."); 135 Cong. Rec. H6423-01, 1989 WL 185279 (1989) (Rep. Fish) ("The torturer who becomes subject to the jurisdiction of our courts must not be shielded."); 137 Cong. Rec. S1369-01 (1991), 1991 WL 9635 (Sen. Kennedy) ("So we have an obligation to

All told, the adoption of Defendants' argument would lead to the very result that the legislative history shows the statute was intended to prevent: the conversion of the United States into a safe haven for human rights violators to avoid accountability for their acts.

Finally, the legislative history reveals no intent on the part of Congress to establish a rule that the exhaustion of available and adequate local remedies necessarily precludes a TVPA claim. Rather, Congress instructed courts to "undertake a case-by-case approach" in determining whether the exhaustion of local remedies precludes a TVPA claim. S. Rep. 102-249, at 10. That is precisely what the District Court did in concluding that, under the particular circumstances of this case, the humanitarian assistance payments that Plaintiffs received from the Bolivian government do not preclude their TVPA claim.[6]

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make our courts accessible . . . to assure that torturers feel the full weight of international law . . . . [I]f other governments follow the same course we are considering today, there will be fewer and fewer places for torturers and death squads to hide.").

[6] As the District Court recognized, the legislative history also shows that Congress intended res judicata principles, not Section 2(b)'s exhaustion requirement, to be the primary device for determining whether a TVPA claim should be precluded. R.203-27 n.19 (citing S. Rep. 102-249, at 10) ("Any concern about a plaintiff using the TVPA to pursue 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."). Res judicata is inapplicable here because there has been no judgment rendered against Defendants.

In sum, in light of the legislative history's clear signal, the District Court was correct to reject Defendants' contention that Plaintiffs' exhaustion of available remedies in Bolivia precludes their TVPA claim, and this Court should too. R.203-26 to R.203-27.

B. Customary International Law Principles Of Comity And Exhaustion Further Demonstrate That Plaintiffs' TVPA Claim Is Not Precluded.

Under international law, the doctrine of exhaustion of local remedies is "grounded in principles of comity." *Castille v. Peoples*, 489 U.S. 346, 349, 109 S. Ct. 1056 (1989). Defendants acknowledge that, together, comity and exhaustion require that "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." AOB at 34 (internal quotation omitted). And, as this Court has recognized, when that State has exercised that opportunity, comity requires respect for the acts taken by the State. *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1305 (11th Cir. 2008).[7]

[7] An article Defendants cite for the proposition that "an individual who has successfully obtained local remedies is precluded from pursuing a claim in international proceedings" (AOB at 34), actually states the opposite. As that article explains, under the International Covenant on Civil and Political Rights ("ICCPR"), "the [Human Rights] Committee shall deal with the matter referred to it only *after* it has ascertained that all available domestic remedies have been invoked and exhausted in the matter." Nsogurua 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, 8 (2003) (citing ICCPR, Dec. 16,

Defendants' position flouts these precepts. Both the 2003 Humanitarian Assistance Program and Law Number 3955 preserved Plaintiffs' right to bring civil claims against Defendants arising out of the events of September and October 2003. *See* R.203-25 nn.17-18; R.191-5 ¶¶10-11.

Defendants ask this Court to depart from the clear intent of both the TVPA and Bolivian law and hold that the payments Plaintiffs have received preclude their TVPA claims. This Court should decline that invitation. As the District Court aptly observed, "[i]t 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." R.203-29. Comity principles simply do not countenance such a result.

1966, 999 UNTS 171, Art. 41(1)(c)) (emphasis added); *accord* 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, 228 (1987); Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 Fordham Int'l L.J. 1245, 1276 (2006). In other words, "after" the human rights victim exhausts "all available domestic remedies," the victim may proceed with her claim; she is not precluded for having obtained anything. The European Convention on the Protection of Human Rights and Fundamental Freedoms contains the same provision. Udombana, at 8 (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, Art. 35(1), 213 UNTS 221, *as amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, 33 ILM 960 (1994)).

Comity principles also require consideration of the fact that "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," R.203-27 – a point that Defendants do not dispute in their brief. The unavailability of the Bolivian judicial system as a forum for redressing Plaintiffs' injuries stems from the principle of Bolivian law that "Defendants must first be criminally convicted in Bolivia before Plaintiffs can bring a civil suit against them in Bolivian court." *Id*. (citing R.191-5, ¶¶6, 16, 19). But Defendants fled Bolivia in 2003 and have no intention of returning to stand trial, and, under Bolivian law, they cannot be prosecuted in absentia. R.191-5 ¶19.[8] The Bolivian government's decision to provide humanitarian assistance payments to Plaintiffs, but without waiving Plaintiffs' rights to pursue other remedies against Defendants, responds to this reality. Principles of comity counsel respect for that decision in this country's courts.

[8] If Defendants ever return to Bolivia and Plaintiffs actually obtain a civil remedy against them in Bolivia, the Bolivian government payments would not be deducted from any eventual recovery because the Bolivian government assistance is not considered compensation under Bolivian law. R.191-5 ¶¶28-29; R.191-7.

C. General Principles Of Exhaustion Under U.S. Law Support The Conclusion That Plaintiffs' Receipt of Humanitarian Assistance From The Bolivian Government Does Not Preclude Their TVPA Claim.

Principles of exhaustion also support the District Court's conclusion that, under the circumstances of this case, Plaintiffs' satisfaction of Section 2(b)'s exhaustion requirement does not preclude their TVPA claim. This is evidenced by the fact that Section 2(b)'s "exhaustion requirement was intended to be analogous to the traditional concept of exhausting administrative remedies" in U.S. law, and it is well-established in U.S. law that exhaustion of such remedies "does not result in a complete bar" to lawsuits. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 660 (2006) (citing S. Rep. 102-249, at 9-10 n.20); *see also Woodford v. Ngo*, 548 U.S. 81, 88-89, 126 S. Ct. 2378 (2006) ("The doctrine [of exhaustion] provides that no one is entitled to judicial relief for a supposed or threatened injury *until* the prescribed administrative remedy has been exhausted.") (emphasis added) (internal quotations and citation omitted); *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57, 385 N.E.2d 560 (1978) (cited in S. Rep. 102-249, at 10 n.21) ("It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies *before* being permitted to litigate in a court of law.") (emphasis added).

Defendants ignore all of this. Instead, they place heavy emphasis on *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981). Their reliance on *Parratt* is misplaced, however. It is true that *Parratt* is cited in the Senate Report on the TVPA, but only because it typifies the "traditional concept of exhausting administrative remedies, *which of course does not result in a complete bar*." Casto, at 660 (citing S. Rep. 102-249, at 9-10 n.20) (emphasis added). The facts and holding of *Parratt* bear this out. *In Parratt*, the plaintiff was a prison inmate who sought to assert claims under 42 U.S.C. §1983 against two prison officials for depriving him of *due process* when his property was seized. 451 U.S. at 543. Nebraska, where the plaintiff was imprisoned, had a tort claims procedure that covered claims such as the plaintiff's, and although this claims procedure "was in existence at the time of the loss here in question," the plaintiff "did not use it." *Id.* *Parratt* held that the plaintiffs' Section 1983 suit was precluded only because there would be *no due process violation* to be addressed in that suit if the plaintiff had availed himself of the state's postseizure procedure. *Id*. at 544 ("Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under §1983, that does not mean that the state remedies are not adequate to *satisfy the requirements of due process*.") (emphasis added).

The Supreme Court subsequently confirmed this reading, explaining that in *Parratt*, "a state employee negligently lost a prisoner's hobby kit; while the Court concluded that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment, it held that all the process due was provided by the State's tort claims procedure." *Zinermon v. Burch*, 494 U.S. 113, 129, 110 S. Ct. 975 (1990) (*citing Parratt*, 451 U.S. at 543-544). In contrast, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148 (1982), the Court held that a Section 1983 action was not precluded because the state claims procedure there did "not vindicate entirely [plaintiff]'s right to be free from discriminatory treatment." *Id*. at 437.

Overall, *Parratt* and *Logan* counsel that the preclusive effect of a state remedy depends on whether the remedy provides full redress for the injury suffered. Here, it does not, under either Bolivian law or the TVPA, because the provision of humanitarian assistance from the Bolivian government did not vindicate Plaintiffs' right to hold accountable the individuals responsible for the deaths of their family members. Their claims may therefore proceed.[9]

[9] The District Court also found parallels between the TVPA and the "collateral-source rule" of U.S. law, which Defendants ignore. The collateral source rule shares a common purpose with the TVPA of "ensur[ing] not only that victims are compensated for their losses, but also that wrongdoers are held accountable for their harmful actions." R.203-29. As the District Court noted, "[u]nder 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

D. Even If The Adequacy Of The Humanitarian Assistance Payments Were At Issue, Defendants Cannot Meet Their Burden To Prove Adequacy.

The District Court recognized that whether the amount of assistance Plaintiffs have received constitutes adequate compensation is a fact-intensive question that is inappropriate for interlocutory review. It thus declined to certify that question. R.211-5.

Undaunted, Defendants ask this Court to take up that question, and make findings of fact that Plaintiffs "have received indisputably adequate, and indeed substantial, compensation for the same losses pursuant to two Bolivian governmental schemes." AOB at 24. Defendants' persistence is puzzling. Even if the adequacy of the payments that Plaintiffs received from the Bolivian government were before this Court, Defendants would lose their argument. That is because the burden of proving the adequacy of local remedies rests with Defendants and it is a "substantial" one, *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005), that Defendants utterly failed to meet. All the Defendants have done is to compare the amounts that were available under the two compensation schemes to the average annual income in Bolivia. AOB at 14, 24. That falls far short of carrying Defendants' burden. Defendants' bald claim that Plaintiffs "have

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liability for damages resulting from his wrongful act." R.203-28 (internal citations omitted). Applying the collateral-source rule here, Plaintiffs' TVPA claim is not precluded.

received indisputably adequate, and indeed substantial compensation" is simply false.[10] In any event, the adequacy of the payments – their sheer monetary value, as well as whether they vindicate the TVPA's aim of ensuring individual accountability – is a question of fact that is very much in dispute.

For one, Defendants ignore that if Plaintiffs prevailed in a civil suit against Defendants in Bolivia, they would be entitled to "moral damages" in addition to compensatory damages. R.191-5, ¶30. Moral damages "would take into account the culpability of the defendants as well as their assets and, as such, is similar to punitive damages in the legal system of the United States." *Id*. Additionally, under "Inter-American Human Rights Court jurisprudence, whose application is mandatory in Bolivia, moral damages contemplate factors such as the circumstances of the case, the seriousness of the violations committed, the suffering occasioned to the victims, the treatment they have received, and the denial of justice, among other principal factors." *Id*. at ¶31. Defendants have not presented any evidence regarding these factors as they relate to any particular Plaintiff. Nor have they presented any evidence of economic damages or pain and suffering for any of the Plaintiffs. Furthermore, any civil award would be *in addition to* the government aid: "[I]f the victims succeed in obtaining a civil

[10] Contrary to Defendants' characterization (AOB at 24), the District Court did not "acknowledge[] that plaintiffs have received substantial compensation." It merely said that "even if arguably 'adequate' compensation for their losses," the payments Plaintiffs received do not preclude their TVPA claim. R.203-30.

judgment against any of those responsible for deaths and injuries in September and October 2003, the payments that the Bolivian government has made to them would not be deducted from this judgment, because those payments constitute humanitarian aid and not reparation for damages caused by the defendants to the victims of the crimes committed in September and October 2003." *Id*. at ¶29. Defendants fail to address this critical point as well.

Finally, as discussed above, even if adequacy were at issue, in addition to the monetary value of what Plaintiffs received, this Court would have to consider whether, under the circumstances of the particular case, the remedy adequately fulfills the purpose of the TVPA. Again, the legislative history is instructive. It explains that the adequacy requirement "ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." H.R. Rep. No. 102–367(I), at 5 (1991). Like the exhaustion provision in general, the adequacy requirement specifically invokes principles of comity. As discussed above, the Bolivian government expressly stated that the compensation scheme to which Plaintiffs availed themselves was just emergency aid. It was not the type of "meaningful remed[y]" intended to redress the harms committed against Plaintiffs by Defendants. Because the assistance did not exonerate

Defendants and preserved Plaintiffs' claims against them, those payments should not be deemed adequate.

II. THIS COURT SHOULD EITHER DECLINE TO REACH OR AFFIRM THE RULING THAT PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS TO STATE A CLAIM THAT DEFENDANTS BEAR COMMAND RESPONSIBILITY FOR THE EXTRAJUDICIAL KILLINGS OF PLAINTIFFS' RELATIVES.

Under this Court's decision in *Ford*, a commander is responsible for the actions of his subordinates when the following three elements are met:

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

Ford, 289 F.3d at 1288; *see also Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006). And under the pleading standard set forth in this Court's prior decision in this case, a complaint states a claim for command responsibility for extrajudicial killings if it contains plausible allegations that the elements of *Ford* are met. 654 F.3d at 1153. The District Court held that the Complaint satisfied that pleading standard. R.203-40.

Defendants concede that the *Ford* doctrine is incorporated into the TVPA. They challenge instead the application of that doctrine to the allegations in the

Complaint. This fact-intensive inquiry is an inappropriate subject for interlocutory review of a denial of a motion to dismiss. Thus, this Court should decline to reach the command responsibility issue. If the Court does address that issue, it should affirm because the Complaint plausibly alleges that Defendants bear command responsibility under *Ford* for the extrajudicial killings of Plaintiffs' relatives.

A. This Court Should Not Reach The Command Responsibility Issue Because it Involves the Application of Settled Law to Contested Facts.

The motions panel that accepted interlocutory review of the TVPA preclusion question in this case left it to the merits panel to determine whether to address the command responsibility question. Order Granting Petition for Permission to Appeal, No. 14-90018 (11th Cir. Nov. 13, 2014). This Court should decline to reach that question for the simple reason that it involves the application of a settled legal standard, the *Ford* command responsibility doctrine that Defendants acknowledge is part of the TVPA, to allegations in the Complaint that Defendants contest. AOB at 38-39. Defendants' challenge to the District Court's command responsibility ruling thus presents "no pure or abstract legal question" for this Court's review; rather, it "is a classic example of a question arising from the application of well-accepted law to the particular facts of a pleading in a specific case," and, as such, is an inappropriate issue for interlocutory review. *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1262 (11th Cir. 2004).

Seeking to dress up its appeal to make it more attractive for interlocutory consideration, Defendants argue that a different command responsibility standard, drawn from the Statute of the International Criminal Court ("ICC"), art. 28, July 17, 1998, 2187 U.N.T.S. 90, rather than *Ford*, applies here because Defendants were not military commanders. AOB at 40-41. This tack gets Defendants nowhere because the Complaint plausibly alleges that Defendants were the "highest commanders of the Bolivian military," R.174, ¶36, and "exercised effective command and operational control over the Armed Forces," *id*. at ¶17; *id*. at ¶¶182, 183 (confirming Defendants' effective command); ICC Statute, art. 28(a) (military commanders include those "effectively acting as a military commander"). Thus, even under the ICC approach, Defendants would be considered military commanders at the pleading stage of this case, in light of the allegations in the Complaint.

Finally, as Defendants note, the ICC Statute imposes liability on non-military superiors if they "consciously disregard" unlawful acts by their subordinates. AOB at 41. The Complaint contains plausible allegations that Defendants did just that. R.174, ¶¶48-50, 81-83, 90, 102, 146-47, 149. Defendants contest those allegations. AOB at 41. But that once again merely highlights the fact-intensive nature of Defendants' challenge to the District Court's ruling regarding their responsibility for the killings at issue here, and further underscores

that the challenge should not be taken up on interlocutory review from a denial of a motion to dismiss.

B. The Complaint Plausibly Alleges That Defendants Bear Command Responsibility For The Extrajudicial Killings Of Plaintiffs' Family Members.

If this Court reaches the command responsibility question, it should affirm because, when the Complaint is viewed as a whole, it contains plausible allegations that Defendants had command responsibility within the meaning of *Ford* for the extrajudicial killings on which Plaintiffs' TVPA claim are based.

Defendants challenge the District Court's rulings with respect to the second and third elements of the *Ford* doctrine: Defendants knew or should have known that their subordinates had committed, were committing, or planned to commit acts in violation of the law of war, and Defendants failed to prevent the commission of the crimes or failed to punish the subordinates after the crimes were committed.[11] As set forth below, Defendants' challenge wrenches snippets of the Complaint out of context and relies extensively on this Court's prior decision dismissing an earlier complaint that has now been superseded. When the current Complaint is viewed as a whole, neither line of attack defeats the plausibility of the allegations that Defendants had command responsibility for the killings.

[11] Defendants do not dispute that the allegations in the Complaint satisfy the first *Ford* factor, the existence of a superior relationship between the commander and the perpetrator of the crime.

Defendants also pin their challenge on several documents that are outside the four corners of the Complaint. Defendants' citation to these documents violates the basic rule of civil procedure that a motion to dismiss must be decided solely by reference to the complaint and the documents incorporated therein. *Financial Security Assurance, Inc. v. Stephens, Inc*, 500 F.3d 1276, 1284 (11th Cir. 2007). The documents in question were exhibits 2, 5, 8, 11, and 12 to Defendants' motion to dismiss, and Defendants have placed them in their Appendix on appeal. *See* R.183-2, R.183-5, R.183-8, R.183-11, and R.183-12.[12] Defendants ask this Court to take judicial notice of the documents. AOB at 3. The District Court denied that request. R.203-12 n.10. This Court should do so as well because the documents are ineligible for judicial notice.

First, "indisputability" of the facts contained in a document "is a prerequisite" for the document to be subject to judicial notice. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). Here, the facts for which Defendants offer the documents are disputed -- indeed, Defendants refer to the documents solely to contest the facts alleged in the Complaint. [13] Second, the documents are

[12] Defendants also cite two other documents, the Manual on the Use of the Force and the Republic Plan, that were exhibits 3 and 4, respectively, to Defendants' motion to dismiss. Those documents were properly before the District Court because they were referenced in the Complaint. R.203-4 to R.203-5 n.5. They thus are properly before this Court.

[13] For example, the Complaint alleges that there were no armed insurgents or guerilla attacks in Bolivia at any relevant time. R.174, ¶¶41, 52, 72, 79, 84, 108,

irrelevant to the issues before this Court, because, at most, they provide an alternative factual narrative, which is wholly inappropriate in a motion to dismiss for failure to state a claim. *See Grossman*, 225 F.3d at 1231. Third, the documents are based on inadmissible hearsay, offer no basis on which to assess the credibility of their sources, and would not be admissible for the truth of the matter stated even at the appropriate procedural stage.[14]

In sum, if this Court decides to review the District Court's denial of Defendants' motion to dismiss on the command responsibility question, it should not consider the five documents that Defendants erroneously claim are subject to judicial notice.[15]

148, 156, 160. Defendants challenge this allegation by citing an un-sourced assertion in one of the documents that the armed forces were confronting "armed insurgents" and faced a "guerilla attack." AOB at 6 (citing R.183-5-12). Indeed, Defendants' own document described the opposition as a "loose, nationwide coalition." R.183-5-12.

[14] Defendants cite *Rich v. Secretary, Florida Dep't of Corrections*, 716 F.3d 525 (11th Cir. 2013), but that case is inapposite because it involved a summary judgment appeal; on summary judgment, evidence outside of the complaint can be considered. Fed. R. Civ. P. 56.

[15] Compounding their error, Defendants mischaracterize the document from outside the Complaint on which they rely most heavily, a 2004 State Department report certifying that the Bolivian military and police were eligible to receive U.S. aid. R.183-5. Defendants fail to mention that the report noted that a subsequent government began investigations into the "events surrounding the loss of life" in September and October 2003; those investigations were still ongoing at the time of the report in 2004. R.183-5-11. The report also recognized that "human rights violations may have occurred in response to large scale unrest" and reaches no conclusions about Defendants' role in such violations. *Id*.

1. The Complaint Plausibly Alleges that Defendants Knew or Should Have Known About the Unlawful Killings of Civilians.

The District Court was correct in concluding that the Complaint plausibly alleges the first *Ford* element of command responsibility, namely that Defendants knew or should have known about the killings in question here. The Complaint contains abundant allegations on this element.

The Complaint also contains sufficient allegations to support a claim of direct command responsibility, a doctrine under which "the commander or superior 'is held liable for ordering unlawful acts.'" Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 Yale J. Int'l L. 89, 99 (2000) (emphasis added) (quoting M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia 345 (1996)); *see also* ICC Statute, art. 25(3). While the *Ford* standard holds commanders liable if they even "knew or should have known" about their subordinates' actions, direct command responsibility applies when the commander actually ordered subordinates to commit unlawful acts. Here, the Complaint plausibly alleges that Defendants ordered or induced their subordinates to commit unlawful killings. R.174, ¶¶65, 71-74, 107, 128, 137. The District Court addressed only the less demanding "knew or should have known" standard of the

Ford command responsibility doctrine, the allegations of which plainly support denial of the motion to dismiss.

a) The Complaint plausibly alleges that Defendants knew of the unlawful killings.

Defendants' knowledge of the unlawful killings at issue here can reasonably be inferred from multiple allegations in the Complaint, including that Defendants agreed in advance on an unlawful plan to kill thousands of civilians, R.174, ¶¶30, 31; "knew and intended" to commit unlawful killings," *id*. at ¶¶7, 51; were told that their plans would lead to a civilian "massacre," *id*. at ¶48; supervised the military operations, *id*. at ¶¶65, 67-68, 71, 99, 106-07, 128, 130, 137; were informed of civilian deaths, *id.* at ¶¶81, 82, 88, 90, 125, 146, 154; repeatedly made the knowingly false claim that the military faced an armed insurgency to justify the use of military combat force, *id.* at ¶¶41, 52, 72, 84, 108, 148, 156, 160; and took responsibility for the civilian killings, *id*. at ¶¶80, 83, 162-63. In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court may draw reasonable inferences from allegations in a complaint to support the conclusion that the allegations plausibly allege an element of a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under that standard, the District Court was correct in concluding that the allegations in the Complaint are sufficient to plead *Ford's* knowledge element. R.203-37 to R.203-38.

Defendants' arguments on this issue are unavailing. First, they point to the absence of an explicit allegation that they were told that "innocent" civilians had been killed "illegally." AOB at 45. But a reasonable inference of knowledge does not require that Defendants were told of unlawful deaths in exactly those words. Rather, their knowledge can be reasonably inferred from allegations referenced above that unlawful civilian killings were the intended result of a plan that they designed, implemented and closely supervised; that they "knew" their plan would result in unlawful civilian deaths; that they were repeatedly warned about the danger of unlawful killings; and that they received regular reports about civilian deaths.

Second, Defendants justify their use of "mass and shock" and "overwhelming combat power" as "a common military strategy," AOB at 44 n.13, but ignore the allegation that they employed those tactics unlawfully to quash civilian opposition to their programs, not as lawful military strategies against enemy combatants. The Complaint alleges that Defendants knew that the military was not engaged in an "armed conflict" that justified military combat operations with collateral civilian casualties,[16] and that they knew that there were no "organized armed groups" operating in Bolivia. R.174, ¶¶41, 52, 72, 84.

[16] An armed conflict involves "resort to armed force *between States* or protracted armed violence between governmental authorities and *organized armed*

Third, Defendants contend the current Complaint is substantially the same as the previous one and suffers from the same pleading defects that led this Court in the first appeal to reverse the District Court's denial of their motion to dismiss. AOB at 45. This contention glosses over dozens of new factual allegations in the Complaint that, as the District Court observed, "cured" the problems this Court identified with the prior complaint. R.203-37 n.24. Particularly weak is Defendants' argument that the current Complaint, like the earlier one, alleges no more than "command responsibility in the context of a modern military operation." AOB at 20, 52. This argument is belied by the allegation, based on Defendants' own conversations, that they planned and intended to unlawfully kill thousands of civilians to suppress opposition to their economic programs. R.174, ¶¶30, 31, 50, 51. As the Complaint further alleges, the purported "modern military operation" was a pretext to unleash unlawful combat force against civilians, with the intent to kill innocent people. Defendants knew that there was no armed opposition that could justify the use of military force. *Id*. at ¶¶41, 52, 72, 84, 108, 148, 156, 160. In short, the Complaint makes clear that the issue is not whether Defendants can be

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groups . . . ." *Prosecutor v. Tadic*, Case No. IT-94-1-I, ¶70 (ICTY App. Chamber Oct. 2, 1995) (emphasis added).

The Complaint refers to a handful of soldiers killed or injured during September and October 2003, under circumstances that indicate that they may have been shot by the military itself. R.174, ¶¶70, 122-23, 135. Even if those shootings were attributed to civilian protesters, that level of violence does not meet the definition of an armed conflict or justify massive combat operations.

held liable for "*high-level decisions* in the context of *a military operation* to restore order *during a period of violent unrest*," AOB at 2 (emphasis added), because the Complaint alleges that Defendants planned the unlawful killings in advance and that their use of military combat force was not in response to "violent unrest."[17]

Fourth, Defendants improperly isolate scattered allegations, rather than considering the Complaint as a whole. For example, Defendants assert that the District Court erred in relying on Defendants' alleged agreement that "thousands of Bolivians would have to die." AOB at 42. Defendants suggest that they were merely "anticipat[ing] that individuals might die" in conflicts with the Armed Forces. *Id.* at 42. But Defendants' use of the passive voice in their brief ("individuals might die") ignores the allegations that they expressly agreed that "they would have to kill" thousands of people "in order to overcome opposition to their plans," and that to facilitate the killings, they agreed to bring troops from an eastern province who would be willing to "kill large numbers of civilians," R.174, at ¶30 – a tactic that they later employed, *id.* at ¶97. Further Defendants' snapshot view of particular strands of the Complaint ignores the allegations that they debated whether hundreds of deaths would be enough, or whether they would need

[17] Plaintiffs do not seek to impose "strict liability" or "respondeat superior," AOB at 13, 37, but rather rely on specific allegations that show Defendants' personal responsibility for unlawful killings.

to kill thousands, and affirmed that they "were prepared to kill 3,000 people or as many as were necessary." *Id.* at ¶31.[18]

Equally misguided is Defendants' selective focus on the allegation that dozens of civilians were killed, not thousands. The Complaint alleges that Defendants remained committed to their plan to kill thousands until shortly before they were forced from office, R.174, ¶¶148, 149(d), 153, 156, 160, 161, and that their plan was aborted by massive protests, opposition within the government and military, and the U.S. government's withdrawal of support, which forced Defendants' resignation before thousands could be killed. *Id*. at ¶¶152, 161.

Defendants fare no better with their quotes from two documents, referenced in the Complaint, authorizing their use of military force against civilians. AOB at 44, citing R.183-3 and R.183-4. Specifically, Defendants point to language in those documents that discuss compliance with human rights principles, but, as the District Court recognized, the Complaint alleges Defendants did not follow those principles. R.203-38 n.25. Moreover, Defendants whitewash the central message of those documents: that they unlawfully authorized the use of lethal combat force

[18] Nothing in the Complaint supports Defendants' assertion that their discussion of thousands of civilian deaths merely reflected the "turbulent history of protest in Bolivia." AOB at 42. To the contrary, Defendants recognized that Bolivian governments had changed policies in response to "several" civilian casualties, R.174, ¶¶27-30, and the Bolivian population's outrage in response to dozens of deaths forced Defendants' resignations before they could reach their goal of thousands of killings. *Id.* at ¶152.

against unarmed civilians, which Defendants executed through a series of decrees, including establishing a "war room" and declaring a "Red Alert" – the equivalent of a state of war – to respond to peaceful marches and a hunger strike. R.174, ¶¶56-68, 62. Likewise, Defendants skirt the allegations that they employed massive military force at the first opportunity, rather than "in situations of extreme necessity, and as a last resort," AOB at 43 (quoting R.183-3-12), and that they repeatedly refused to negotiate, R.174, ¶¶24, 42-45, 64, 88, 105, or employ the police to enforce the law, *id.* at ¶¶58, 64, 85.

b) The Complaint Plausibly Alleges that Defendants Should Have Known About the Unlawful Killings.

Ford's knowledge element also is satisfied if the commander "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." 289 F.3d at 1288. This standard does not require that a commander have information that definitively shows that subordinates have committed a crime; rather, all that is required is enough information to trigger an investigation. As one leading international decision described the point, "[i]t 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." *Prosecutor v. Delalic (Delalic I)*, Case No. IT-96-21-T, ¶393 (ICTY Trial

Chamber Nov. 16, 1998); *see also Prosecutor v. Mucic*, Case No. IT-96-21-T, ¶¶383, 386 (ICTY Trial Chamber Nov. 16, 1998) (same); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, ¶28 (ICTR App. Chamber July 3, 2002) (same).[19]

Here, the Complaint plausibly alleges that Defendants had substantial information that should have placed them on notice of the unlawful deaths of civilians, thus triggering their obligation to initiate an investigation. They failed to do that because it was their plan in the first place to kill civilians to deter political protests. Defendants were warned of the likelihood of a massacre. But they went ahead and issued decrees that authorized use of massive military force against civilians. Defendants were subsequently told that civilians had been killed and were repeatedly asked to change course to prevent further deaths. Following the civilian deaths on September 20, 2003, and dozens of additional civilian killings in late September and early October, Defendants clearly had notice of the need to

[19] International tribunals look to both direct and circumstantial evidence to apply the knew-or-should-have-known standard. "The membership of the accused in an organized and disciplined structure with reporting and monitoring mechanisms has been found to facilitate proof of actual knowledge." *Prosecutor v. Brima*, Case No. SCSL-04-16-T, ¶793 (Special Court for Sierra Leone June 20, 2007). Other factors include the modus operandi of the crimes, their number and frequency, the length of time during which crimes are committed, the number of troops and logistics involved, and the existence of reporting mechanisms. *Prosecutor v. Delalic (Delalic II)*, Case No. IT-96-21-A, ¶386 (ICTY App. Chamber Feb. 20, 2001); *see also* Guénaël Mettraux, *The Law of Command Responsibility* 214-15 (2009).

investigate. Moreover, Berzaín was on the scene during some of the military operations and directly supervised others, while Lozada was in contact with him and issuing orders as the operations progressed. Rather than investigate, they repeatedly praised the military, falsely claimed that the armed forces were battling an armed insurgency, and expanded the scale of the military operation.

In short, Defendants can be held liable because the Complaint adequately alleges that, at a minimum, they should have known of the risk of unlawful killings.

2. The Complaint Plausibly Alleges that Defendants Failed to Prevent or Punish the Crimes Committed by Their Troops.

The District Court correctly held that the Complaint sufficiently alleges the third element of command responsibility under *Ford*: Defendants failed to prevent the commission of the crimes or to punish their subordinates after the commission of the crimes.

To begin with, Defendants designed, implemented, and supervised an intentional plan to kill civilians. The deaths began in January 2003 and were followed by urgent warnings about the danger of more deaths. By the time the first of Plaintiffs' relatives was killed on September 20, 2003, Defendants had been on notice for months that the use of massive military force against civilians had and would lead to unlawful deaths. They had an obligation to investigate the killings, punish those responsible, and prevent further killings, even if they did not have

conclusive information that the killings were unlawful. *Delalic I*, ¶393. Rather than comply with that obligation, Defendants ordered extended combat operations based on the knowingly false claim that the military was fighting armed subversive groups. R.174, ¶¶78-79. In the end, Defendants failed to carry out their obligation to prevent the killings of civilians and to punish their subordinates for those killings.

Defendants' response to all of this is to say that command responsibility "doesn't require a superior to perform the impossible." AOB at 48 (citing *Prosecutor v. Blaskic*, Case No. IT-95-14-A, ¶417 (ICTY App. Chamber July 29, 2004) (quoting *Delalic I*, ¶395)). True. But Defendants offer no support for their assertion that restraining their armed forces was "impossible." The Complaint plausibly alleges that Defendants "exercised effective command" over the Armed Forces, R.174, ¶17, and commanded these military operations. *See, e.g.*, *id*. at ¶¶57, 65-68, 71-72, 78, 83, 101, 137, 155, 157. Indeed, Defendants stated repeatedly that the military was under their control and that they took responsibility for its actions. *Id.* at ¶¶80, 83, 93, 126, 156, 162, 163.

Prosecutor v. Oric, Case No. IT-03-68-Y (ICTY Trial Chamber June 30, 2006), on which Defendants rely, notes that "the more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react." *Id.* at ¶329. Here, Defendants took no measures

to prevent the "grievous" crimes committed by subordinates. Their argument that nothing could prevent the killings, AOB at 47, also ignores their responsibility for ordering the use of massive military force with the intention of killing thousands of civilians.

Defendants also repeat their unsupported version of events: that an "undisputed" hostage crisis and a siege of La Paz required action. AOB at 47. But the Complaint plausibly alleges that there was no "crisis" that justified massive military force, and that such force was neither lawful nor required in response to a handful of roadblocks in September or the demonstrations against civilian deaths that, by mid-October, had restricted access to La Paz.

Defendants also argue that they had no time to punish those responsible for the deaths that occurred the week before Defendants fled Bolivia in October 2003. AOB at 47-48. However, their obligation to punish was triggered by civilian deaths in January 2003, and again in September of that year. And they completely disregard their duty to *prevent* those deaths. Had they altered their plans, investigated the killings, and punished the perpetrators in January, or when they were warned that their policies were leading to bloodshed, or when they learned of the civilian deaths on September 20, or when additional civilians were killed in the following weeks, they could have prevented the deaths in mid-October.

Finally, Defendants disingenuously claim that the military opened investigations "during their tenure," AOB at 49, citing the 2004 U.S. State Department document that is not properly before this Court. At most, that report raises questions of disputed fact that cannot be resolved at this stage of the litigation. Equally important, the document lists a handful of isolated investigations with no indication that the cited investigations were initiated by Defendants or took place "during their tenure." R.183-5-10.[20] Indeed, the report indicates that the investigations of the deaths of Plaintiffs' decedents occurred *after* Defendants left office. R.183-5-7 to R.183-5-8, R.183-5-12.

C. The Complaint Plausibly Alleges that the Killings of Plaintiffs' Decedents were Extrajudicial Killings.

Defendants' brief challenges the District Court's ruling that the Complaint plausibly alleges that the killings at issue meet the definition of extrajudicial killings. AOB at 49-54. However, Defendants did not seek to certify that issue for appeal. Thus, it is not properly before this Court at this time.

If this Court chooses to address the extrajudicial killing issue, it should affirm. When the Complaint is viewed as a whole, it adequately alleges that the

[20] The only investigation cited in the State Department document that occurred while Defendants were in office concluded that some cases required additional investigation, but the document gives no indication that any further investigations took place. R.183-5-6. The report also indicates that, although some soldiers were indicted for violations during that incident, they were later acquitted by a military court in a process that was criticized by independent human rights organizations. R.183-5-11 to R.183-5-12.

killing of each of Plaintiffs' decedents was an extrajudicial killing, which is defined by the TVPA, §3(a), 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."[21] As the Complaint plausibly alleges, Defendants agreed to use massive military force to kill thousands of civilians to deter political protests; revised military standards to permit the use of massive force against protesters; ordered the military to "take" a civilian town; falsely claimed that they were fighting an armed insurgency; and took responsibility for and praised military actions that injured and killed unarmed civilians. Soldiers on different days and in different locations were told to shoot and kill civilians in their homes and when they ran for cover. As the District Court recognized, this is more than enough to state a claim for extrajudicial killings within the meaning of the TVPA. R.203-33 n.21, R.203-34.[22]

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[21] The U.S. government has long recognized that killings by security forces without due process of law constitute extrajudicial killings, and frequently condemns killings in situations analogous to this case. *See, e.g.*, Country Report on Human Rights Practices 2000, Appendix A (Feb. 23, 2001) (noting that extrajudicial killings are "killings committed by police or security forces in operations. . . that result[] in the death of persons without due process of law (for example. . . killing of bystanders)"); Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Country Report on Human Rights Practices 2010, Peru at 2 (2011) (noting the unlawful killings of protesters).

[22] A finding of extrajudicial killings here is consistent with decisions holding that, when government agents implement a deliberate campaign of generalized violence, resulting civilian murders constitute extrajudicial killings; proof that a particular individual was specifically targeted is not required. *See In re Chiquita*

The killings also fall within the core and universally accepted international law definition of extrajudicial killings.[23] The Restatement (Third) of the Foreign Relations Law of the United States (1986) provides that a killing is unlawful unless it is "necessary under exigent circumstances," such as "by police officials in the line of duty in defense of themselves or other innocent persons, or to prevent serious crimes." §702 cmt. f. Although Defendants cite the exception to this rule as a justification for their actions, AOB at 38, the Complaint alleges that none of Plaintiffs' decedents posed any threat to security forces or to other persons when they were intentionally killed by military sharpshooters. R.174, ¶¶8, 87, 104, 111, 128.

Defendants' argument that the Complaint does not allege that the killings were deliberate is based on two distortions of the record. First, Defendants again

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Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1325-30 (S.D. Fla. 2011) (murders committed during campaign to kill civilians were extrajudicial killings); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 270 (S.D.N.Y. 2002) (Zimbabwe's ruling party liable for extrajudicial killings committed as part of "campaign of terror designed to crush political opposition"); *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627, 1996 WL 164496, at *1-2 (S.D.N.Y. Apr. 9, 1996) (Rwandan Hutu leader liable for summary execution committed as part of genocidal campaign); *Xuncax v. Gramajo*, 886 F. Supp. 162, 172-73 (D. Mass. 1995) (Minister of Defense who "devised and directed the implementation of [the Guatemalan military forces'] indiscriminate campaign of terror against civilians" liable for extrajudicial killings).

[23] The TVPA incorporates the international law definition of extrajudicial killing, excluding a killing that, "under international law, is lawfully carried out under the authority of a foreign nation." TVPA note, §3(a).

take factual allegations out of context. For example, they isolate the allegation that an officer shouted "shoot anything that moves," and argue that the order cannot be traced to Defendants. AOB at 50-51. But the District Court, evaluating the Complaint as a whole, properly concluded that "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." R.203-33 n.21.

Second, Defendants again repeatedly quote from this Court's decision in the first appeal of this case, *see, e.g.*, AOB at 45, 47, 49, 50-51, 52, which addressed a now-superseded complaint that lacked detailed allegations of Defendants' responsibility for the civilian deaths. As the District Court recognized, the current Complaint places each individual death in the framework of Defendants' deliberate plan to shoot to kill thousands of civilians and allegations showing that the military executed that plan under the close supervision of Defendants. As a consequence, hundreds of civilians were shot intentionally, including Plaintiffs' family members. These factual allegations showing Defendants' intent, planning, and supervision were not part of the complaint considered by the prior panel.[24] The combined

[24] The District Court correctly concluded that the Complaint contains allegations that are not compatible with the theory of accidental or negligent deaths suggested by this Court based on the prior complaint. *Mamani*, 654 F.3d at 1155. Viewing the Complaint as a whole, it is no longer equally likely that military sharpshooters happened to take advantage of their deployment to kill people with whom they had a prior grudge, or that stray bullets killed or injured civilians who were far from the site of any demonstrations at the time that they were shot.

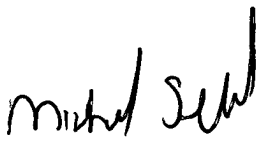
impact of these allegations is to render plausible Plaintiffs' allegation that each of the decedents' deaths was an extrajudicial killing resulting from Defendants' implementation of their unlawful plan.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order denying Defendants' Motion to Dismiss.

Respectfully submitted,

Dated: March 6, 2015

By 
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CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMITATIONS AND TYPEFACE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,729 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point Times New Roman font.

Dated: March 6, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2015, I caused the Brief of Appellees to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and further caused copies of Brief of Appellees to be sent, by third-party commercial carrier to delivery overnight, to the Clerk.

Counsel for Appellants who are registered CM/ECF users will be served with the Brief of Appellees by the appellate CM/ECF system. I further certify I caused copies of the Brief of Appellees to be served by First-Class Mail, postage prepaid, to the following counsel for Appellants who are non-CM/ECF participants:

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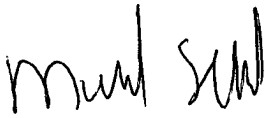
By 
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