**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**
**(Miami Division)**

**Case Nos. 07-22459 & 08-21063 (JORDAN/MCALILEY)**

ELOY ROJAS MAMANI, *et al.*,

Plaintiffs,

v.

GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendant,

JOSÉ CARLOS SÁNCHEZ BERZAÍN,

Defendant.

**DEFENDANTS' REPLY IN SUPPORT OF JOINT MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs ignore the complaint they filed and defend one they did not, and could never, bring. They do not dispute that this Court must dismiss a case challenging the Bolivian Government's response to a violent uprising that: held hostage a city (Sorata), forced the Defense Minister to flee for safety, confronted escorted hostages as they headed to shelter, starved the capital (La Paz) of supplies, precipitated a state of national emergency, confronted escorted supply trucks, and unseated a democratically-elected government. Opposition ("Opp."), *passim*. Plaintiffs are therefore forced to proclaim that the "case does not require this Court to sit in judgment on unintended collateral killings or a government's legitimate use of force to restore order." *Id*. at 1. But these listed events are plainly set forth in the Amended Consolidated Complaint ("ACC" or "Complaint") and present the very non-justiciable issues plaintiffs now claim do not exist.

Faced with this insurmountable hurdle, plaintiffs assert that this case is instead only about the "targeted killings of peaceful, unarmed civilians." Opp., *passim.* But—except for recently added, conclusory language in the first paragraph—their Complaint contradicts this position as well. In contrast to their Opposition, plaintiffs' ACC does not and could not allege that the decedents died on uneventful, peaceful days. It does not allege that two country leaders happened to decide to round up and execute civilians in the public square, begin ethnic cleansing, or engage in a series of murders for sport. Instead, plaintiffs sue first for the death of one girl who, along with a member of the military and two others, ACC ¶ 41, was killed on September 20, 2003, as fighting ensued during the rescue mission of the trapped tourists from Sorata, after protestors forced the Minister of Defense to flee Sorata, as protestors confronted the convoy leaving with the rescued tourists, and in the area where the convoy was then traveling. ACC ¶¶ 29–30, 40, 43, 47. They allege the remaining eight deaths they sue over occurred over the two day period in October when the country was in a "state of emergency," after military and police worked to open roads into a starving La Paz, in the area where protestors confronted those military and police, and shortly before the violent uprising toppled the democratically-elected government. Plaintiffs ask the Court to just ignore this context. But this context not only frames their claims, it contradicts the last-minute and conclusory allegation, upon which the entire Opposition now rests, that defendants somehow intentionally ordered killings of civilians.

The law is plain that plaintiffs' suit cannot proceed for a host of reasons that the Opposition does nothing to contradict. Plaintiffs' response to the political question and act-of

state doctrines is to ignore the relevant jurisdictional facts. The jurisdictional facts establish that dismissal is appropriate because the U.S. has already addressed the propriety of the Bolivian Government's and rioters' actions, and that the U.S. Government's assessment of and response to the uprising are a key part of current Bolivian-U.S. foreign relations. Plaintiffs' retort—that the State Department did not ratify the killing of "innocent" civilians—is a non-sequitur. The State Department found no evidence that civilians were targeted and concluded that the Bolivian response, which included the unfortunate deaths of innocents, was commensurate with the threat. And, as to the impact of this litigation, plaintiffs fail to inform the Court that the mere filing of Defendants' Joint Motion to Dismiss ("JMD"), with its revelation that Minister Berzaín received asylum, led to violent attacks on the U.S. Embassy in Bolivia, the recall of the U.S. Ambassador, and a round of diplomatic talks to begin the day after this Reply is filed. Moreover, defendants have immunity. Plaintiffs' argument that it disappeared when they were forced from office is contrary to law, and a purported waiver from the people that led their ouster is ineffective.

Even were the Court to exercise jurisdiction, it should dismiss the suit because plaintiffs have not stated any cause of action. Plaintiffs' contention that they do not challenge the proportionality of the government's response simply ignores the realities of the Complaint they had to file. Plaintiffs' extrajudicial killing claim is contradicted by their allegations. Next, while plaintiffs assert that there were widespread and systematic attacks sufficient to allege a crime against humanity, the ACC alleges that the shootings were "targeted," not widespread; and "indiscriminate," not systematic. Plaintiffs' claim that there is a recognized norm of a right to life, liberty, security of person, association, and assembly is unsupported. Plaintiffs do not dispute that secondary liability cannot apply where, as here, there are no primary violations. Their defense of the state law claims contains similar deficiencies.

As becomes plain, plaintiffs' vigorous defense of a complaint they could never file and their attempt to force a public trial in this matter confirm that the Court should grant defendants' Joint Motion to Dismiss.

## I. PLAINTIFFS' OPPOSITION IS CONTRADICTED BY THEIR COMPLAINT.

To support arguments central to their Opposition, plaintiffs characterize their Complaint in a manner not supported by the allegations they cite and contradicted by the ones they ignore.

Plaintiffs argue that "[t]he two Defendants devised, directed and/or carried out a plan to target and intimidate Bolivian citizens from protesting against the Lozada government." Opp. at

2 (*citing* ACC ¶¶ 30, 34, 36, 47, 48). But the paragraphs they cite allege no such thing. Instead, they allege only that defendants devised a plan to save the Sorata hostages and escort fuel into La Paz during a state of emergency. *See* ACC ¶ 30 (defendants ordered joint mobilization force to "rescue" the travelers in Sorata); ¶ 34 (the convoy arrived in Sorata and protestors forced Minister Berzaín out of town); ¶ 36 (defendants authorized a task force to use "necessary force" to "restore public order"); ¶ 47 (defendants signed an executive decree establishing a "state of emergency" and "declaring transport of gas to La Paz a national priority"); ¶ 48 (anticipating that forces would use violence, clause in decree offered indemnification for damages). Plaintiffs' spin is well-taken only if what they mean by "protesting" is, as the ACC alleges, holding tourists hostage in a town and also starving the capital such that supplies could not enter; what they mean by "targeting and deliberately intimidating" is, as the ACC alleges, stopping such civil unrest by freeing the hostages or opening up the town; and what they mean by "devising a plan" is, as the ACC alleges, to authorize the escort of tourists out of Sorata and fuel into La Paz.

Plaintiffs state in their Opposition that the decedents were killed even though they were far removed from the protests. Opp. at 2. Here, both the ACC ***and*** the Opposition are to the contrary. Although plaintiffs try to allege that some decedents were not in the center of the protests, the ACC and Opposition both demonstrate that they were near the actual fighting. The specific allegations of the ACC allege that the decedents died on the day and in the area of, and while actually watching, listening to, or running from, clashes between protestors and security forces. ACC ¶¶ 40, 51, 54, 56–58, 69–70, 72. (El Alto is a suburb of La Paz; the main road to La Paz travels through it and thus the blockades of La Paz occurred in and around El Alto.) And the Opposition expressly admits that decedents were "***within a zone of risk***." Opp. at 50.

Plaintiffs argue that "Defendants ordered sharpshooters into the outskirts of La Paz to kill civilians in order to deter others from participating in public places." Opp. at 2 (*citing* ACC ¶¶ 1, 23, 26–28, 39). Other than the conclusory language in paragraph 1, which is discussed below, not a single allegation they cite supports this charge. ACC ¶ 23 (addressing the events of January and February 2003); ¶¶ 26–28 (alleging widespread protest and a general civil strike); ¶ 39 (alleging sharpshooters attacked civilians in Warisata, the city through which hostages were led out of Sorata, but not that they killed, or were ordered by defendants to kill, innocent civilians). Even paragraph 1 does not allege that persons were ordered killed to deter others from protesting.

Plaintiffs' argument—and indeed their entire Opposition—therefore relies exclusively on conclusory language found in paragraph 1. This language has some history. Plaintiffs originally alleged—also in insufficient, conclusory fashion—that defendants "ordered Bolivian security forces . . . to use deadly force ***to suppress popular protests*** against government policies." Case No. 07-22459, D.E. 1, ¶ 1 (emphasis added). After receiving the first motion to dismiss, plaintiffs amended the Complaint. Plaintiffs dropped the allegation that the government acted to suppress popular protests. They inserted in its place the allegation that the "defendants' response to the protests of September and October 2003 was to order Bolivian security forces . . . to attack and kill scores of unarmed civilians, many of whom—including the victims on whose behalf plaintiffs are suing—were not involved in the protests at all, and who were not even in the vicinity of the protests." ACC ¶ 1. Plaintiffs present no facts to indicate that this is anything other than speculative, and their specific allegations contradict this newly-minted allegation.[1]

The rest of the Complaint alleges that deaths occurred ***only*** in the midst of, and ***only*** as a result of, the terrorizing of the entire town of Sorata and the subsequent state of emergency in La Paz. According to the ACC, protestors initiated civil disorder in September 2003 by trapping tourists in Sorata for almost a week. ACC ¶¶ 27–30. They allege that in response defendants ordered police and military to rescue the hostages in Sorata. *Id.* ¶ 30. When they arrived, "[p]rotesting local villagers forced Defendant Sánchez Berzaín out of town." *Id.* ¶ 34 (The Court can reasonably infer that the "protestors" did not politely ask him to leave.) As the convoy attempted to leave Sorata with the rescued tourists, protestors blocked the road out of town, *id.* ¶ 35, thereby necessarily trapping the tourists in buses on a road. The government thereafter issued a decree authorizing the use of "necessary force" to restore public order in this area. *Id.* ¶ 36. (The decree says nothing about authorizing deadly force against innocent civilians; plaintiffs' argument that it should nonetheless be read that way is Orwellian.) Villagers confronted the convoy as it traveled through Warisata. *Id.* ¶ 37. The first represented decedent died in the midst of the conflict in Warisata, where she lived. *Id.* ¶ 39.

As to La Paz, for weeks after Sorata, protests continued to spread throughout the region.

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[1] *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1965, 1966 n.5 (2007), requires that plaintiffs' "factual allegations must be enough to raise a right to relief above the speculative level." Those allegations must cross the threshold from "conclusory" to "factual," and from the "factually neutral" to the "factually suggestive." *Id.* at 1966 n.5. They must be "plausible" and not merely "conceivable." *Id.* at 1965 & n.5; *Davis v. Coca-Cola*, 516 F.3d 955, 974 n.43 (11th Cir. 2008).

Protestors initiated a general civil strike and blocked all roads into La Paz, causing President Lozada, with the full backing of his Cabinet, to declare in Supreme Decree 27209 "a state of emergency in the country, declaring the transport of gas to La Paz a national priority." ACC ¶ 47. Like Directive 27/03, Decree 27209 says absolutely nothing about killing innocent civilians.[2] The other deaths at issue here occurred on October 12 and 13, when protestors clashed with the military and police who were called to escort fuel into La Paz through the roadblocks pursuant to the Decree. Plaintiffs allege Minister Berzaín was in a helicopter flying overhead, but do not allege that he directed military officials to aim at persons outside the protest areas or innocent civilians. These deaths occurred during the state of emergency, the days before and of a nationally-televised address by President Lozada announcing an attempted *coup*, and four days before the elected government was toppled. ACC ¶ 60, 74.

Clearly, things were not calm in Bolivia when the decedents died. Plaintiffs no doubt allege that in the midst of a hostage situation and state of emergency, civilians were killed—though it bears noting that plaintiffs can only allege "on information and belief" that sharpshooters killed civilians, which does not forestall dismissal.[3] The fact that persons died under such circumstances does not "factually suggest" that it is "plausible" that the defendants ordered military personnel on the ground intentionally to kill innocent civilians. To the contrary, the factual allegations are quintessential official functions of the President and Defense Minister. That they were undertaken in the circumstances alleged does not give rise to the inference that defendants were involved in a plan to target civilians. Plaintiffs have done nothing more than juxtapose defendants' official actions as senior governmental officials with the regrettable outcome of the clash on the ground between protesters and government security forces. The Court may not infer intent to kill from the exercise of legitimate authority.

The case of Teodosia Mamani is a prime example. Plaintiffs allege that she lived in the area of protests during the state of emergency, and that she was shot when "a bullet, fired by the

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[2] Plaintiffs argue that the Court should infer an order to kill because the decree provided compensation to victims for material and personal losses. Opp. at 38. The Court is not required to accept the unreasonable inference that a government that ordered the murder of civilians simultaneously concerned itself with compensating them. *See Twombly*, 127 S. Ct. at 1965.

[3] *Twombly* dismissed claims made "upon information and belief" as insufficient. 127 S. Ct. at 1962–63. Courts have since dismissed suits based on "information and belief" and where plaintiffs set "forth no further information to 'factually suggest'" that the conduct is "plausible." *See, e.g., 316, Inc. v. Md. Cas..*, No. 07cv528, 2008 WL 2157084, *4 (N.D. Fla. May 21, 2008).

military, blasted through the wall of the house she was in." ACC ¶ 57. A military sniper, no matter how skilled, does not have x-ray vision sufficient to aim through a wall. The plausible inference is that she was shot by a stray bullet. While the other eight deaths at issue are not as clear, to the extent the ACC supplies information, the ACC indicates that each appears similarly to involve people either peering from terraces or windows or actually on the ground amidst the gunfire and chaos, *id.* ¶¶ 54, 72; that military were also killed, *id.* ¶ 41; and that the military shot in the air to disperse crowds, not into them to kill them, *id.* ¶ 53. The ACC moreover contains no allegation that either President Lozada or Minister Berzaín had any particular connection to the decedents. It certainly does not allege that defendants ordered anyone to intentionally kill them. To the contrary, other than in the conclusory and unsupported first paragraph, plaintiffs never use the active voice to refer to any orders or commands of President Lozada or Minister Berzaín (as in "President Lozada ordered the troops to . . ."), but refer solely to "forces under the Defendants command," Opp. at 1, 12, in the sense that all U.S. forces in Iraq, Afghanistan, or anywhere else are "under the command" of President Bush. The allegation that forces were under the defendants' command is ***not*** an allegation that defendants ordered them to take certain actions.

Ultimately, the only specific allegations about President Lozada are that he issued decrees calling out the equivalent of the National Guard to Sorata and La Paz. It is difficult to imagine what less a President should do in such a situation. As to Minister Berzaín, the specific allegations are that he helped implement the decrees and directed personnel in a helicopter flying over protests (but not that he ordered innocent civilians shot then). These allegations do not support the conclusory charge that they ordered the deaths of innocent civilians.

Plaintiffs also argue that the defendants continued to authorize military and police to address the public riots even though they had secondhand knowledge that civilians were being targeted. Opp. at 31. Their factual allegation states only: "images of violence perpetrated by the government forces were repeatedly shown on the major Bolivian television stations and in major newspapers. Furthermore, community and human rights leaders met with [defendants], . . . to discuss the violence that was taking place." ACC ¶ 87; *see also* ¶ 86 (stating only in conclusory fashion that defendants "knew or should have known" of targeted deaths). Glaringly, there is ***no*** allegation that either the media reports or community leaders informed defendants that military and police were indiscriminately killing innocent civilians, as opposed to responding to the riot situations they were trying to resolve. And there is ***no*** allegation that the starvation of La Paz

had ceased or that those responsible for the violent uprising had ceased their use of deadly force.

## II. PLAINTIFFS' POLITICAL QUESTION ANALYSIS IGNORES THE STATE DEPARTMENT'S ACTIONS TO DATE AND MISSTATES THE LAW.

Plaintiffs seek to avoid the plain bar of the political question doctrine here by proclaiming that the Court will not be asked to second-guess conclusions already reached by the Executive branch. Opp. at 8. The claim mischaracterizes what has happened to date and its importance to U.S. foreign policy. It is also flatly contradicted by plaintiffs' own Motion to Strike which, among other things, claims that conclusions reached by the American Ambassador concerning the events were "rife with bias and rumor." Mot. to Strike at 5. The Executive, not the Judiciary, has the task of assessing how the United States will conduct its foreign affairs in light of actions taken by other governments. JMD at 15–19. The State Department undertook that role here, investigating how the Bolivian government responded to the 2003 riots, pronouncing that response to be appropriate, and recommending to Congress that Bolivia continue to receive U.S. funding. Additionally, in granting Minister Berzaín asylum,[4] the U.S. Executive found that he could not return to Bolivia because of "persecution on account of . . . political opinion." JMD at 17. Further, the Executive's findings do more than contravene plaintiffs' general themes, contradicting many of the exact allegations in the ACC. For example:

- The ACC alleges that "[t]he military chased the unarmed villagers" and fired live ammunition during the hostage situation. ACC ¶ 35. But according to State, military forces were ambushed with "small arms fire" upon leaving Sorata, and they pursued their attackers using only "teargas and rubber bullets." JMD Ex. 10 at FOIA-027–028.
- The ACC alleges solely on "information and belief" that a sharpshooter killed decedent Marlene Rojas. ACC ¶ 40. But according to State, Ms. Rojas was "shot in [the] chest by [a] stray bullet as she looked out a window." JMD Ex. 20 at FOIA-028.
- The ACC alleges that Teodosia Mamani was killed by a military individual who—

[4] Plaintiffs do not dispute Minister Berzaín's status as a political asylee, nor do they dispute that at the time he was granted asylum the U.S. Executive was cognizant of what had transpired in Bolivia. Instead, plaintiffs assert that he was not forthcoming in his asylum application with respect to criminal charges allegedly pending against him in Bolivia. Opp. at 6. Plaintiffs lob this reckless charge by relying on rogatory letters Bolivia sent to the State Department to deliver to Minister Berzaín. Opp. at 6, Ex. C. These letters were intended to notify him of the charges being brought against him, s*ee id.*, but, as ***plaintiffs affirmatively plead***, and on this point they are right, the State Department never served these letters on Minister Berzaín, nor did they serve on President Lozada similar letters addressed to him. ACC ¶ 76. Plaintiffs' attachment of the Letters Rogatory does not support their point, but the State Department's to serve the Letters raises the implication that it considered the Letters' allegations to be politically motivated.

> inexplicably—was able to see and aim "through the wall of the house she was in." ACC ¶ 57. But according to State, at the time and place of her death, protestors brought "dynamite and guns to bear" and "danger of misdirected fire coming through windows or walls [wa]s a real threat for even those who stay[ed] home." JMD Ex. 10 at FOIA-043.

Moreover, the State Department's conclusions and reaction is currently a key component in U.S.-Bolivia relations. Upon the filing of the Joint Motion to Dismiss, for example, and the disclosure therein that State had granted asylum to Minister Berzaín (President Lozada did not request asylum), thousands of demonstrators marched on the U.S. Embassy in "violent protests." Opp. Ex. E; *see also* Declaration of Beth A. Stewart; Exhibit ("Ex.") 42 (State Department Press Statement). The Bolivian police were forced to use tear gas to protect the Embassy when "crowds tried to push through a police line." Opp. Ex. E. The current Bolivian government then refused to pledge to defend the Embassy in the future, leading the U.S. to recall its Ambassador to Washington. *See* Ex. 42. While the Bolivian government and plaintiffs now represent that this case will not "cause any disruption or change in the diplomatic relations between Bolivia and the United States," Opp. Ex. D, these dramatic events prove just the opposite to be true.

Trying to ignore or sidestep what the State Department has repeatedly concluded and its importance in U.S. foreign relations, plaintiffs contend that the State Department did not ratify "targeted killings of peaceful, unarmed civilians." Opp. at 8. That assertion is grossly misleading. The State Department did not ratify any such killings because it found no evidence that they occurred. The State Department investigated and found to the contrary that the government's response was "commensurate" to the threat posed. JMD Ex. 2.

No matter how they characterize their allegations, plaintiffs ultimately ask this Court to draw the exact opposite conclusion than did the State Department—that the defendants' response was ***not*** commensurate, but rather disproportionate; that they did not act to protect Bolivian citizens, but rather to kill them; and that the military and police further inflamed, rather than sought to quell, the civil unrest. If there were any doubt on this score, it was laid to rest by plaintiffs' Motion to Strike, which argues that the Court must ignore the State Department's conclusions because, plaintiffs claim, State personnel were biased and transmitted to D.C. unreliable second-hand information they received without question from the Lozada government. *See* Mot. to Strike at 5. (This accusation is verifiably wrong. Opp. to Mot. Strike at II.A.2.) The political question doctrine prevents precisely this type of judicial second-guessing.

Ignoring what happened last month, plaintiffs cite to an *amicus* brief the United States

filed 28 years ago for the proposition that Alien Tort Statute ("ATS") cases do not implicate foreign relations. Opp. at 8–9. The Executive's view there was only that torture could be actionable in U.S. courts. It limited its position, stating "[t]his does not mean that [the ATS] appoints the United States courts as Commissions to evaluate the human rights performance of foreign nations." *Amicus* Brief Supporting Appellants in *Filartiga v. Pena-Irala*, 1980 WL 340146, at *22 (2d Cir. 1980). As discussed, ***this*** suit has already indisputably affected relations between the U.S. and Bolivia.

Plaintiffs do not dispute that only one *Baker* factor need apply for the political question doctrine to bar their suit. They argue that none apply, but the ACC implicates every one.

As to the first factor, "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), plaintiffs do not dispute that the handling of foreign affairs is left to the Executive.[5] Instead, they counter that assessing human rights abuses is best left to the Judiciary, citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996). Both cases are inapposite. *Kadic* did not involve foreign government action at all but rather the actions of a Bosnian-Serb warring military faction that was not a recognized state. *See* 70 F.3d at 237. And *Abebe-Jira* involved allegations that the equivalent of a city councilman in Ethiopia personally tortured the plaintiffs. *See* 72 F.3d at 845. Neither case challenged prior official U.S. pronouncements on actions taken by a foreign government—pronouncements that are at the heart of current foreign relations—nor made any specific pronouncements concerning the plaintiffs' allegations. Plaintiffs also cite *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004), for the proposition that not all foreign relation issues raise political questions. Opp. at 9. But there the defendant was a corporation and a treaty expressly contemplated court action. Moreover, the court ***dismissed*** the case on comity grounds. *Id.* at 1237–40.

[5] In the face of defendants' overwhelming collection of State Department reports and statements evidencing that this litigation must be dismissed on political question grounds, plaintiffs cite to an off-the-cuff comment made by the current Ambassador that asylum is a judicial, not political, issue. Opp. at 14; *see also* Ex. 49 (*Wash. Times*, June 11, 2008); 50 (*LatinNews Daily*, June 12, 2008). His comment only confirms that this litigation cannot proceed. It was made contemporaneous with the attempted storming of the Embassy, which resulted from this litigation. And while the Ambassador was correct that administrative law judges can review *denials* of asylum, the ultimate decision rests with the Department of Homeland Security or Attorney General.

Plaintiffs next claim that "an expression of executive branch support for Defendants' actions would not transform this tort suit into a nonjusticiable political question." Opp. at 10. That statement is flatly contradicted by the statement in *McMahon v. Presidential Airways, Inc.*, a case cited by plaintiffs,[6] that reexamination of Executive decisions does raise a nonjusticiable political question. *See* 502 F.3d 1331, 1358 (11th Cir. 2007). And the proposition is found nowhere in *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992), the only case plaintiffs cite in support. There, certain defendants were low-level *contra* military officials who, while in Florida, planned the torture and execution of a specific individual. *Id.* at 333, 335. While the United States supported the *contras* in general, *id.* at 335, nowhere did the Executive address the specific events underlying the complaint. Even so, the Eleventh Circuit concluded that the district court ***appropriately*** dismissed on political question grounds "the broad allegations of the claims in the amended complaint against the defendant organizations," which included the *contras*. *Id.* at 337. Here, the United States cannot speak with one voice if courts permit charges to go forward at the same time the State Department has publicly addressed—based on its review of the facts and foreign policy implications—the very subject of the lawsuit.

As to the second factor, whether the case presents "a lack of judicially discoverable and manageable standards for resolving" the dispute, *Baker*, 369 U.S. at 217, plaintiffs again rely on *Linder*. But there, the "substantial tortious conduct took place in the Southern District of Florida" and the court highlighted that "***[t]his is not a case where the tortious conduct occurred wholly or even principally outside of the United States.***" *Linder*, 963 F.2d at 336 (emphasis added). The case could proceed against certain individuals because "the complaint is narrowly focused on the lawfulness of the defendants' conduct in a single incident." *Id.* at 337. In other words, *Linder* bears no relation at all to the allegations in plaintiffs' ACC.

Plaintiffs also claim that the instant case only presents a question of whether innocent civilians were targeted and that such "damages claims 'are particularly judicially manageable.'" Opp. at 11. Plaintiffs here allege one town taken hostage; a necessary government rescue met with violence; widespread protests that led to military casualties and an attack on a Government cabinet official; the blockade of a capital; and a "state of emergency." ACC ¶¶ 28–30, 41, 47.

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[6] *McMahon* held that defendants could move for political question dismissal again on remand by presenting evidence outside the pleadings. 502 F.3d at 1337–38, 1365 n.36. On remand, defendants have stated their intention to file a renewed political question motion to dismiss. *See McMahon v. Presidential Airways, Inc.*, No. 05-1002 (M.D. Fla. May 1, 2008), D.E. 145.

State Department reports portray a state of siege replete with armed rioters using rifles, dynamite, and roadblocks in an armed struggle against the government. JMD Ex. 2 at FOIA-011; JMD Ex. 10 at FOIA-027, 032, 033, 042. Plaintiffs, in sum, do not present a run-of-the-mill damages claim. Assessing damages in the context of a government's response to the type of civil disorder at issue here is not judicially manageable. *See* JMD at 17–18.

Plaintiffs' response to the third *Baker* factor, "an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217, is equally misguided. Plaintiffs make the groundless argument that Congress, in enacting the ATS in 1789 to address piracy, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004), made a policy determination that a U.S. court should hear a case by Bolivians against Bolivians about violent civil unrest in Bolivia. Opp. at 11. In support of their assertion that this was the type of case for which Congress passed the ATS 219 years ago, plaintiffs cite only *Kadic*, in which the Second Circuit held in general terms (pre-*Sosa*) that some international norms can provide judicially manageable standards for ATS suits. 70 F.3d at 249. It does not bear on whether the Judiciary is in the best position to make an "initial" policy determination regarding how the Bolivian government should have responded to armed riots in 2003 given that the Executive has already made such a determination.

As to *Baker* factors four, five, and six, plaintiffs contend that this litigation would not result in multifarious pronouncements because the State Department has not ratified defendants' actions (which plaintiffs characterize as the "targeting of peaceful, unarmed civilians"). Opp. at 11. As detailed above, the State Department did not ratify the intentional murder of "peaceful, unarmed civilians" because it concluded that no such activity occurred; it instead ratified the Bolivian government's response to the uprising, recognizing that the response resulted in the unfortunate deaths of certain civilians, including some of the specific decedents at issue here. And based on an unrelated State Department statement that there may have been human rights abuses in Bolivia during 2003, plaintiffs argue that the State Department's specific findings with regard to what happened in Sorata and La Paz are irrelevant. Opp. at 4 n.4. This argument is without merit. The State Department statement noted that "many of the human rights abuses in the past occurred within the justice system," JMD Ex. 2 at FOIA-007, which does not implicate the allegations in the ACC. The State Department also noted that "[t]here were reports that military conscripts were mistreated . . . and of arbitrary arrest and detention. Prison conditions are harsh, and violence in prisons was a problem. . . . Other problems include pervasive domestic

violence and discrimination against women . . . ." Opp. Ex. A at FOIA-072. Not one of these concerns—which the State Department has included in every Bolivian Country Report from 1999 to 2007, *see* http://www.state.gov/g/drl/rls/hrrpt—casts any doubt on the Executive's considered judgment, and public pronouncements, on the events of 2003.

Plaintiffs also argue that even if the State Department has ratified the defendants' actions, political question dismissal is improper because the doctrine is limited to contexts where "such contradiction would seriously interfere with important governmental interests." Opp. at 12 (*quoting Kadic*, 70 F.3d at 249). Even if that were an accurate recitation of the law in this Circuit (it is not, *see McMahon*, 502 F.3d at 165 (discussing whether case implicates political question)), the standard is more than met here. As demonstrated above, *see supra*, p. 8, this case already has had negative effects on U.S.-Bolivian relations. *Cf. Matar v. Dichter*, 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007) (dismissing on political question and stating that "[t]his Court cannot ignore the potential impact of this litigation on the Middle East's delicate diplomacy").

Plaintiffs conclude by attempting to distinguish cases cited by defendants on the grounds that some of those cases involved the "conduct of the U.S. government and its highest ranking officials." Opp. at 13. Although the Court is not required under the facts here to so find, the conduct of the U.S. government and its officials is very much at issue here, as shown by the statements and actions of the State Department, the National Security Advisor, and the U.S. Ambassador to Bolivia, who supported the Lozada government during the events in question. JMD at 11–13. Plaintiffs also attempt to distinguish other cases by arguing that they involve only the Arab-Israeli conflict. Opp. at 13; JMD at 18–19. This position is makeweight. The political question doctrine is not limited to conflicts between Arabs and Israel. The issue raised in those cases, and by the one at bar, is whether Executive support for U.S. allies should be questioned by the Judiciary. The answer is uniformly no.

To our knowledge, no ATS or TVPA complaint has ever successfully asked a court to adjudicate claims that so clearly contradict foreign policy judgments made by the Executive.

## III. PLAINTIFFS' OPPOSITION CONFIRMS THAT THE ACT-OF-STATE DOCTRINE APPLIES HERE.

This litigation concerns innumerable official acts performed within Bolivian, many of them documented in the Complaint, *see, e.g.*, ACC ¶¶ 30, 47, and would require this Court to repudiate all of them. Plaintiffs concede that defendants were acting in their capacities as the Bolivian President and Minister of Defense when they ordered or directed the military and police

action at issue in this litigation. *See, e.g.*, ACC ¶¶ 7, 30, 47, 79. Plaintiffs assert, however, that certain "*jus cogens*" human rights violations are so egregious that they can never be official actions because no sovereign could ever authorize them. This circular argument is routinely advanced—and routinely rejected—in ATS cases. Indeed, every Circuit other than the Ninth[7] to consider the issue has ruled against plaintiffs' position. *See Belhas v. Ya'alon*, 515 F.3d 1279, 1286–88 (D.C. Cir. 2008) (affirming immunity notwithstanding allegations of *jus cogens* violations); *Ye v. Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) (same); *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *13–15 (E.D. Va. Aug. 1, 2007) (same); *Matar*, 500 F. Supp. 2d at 292–93 (S.D.N.Y.) (same); *Doe I v. Israel*, 400 F. Supp. 2d 86, 105 (D.D.C. 2005) (same).[8]

As previously discussed, plaintiffs' allegations require the unsupported and implausible inference that in seeking to rescue hostages and reopen the capital, defendants ordered the killing of civilians; yet the only facts alleged involved unambiguously official acts. *See* JMD at 19–21. According to plaintiffs, the defendants employed the military and police to "'rescue' the group of travelers in Sorata," ACC ¶ 30, "to reestablish public order," *id.* ¶ 36, and to "establish[ ] a state of emergency" to bring vital supplies into La Paz, *id.*¶ 47. Plaintiffs do not dispute that they challenge these official acts, but instead contend that Bolivia has repudiated them. Opp. Ex. D. But these acts do not become any less official under U.S. law because the current Bolivian Government—headed by the person who helped unseat defendants, JMD Ex. 10 at FOIA-029, 034–035—now claims they were unofficial. That repudiation has no bearing on whether actions were official when taken or are official under American law.

The cases cited by plaintiffs are each inapposite. *Jimenez v. Aristeguieta*, 311 F.2d 547, 557–58 (5th Cir. 1962), involved the treaty-based extradition of a former head-of-state charged with "financial crimes." In *Kadic*, there could be no official action because the defendant did not lead any "foreign sovereign" recognized by the United States and, in any event, the act-of-state issue was not preserved below. 70 F.3d at 250. *Hilao v. Marcos*, 25 F.3d 1467, 1468–69 (9th Cir. 1994), and *Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988), involved claims that

[7] *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1469–72 (9th Cir. 1994).

[8] Plaintiffs' citation to a Senate Report that states the act-of-state doctrine should not apply to claims of torture, Opp. at 15, has no bearing on whether it applies to official acts aimed at restoring order, even where those acts led to civilian deaths. In any event, the TVPA nowhere limits the doctrine as indicated in the Report, and courts have dismissed TVPA claims on act-of-state grounds. *See Corrie*, 403 F. Supp. 2d at 1032; *Doe*, 400 F. Supp. 2d at 113-14.

Ferdinand Marcos, over the course of fifteen years, tortured, executed, and "disappeared" thousands of individuals and otherwise embezzled substantial sums from the government. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713, 719 (9th Cir. 1992), the Ninth Circuit affirmed sovereign immunity though the case involved claims of prolonged torture of a Jewish plaintiff by an anti-Semitic military junta. And *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993), involved allegations of torture over a two year period by a former military ruler. Plaintiffs have not cited any case in which actions to quell violent uprisings—no matter how abusive those actions were alleged to have been—were held to be unofficial acts.

Because plaintiffs ask this Court to repudiate official acts, the act-of-state doctrine should bar plaintiffs' suit pursuant to the three *Sabbatino* factors. First, there is ***no*** consensus as to whether defendants' actions violated customary international law. *See* Ex. 43 (Rebuttal Declaration of Eric Posner, Kenneth Anderson, Julian Ku ("Rebuttal Decl.")) at ¶ 11. Second, this case has substantial implications for the conduct of U.S. foreign affairs, as evidenced by the massive protests following the disclosure of Minister Berzaín's asylum status. *See supra* p. 8.

As to the final *Sabbatino* factor, plaintiffs argue that the Court cannot give less weight to positions taken by the current Morales government because "such an assessment entails an inquiry [that] would require the court to examine exactly the kind of sensitive foreign political and diplomatic issues that the act of state doctrine is designed to avoid." Opp. at 16 n.10. Defendants agree, which is further justification to dismiss. Defendants' contention that they defended an "attack against the democracy and constitutional order in Bolivia," JMD Ex. 25, will require this Court also to judge the ***current*** President of Bolivia, *i.e.*, the person who led the violent uprising, JMD Ex. 10 at FOIA-029, 034–035. As plaintiffs argue, the act-of-state doctrine was designed to avoid entangling courts in these kinds of sensitive political and diplomatic issues.

## IV. DEFENDANTS ARE IMMUNE FROM SUIT.

Plaintiffs assert that defendants' immunity disappeared the instant they were forced out of office. This argument has been rejected by numerous courts. JMD at 22. Notwithstanding the overwhelming weight of authority, plaintiffs argue that the Supreme Court's decision regarding corporations in *Dole Food v. Patrickson*, 538 U.S. 468 (2003), supports their view that immunity

does not attach to individual former officials. Opp. at 19–20.[9] The D.C. Circuit, in a case argued by plaintiffs' counsel, recently declined to extend *Dole* in precisely the manner plaintiffs suggest. That court held: "[t]o allow the resignation of an official involved in the adoption of policies underlying a decision or in the implementation of such decision to repeal his immunity would destroy, not enhance that comity." *Belhas*, 515 F.3d at 1286; *see also In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005) (declining to extend *Dole* to former officials).

Additionally, plaintiffs submit a letter that purports to be from the Bolivian Minister of Justice and purports to waive any immunity asserted by President Lozada and Minister Berzaín. Opp. Ex. D. This Court should not rely on the purported waiver. As an initial matter, this Court should not even consider the waiver letter for any purposes unless it is submitted by the State Department, following proper authorization by the signatory.[10] If the Court accepts plaintiffs' view that the State Department's acceptance is irrelevant, *see* Opp. at 18–19, the Court still should disregard the purported waiver on these facts. Evo Morales illegally and violently toppled a democratically-elected government to ultimately (and necessarily wrongfully) secure power. JMD Ex. 10 at FOIA-029, 034–035. His Government now purports to waive the immunity of those who were charged with restoring public order during the violent riots he spear-headed. For the Court to recognize this waiver would be to condone the unlawful and violent toppling of a legitimate government and condemn those whom the immunity doctrine was designed to protect. It would also have the opposite effect that plaintiffs intend. Recognizing waiver here would signal that, if faced with unlawful protests, leaders should keep power at all costs, lest the protestors take power and waive their immunity. Where, as here, the Executive has granted political asylum to one defendant and has made specific findings that defendants' actions were reasonable, this Court should disregard the waiver letter.

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[9] The Eleventh Circuit cases cited at Opp. 21 do not discuss FSIA, much less whether it applied.

[10] Nowhere does the letter assert that the Minister of Justice has the authority to waive immunity. *See* FED. R. EVID. 902(3) (requiring for self-authentication that the signer be "authorized by the laws of a foreign country to make the execution or attestation"). In *In re Doe*, the court accepted waiver when the U.S. and Philippines had entered into a cooperation agreement, State explicitly requested the letter, and the U.S. submitted it. 860 F.2d 40, 43–45 (2d Cir. 1988). In *Paul v. Avril*, the court accepted a letter from a government that waived whatever immunity shielded a military dictator who took power in a *coup*. 812 F. Supp. at 210–11.

## V. PLAINTIFFS DO NOT SUPPORT THEIR ATS OR TVPA CLAIMS.

Neither the ATS[11] nor the Torture Victim Protection Act ("TVPA") provide any basis for hearing a complaint that alleges a government disproportionately responded to an armed uprising. Plaintiffs do not dispute this. Instead, plaintiffs claim that defendants' argument is based on a "fanciful" rendition of the facts and is "disconnected" from the actual allegations in the ACC. Opp. at 1. Yet defendants' motion to dismiss relied on the ACC as a whole, not only on the one conclusory allegation that plaintiffs recently added and then cherry-picked as the linchpin for their Opposition. The ACC as a whole asks this Court to second-guess the Bolivian government's efforts to restore order in the face of massive and dangerous civil unrest. The law is firmly established that plaintiffs cannot support such a claim under either the ATS or the TVPA. JMD at 26–31. Moreover, as detailed above, the paragraph of the Complaint on which plaintiffs' entire Opposition rests is not supported by any other "factual suggestion" that makes the allegation "plausible." *See supra*, Part I.

Seeking international norms for propositions about which none exist, plaintiffs submit an expert declaration to address their view of the state of international law. Even without a rebuttal expert declaration, the existing case law well demonstrates that plaintiffs' declaration is not persuasive. But in fact, defendants' rebuttal expert declaration, submitted herewith, confirms that plaintiffs' declaration cannot be credited. Plaintiffs' declaration draws conclusions by citing sources that do not set international law norms and, in many instances, do not even stand for the propositions for which they are cited. *See* Rebuttal Decl., *passim*.

### A. Plaintiffs Allege A Disproportionate Force Claim.

Plaintiffs have tacitly conceded a dispositive legal issue in this case: that this court cannot "sit in judgment on unintended collateral killings or a government's legitimate use of force to restore order." Opp. at 1. Each of plaintiffs' claims impermissibly requires the Court to determine whether police and military overreacted to the crises they addressed. *See* Rebuttal Decl. ¶ 67. But neither plaintiffs nor their experts identify any internationally recognized norm that survives "vigilant doorkeeping" by which this Court can make this determination. Indeed,

[11] Plaintiffs' contention that subject matter jurisdiction exists over an ATS claim so long as it is not "wholly insubstantial and frivolous," the 28 U.S.C. § 1331 standard, cannot be squared with the "vigilant doorkeeping" required under § 1350. *Sosa*, 542 U.S. at 729. In the pre-*Sosa* case plaintiffs cite in support, the plaintiff sought dismissal and disclaimed reliance on the ATS. *See Herero v. Deutsche Bank*, 370 F.3d 1192 (D.C. Cir. 2004).

U.S. law expressly bars civil suits attacking a government's suppression of a riot. JMD at 26–29.[12] Deaths that occurred as a result of that riot are not actionable in tort in the U.S., further proof that there is no internationally-recognized norm that applies here. *Id.* at 26.

Rather than argue otherwise, plaintiffs contend that the rule of proportionality applies only to "armed conflict," which they contend was not present in Bolivia. Opp. at 28. This is nonresponsive. The question is whether any norm exists pursuant to which this Court could resolve claims addressing the use of force to quell violent uprisings. Plaintiffs do not identify any such standard, and, indeed, there is none. Rebuttal Decl. ¶ 52. Instead, plaintiffs argue that ***if*** the law of armed conflict applied (they contend it does not), the principle of distinction applies to their claims. The only case they cite that addresses this principle alleged the deaths of thousands of civilians at the hands of terrorists organizations—a situation far removed from the ACC. Opp. at 28–29 (*citing Almog v. Arab Bank*, 471 F. Supp. 2d 257, 278 (E.D.N.Y. 2007)). Even assuming the law of armed conflict and principle of distinction apply, the principle is not implicated because plaintiffs have failed properly to plead, and the ACC belies, that defendants ordered the military intentionally to kill peaceful unarmed civilians. *See supra*, Part I.

**B. Plaintiffs Do Not Allege Extrajudicial Killings Under the ATS or TVPA.**

Plaintiffs do not provide any support for their contention that the international law norm prohibiting extrajudicial killings applies to deaths that occurred in the midst of a government's response to civil disorder.[13] "Although there may arguably be a general customary international law norm against summary executions of political opponents or suspected criminals taken into custody, that norm does not prohibit the actions alleged in the Complaint. There is no international consensus regarding the rules that ought to govern law enforcement operations to restore civil order." Rebuttal Decl. ¶ 24. Neither the plaintiffs nor their experts have cited a single case supporting their groundless contention. *See id.* ¶¶ 26–45.

The cases plaintiffs cite in their Opposition are all inapposite. *Almog*, 471 F. Supp. 2d at 260, involved an alleged *intifada* characterized by systematic and widespread terror campaigns designed to kill Jews and Israelis, in a case alleging genocide and crimes against humanity but

[12] The ACC pleads allegations that constitute a riot. JMD at 28 n.19.

[13] Plaintiffs do not dispute that under either the ATS or TVPA, their extrajudicial killing claim must rest on a well-defined international law standard. Opp. at 26.

not alleging extrajudicial killings. *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153–54 (E.D. Cal. 2004), involved the alleged coordination and planning of the assassination of an Archbishop while he was delivering mass. As to *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005), in that case a military *junta* "embarked upon the 'Caravan of Death'" over a five year period to torture and kill individuals who were incarcerated due to their alleged opposition to the military junta. In each international case they cite, "the government ordered military or security personnel to undertake clandestine missions to detain and execute . . . victims who were targeted because of their role in guerilla movements or political opposition. . . . [T]hese decisions may reflect a norm against programs to systematically capture and summarily execute political opponents. They do not show state consent to a norm against civilian killings, even deliberate civilian killings, in the course of an overt, short-term military and law enforcement action to quell a temporary civil disturbance . . . ." Rebuttal Decl. ¶ 40. Indeed, just since 2006, episodes involving civil unrest and resulting in civilian deaths have occurred in Mexico, Israeli-occupied territory, Congo, Egypt, Nepal, Venezuela, Turkey, China, Libya, Bolivia, Pakistan, Georgia, Kenya, India, and—involving UN security personnel—Kosovo. *See* Rebuttal Decl. ¶ 51. Governments in those cases have not acknowledged that they have, or might have, violated an international norm against extrajudicial killings (or crimes against humanity). *Id.* ¶ 63. There is thus no state practice condemning extrajudicial killing in the context of a response to civil unrest.

As well, as discussed at length above, even in the manner that plaintiffs attempt to define the norm, plaintiffs' Complaint does not sufficiently allege that the defendants ordered any such extrajudicial killings. *See supra*, Part I. Moreover, under the TVPA, plaintiffs concede they must plead that the killings were deliberated. Opp. at 27. As discussed, plaintiffs have failed to plead such deliberation and the ACC in fact belies its existence. And there is no international norm governing a government's treatment of persons who are not in State custody but are located in the midst of civil disorder and the response thereto. *See* Rebuttal Decl. ¶¶ 24, 52.

### C. Plaintiffs Mischaracterize Payments Received to Date and Fail To Disclose That They Are To Receive Additional Compensation.

Plaintiffs' TVPA claim fails at the outset because plaintiffs have already been compensated by the Bolivian government for the decedents' deaths.[14] JMD at 35–36. Tellingly,

[14] Although the 11th Circuit has held that no exhaustion applies to the ATS, the Supreme Court has stated it would consider it "in an appropriate case." *Sosa*, 542 U.S. at 733 n.21.

plaintiffs do not deny that they have received compensation from the Bolivian government; in light of that concession and defendants' ample evidence concerning the compensation, defendants have established that plaintiffs cannot seek relief again here. Plaintiffs attempt to dismiss the compensation as mere "emergency relief," but their efforts are unavailing. First, the Agreement itself expressly provides 5,000 Bolivianos in "emergency and funeral assistance," and, "furthermore," an ***additional*** 55,000 Bolivianos in "compensation." JMD Ex. 36. Second, the cases demonstrate that the characterization of the compensation does not undercut the significance of plaintiffs having received it. *See Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025 (W.D. Wash. 2005) ("A foreign remedy is adequate even if not identical to remedies available in the United States."), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007). Third, the sums were quite significant—seven times the average per capita annual income in Bolivia, *see* Ex. 44 (2004 Background Note) at 1—and refute or render meaningless the characterization that the payments were simply "emergency relief."

Moreover, plaintiffs are pursuing ***additional*** compensation from the Bolivian government. On April 29, 2008, two of the plaintiffs, in their capacity as the president and vice-president of the "Association of Fallen Family Members Killed in the Gas War in September and October of 2003," signed a consent agreement with the Bolivian government regarding legislation to provide additional compensation. *See* Ex. 45 ("Meeting of Agreement Minutes"). A draft of the bill discussed in that agreement was then submitted to the President of Bolivia's National Congress on June 11, 2008—prior to plaintiffs filing their Opposition. *See* Ex. 46 (Letter Enclosing Draft Bill). The bill already has passed the lower Chamber, Ex. 47 (*La Razón*, July 13, 2008), and two weeks ago was transmitted to the Senate, Ex. 48 (Bill No. 1005/2008) at Art. 6(a). The introduction to the draft bill states that "[t]he purpose of this law is to grant a one-time payment benefit, academic support and public recognition for the victims of the events of February, September, and October 2003." *Id.* Art. 1. With this Law plaintiffs will receive more than USD $18,000, which yields a total compensation to plaintiffs of between 25 and 30 years of the average annual Bolivian income. This Court cannot hear a TVPA claim in which plaintiffs have already been compensated ***and*** are seeking even more. *See* 28 U.S.C. § 1350 note §2(b).

Plaintiffs would have the Court ignore all of these efforts taken by the Bolivian government to compensate them because they were undertaken by that country's Congress, rather than a court. Opp. at 43. This novel argument is unsupported by the plain language of the

TVPA itself, which states that "a court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note § 2(b). The statute says absolutely nothing about the necessity of a court judgment, and plaintiffs cite no U.S. case so interpreting the legislation. The Senate Report plaintiffs rely on addresses only whether a final judgment against the plaintiff, not an administrative remedy in general for the plaintiff, will require dismissal of a TVPA claim. Opp. at 43.[15] And the House Report explains that the purpose of the exhaustion requirement is to "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. Plaintiffs' proposed limitation makes no sense, as it would expose U.S. courts to unnecessary burdens where the country's legislative branch provided "meaningful remedies."

The cases plaintiffs cite also do not support their argument. In each case, the claimants had obtained ***no*** relief, and the question was whether they had at least exhausted the remedies available to them. *See Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (plaintiff could not enforce judgment after defendant freed from prison and restored to power); *Velásquez Rodríguez* (student detained and tortured and three writs of habeas corpus brought did not produce results); *Feirén Garbi and Solís Corrales* (government would not assist in search for disappeared individuals). None of the cases support the untenable argument that a U.S. court must burden itself with providing a remedy that plaintiffs have already received in their own country because the remedy was granted by the Legislature, as opposed to the Judiciary.[16]

**D. Plaintiffs Do Not Allege Crimes Against Humanity.**

The norms governing crimes against humanity "do not reach the allegations of the Complaint. Operations to restore order, such as those alleged in the Complaint, fall well outside the core, widely-accepted meaning of crimes against humanity." Rebuttal Decl. ¶ 53. A survey of instances in international state practice in which crimes against humanity have been found, such as the Holocaust and the Rwanda genocide, establishes that plaintiffs have not pleaded "the level of orchestration and savagery" necessary. *Id.* ¶ 64.

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[15] *Corrie*, 403 F. Supp. 2d at 1025-26, did not hold that only courts provide meaningful remedies.

[16] Nor do plaintiffs cite any TVPA case to support their argument that the remedies received here are insufficient because they did not address defendants' liability. Opp. at 44.

Plaintiffs argue that the Lozada government's response to the protests was ***widespread*** because it was "conducted on a large scale against many people." Opp. at 30. As an initial matter, plaintiffs purport to satisfy this high standard by relying on the alleged 67 deaths (including members of the military and police) and over 400 injuries. ACC ¶¶ 1, 75. Yet plaintiffs dissociate themselves from every casualty other than their nine relatives' in rebutting defendants' contention that the ACC effectively pleads the disproportionate use of force. Plaintiffs cannot simultaneously claim this litigation is, and is not, about the casualties that occurred during the government's overall response to the 2003 crises. In any event, the cases plaintiffs cite make plain that their allegations fall far short of a widespread attack. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479–80 (S.D.N.Y. 2005), involved the ethnic cleansing of 114,000 to 250,000 persons in southern Sudan. *Prosecutor v. Tadic*, Case No. IT-94-1-T, *available at* 1997 WL 33774656 (May 7, 1997), addressed ethnic cleansing of Muslims by defendants who personally engaged in torture, rape, and other atrocities in a concentration camp during the Balkan conflict. In *Prosecutor v. Kordic/Cerkez*, Case No. IT-9514-2-T, *available at* 2001 WL 34712270 (Feb. 26, 2001), defendants followed a preconceived plan of shelling houses and then sending soldiers from house to house, killing and wounding many of the inhabitants, and setting fire to the houses; detainees were then used as human shields.[17] In *Mujica*, the court held only that crimes against humanity are generally actionable under *Sosa*, 381 F. Supp.2d at 1180; the Court ultimately ***dismissed***, however, on the political question doctrine, *id.* at 1194. Finally, in *Hurtado* a unit of the Peruvian military allegedly packed villagers into a house and set it on fire with grenades, an incident that occurred amidst a twenty year civil war during which plaintiffs alleged the army "carried out massacres, disappearances, and torture in the Andean highlands." *Lizarbe v. Hurtado*, Case No. 07-21783, D.E. 1 (July 11, 2007) at ¶ 14.

Plaintiffs also fail to defend their argument that the decedents died as a result of ***systematic*** attacks. They state that the ACC "explains in great detail that [the government's actions] were methodically orchestrated by the defendants." Opp. at 31. Plaintiffs argue this because, as they concede, they must allege "a high degree of orchestration and methodical planning." *Id.* (quoting authorities). Yet not a single allegation alleges in any detail, much less

[17] *Cabello's* inapplicability is explained above. *See supra* at p.18.

"great detail," how the defendants allegedly orchestrated, methodically, decedents' deaths. Plaintiffs allege only in conclusory fashion that defendants orchestrated attacks on protestors. ACC ¶ 81. But their Complaint makes plain that the deaths were the byproduct of the crises in Sorata and La Paz. Indeed, the allegations plaintiffs make with respect to defendants' planning involve their official decrees (a Directive and Supreme Decree) to restore order. *See supra*, p.13.

Finally, individuals "targeted based on the individualized suspicion of engaging in certain behavior" are not victims of a crime against humanity. JMD at 37–38 (citing cases). "The victims of the [armed forces] were targeted because they were oil protesters, or because they were associated with oil protesters . . . . Though the evidence indicates that the [armed forces] were not particularly selective in choosing their targets, the victims . . . were not targeted . . . simply because they were civilians." *Bowoto v. Chevron Corp.*, No. C 99-02506, 2007 WL 2349343 *10 (N.D. Cal. Aug. 14, 2007) (discussing multiple ICTY cases). Customary international law finds a crime against humanity when persons are indiscriminately tortured and killed. *Id.* at *6. It is not a crime against humanity for individuals to be specifically targeted, as plaintiffs allege in Count III, to deter persons from joining violent uprisings such as those in Sorata and La Paz. *Id.*; Rebuttal Decl. ¶ 62.

**E. Plaintiffs' Count for the Violation of the Rights to Life, Liberty, Security of Person, Association, and Assembly Must Be Dismissed.**

Plaintiffs do not cite to a single post-*Sosa* case in which a court has held that a violation of the right to life, liberty, security of person, association, and assembly is sufficiently defined under international law to support an ATS claim. Instead, plaintiffs cite only pre-*Sosa* decisions that relied on reasoning that the Supreme Court has expressly rejected. In *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003), the court "reluctantly" found a right to associate and organize by holding that the ATS was the "implementing legislation" for non-self-executing treaties. *See also Estate of Cabello v. Fernández-Larios*, 157 F. Supp. 2d 1345, 1359–60 (S.D. Fla. 2001) (same). But *Sosa* later rejected the conclusion that non-self-executing treaties could alone support an ATS claim. *See Sosa*, 542 U.S. at 734–35. In *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995), the court held that the ATS "yields both a jurisdictional grant and a private right to sue for tortious violations of international law (or a treaty of the United States). . . ." *Sosa* rejected that conclusion as well. *See Sosa*, 542 U.S. at 713–14. And in *Wiwa v. Dutch Petroleum*, 2002 WL 319887, *7 (S.D.N.Y. Feb. 28, 2002), the court recognized a claim for arbitrary detention, *i.e.*¸ the very claim that *Sosa* later rejected as

insufficiently defined. Plaintiffs also attempt to support this claim through their experts. That attempt wholly fails for reasons explained by the rebuttal. *See* Rebuttal Decl. at ¶¶ 65–78.[18] Plaintiffs finally argue that though the full extent of these alleged rights are not cognizable under *Sosa*, melding them together somehow suffices to state a cognizable international norm. Opp. at 34. Nowhere do plaintiffs define the elements or contour of such a hodgepodge norm. This failure is all the proof this Court needs that this right is not an accepted norm sufficient under *Sosa*. *See Bowoto v. Chevron*, No. C 99-02506, 2008 WL 2271600, *11–12 (N.D. Cal. May 30, 2008) (holding claims identical to the ones plaintiffs assert are "not actionable under the ATS").

Even so, plaintiffs' experts explain that there is an exception for "exigent circumstances as might apply to police officials in line of duty in defense of themselves or of other innocent persons." Pl. Ex. F ¶ 28; *see* JMD at 40. Such exigencies are evident on the face of the ACC: government forces acted to "'rescue' the group of travelers in Sorata," ACC ¶ 30, and to alleviate "a state of emergency . . ., declaring the transport of gas to La Paz a national priority," *id.* ¶ 47.

**F. The Presumption Against Extraterritoriality Bars Plaintiffs' Action.**

Plaintiffs argue that this presumption does not apply to ATS claims. Yet none of the Circuit cases cited by plaintiffs, Opp. at 35, so provide. Plaintiffs lift out of context and thus pervert "*Sosa*'s statement that 'modern international law is very much concerned with' limits on foreign government's treatment of its own citizens," *id.*[19] This was in a paragraph that emphasized the "high bar" for ATS claims, that counseled ***against*** "consider[ing] suits under rules that would go so far as to claim a limit on the power of foreign governments over their own

[18] Plaintiffs do not meaningfully distinguish cases that reject these rights. Opp. at 34. *Flores* did not limit its rejection of a "right to life" to the environmental context, and in fact rejected two of the very sources on which plaintiffs heavily rely for these various rights. *Compare* Opp. Ex. F ¶¶ 41, 54, *with Flores*, 414 F.3d at 254–55. Further, that this Court rejected a right to life claim in *Saperstein v. Palestinian Authority*, No. 1:04-cv-20225, 2006 WL 3804718 (S.D. Fla. Dec. 22, 2006), in the context of war crimes and terrorism only militates against such a right here; if such a right does not apply in that context, it cannot apply to a government's response to violent riots.

[19] Plaintiffs' contention, Opp. at n.24, that defendants mischaracterize *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), is wrong. *Compare Amerada Hess*, 488 U.S. at 439 (FSIA provides the sole basis for obtaining jurisdiction over a foreign state) *with* JMD at 41 ("[T]he ATS cannot be applied to suits against foreign states."). Plaintiffs also do not address that in an analogous case, the Supreme Court applied "[t]he canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441.

citizens, and to hold that a foreign government or its agent has transgressed those limits," and noted that they "should be undertaken, ***if at all***, with great caution." *Sosa*, 542 U.S. at 727–28.

**G. Secondary Liability Does Not Attach.**

Plaintiffs cannot maintain secondary liability because, as discussed above, they have not established any primary liability. Plaintiffs' secondary liability claims suffer from other infirmities. As to aiding and abetting liability, plaintiffs do not sufficiently allege that defendants knew and intended that their orders would substantially assist the military in targeting innocent civilians far from protests in order to subvert further protests. *See supra* Part I. As to command responsibility, that doctrine is limited to armed conflicts, *see Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002), which plaintiffs contend this was not, Opp. at 28. Plaintiffs claim *Ford* upheld the doctrine outside the context of armed conflict, Opp. at 39, but in fact it upheld it in the context of a "civil war." *Ford*, 289 F.3d at 1286. Their other citations are equally without merit. *See, e.g.*, *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (only issue on appeal was equitable tolling of statute of limitations); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (pre-*Sosa* opinion resting liability on unspecified agency theory of alleged torturers who were members of the defendant's personal security detail). As to conspiracy, the Eleventh Circuit's *Cabello* decision permitting conspiracy liability for all customary international law violations has been vitiated by *Hamdan*. JMD at 46. Glaringly, plaintiffs' expert declaration argues in favor of several forms of secondary liability and shows familiarity with *Hamdan*, Opp. Ex. F at 4, 15–22, but does not offer any view on the continuing viability of conspiracy liability. That silence speaks volumes.[20] *See also* Rebuttal Decl. ¶¶ 79–85.

**H. Plaintiffs' State Law Claims Must Also Be Dismissed.**

All state claims against President Lozada are time-barred. Without citation, plaintiffs assert that "[t]he *Van Dusen* principle is inapplicable to claims alleged for the first time in the transferee court." Opp. at 45. Not so. *See, e.g.*, *Brown v. Hearst Corp.*, 54 F.3d 21, 24 (1st Cir. 1995). Moreover, though plaintiffs attempt to limit *Van Dusen* to diversity cases rather than supplemental jurisdiction cases, the case law is to the contrary. *See, e.g.*, *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 434 F. Supp. 2d 203, 207–08 (S.D.N.Y. 2006). Plaintiffs reliance on *Boardman Petrol. v. Federated Mut. Ins. Co.*, 135 F.3d 750 (11th Cir. 1998), is inapposite.

[20] Plaintiffs also fail to allege a "plausible" conspiracy under *Twombly*. JMD at 45–47.

There, after transfer, the court had to apply one state's choice-of-law principles because it was faced with one plaintiff, one defendant, and one contract. Plaintiffs also suggest that *Van Dusen* is inapplicable because President Lozada moved for transfer, Opp. 45, but the Supreme Court has flatly rejected this argument. *See Ferens v. John Deere Co*., 494 U.S. 516, 531 (1990).

Plaintiffs also assert that Maryland courts would apply the substantive limitations period of Bolivia. That only may be true if the foreign statute of limitations extinguishes the underlying right as well as the remedy, which occurs only in two narrow situations inapplicable here. *Sokolowski v. Flanzer*, 769 F.2d 975, 978 (4th Cir. 1985). First, the statute creating the right must contain a "built-in" limitations period. *Id.* But the single limitations period plaintiffs cite is set forth in a stand-alone provision apart from the many torts to which it applies. Opp. 46. The second situation, a limitations period that "is specifically directed to the statutorily-created liability," *Sokolowski*, 769 F.2d at 978, also does not apply because the cited provision *addresses* none of the statutes plaintiffs claim were violated. That the Bolivian courts may consider its limitations period to be substantive, Opp. 46, is immaterial because it is Maryland's characterization that matters, not Bolivia's. *Id.*

As to Florida substantive law, plaintiffs rely on the transitory tort doctrine to assert Florida tort claims. Their citation to a malfunctioning soda bottle cap case does not support this reliance. Opp. at 47 (*citing White v. Pepsico, Inc.*, 568 So. 2d 886 (Fla. 1990)). Plaintiffs further contend their state claims survive *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) because state tort statutes are neutrally applicable; this Circuit, however, has applied *Garamendi* to such statutes. *See Ungaro-Benages*, 379 F.3d at 1233. Plaintiffs imply there is no conflict between their claims and the Executive's foreign relations power. There plainly is. *See supra*, Part II. Plaintiffs defend Count V by arguing that they have pled "deliberate" and "targeted" killings. They do not. *See supra*, Part I. They defend Counts IV, VI and VII by arguing that defendants owed decedents a duty of care because plaintiffs were "bystanders" within a "zone of risk," Opp. at 50; this position confirms that their newly-added paragraph 1, in which they claim decedents were far from the protests, is untenable. The claims fail because they pled only discretionary exercises of authority by legally permissible means, which are protected under the discretionary function and public duty doctrines. JMD at 49–50.

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Dated: July 21, 2008

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 21, 2008, I electronically filed the foregoing reply with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on Ira J. Kurzban, a member of the bar of this Court, on this day via transmission of Notices of Electronic Filing generated by CM/ECF and on the other counsel listed on the attached Service List by electronic mail (in pdf format).

_____/s/ Eliot Pedrosa_____

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