UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NOS. 07-22459-CIV-JORDAN & 08-21063-CIV-JORDAN

ELOY ROJAS MAMANI, et al.,)
Plaintiffs)
vs.)
JOSE CARLOS SANCHEZ BERZAIN, and GONZALO DANIEL SANCHEZ DE LOZADA SANCHEZ BUSTAMANTE)
Defendants)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

For the reasons which follow, the defendants' joint motion to dismiss [D.E. 81 in Case No. 07-22459 and D.E. 65 in Case No. 08-21063] is GRANTED IN PART and DENIED IN PART. The clerk shall file a copy of this order in both cases.

I. FACTUAL ALLEGATIONS

This is a civil action for compensatory and punitive damages against the former President of Bolivia, Gonzalo Daniel Sanchez de Lozada Sanchez Bustamante (Mr. Lozada), and the former Minister of Defense of Bolivia, Jose Carlos Sanchez Berzain (Mr. Berzain), for their alleged roles in the massacre of Bolivian civilians in September and October of 2003. In general, the complaint alleges that, during this time period, many Bolivians engaged in protests against unpopular policies of the Bolivian government headed by Mr. Lozada. In response to these protests, the defendants allegedly ordered Bolivian armed forces to attack and kill unarmed civilians, many of whom were not involved in the protests and were not in the vicinity of the protests. Under the alleged direction of the defendants, the armed forces intentionally killed 67 individuals and injured over 400 others.

Mr. Lozada is a Bolivian citizen and, since he left Bolivia in October of 2003, he has been a resident of the United States. He currently resides in Chevy Chase, Maryland. *See* Corrected Amended Consolidated Complaint ¶ 5 [D.E. 77].[1] From August 1993 to August 1997, and again

[1] All references to the complaint are to the corrected amended consolidated complaint. All docket entry citations refer to Case No. 07-22459.

from August 2002 to October 2003, Mr. Lozada served as President of Bolivia. *See id.* Mr. Berzain is also a Bolivian citizen and, since he left Bolivia in October 2003, he has been a resident of the United States. He currently resides in Key Biscayne, Florida. *See id.* at ¶ 6. At all relevant times in September and October of 2003, Mr. Lozada (as President and Captain General of the Armed Forces) and Mr. Berzain (as Minister of Defense) possessed and exercised command and control over the armed forces of the country. *See id.* at ¶ 7.

All the plaintiffs are citizens of Bolivia, and currently reside in Bolivia. They bring this action in their individual capacities and on behalf of relatives who were killed in September and October of 2003 by the Bolivian armed forces or persons acting in coordination with them. *See id.* at ¶¶ 8-16. All the decedents were natives of Bolivia's indigenous Aymara community. *See id.* at ¶ 17.

The complaint alleges that during his first term Mr. Lozada oversaw the sale of state industries, provoking widespread domestic criticism based on allegations that these sales were corrupt. *See id.* at ¶ 20. The defendants were involved in the violent suppression of those who criticized the government. *See id.* at ¶ 21. During Mr. Lozada's second term, the government again employed violence to quell criticism of economic policies, and used military force to silence opposition and intimidate the civilian population, particularly poor and indigenous citizens. *See id.* at ¶¶ 22-23. The complaint sets forth details of several sequential incidents of violence by the Bolivian government. *See id.* at ¶ 23. For example, in January of 2003, the government responded violently to protests and killed demonstrators. In February of 2003, Mr. Lozada ordered the armed forces to suppress a strike, again killing demonstrators. *See id.*

In September of 2003, villagers began to congregate to protest government policies, marched to the city of La Paz, and blocked major highways -- thereby halting automobile traffic on some routes into La Paz and precluding some travelers from the village of Sorata from returning to La Paz. *See id.* at ¶¶ 26-29. In response, Mr. Berzain ordered the mobilization of a joint police and military operation to rescue the group of travelers trapped in Sorata. *See id.* at ¶ 30. On September 30, 2003, the military arrived in Warisata and shot tear gas and bullets at a group of demonstrators. *See id.* at ¶ 31-32. A military and police convoy later arrived in Sorata, where Mr. Berzain was present and directing military personnel. *See id.* at ¶ 34. Protesting local villagers forced him out of the town

and the convoy left with the travelers. *See id.* Outside Sorata, local villagers blocked the roads with rocks, and the military chased, shot, and killed an elderly man. *See id.* at ¶ 35. That afternoon, Mr. Lozada ordered the armed forces to form a task force and authorized the use of "necessary force" to reestablish public order. *See id.* at ¶ 36.

In the early afternoon, the townspeople of Warisata protested the military's use of deadly force in Sorata while security forces approached Warisata. *See id.* at ¶ 37. Security forces were on the ground, and Mr. Berzain participated in the military operation from a helicopter. Shots were fired at the villagers below, killing eight-year old Marlene Nancy Rojas Ramos, who was looking out from a window inside her home. *See id.* at ¶¶ 38-40. Two other civilians and a soldier were also killed. *See id.* at ¶ 41.

On October 1, 2003, Aymara villagers again blocked roads to protest the events in Warisata and Sorata, and strikes spread throughout the highlands and the countryside. *See id.* at ¶ 43. A week later, community organizations called for an indefinite general strike. *See id.* at ¶ 44. On October 11, 2003, the defendants promulgated Executive Decree 27209, establishing a state of emergency in the country. *See id.* at ¶ 47. A clause in the Executive Decree offered indemnification for damages to persons and property from the government's actions. *See id.* at ¶ 48. The complaint, among other things, challenges the legality of the Executive Decree. *See id.* at ¶ 49-50.

On October 12, 2003, the military and police killed 30 civilians and injured more than 100 people in and around the city of El Alto. *See id.* at ¶ 51. As the protesters fled, military officers fired shots. *See id.* at ¶ 53. Some of the plaintiffs' relatives died from these shootings. For example, Ms. Apaza died while she was on the terrace in her house; Mr. Quispe died when he went to check on his property in El Alto; Ms. Morales died when a bullet blasted through the wall of her house; and Mr. Carvajal died when he went to close a window in his house. *See id.* at ¶¶ 55-58.

One day later, on October 13, 2003, the military opened fire on a group of villagers from Ovejuyo, resulting in various deaths. *See id.* at ¶ 63-72. On October 17, 2003, Mr. Lozada resigned as President and both defendants left Bolivia for the United States. *See id.* at ¶ 74.

In November of 2004, the Trial of Responsibilities commenced in Bolivia to determine the criminal liability of the defendants for the 67 deaths and over 400 injuries during September and October of 2003. *See id.* at ¶ 75. The defendants, however, have refused to return to Bolivia to face

trial. *See id.* at ¶ 76. On June 22, 2005, the Bolivian government formally requested that the U.S. Department of State serve the defendants in connection with the criminal investigation in Bolivia. *See id.* In January of 2007, the Supreme Court of Bolivia issued criminal "pre-indictments" against the defendants. *See id.* at ¶ 77.

Count I alleges that the killings of the plaintiffs' relatives were "extrajudicial" under customary international law, and as defined by the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, and are thus actionable under both the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the TVPA. *See id.* at ¶ 92-95.[2] Count II alleges that the extrajudicial killings were committed as part of a widespread or systematic attack against a civilian population, and were intended to terrorize the indigenous Aymara population of the La Paz region, and therefore violated the customary international law norm prohibiting crimes against humanity. *See id.* at ¶ 97-99. Count III alleges that the killings of the plaintiffs' relatives were violations of their rights to life, liberty and security of person, their rights to association, and in one case, the right to peaceful assembly, in violation of customary international law. *See id.* at ¶ 101-02. Both Count II and Count III are alleged as actionable under the ATS.

Count IV is a wrongful death claim under unspecified law, alleging that the defendants tortiously and intentionally ordered military personnel to use deadly force against the unarmed decedents. *See id.* at ¶ 105. The plaintiffs claim that they suffered damages due to mental pain and anguish, medical and funeral expenses, and the loss of future support and services. *See id.* at ¶¶ 106-14. Count V is a claim for intentional infliction of emotional distress under Florida law, alleging that the defendants' conduct was outrageous and intended to cause the plaintiffs emotional distress. The plaintiffs seek compensatory and punitive damages. *See id.* at ¶¶ 116-119. Count VI is a claim for negligent infliction of emotional distress under Florida law, and also seeks compensatory and punitive damages. *See id.* at ¶¶ 124-27. Count VII is a negligence claim under Florida law, alleging that the defendants failed to use reasonable care to avoid injury to the plaintiffs. The plaintiffs again seek compensatory and punitive damages. *See id.* at ¶¶ 129-30.

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[2] In a separate order, I dismissed the plaintiffs' TVPA claims without prejudice for failure to exhaust local remedies. *See Rojas Mamani v. Sanchez Berzain*, --- F. Supp. 2d ----, 2009 WL 1765655 (S.D. Fla. 2009).

The plaintiffs allege that jurisdiction exists under the ATS, 28 U.S.C. § 1350, as well as 28 U.S.C. §§ 1331 (federal question) and 1332 (diversity). The plaintiffs further assert that there is supplemental jurisdiction over their state-law claims pursuant to 28 U.S.C. § 1367.

The defendants have moved to dismiss on several grounds. They argue that this case concerns political questions that are left exclusively to the Executive Branch under separation of powers principles. They also contend that, under the act-of-state doctrine, a court should not judge the actions of foreign governments. They further assert that they are immune from suit for the official actions they took, as a former head-of-state or minister of defense, under common law head-of-state immunity and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611.

On the merits, the defendants argue that the plaintiffs have failed to allege any violation of international law because United States courts do not review a government's handling of riot situations. Specifically, they say that Count I (extrajudicial killing) fails to state a claim because the ATS does not apply to government actions of the type the plaintiffs allege. According to the defendants, the plaintiffs have failed to allege that the killings were deliberate or that the decedents were in the government's custody or control. The defendants contend that Count II, for crimes against humanity, fails to state a claim because the plaintiffs do not adequately allege that their acts were directed against a civilian population, or that the attacks were "widespread" or "systematic." The defendants maintain that Count III -- for violations of the rights to life, liberty and security of person, and freedom of assembly and association -- fails because the plaintiffs do not allege a violation of customary international law. Finally, the defendants argue that the state law claims in Counts IV - VII should be dismissed and that they fail both under Maryland and Florida law.

II. Legal Standards

A. Rule 12(b)(1)

A motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) can be based upon either a facial or factual challenge to the complaint. *See Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.1981).[3] *See also Stalley ex rel. United States v. Orlando Regional Healthcare System, Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008); *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

(11th Cir. 1990) (per curiam). "A facial attack on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Stalley*, 524 F.3d at 1232-33 (citing *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir.2007)). In contrast, a factual attack on a complaint challenges the existence of subject-matter jurisdiction using material extrinsic from the pleadings, such as affidavits or exhibits. *See id.* at 1233. When defending against a facial attack, a plaintiff has safeguards similar to those retained against a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See id.* (quotations omitted). The court is required to look and see if the plaintiff has sufficiently alleged a basis for subject-matter jurisdiction, and the allegations in the complaint are taken as true for the purposes of the motion. *See id.* at 1232-33 (citing *Lawrence*, 919 F.2d at 1529).

On the issue of subject-matter jurisdiction, a court may look beyond the pleadings in determining international law. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 255 n.30 (2d Cir.2003) ("While the determination of customary international law is not strictly factual, courts must resort to submissions outside the pleadings in order to ascertain the customs and practices of states."). When reviewing a motion to dismiss under both Rule 12(b)(1) and Rule 12(b)(6), a court should generally decide jurisdictional questions first. *See Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir.1990).

B. RULE 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), the plaintiffs must plead "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. For Choice, Inc.,* 253 F.3d 678, 683 (11th Cir. 2001). The court must limit its consideration to the complaint. *See GSW, Inc. v. Long County,* 999 F.2d 1508, 1510 (11th Cir. 1993). The factual allegations are accepted as true and all reasonable inferences from these allegations are drawn in the plaintiffs' favor. *See Roberts v. Fla. Power & Light Co.,* 146 F.3d 1305, 1307 (11th Cir. 1998).

The plaintiffs, however, must allege more than "labels and conclusions." *See Fin. Sec. Assur., Inc. v. Stephens, Inc.,* 500 F.3d 1276, 1282 (11th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 554-55 (2007)). The factual allegations in the complaint must "possess

enough heft" to set forth "a plausible entitlement to relief." *Id.* Furthermore, "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).

III. JURISDICTIONAL CHALLENGES

The defendants raise three jurisdictional challenges, and argue that traditional separation of powers and comity principles deprive this court of subject-matter jurisdiction. First, they argue that the complaint poses non-justiciable political questions. Second, they assert that, under the act-of-state doctrine, a federal court should not judge the Lozada government's official response to an uprising. Third, they argue that the doctrine of head-of-state immunity immunizes Mr. Lozada and the FSIA similarly immunizes Mr. Berzain.

A. POLITICAL QUESTION

The defendants assert that the complaint presents a political question because it involves second-guessing the Executive Branch's endorsement and ratification of the Bolivian government's actions. In response, the plaintiffs argue that the United States condemned the human rights abuses that were allegedly committed by the defendants and that the Executive Branch in the United States repeatedly recognized the importance of holding accountable those responsible. The United States has declined to take a position in this case on the applicability of the political question doctrine, or the justiciability of the plaintiffs' claims, explaining that its "relations with the current Government of Bolivia are complex and difficult." *See* United States' Notice at 2 [D.E. 107].

The D.C. Circuit remarked two decades ago that "[n]o branch of the law of justiciability is in such disarray as the doctrine of the 'political question.'" *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 933 (D.C. Cir. 1988). Today, the doctrine is not much clearer. *See, e.g.*, *Doe v. Bush*, 323 F.3d 133, 140 (1st Cir. 2003) (describing the doctrine as "famously murky").

Any discussion of the political question doctrine starts with the six factors delineated in *Baker v. Carr*, 369 U.S. 186, 217 (1962): (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need

for unquestioning adherence to a political decision already made; and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. These factors are listed in descending order of both importance and certainty. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 n.35 (11th Cir. 2007). "A case may be dismissed on political question grounds if - and only if - the case will require the court to decide a question possessing one of these six characteristics." *See McMahon,* 502 F.3d at 1358.

1. Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department

"Under *Baker*'s first factor, a political question is raised when a suit requires reexamination of issues entrusted by the Constitution's text to a coordinate political department." *Carmichael v. Kellogg, Brown & Root Service, Inc.*, 2009 WL 1856537, at *6 (11th Cir. Jun 30, 2009). The first factor recognizes that, under separation of powers principles, certain decisions have been exclusively committed to the other branches of the government and are therefore not subject to judicial review. *See McMahon*, 502 F.3d at 1358-59. The defendants cite *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997), in arguing that the area of foreign relations is best left, and constitutionally committed to, the political branches.

In *Aktepe*, the Eleventh Circuit held that the first *Baker* factor barred judicial review of certain decisions concerning training by the U.S. military. *Aktepe* involved a U.S. ship accidentally firing two live missiles during a joint training exercise involving both the Turkish and U.S. navies. *See id.* at 1402. The panel noted that the text of the Constitution explicitly invests the political branches with authority over the military, and explained that, to decide the negligence claims, a court would have to determine whether various members of the U.S. military exercised reasonable care during a training exercise, which in turn would have required reexamination of core military decisions, including "Navy communication, training, and drill procedures." *See id.* at 1403-04.

Subsequently, in *McMahon* -- an action brought by survivors of U.S. soldiers killed in an airplane crash in Afghanistan against a civilian contractor providing air transportation to the Department of Defense -- the Eleventh Circuit distinguished *Aktepe*, noting that in *Aktepe* it "was obvious, even from the complaint, that the suit would require the court to review actual, sensitive judgments made by the military." *See McMahon*, 502 F.3d at 1362. The panel therefore held that

the first *Baker* factor did not justify dismissal because the private contractor failed to show that resolution of the negligence claim would require reexamination of any decision made by the U.S. military. *See id.* at 1361.

Aktepe does not control here, as the U.S. military was not involved in any of the alleged events that form the basis of the complaint. I agree with the plaintiffs, moreover, that not every case that touches upon foreign relations is necessarily barred by the political question doctrine. As the Second Circuit put it:

> Not every case 'touching foreign relations' is nonjusticiable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in § 1350, without compromising the primacy of the political branches in foreign affairs.

Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (internal citations omitted). *See also Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (court cannot shirk its responsibility to interpret statutes "merely because our decision may have significant political overtones"); *Baker*, 369 U.S. at 211 ("it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Ungaro-Benages v. Dresdner Bank AG,* 379 F.3d 1227, 1235 (11th Cir. 2004) ("not all issues that could potentially have consequences to our foreign relations are political questions").

Given that Congress passed both the ATS and the TVPA, "[t]he judiciary is the branch of government to which claims based on international law has been committed." *In re Agent Orange Prod. Liability Litigation*, 373 F. Supp. 2d 7, 69 (E.D.N.Y. 2005), *aff'd* 517 F.3d 104 (2d Cir. 2008). The defendants in *In re Agent Orange*, like Mr. Lozada and Mr. Berzain here, argued that adjudication of the case (which included challenges under the ATS to how the President and Congress chose to prosecute the war in Vietnam, specifically with respect to the use of herbicides) would require courts to "second-guess the wisdom of core military and diplomatic decisions and might interfere with present sovereign-to-sovereign relations between the United States and Vietnam." *See* 373 F. Supp. 2d at 69. The district court, however, rejected this argument and held that there was no textually demonstrable commitment of the issue to a coordinate political branch,

noting that the issues presented required interpretation of both international law - including treaties - and domestic tort law. *See id.* at 70. The district court cited *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004),[4] for the proposition that "hybrid tort and international law actions have long been addressed by the courts" and explained that Article III explicitly extends judicial power to the domain of treaties. *See id.* The district court held that the political question doctrine did not apply because the case did not meet any of the *Baker* factors and the defendants' position made it "difficult to imagine how the law of nations could be enforced in our courts at any time in any controversy." *See id.* at 75.[5]

Here, resolution of the plaintiffs' claims would not require me to reexamine any military or political judgments of the Executive Branch. The plaintiffs seek damages for the human rights abuses allegedly committed by two Bolivian officials in Bolivia; the plaintiffs do not challenge actions or decisions taken by the Executive Branch in the United States. The fact that the Executive Branch may have previously commented on the events in Bolivia does not necessarily transform this case into a nonjusticiable political question. *See Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (political question doctrine did not bar plaintiffs' suit for damages from the leaders of the Nicaraguan contras for the targeted killing of a U.S. citizen: "[T]he complaint challenges neither the legitimacy of the United States foreign policy toward the contras, nor does it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war. On the contrary, the complaint is narrowly focused on the lawfulness of the defendants' conduct in a single incident."). *See also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (summarily concluding in light of *Linder* that the political question doctrine did not bar ATS action alleging torture against former Ethiopian government official).

Moreover, this case is distinguishable from those decisions which have dismissed claims under the first *Baker* factor. *See, e.g.*, *Carmichael*, 2009 WL 1856537, at *1 (concluding that adjudicating the plaintiff's claims would require extensive reexamination and second-guessing of many sensitive judgments surrounding the conduct of a military convoy in war time -- including its

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[4]*Sosa* is discussed in more detail in Part IV.

[5]The district court nevertheless dismissed the claims on other grounds, and the Second Circuit affirmed the dismissal. *See In re Agent Orange*, 517 F.3d at 108.

timing, size, configurations, speed, and force protection); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-83 (9th Cir. 2007) (holding that resolution of the case would require the court to question the political branches' decision to grant extensive military aid to Israel, a decision which was committed to the legislative and executive branches under the first *Baker* test); *Schneider v. Kissinger*, 412 F.3d 190, 194-95 (D.C. Cir. 2005) (holding that decision of Executive Branch officials, performing their delegated functions concerning national security and foreign relations, to prevent the establishment of a Communist government in Chile during the Cold War, was textually committed to the political branches of the government and therefore presented a non-justiciable political question); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005) (issues relating to the ongoing Israeli-Palestinian conflict -- such as determining to whom the land in the West Bank belongs or declaring Israel's self-defense policies as tantamount to terrorism or other illegal activity -- were highly political in nature and that ruling on the issues would require the court to interfere in the Executive Branch's constitutionally granted power to conduct foreign affairs).

Thus, in light of the Supreme Court's statement that the doctrine "is one of 'political questions,' not one of 'political cases,'" *Baker*, 369 U.S. at 217, at this early stage of the litigation I cannot say it is evident that the plaintiffs' suit will call into question decisions made by or committed to the Executive Branch. *See McMahon*, 502 F.3d at 1365 ("It would be inappropriate to dismiss the case on the chance that a political question may eventually present itself.").

2. Lack of Judicially Discoverable and Manageable Standards

In *Vieth*, 541 U.S. at 278, the Supreme Court discussed the second *Baker* factor. The plurality concluded that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist: "One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*." *See id.* Whether there are judicially discoverable or manageable standards does not revolve around whether the case is large, complicated, or otherwise difficult to tackle from a logistical standpoint. *See Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005). "Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Id*. (quoting *Vieth*, 541 U.S. at 278).

It has been "established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort

Act." *Kadic*, 70 F.3d at 249. Indeed, in *McMahon* the Eleventh Circuit rejected an argument that the suit met the second *Baker* factor because there were no manageable judicial standards:

> We readily acknowledge that flying over Afghanistan during wartime is different from flying over Kansas on a sunny day. But this does not render the suit inherently non-justiciable. While the court may have to apply a standard of care to a flight conducted in a less than hospitable environment, that standard is not inherently unmanageable. *See Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (rejecting political question challenge to tort suit arising out of activity of Nicaraguan contras, and noting that "the common law of tort provides clear and well-settled rules on which the district court can easily rely") (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)). The flexible standards of negligence law are well-equipped to handle varying fact situations. The case does not involve a sui generis situation such as military combat or training, where courts are incapable of developing judicially manageable standards.

McMahon, 502 F.3d at 1364. The panel further noted that, as opposed to claims for injunctive relief, "[d]amage actions are particularly judicially manageable." *See id.* at n.34.

The plaintiffs here seek damages for the allegedly targeted killings of unarmed and non-violent family members pursuant to the ATS. In *Sosa*, the Supreme Court concluded that the ATS provides a substantive cause of action and set out the standard for assessing cognizable claims under that statute. As discussed later, the plaintiffs' claims for extrajudicial killing and crimes against humanity have specific discernable elements, and the cases involving these claims provide manageable standards for assessing such claims. Often times, these claims are against foreign officials and governments, yet they do not necessarily implicate the political question doctrine.

Carmichael and *McMahon* each involved accidents in a time of war, but the cases reached different results. *Carmichael* held that the political question doctrine barred a claim arising from a truck accident in a military convoy in Iraq, while *McMahon* held that claims arising from an airplane crash in Afghanistan did not implicate the political question doctrine. The key difference for the Eleventh Circuit was that in *Carmichael* a court would be compelled to second-guess the United States' military judgments. Here, I am not asked to pass any judgment on the United States' military or political actions, decisions, or policies. Rather, the issues are whether the defendants' alleged acts constitute extrajudicial killings and crimes against humanity under binding customary international

norms. Thus, the second *Baker* factor does not support applying the political question doctrine to bar the plaintiffs' claims. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1193 (C.D. Cal. 2005) (court had the legal tools to evaluate claim that the Columbian Air Force, along with a corporate defendant, bombed a village and killed innocent civilians in violation of binding international law norms).

3. The Impossibility of Deciding Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion

"[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Kadic*, 70 F.3d at 249. Where there is "an ordinary tort suit, there is no 'impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.'" *McMahon* 502 F.3d at 1364-65 (citing *Baker*, 369 U.S. at 217). The international law claims in this case are not "ordinary tort suits," like the airplane crash wrongful death action in *McMahon*, but they are ordinary ATS claims and customary international law provides the appropriate standards for adjudicating such claims without making an initial policy determination. Similarly, at least at this early stage of the case, the plaintiffs' wrongful death claims are not barred by the political question doctrine. To the extent that Bolivian substantive law may apply to the wrongful death claims, the parties have not yet briefed the content of that law. I cannot say, therefore, that the wrongful death claim is nonjusticiable.

The defendants cite *Aktepe, Schneider, and Doe I.* As previously discussed, however, these cases are distinguishable. *Aktepe* involved military training operations, and the Eleventh Circuit held that deciding the case would require a court to make initial policy decisions most appropriately reserved for military discretion, such as determining how to conduct firing drills. *See* 105 F.3d at 1404. In *Schneider*, the D.C. Circuit explained that a court would be "forced to pass judgment on the policy-based decision of the executive to use covert action to prevent that government from taking power." *See* 412 F.3d at 197. And in *Doe I*, the district court would be entangled in the controversial issue of declaring the legality or propriety of the Israeli defendants' actions in the West Bank. *See* 400 F. Supp. 2d at 112.

In this case, as noted above, I must decide whether the alleged acts undertaken by the Bolivian armed forces under direction of the defendants constitute extrajudicial killings and crimes against humanity under binding customary international norms, and permit an action for wrongful death under state or foreign law. Because there are discoverable and manageable international and domestic law standards to facilitate the adjudication of the international law and wrongful death claims, there is no need for any initial policy determinations which would implicate the third *Baker* factor.

4. Other *Baker* Factors: Respect to Coordinate Branches of Government; The Need for Unquestioning Adherence to a Political Decision Already Made; and the Potentiality of Embarrassment from Multifarious Pronouncements

The fourth, fifth, and sixth *Baker* factors mainly concern the impossibility of a court undertaking independent resolution without effecting multifarious pronouncements and without giving the respect due to coordinate branches of government. The defendants argue that the State Department has ratified the actions taken by the Lozada government, and that a finding against either defendant in this case would contradict the Executive Branch's decision in granting Mr. Berzain political asylum.[6] *See* Joint Motion to Dismiss at 16. In response, the plaintiffs deny that the U.S. government ratified the defendants' actions, citing to the defendants' exhibits for the proposition that "the U.S. government praised the successor government's commitment to investigate human rights violations which occurred in the September/October period." *See* Plaintiffs' Response at 11.

With respect to the fourth factor, a court should "consider whether it would be possible to resolve this case without expressing a lack of respect for the Executive's handling of foreign relations." *Mujica*, 381 F. Supp. 2d at 1193. In *McMahon*, for example, the Eleventh Circuit held that there was "no evident impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government because [the defendant] ha[d] not shown that the suit will implicate a decision made by a coordinate branch of government." 502 F.3d at 1365 (internal citation and quotation marks omitted). The same is true here. The United States declined to intervene in this case after it was invited to do so. *See* United States' Notice at

[6] The defendants, however, cite no authority for the proposition that the granting of political asylum precludes the adjudication of federal or state claims brought against the asylee under the political question doctrine.

2 ("The United States takes no position on those issues at this time."). In at least some of the cases that have applied the political question doctrine, the State Department had filed a statement of interest asserting the government's position against allowing the suit to go forward. *See, e.g., Mujica*, 381 F. Supp. 2d at 1194 (holding that the fourth *Baker* factor applied because proceeding with the litigation would indicate a lack of respect for the Executive Branch where the State Department had filed a statement of interest outlining several areas of foreign policy that would be negatively impacted by proceeding); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22, 28 (D.D.C. 2005) (holding that ATS claim against entity owned by the Indonesian government was nonjusticiable because adjudication of liability would create risk of interfering in Indonesian affairs and U.S. foreign relations where the State Department filed a statement of interest stating that adjudication of the lawsuit would risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the ongoing struggle against international terrorism). The fact that the United States has chosen not to express any views at this time, though not determinative, counsels against application of the political question doctrine. *See Alperin*, 410 F.3d at 555-56 (holding that the fourth *Baker* factor did not apply: "Had the State Department expressed a view, that fact would certainly weigh in evaluating this fourth *Baker* formulation."). Furthermore, allowing the plaintiffs' claims to proceed does not preclude the political branches from expressing their views as the case develops. In fact, in its notice, the government states that it "will continue to monitor this litigation." *See* United States' Notice at 2. Should circumstances change, I will re-evaluate the defendants' political question argument.

The defendants also point to events that they claim will affect diplomatic relations -- the expulsion of each country's ambassador by the respective host nation, the Bolivian government's allegation that the United States was a leading actor in the events of September and October of 2003, the Bolivian government's request for extradition of both defendants, and protests in Bolivia after Mr. Berzain's public announcement on Bolivian radio that he was granted asylum. Such conflicts or tensions, however, do not carry the day in light of the United States' silence. *See McMahon*, 502 F.3d at 1365 ("[W]e note that to this point the United States has not intervened in the instant case, despite an invitation to do so. We have previously found the opinion of the United States significant in deciding whether a political question exists. The apparent lack of interest from the United States on this point fortifies our conclusion that the case does not yet present a political question.") (internal

citation omitted). At this time, I see no concern that judicial handling of the plaintiffs' claims will involve an unusual need for unquestioning adherence to a political decision already made.

Finally, as to the sixth *Baker* factor, the government's decision not to take a position indicates the absence of "pronouncements" by the political branches regarding the resolution of the plaintiffs' international law claims. The political question doctrine simply is not a bar.

In sum, this case does not currently implicate any actions taken or decisions made by the Executive Branch, and the State Department has so far declined to intervene in this litigation. I therefore conclude that the fourth, fifth, and sixth *Baker* factors are not implicated in this case. In light of the Supreme Court's statement regarding "the necessity for discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, however, the defendants may move to dismiss on political question grounds after further factual or legal developments.

B. Act of State Doctrine

The act of state doctrine bars a United States court from entertaining a claim that would require it "to declare invalid the official act of a foreign sovereign performed within its own territory." *See W.S. Kirkpatrick & Co., Inc. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 404, 306 (1990) ("Act of state issues only arise when a court *must decide* -- that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign."). The act of state doctrine is to be applied sparingly, and only where the validity of an official act by a foreign sovereign is at issue. *See Doe I*, 400 F. Supp. 2d at 113; *Ampac Group Inc. v. Republic of Honduras*, 797 F. Supp. 973, 978 (S.D. Fla. 1992). Although the political question doctrine is based on constitutional separation of powers principles, the act of state doctrine is based on prudential separation of powers concerns, as well as notions of sovereign respect and intergovernmental comity. *See Doe I*, 400 F. Supp. 2d at 113. It reflects the judiciary's reluctance to complicate foreign affairs by validating or invalidating the actions of foreign sovereigns. *See id.*; *Kirkpatrick*, 493 U.S. at 404. "When it applies, the act of state doctrine is a rule of law that requires courts to presume that actions taken within a foreign sovereign's own territory are valid." *See Doe I*, 400 F. Supp. 2d at 113.

Kirkpatrick relied in part on *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), and recalled that a "balancing approach" could be applied -- the balance shifting against application of the doctrine, for example, if the government which committed the challenged act of state is no longer in existence. *See Kirkpatrick*, 493 U.S. at 409 (citing *Sabbatino*, 376 U.S. at 428).

In balancing respect for the sovereignty of foreign states and the separation of powers in administering foreign affairs on the one hand, against the power and duty of a court to exercise its judicial functions on the other, *Sabbatino* set out three factors for consideration: (1) the degree to which consensus has been reached regarding a particular area of international law; (2) the potential significance of any implications that the issue may have on the foreign relations of the United States; and (3) whether the government that perpetrated the challenged act is still in power. *See Sabbatino*, 376 U.S. at 428.

In sum, I must first examine the *Kirkpatrick* prerequisites: whether this case involves an official act of a foreign sovereign performed within its own territory, and whether the relief sought would require me to declare invalid the official act. I must then consider the three *Sabbatino* factors in determining whether the act of state doctrine bars this action, keeping in mind that the burden of proving acts of state rests on the party asserting the application of the doctrine. *See Honduras Aircraft Registry Ltd. v. Gov't of Honduras,* 129 F.3d 543, 550 (11th Cir. 1997).

The *Kirkpatrick* analysis is not determinative here. Even if I agreed with the defendants that (1) this case involves an official act of a foreign sovereign because of the plaintiffs' allegations that the defendants ordered or directed the military and police to kill unarmed civilians, and (2) the relief sought would require me to declare those actions invalid, the *Sabbatino* factors weigh against the application of the act of state doctrine. As the Supreme Court stated in *Kirkpatrick*, "sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application." *See Kirkpatrick*, 493 U.S. at 409 (relying on *Sabbatino,* and further explaining that "[i]t is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked").

The first *Sabbatino* factor weighs against invoking the act of state doctrine in this case. As discussed later, the plaintiffs' international law claims -- extrajudicial killings and crimes against humanity -- are recognized as violations of international law. *See also Kadic*, 70 F.3d at 250 ("it would be a rare case in which the act of state doctrine precluded suit under [the ATS]"); *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc*., 176 F.R.D. 329, 353 (C.D. Cal. 1997) ("In the context of jus cogens violations of international law, which are, by definition, internationally

denounced, the high degree of international consensus severely undermines defendants' argument that [the] alleged activities should be treated as official acts of state."); Restatement (Third) of Foreign Relations Law of the United States § 443, cmt. c (1987) ("A claim arising out of an alleged violation of fundamental human rights -- for instance, a claim on behalf of a victim of torture or genocide -- would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts."). Indeed, *Sabbatino* was careful to recognize the doctrine in the absence of "unambiguous agreement regarding controlling legal principles." *See Sabbatino*, 376 U.S. at 428. Here, given the degree of consensus concerning this area of international law, "the more appropriate it is for the judiciary to render decisions regarding it." *See id.*

The second *Sabbatino* factor is a closer call. The defendants contend that this case will affect relations between the two countries in light of Bolivian President Morales' condemnation of the United States' alleged involvement in the events of September and October of 2003, and Bolivia's current efforts to extradite the defendants. The plaintiffs, however, respond that this litigation will not negatively impact foreign relations, but instead will further the United States' interest in combating human rights violations in Bolivia and elsewhere. The plaintiffs point to one of the defendants' exhibits, in which the State Department expressed its support for Bolivian efforts to investigate and prosecute the human rights abuses after the defendants resigned. *See* Defendant's Exhibit 2 at FOIA-011 ("The new government is living up to its promise of respecting the human rights and fundamental freedoms of its citizens. [President] Mesa . . . has supported efforts to try former officials accused of human rights abuses") [D.E. 81-4]. On this current record, I cannot say that the defendants have met their burden for application of the act of state doctrine.

In addition, it seems to me that the adjudication of the plaintiffs' international law claims would not negatively impact foreign relations because the United States has not intervened in this case and has not filed a statement of interest indicating that this case will adversely affect its relations with Bolivia. "Because the goal of the act of state doctrine is to protect the interests of the United States and of the international community, the doctrine is not applied at every conceivable opportunity." *Unocal*, 176 F.R.D. at 350. Indeed, in *Kirkpatrick*, the Supreme Court stated:

> Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does

> not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.

Kirkpatrick, 493 U.S. at 409-10. Moreover, where the foreign country's current government seeks (or favors) an adjudication of these matters, there is less of a possibility that a federal court's pronouncements will embarrass our relations with that government. The second factor thus tips slightly against invocation of the act of state doctrine.

The third *Sabbatino* factor is an easy call. The government in which the defendants served is no longer in power in Bolivia. The current Bolivian government, which is recognized by the United States, has not objected to the adjudication of the claims against its former officials in this litigation. Indeed, the current government has sought to prosecute the defendants domestically for their alleged abuses, and has -- as explained below -- waived any immunity the defendants would have enjoyed in this litigation. It seems to me that allowing the plaintiffs' international law claims to proceed would not raise the issues of sovereignty that the act of state doctrine seeks to avoid. This factor therefore weighs strongly against the application of the act of state doctrine. *See Sabbatino*, 376 U.S. at 428 ("The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . the political interest of this country may, as a result, be measurably altered.").

The act of state doctrine, then, does not bar the plaintiffs' claims.

C. Immunity

The defendants argue that Mr. Lozada is immune as a former head of state for official acts taken while in office, and that Mr. Berzain is immune under the FSIA. I disagree.

1. Head-of-State Immunity for Mr. Lozada

Head-of-state immunity generally does not apply to a former head of state if it has been waived by the current government. *See e.g.*, *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("by issuing the waiver, the Philippine government has declared its decision to revoke an attribute of [the Marcoses'] former political positions; namely, head-of-state immunity") (cited favorably in *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997)); *Paul v. Avril*, 812 F. Supp. 207, 210-11 (S.D. Fla. 1993) (holding that former military ruler of Haiti was not entitled to head-of-state immunity because it had been waived by the Haitian government: "Defendant attempts to convince the Court that no weight should be given the waiver because it would encourage countries to disavow

those former leaders who do not curry favor with the new government. Immunity is a grant in a sense awarded at the sovereign's discretion."). *Cf. Lafontant v. Aristide*, 844 F. Supp. 128, 131-134 (E.D.N.Y. 1994) (rejecting argument that Haitian government had implicitly waived head-of-state immunity because there was no explicit waiver, but stating that a head of state is immune unless that immunity has been waived: "Head-of-state immunity, like foreign sovereign immunity, is premised on the concept that a state and its ruler are one for purposes of immunity."). As the Fourth Circuit has explained:

> [A]pplication of the [head-of-state immunity] doctrine to Ferdinand and Imelda Marcos would clearly offend the present Philippine government, which has sought to waive the Marcos' immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote. Our view is that head-of-state immunity is primarily an attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of Mr. and Mrs. Marcos.

See In Re Grand Jury Proceedings, Doe No. 700, 817 F.2d 1108, 1111 (4th Cir. 1987) (holding that the Philippine government has waived whatever head-of-state immunity was enjoyed by Ferdinand and Imelda Marcos: "head-of-state immunity can be waived by the sovereign").

The current Bolivian government has waived any head-of-state immunity that Mr. Lozada would have enjoyed in this litigation. The United States has filed a notice indicating that it has received a "Diplomatic Note and Letters from the current Government of Bolivia stating that it has waived any immunity." *See* United States' Notice Concerning Immunity at 1 [D.E. 107]. Attached to this notice are two letters, the first being a letter to former Secretary of State Condoleeza Rice from the Embassy of Bolivia pronouncing "an express waiver . . . of any immunity asserted or attempted by [the defendants]." *See* Republic of Bolivia, Ministry of Foreign Affairs and Culture Letter [D.E. 107-1]. The second letter states that the "Department of State accepts the waiver of immunity we have received from the Government of Bolivia with respect to the claims against that Government's former officials identified in the waiver." *See* Letter to the Honorable Gregory Katsas, Assistant Attorney General, Civil Division, United States Department of Justice, from the Honorable John B. Bellinger, III, Legal Advisor, United States Department of State [D.E. 107-2]. In light of the Bolivian government's waiver, Mr. Lozada is not entitled to head-of-state immunity.

2. Immunity Under the FSIA for Mr. Berzain

Mr. Berzain argues that, because the plaintiffs allege that he acted solely in furtherance of his official duties, the FSIA immunizes his conduct. Mr. Berzain, however, is not entitled to FSIA immunity.

Although there is some split of authority on the issue, some courts have held that the FSIA may apply to individuals like Mr. Berzain. *See, e.g.*, *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990) (concluding that the FSIA can fairly be read to include individuals sued in their official capacity). Others have come to a contrary conclusion. *See Yousuf v. Samantar*, 552 F.3d 371, 380-81 (4th Cir. 2009) (concluding, based on the language and structure of the statute, that the FSIA does not apply to individuals); *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005) (same). The Eleventh Circuit has not yet decided the issue. *See Guevara v. Republic of Peru*, 468 F.3d 1289, 1305 (11th Cir. 2006) (stating that, although several circuits have extended immunity to state officials acting in their official capacity, the "FSIA does not expressly provide immunity to individuals," but finding no need to decide the issue). I need not address whether the FSIA applies to individuals because, even if it does, Mr. Berzain's immunity was waived.

The FSIA has a specific waiver provision: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Here, as noted above, the Bolivian government has waived Mr. Berzain's immunity. *See Paul*, 812 F. Supp. at 211 (holding that former military ruler was not entitled to immunity under the FSIA because it had been waived by the Haitian government). *See also Doe*, 860 F.2d at 45 ("A state can waive foreign sovereign immunity. It can also waive diplomatic immunity. The related doctrine of head-of-state immunity is logically similarly waivable.") (internal citations omitted). That is the end of the matter.

IV. The Plaintiffs' International Law Claims

A. The ATS and the *Sosa* Rule

The ATS provides in its entirety that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. To obtain relief under the ATS, the plaintiff "must be (1)

an alien, (2) suing for a tort, which was (3) committed in violation of international law." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005). The "law of nations" has become synonymous with the term "customary international law," which describes the body of rules that nations in the international community "universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003).[7]

In deciding whether a rule rises to the level of customary international law, courts can consider the general usage and practice of nations, judicial decisions recognizing and enforcing that law, international conventions, and the works of highly publicized jurists. *See Agent Orange*, 517 F.3d at 116. Because customary international law derives from the customs and practices of many nations, rather than from one definitive source, courts should exercise "extraordinary care and restraint" in deciding whether an offense violates a generally established norm of customary international law. *See id.* The norms of the law of nations are found by consulting juridical writings on public law, considering the general practice of nations, and referring to judicial decisions recognizing and enforcing international law. *See Kadic*, 70 F.3d at 238.

In *Sosa*, the Supreme Court clarified the means by which norms of customary international law are to be identified for the purpose of the ATS. The Court held that the ATS, which originally was enacted as part of the Judiciary Act of 1789, was jurisdictional and did not create a statutory cause of action. *See* 542 U.S. at 712. The Supreme Court cautioned federal courts to be careful in deciding whether an alleged violation of the law of nations could support an ATS claim, and limited the types of claims that could be recognized to those bearing the same character as the claims originally contemplated by Congress at the time of the ATS' drafting. In particular, *Sosa* held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Id.* at 725. The Court noted that these paradigms encompassed only those torts corresponding to Blackstone's three primary offenses: violation of safe conduct, infringement of the rights of ambassadors, and piracy. *Id.* at 724.

[7] *See also Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 269 n. 15 (E.D.N.Y. 2007) ("In the context of the ATS, the phrase 'law of nations' is consistently used interchangeably with the phrases 'norm of international law' and 'international law.'").

Although the Court did not limit ATS claims to these three offenses, it concluded that, under the ATS, courts can hear only a "very limited category" of claims. *Id.* at 712. Without offering any modern examples, the Court wrote that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732. Ultimately, the Court concluded that the norm against arbitrary arrest was not in fact a norm of customary international law of sufficient definiteness and acceptance to support a cause of action that could be heard under the ATS. *See id.* at 738 ("Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require . . . a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.").

Interpreting *Sosa*, the Second Circuit has held that "[w]hether an alleged norm of international law can form the basis of an ATS claim will depend upon whether it is (1) defined with a specificity comparable to these familiar paradigms; and (2) based upon a norm of international character accepted by the civilized world." *See Agent Orange*, 517 F.3d at 117 (citing *Sosa,* 542 U.S. at 725, 738). The Eleventh Circuit, post-*Sosa,* has upheld ATS claims based on widely accepted, clearly defined international law norms, like the prohibition against torture. *See Aldana*, 416 F.3d at 1253 (holding that the complaint sufficiently alleged torture in violation of the law of nations under the ATS). As a preliminary matter, then, the essential question is whether the plaintiffs have alleged a violation of an international norm that is sufficiently clear in nature to support subject matter jurisdiction under the ATS, as interpreted in *Sosa*.

B. Extrajudicial Killing

The Eleventh Circuit, post-*Sosa*, has recognized claims for extrajudicial killings pursuant to the ATS. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151-52 (11th Cir. 2005) (affirming jury verdict holding defendant liable for extrajudicial killing, torture, and crimes against humanity). Other courts have similarly held that claims for extrajudicial killings meet the *Sosa* standard. *See, e.g., Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153-54 (E.D. Cal. 2004) ("Although the [ATS] does not provide a definition of extrajudicial killing, under international law, extrajudicial killing is a

norm that is 'specific, universal, and obligatory.' It meets the requirements of *Sosa* to be recognized under federal law."). *See also Mujica*, 381 F. Supp. 2d at 1179 ("Thus, the Court holds that there is a binding customary international law norm against extrajudicial killing."); *Flores*, 414 F.3d at 249 (pre-*Sosa* case holding that "offenses that may be purely intra-national in their execution, such as official torture, extrajudicial killings, and genocide, do violate customary international law because the 'nations of the world' have demonstrated that such wrongs are of 'mutual . . . concern,' and capable of impairing international peace and security") (citations omitted).

Having determined that the plaintiffs alleged a violation of an international norm that is sufficiently clear in nature to support subject-matter jurisdiction under the ATS, I must now address whether their allegations state a claim for relief. The defendants argue that the claim for extrajudicial killing fails because the plaintiffs failed to allege that the killings were deliberate or that the decedents were in the government's custody or control.

The TVPA expressly defines extrajudicial killings, as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 28 U.S.C. § 1350, Note, § 3(a). Although it appears that the ATS is not limited to the express definition set out in the TVPA,[8] it is not clear what constitutes an extrajudicial killing. *See Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465 (S.D.N.Y. 2006) ("Plaintiffs have not directed the Court to any international authority establishing the elements of extrajudicial killing, and the Court is aware of none."). For example, a soldier's killing of an armed attacker in self-defense, though not expressly authorized by a court judgment, would not be extrajudicial in the *Sosa* sense.

In cases involving claims for extrajudicial killing under the ATS, TVPA, and the FSIA,[9] courts have upheld claims for extrajudicial killings when a political opponent has been specifically targeted (most commonly through assassinations) or when innocent civilians have been attacked without provocation. *See Cabello*, 402 F. 3d at 1152 (holding that a jury could conclude that the decedent was a victim of an extrajudicial killing where defendant selected him -- a political prisoner

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[8] *See Aldana*, 416 F.3d at 1250 (holding that the TVPA's express definition of torture is not necessarily the same as the international law definition).

[9] The FSIA adopts the definition of extrajudicial killing from the TVPA. *See Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1248 (S.D. Fla. 1997).

-- for execution, drove him out of prison in a truck, and repeatedly stabbed him to death); *Wachsman ex rel. Wachsman v. Islamic Republic of Iran*, 603 F. Supp. 2d 148, 155 (D.D.C. 2009) (abduction and execution of unarmed civilian falls within the FSIA's definition of extrajudicial killing); *Lizarbe v. Hurtado*; Case No. 07-21783, Order [D.E. 33] (S.D. Fla. Mar. 4, 2008) (Jordan, J.) (awarding damages for extrajudicial killings where Peruvian security forces entered village, rounded up unarmed civilians, beat the men, raped some of the women, and ultimately used machine guns and grenades to kill villagers who had done nothing to present a public threat)*; Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27, 34 (D.C. 2008) (former prime minster's murder and mutilation met the definition of an extrajudicial killing under the TVPA); *Oveissi v. Islamic Republic of Iran*, 498 F. Supp. 2d 268, 275-76 (D.C. 2007) (gunning down former chief of armed forces under previous regime on a street qualified as an extrajudicial killing); *Alejandre*, 996 F. Supp. at 1248 (Cuban Air Force committed extrajudicial killings in violation of the TVPA when it shot down unarmed, civilian airplanes on a humanitarian mission in international waters: "[T]he unprovoked firing of deadly rockets at defenseless, unarmed civilian aircraft undoubtedly comes within the statute's meaning of 'extrajudicial killing.'"); *Lafontant*, 844 F. Supp. at 138 (E.D.N.Y. 1994) (assuming that the assassination of political opponent fell within TVPA's definition of extrajudicial killing).

1. Plaintiffs with Sufficient Allegations

In light of the Rule 12(b)(6) standard set out in *Twombly*, the plaintiffs must include enough factual allegations to enable a court to determine whether, if true, those facts plausibly, rather than merely conceivably, constitute a violation of the law of nations. Here, I conclude that seven of the plaintiffs have stated claims for extrajudicial killings by alleging sufficient facts to plausibly suggest that the killings were targeted.

Sonia Espejo Villalobos asserts that her husband was killed by military officers who took up firing positions and began shooting directly at civilians with rifles and machines guns from at least one block away. *See* Compl. at ¶ 54. Similarly, Hernan Apaza Cutipa alleges that his sister was killed by a sharpshooter shooting a bullet to her head as soon as she peeked over the ledge of her fourth floor terrace. *See id.* at ¶ 55. There were no protestors in front of or near the home when she was shot, indicating that her death was plausibly a deliberated and targeted killing rather than a

merely accidental or negligent killing. Juana Valencia Carvajal claims that her husband was shot in the chest by military personnel as he closed a window in his home. The circumstances of these shootings support an inference that the killings were targeted. *See id.* at ¶ 58.

Etelvina Ramos Mamani alleges that her eight-year old daughter, Marlene, was killed deliberately by a sharpshooter with a single bullet striking her in the chest as she peered out of a second-floor window in her home. *See id.* at ¶ 40. The fact that no other bullets hit the house before or after Marlene was killed provides sufficient support at this stage for the allegation that Marlene's killing was targeted and deliberate. Moreover, the complaint states that "a sharpshooter fired the shot from at least several hundred yards." *See id.* The location of Marlene's home in relation to the location of the protests at the time she was killed is, of course, significant; it may be, as the defendants point out, that Marlene was caught in crossfire from the ongoing civil unrest, especially if her home was in close proximity to the protests. But I cannot draw such an inference in the defendants' favor at this stage.

Hermogenes Bernabe Callizaya contends that his father, Jacinto Bernabe Roque, was killed by military officers who had been dispersed throughout the hills surrounding Lake Animas while Mr. Bernabe walked through the hills to tend to his crops. *See id.* at ¶ 70. Similarly, Gonzalo Mamani Aguilar alleges that his father was shot in the leg by military personnel from a significant distance while he was up in the hills tending to his farm. *See id* at ¶ 72. The distance from the conflict of these shootings plausibly suggests that these too were targeted killings.

Finally, Felicidad Rosa Huanca Quispe contends that her father, Raul Ramon Huanca Marquez, was shot "from a significant distance as he crawled along the ground to avoid gunfire" while the military shot at civilians as they drove through the village of Ovejuyo. *See id.* at ¶ 73. The absence of conflict in Ovejuyo at the time and the fact that a military officer shot Mr. Marquez while he was crawling away sufficiently supports the allegation that this killing was a targeted one.

2. Plaintiffs with Insufficient Allegations

Counsel for the plaintiffs conceded in oral argument that there must be allegations to show intentional targeting of civilians in an area where there were no violent demonstrators or attacks against the armed forces. *See* Transcript of Hearing, October 24, 2008 at 51-55 [D.E. 94]. Two of the plaintiffs' claims for extrajudicial killing fail under *Twombly*.

Juan Patricio Quispe Mamani alleges that his brother was shot and killed by a bullet in the lower back when he went to check on his property in El Alto, which he believed might have been damaged that day. *See id.* at ¶ 56. Mr. Quispe, however, has not provided sufficient facts to suggest that the killing was deliberate; there are no allegations as to whether the decedent was in the vicinity of any protests at the time he was killed, who shot him, or any other facts about the circumstances of his death. The conclusory claim about a targeted killing therefore fails to satisfy *Twombly*.

Similarly, Teofilo Baltazar Cerro alleges that his wife was killed when a bullet fired by the military went through a wall of her house striking her in the abdomen. *See id.* at ¶ 57. Mr. Baltazar has not pled sufficient facts to show that her death was a targeted killing. Although he alleges that she was not protesting against the government, he fails to mention whether there were any ongoing protests or clashes in the vicinity of the home, or any other facts that would show some targeting, rather than an accidental or negligent killing (e.g., a stray bullet that penetrated the wall).

Because Mssrs. Quispe and Baltazar have failed to plead enough factual allegations to meet the *Twombly* standard, they do not state claims for extrajudicial killings under the ATS. *See Aldana*, 416 F.3d at 1253 n.11 ("some minimal pleading standard does still exist"). These claims are therefore DISMISSED WITHOUT PREJUDICE.

3. CUSTODY AND CONTROL

The defendants' second argument, supported by only one case dealing mainly with torture, is that a claim for extrajudicial killing requires the showing of custody or control. I disagree. Courts have generally required that claims for extrajudicial killing be conducted under the actual or apparent authority, or color of law, of a foreign nation. *See, e.g.*, *Saravia*, 348 F. Supp. 2d at 1149-50 (assassination of a priest as he presided over Mass constituted an extrajudicial killing); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 420-21 (S.D.N.Y. 2002) (Zimbabwe opposition member killed when car he was hiding was doused with gasoline and ignited). The plaintiffs here allege that their relatives were killed by the Bolivian armed forces and that at all relevant times the armed forces acted under the authority of Messrs. Lozada and Berzain. *See* Complaint at ¶ 7. This is sufficient.

C. CRIMES AGAINST HUMANITY

Crimes against humanity are recognized as violations of international law. *See Cabello*, 402 F.3d at 1161; *Aldana*, 416 F.3d at 1247. *See also Sarei v. Rio Tinto, PLC.*, 487 F.3d 1193, 1202 (9th Cir. 2007) (listing crimes against humanity as "jus cogens violations that form the least controversial

core of modern day ATCA jurisdiction"); *Flores*, 414 F.3d at 244 n.18 (stating that customary international law prohibits crimes against humanity); *Almog*, 471 F. Supp. 2d at 277 ("Acts of genocide and crimes against humanity violate the law of nations and these norms are of sufficient specificity and definiteness to be recognized under the ATS."); *Mujica*, 381 F. Supp. 2d at 1183 (recognizing crimes against humanity as a cause of action under ATS); *Saravia*, 348 F. Supp. 2d at 1154 (stating that the proscription against crimes against humanity constitutes a "specific, universal and obligatory" international norm). To establish crimes against humanity, the plaintiffs must sufficiently allege a widespread or systematic attack directed against any civilian population. *See Aldana*, 416 F.3d at 1247; *Cabello*, 402 F.3d at 1161. *See also Rome Statute of the Int'l Criminal Court*, 37 I.L.M. 999, 1004 (1998) (defining crimes against humanity as any of the enumerated acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack").

1. "WIDESPREAD AND SYSTEMATIC"

A "widespread" attack is one that involves a "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims." *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998), *available at* 1998 WL 1782077. *See also Bowoto v. Chevron Corp.*, 2007 WL 2349343, at *3, 11 (N.D. Cal. Aug. 14, 2007) (finding that sporadic episodes of violence over a long period of time do not constitute a widespread attack) (citing *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 183 (Nov. 30, 2005), *available at* 2005 WL 3746053); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 670 (S.D.N.Y. 2006) ("A widespread attack is one conducted on a large scale against many people, while a systematic attack is an organized effort to engage in the violence.") (citations omitted).

A "systematic" attack is "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources." *See Akayesu*, ¶ 580. The word "systematic" refers to the "organized nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence." *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeal Judgment, ¶ 101 (July 29, 2004), *available at* 2004 WL 2781930 (footnote omitted). *See also Limaj*, ¶ 183 (stating that "systematic" refers to

organization and improbability of randomness); *Talisman Energy*, 453 F. Supp. 2d at 670 (quoted above).

When ascertaining whether an attack is widespread or systematic, a court must look at the "means, methods, resources and result of the attack upon the population." *See Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Appeal Judgment, ¶ 95 (June 12, 2002), *available at* 2002 WL 32750375; *Bowoto*, 2007 WL 2349343, at *4. Other factors include "the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes." *Bowoto*, 2007 WL 2349343, at *4.

Here, the plaintiffs allege that the attacks and killings were conducted over a period of four weeks (from September 20, 2003 to October 16, 2003) in several towns, resulting in 67 deaths and over 400 injuries. *See* Compl. ¶¶ 1, 8-16, 31, 74. These allegations are sufficient to survive a motion to dismiss because they serve as preliminary evidence of a large-scale attack involving a multiplicity of victims, thereby satisfying the definition of "widespread." Although I need not determine whether the acts were also systematic -- because the requirement that attacks be widespread or systematic is a disjunctive one -- the plaintiffs have also alleged sufficient facts to satisfy the "systematic" prong. They allege that the defendants planned and ordered the use of deadly force and mobilized military sharpshooters and officers with machine guns to kill dozens of civilians over a four-week period in order to terrorize the population. *See id.* at ¶¶ 30, 34, 36, 38, 39, 52, 69, 98.

2. "ATTACK DIRECTED AGAINST"

"An attack has been defined as a course of conduct involving the commission of acts of violence." *Limaj*, ¶ 182. An "attack" is not synonymous with an "armed conflict." *See Kunarac*, ¶ 86. "Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it. . . . the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population." *Id.* The phrase "directed against" specifies "that in the context of a crime against humanity the civilian population is the primary object of the attack." *Id. at* ¶ 91. *Bowoto*, for example, noted that courts should inquire into the basis upon which the victims were targeted. *See Bowoto*, 2007 WL 2349343, at *10 (citing *Limaj*,¶ 217). "If they were targeted based on individualized suspicion of

engaging in certain behavior, then the attack was not 'directed at a civilian population.'" *Id.* (citing *Limaj*, ¶¶ 226-27). In contrast, where victims are targeted merely because they are civilians and the only motive behind the attack is to put civilians in fear, the attack is directed against a civilian population. *See id.*

The plaintiffs have sufficiently alleged the use of armed forces and the commission of violent acts to meet the definition of "attack." *See* Complaint ¶¶ 1, 23, 30-32, 35, 38-39, 51-54, 63-64. They also allege that military force was used "to silence opposition and intimidate the civilian population" and the "attacks were intended to terrorize the indigenous Aymara population of the La Paz region." *Id.* at ¶¶ 23, 98. Finally, they assert that the military targeted persons who were not involved in the protests and who were not in the vicinity of the protests, indicating that they may have been singled out because they were civilians. *See id.* at ¶¶ 1, 55. These allegations are sufficient to meet the "directed against" element.

The defendants assert that the only targeted individuals were those "who were illegally blockading roads and causing civil unrest and that several bystanders were killed in the violence." *See* Joint Motion to Dismiss at 37. Perhaps so, but I cannot draw such inferences in the defendants' favor at this time, particularly given the plaintiffs' specific allegations that the defendants targeted the victims because they were Aymara civilians and not because they were protestors or bystanders. The plaintiffs may have a difficult time proving their claims in light of what the protests and conflicts there were going on at the time, but that is not a valid reason for dismissal of their claims at this time.

3. "CIVILIAN POPULATION"

The requirement that an attack be directed against a "civilian population" does not mean that a state's entire population must be victimized. Instead, the term requires that the alleged crimes be of a collective nature and not single or isolated acts. *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 644 (May 7, 1997), *available at* 1997 WL 33774656. The word "population" has not been interpreted to mean the entire population of a geographical entity; it is sufficient to show that "enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to [establish] that the attack was in fact directed against a civilian 'population,' rather than against a limited and randomly selected number of individuals." *Kunarac*, ¶ 90. Therefore, "the

emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population." *Tadic*, ¶ 644.

The plaintiffs allege that defendants intentionally killed 67 persons and injured over 400 others, that these attacks were directed against the Aymara civilian population so as to terrorize that population, and that individuals were targeted because of their membership in that population. These allegations are sufficient to survive a Rule 12(b)(6) motion.

The plaintiffs, however, will have to prove that the decedents were targeted because they were Aymara *civilians*, not just protestors who happened to be Aymaran. *Cf. Aldana*, 416 F.3d at 1247 (dismissing crimes against humanity claim because it was not expressly pled in the complaint: "[T]o the extent that crimes against humanity are recognized as violations of international law, they occur as a result of 'widespread or systematic attack' against civilian populations. Those kinds of words are not found in the complaint.") (citation omitted). For example, in determining whether there was a "civilian population," at the summary judgment stage, *Bowoto* utilized a two-part test: "(1) the raw number of victims in proportion to the overall civilian population of the region . . . and (2) the level of precision with which the attackers selected their targets." *Bowoto*, 2007 WL 2349343, at *6 (interpreting *Limaj*, ¶¶ 226-27). The plaintiffs therefore may have to prove that the raw number of victims in proportion to the overall civilian population of the region is of a magnitude that rises to the level of a crime against humanity. Not every act of violence rises to the level of atrocities constituting crimes against humanity.

D. COMMAND RESPONSIBILITY[10]

The defendants assert that the secondary liability claims for aiding and abetting, command responsibility, ratification, and conspiracy fail because the plaintiffs have not stated any primary cause of action and therefore cannot state a claim that the defendants aided in the violation of any tort. Additionally, they argue that command responsibility imposes liability on military commanders

[10] The doctrine of command responsibility as an international principle is described in *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeal Judgment, ¶¶ 182-268 (Feb. 20, 2001), *available at* 2001 WL 34712258.

for their subordinates' violations of the laws of war, and so this concept is limited to violations of the laws of war.

"[V]icarious liability is clearly established under customary international law, obviating any concerns regarding universality. In particular, command responsibility -- the military analogue to holding a principal liable for the acts of an agent -- was firmly established by the Nuremberg Tribunals." *In re South African Apartheid Litigation*, 2009 WL 960078, at *21 (S.D.N.Y. Apr. 8, 2009) (footnotes omitted). The elements of liability under the command responsibility doctrine are: "(1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes." *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002) (involving TVPA claim, brought against former Salvadoran officials on behalf of a churchwomen who had been tortured and murdered in El Salvador, pursuant to the command responsibility doctrine).

Although *Ford* involved claims pursuant to the TVPA, the Eleventh Circuit has held that "the TVPA and the [ATS] permit claims based on direct and indirect theories of liability." *See Cabello*, 402 F.3d at 1158. *See also Aldana*, 416 F.3d at 1247-48 ("A claim for state-sponsored torture under the Alien Tort Act or the Torture Victim Protection Act may be based on indirect liability as well as direct liability. . . . The Alien Tort Act 'reaches conspiracies and accomplice liability,' and the Torture Victim Protection Act reaches those who ordered, abetted, or assisted in the wrongful act.") (citing *Cabello,* 402 F.3d at 1157). For example, a district court has held that the mayor of Beijing and deputy provincial governor could be held liable under the ATS and the TVPA on the basis of their command responsibility when the police and other security forces committed human rights violations against Falun Gong practitioners. *See Doe v. Qi*, 349 F. Supp. 2d 1258, 1331 (N.D. Cal. 2004).

I am not persuaded by the defendants' argument that this doctrine is limited to violations of the laws of war. Although the churchwomen's murders in *Ford* occurred during a civil war in El Salvador, the claims in that case were for torture and extrajudicial killing. Moreover, other courts

have specifically recognized command responsibility liability for acts which did not occur during an armed conflict. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (the "United States has moved toward recognizing similar command responsibility for torture that occurs in peacetime, perhaps because the goal of international law regarding the treatment of noncombatants in wartime -- to protect civilian populations and prisoners . . . from brutality -- is similar to the goal of international human-rights law."). *See also Qi*, 349 F. Supp. 2d at 1330-31 (relying on *In re Yamashita*, *Hilao*, legislative history, and international statutes and cases to conclude that the doctrine of command responsibility applied to civilian superiors as well as military commanders); *Abebe-Jiri v. Negewo*, 1993 WL 814304, at *4 (N.D. Ga. Aug. 20, 1993) ("Defendant is responsible under international law for his own acts, for acts which he directed, ordered, aided, abetted or participated in, and for acts committed by forces under his command which he authorized."), *aff'd* 72 F.3d 844 (11th Cir. 1996). *Cf. Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006) (affirming district court's equitable tolling of statute of limitations on refugees' torture claims against military personnel in El Salvador after the jury had held the defendants liable under the doctrine of command responsibility); *Paul*, 901 F. Supp. at 335 (holding the former military ruler of Haiti responsible for torture and arbitrary detention committed by those "acting under his instructions, authority, and control and acting within the scope of the authority granted by him.").[11]

The plaintiffs' allegations are sufficient to establish a claim under the theory of command responsibility. The plaintiffs allege that defendants were high-ranking government officials at the time the acts occurred, and as such, "exercised command and control over the armed forces of Bolivia, which includes the Army, Navy and Air Force and, as a reserve or auxiliary force, the police . . . . and ha[d] the actual authority and practical ability to exert control over subordinates in the security forces." *See* Compl. ¶¶ 18, 19, 79, 80. The plaintiffs also allege that the defendants' command over such forces included the authority and responsibility to give orders to, set policy for, and manage the affairs of these forces, and to appoint, remove and discipline the personnel of such forces. *See id.* ¶ 79. These allegations satisfy the superior-subordinate relationship between the commanders and the alleged perpetrators. *See Qi*, 349 F. Supp. 2d at 1331.

[11] *Abebe-Jiri*, *Arce*, and *Paul* are ATS cases.

The plaintiffs have also alleged the requisite knowledge. They claim that the defendants met with military leaders and other ministers to plan widespread attacks involving the use of high-caliber weapons against protesters and "knew or should have reasonably known of the pattern and practice of widespread, systematic attacks against the civilian populations by subordinates under their command" because images of the violence were repeatedly shown on the major Bolivian television stations and in major newspapers. *See* Compl. ¶¶ 81, 85, 87; *Qi*, 349 F. Supp. 2d at 1332-33.

Finally, the plaintiffs have alleged that the defendants failed to prevent the violence or to punish the perpetrators. *See* Compl. ¶ 87 ("rather than taking necessary steps to prevent additional violence, Defendants and the government escalated the attacks against the civilian population"), and ¶ 88 (the defendants "failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under their command for committing such abuses"). These allegations satisfy the third element for command responsibility. *See Qi*, 349 F. Supp. 2d at 1333.[12]

E. Rights to Life, Liberty, and Security of Persons and Freedom of Assembly and Association

Unlike extrajudicial killings and crimes against humanity, the rights to life, liberty, and security of persons and freedom of assembly and association are not sufficiently definite to meet *Sosa*'s specificity requirement. Like the prohibition against arbitrary arrest and detention, which failed in *Sosa*, the rights enumerated in Count III are not actionable under the ATS. *See Flores*, 414 F.3d at 254 (holding that the rights to health and life were insufficiently definite to be binding rules of customary international law under the ATS); *Bowoto*, 557 F. Supp. 2d at 1095 (dismissing claim for the violation of the right to life, liberty, security of person and peaceful assembly and association because the "claims asserted are not yet definite enough to meet *Sosa*'s standards"); *Saperstein v. Palestinian Auth.*, 2006 WL 3804718, at *8 (S.D. Fla. Dec. 22, 2006) (describing "violence to life" as "ambiguous" and "unspecific conduct" for purposes of determining subject matter jurisdiction under *Sosa*'s standards of specificity); *Kiobel*, 456 F. Supp. 2d at 467 (granting motion to dismiss on claims for right to life, liberty and security of person, and to peaceful assembly and association

[12] Having determined that their allegations are sufficient to establish command responsibility liability, I need not address the plaintiffs' other theories at this time.

because no particular or universal understanding of the civil and political rights exists to make the claims actionable under the ATS).

The plaintiffs rely on *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *11 (S.D.N.Y. Feb. 28, 2002) (*Wiwa I*), which stated that the right to peaceful assembly was based on "well-articulated international norms." A subsequent decision by the same court, however, recently held that rights related to peaceful assembly do not meet the *Sosa* standard and thus cannot give rise to an ATS claim. *See Wiwa v. Royal Dutch Petroleum Co.*, 2009 WL 1574869, at *6 (S.D.N.Y. Apr. 23, 2009) (*Wiwa II*). The court clarified that at the time of the earlier order, the defendants did not dispute that customary international law prohibited violations of rights related to peaceful assembly. *See id.* at *5. Given that *Wiwa I* was decided before *Sosa*, I agree with *Wiwa II*.

Count III is therefore DISMISSED for failure to state a claim.

V. The Plaintiffs' State Law Claims

The plaintiffs assert claims against the defendants under Florida law for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. They also assert a claim for wrongful death, but do not indicate under what law that claim arises. The defendants move to dismiss all of these claims on a variety of grounds. Among other things, the defendants argue that the claims are time-barred under Maryland and Florida law, and that the claims involve novel and complex issues of state law such that dismissal is appropriate under 28 U.S.C. § 1367(c)(1).

A. Statute of Limitations

Before addressing the defendants' arguments, it is necessary to figure out under what substantive law the wrongful death claim is being asserted. As noted above, the plaintiffs do not specify in their complaint what law governs this claim. But under Eleventh Circuit precedent, when a party does not allege in a pleading that foreign law (i.e., the law of a sister state or of a another nation) applies, Florida law will generally be assumed to apply. *See Stone v. Wall,* 135 F.3d 1438, 1441-42 (11th Cir. 1998). I therefore conclude that the plaintiffs are also proceeding under Florida law with respect to their wrongful death claim.

The defendants argue that the Florida tort claims are barred by the Maryland statute of limitations as to Mr. Lozada, and by the Florida statute of limitations as to Mr. Berzain. The

plaintiffs respond that the Florida tort claims are not untimely because Bolivia's statute of limitations applies.

Under 28 U.S.C. § 1404(a), a transferee court must apply the choice-of-law rules of the transferor court. Because the case against him was transferred from the District of Maryland, Mr. Lozada argues that I must use Maryland's choice-of-law rules to figure out the appropriate statute of limitations. This is the normal practice under *Van Dusen v. Barrack,* 376 U.S. 612, 639 (1964), but here there are two reasons why this general principle should not govern. First, Mr. Lozada's case has been consolidated with Mr. Berzain's case, which was filed at around the same time in the Southern District of Florida. Where different choice-of-law rules (or substantive rules) would have to be applied to different litigants in consolidated cases, the Eleventh Circuit uses a "primacy of interests" analysis, *see Bott v. Am. Hydrocarbon Corp.,* 441 F.2d 896, 899-900 (5th Cir. 1971), or a "balance of interests" analysis, *see Boardman Petroleum, Inc. v. Federated Ins. Co.*, 135 F.3d 750, 753 (11th Cir. 1998), to figure out which state's rules or laws apply. Second, the tort claims against Mr. Lozada were added after transfer and after consolidation. This is not dispositive, but it does indicate that the plaintiffs would not obtain an undue advantage by having Florida choice-of-law rules apply to the defendants' statute of limitations arguments concerning the Florida tort claims. On balance, I conclude that I should use Florida's choice-of-law rules -- the traditional default rule for district courts sitting in diversity, *see generally Klaxton v. Stenor Mfg. Co.,* 313 U.S. 487, 496-97 (1941) -- to determine which jurisdiction's statute of limitations will apply to the Florida tort claims. Florida has a greater interest than Maryland on the choice-of-law issue: the consolidated cases are now pending here; the case against Mr. Berzain was filed at around the same time in the Southern District of Florida; the tort claims are purportedly based on Florida law; and the tort claims against Mr. Lozada were not filed until after transfer and consolidation.

To resolve choice-of-law issues in tort cases, Florida courts apply the flexible significant relationships test from the Restatement (Second) of Conflicts of Laws §§ 145-46 (1971). *See, e.g., State Farm Mut. Auto. Ins. Co. v. Roach,* 945 So.2d 1160, 1163 (Fla. 2006). This test applies to questions concerning which statute of limitations to apply in a tort case. *See Merkle v. Robinson,* 737 So.2d 540, 543 (Fla. 1999). Fortunately, there is no need to engage in a comprehensive analysis

under the significant relationships test because there is a Florida Supreme Court case with relatively similar facts which indicates that Bolivia's statute of limitations will apply.

In *Fulton County Admin. v. Sullivan*, 753 So.2d 549 (Fla. 1999), the parents of a murder victim brought a wrongful death action against the victim's husband, who had confessed to arranging her murder in Georgia. At the time the action was filed in Florida, the victim's parents were Georgia residents, and the husband was a Florida resident. One of the issues presented on appeal was whether the action was barred by the applicable Florida statute of limitations. The husband had argued that the action was barred, while the parents responded that the statute of limitations was tolled due to the husband's fraudulent concealment. *See id.* at 551-52. The Florida Supreme Court declined to answer a certified question about whether fraudulent concealment could toll the applicable Florida statute of limitations because it concluded that, under *Merkle* (cited above), Georgia's statute of limitations, and not Florida's, governed. Georgia, said the Florida Supreme Court, had the most significant relationship to the circumstances underlying the case: "Lita Sullivan, a Georgia resident, was killed in Georgia, and Georgia police investigated her death. Moreover, the plaintiffs in this wrongful death action, Lita Sullivan's parents, are Georgia residents." *Id.* at 552.

The controlling facts here are very similar to those in *Sullivan*. First, the decedents were Bolivian citizens killed in Bolivia, allegedly by armed forces under the direction of the defendants, who were also Bolivian citizens at the time. Second, the Bolivian authorities have investigated the deaths and have sought to prosecute the defendants in Bolivia. Third, the plaintiffs are Bolivian citizens. Thus, under *Sullivan* it is Bolivia -- as opposed to Florida or Maryland -- which has the most significant relationship to the statute of limitations issue. *See* 753 So.2d at 552. I therefore look to Bolivian law to determine whether the Florida tort claims are timely.[13]

Under Rule 12(b)(6), a claim should be dismissed on statute of limitations grounds only if it is apparent from the face of the complaint that the claim is time-barred. *See La Grasta v. First Union Securities, Inc.,* 358 F.3d 840, 846 (11th Cir. 2004). The deaths which form the basis of the complaint occurred in September and October of 2003, and the complaints were filed in September of 2007 (against Mr. Lozada) and in October of 2007 (against Mr. Berzain).

[13]Given that Bolivian law applies to the statute of limitations issue, it may also provide the substantive law for the wrongful death claims.

As the parties seeking to invoke Bolivian law, the plaintiffs have the burden of providing sufficient documentation to establish what Bolivian law is with regard to the applicable statutes of limitations. *See* Fed. R. Civ. P. 44.1; *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.,* 181 F.3d 435, 440-41 (3rd Cir. 1999) (citing cases and authorities). In their response to the motion to dismiss, the plaintiffs assert that (1) under Bolivian law statutes of limitation are substantive, (2) under Bolivian law, their tort claims are statutory, and (3) Bolivia applies penal statutes of limitation to civil actions where the cause of action would also be a crime under Bolivian law. *See* Plaintiffs' Response at 46. The plaintiffs, however, do a poor job of explaining their arguments. They cite to (but do not quote from) various provisions of the Bolivian Civil Code and the Bolivian Penal Code, and do not explain why those provisions support their position. Instead, they simply provide the original Spanish language versions and their English translations as exhibits, and expect that the reader will turn to those provisions for an understanding of their arguments. The defendants, for their part, do not address Bolivian law. *See* Defendants' Joint Reply at 24-25. Though thin, the plaintiffs' submissions are sufficient under Rule 44.1, given the defendants' failure to address Bolivian law. *Cf. Forzley v. AVCO Corp. Elec. Div.,* 826 F.2d 974, 979 n.7 (11th Cir. 1987) (party complies with its obligation under Rule 44.1 if it provides an unchallenged English translation of foreign law).

In Bolivia, there is a general three-year statute of limitations (running from the date of the act in question) for a civil tort claim, but if "the event is classified as a criminal offense, the right to reparations prescribes at the same time as the criminal action or sentence." *See* Bolivian Civil Code Art. 1508(I)-(II). Thus, it is necessary to look at the limitations periods for various criminal offenses.

Murder in Bolivia is punishable by 30 years in prison without parole. *See* Bolivian Penal Code Art. 252. Homicide in Bolivia is punishable by five to 20 years in prison. *See* Bolivian Penal Code Art. 251. Negligent homicide in Bolivia is punishable by six months to three years in prison, but if the "death is produced as a consequence of a serious negligent violation of the duties inherent to a profession, trade or office, the punishment will be imprisonment of one to five years." *See* Bolivian Penal Code Art. 260. Causing very serious injury in Bolivia is punishable by two to eight years in prison. *See* Bolivian Penal Code Art. 270. Finally, causing injury resulting in death in Bolivia is punishable by one to four years in prison, "even if the death was not intended, if that death could have been prevented." *See* Bolivian Penal Code Art. 273.

Crimes with sentences of six years or more in prison (e.g., murder, homicide, causing very serious injury) have an eight-year statute of limitations in Bolivia. *See* Bolivian Penal Code Art. 101(a). Crimes with sentences of less than six years and more than two years in prison have a five-year statute of limitations in Bolivia. *See* Bolivian Penal Code Art. 101(b). Any other crimes have a three-year statue of limitations in Bolivia. *See id.* at Art. 101(c).

Given the allegations in the complaint (i.e., that the defendants "intentionally ordered military personnel to use deadly force against the unarmed decedents, who posed no threat"), the plaintiffs' wrongful death claims are not time-barred. The defendants' alleged conduct could constitute murder or homicide, crimes which have eight-year statutes of limitations.

The other tort claims do not fare as well. The plaintiffs have not shown that intentional infliction of emotional distress, negligent infliction of emotional distress, or negligence -- as those acts are alleged in the complaint -- are crimes (or could constitute crimes) under Bolivian law, as there is no physical injury to the plaintiffs. Thus, the normal three-year Bolivian statute of limitations applies. Assuming that these torts could constitute negligent homicide or injury followed by death under Bolivian law (even thought the plaintiffs themselves were not physically harmed or killed), the same three-year statute of limitations would apply under the Bolivian Civil Code or the Bolivian Penal Code. Because the complaints against the defendants were filed more than three years from the date of the challenged conduct, and the other Florida tort claims are therefore untimely.

Accordingly, Count IV for wrongful death is timely, but Counts V-VII are untimely and are DISMISSED WITHOUT PREJUDICE.[14]

B. OTHER ARGUMENTS

The defendants present other arguments as to why Count IV should be dismissed. I do not find any of them persuasive. First, given the uncertainty over what substantive law will apply to Count IV, it is too early to say that there is a novel or complex issue of state or foreign law. *See* 28 U.S.C. § 1367(c)(1). The mere application of foreign law does not necessarily make the exercise of supplemental jurisdiction inappropriate under § 1367(c)(1). *See Voda v. Cordis Corp.*, 476 F.3d 887,

[14]In light of the dismissal of Counts V-VII on statute of limitations grounds, I do not address the defendants' other arguments with respect to these claims.

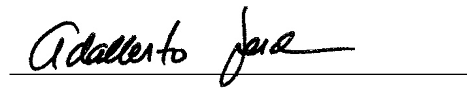
893-94 (10th Cir. 2007). Second, on this undeveloped record, and given the United States' current decision to not voice any views, there is no evidence of direct conflict between the Executive Branch's conduct of foreign affairs and the wrongful death claims against the defendants. Dismissal under *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 419-20 & n.11 (2003), is not appropriate at this time.

VI. CONCLUSION

The defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART. With respect to Count I, Messrs. Quispe, Baltazar, and Ms. Quispe's claims are DISMISSED WITHOUT PREJUDICE. Count III is DISMISSED for failure to state a claim. The plaintiffs state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence, Counts V, VI, and VII, are also DISMISSED because they are barred under the Bolivian statute of limitations.

The defendants shall file their answers to the claims that remain no later than December 10, 2009.

DONE and ORDERED in chambers in Miami, Florida, this 9th day of November, 2009.



Adalberto Jordan
United States District Judge

Copy to: All counsel of record.