UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

ELOY ROJAS MAMANI, *et al.*, Plaintiffs, v. GONZALO DANIEL SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE, Defendant.	)	**Case No. 08-21063-CV-COHN**
ELOY ROJAS MAMANI, *et al.*, Plaintiffs, v. JOSÉ CARLOS SÁNCHEZ BERZAÍN, Defendant.	)	**Case No. 07-22459-CV-COHN**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR A NEW TRIAL

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INTRODUCTION

The Eleventh Circuit remanded for this Court to consider two issues: "[1] whether, for each decedent, Plaintiffs produced sufficient evidence to demonstrate that each death was not lawful under international law and thus extrajudicial and, if so, [2] whether Plaintiffs produced sufficient evidence to link Defendants to that wrongdoing via the command-responsibility doctrine." *Mamani v. Sánchez de Lozada*, 968 F.3d 1216, 1240 (11th Cir. 2020) ("*Mamani III*"). Viewed in the light most favorable to Plaintiffs, the record was more than adequate to support the jury's verdict on both.

On the first issue, the jury heard that soldiers shot indiscriminately for hours, even though no civilians in the relevant areas were armed or otherwise engaging in any attack; that the defenseless victims were hiding, fleeing, or in their homes when they were fatally shot; and that soldiers received and acted on orders to "shoot at anything that moved." Those are the quintessential circumstances that the relevant authorities (which Defendants ignore) describe in finding that killings are unlawful under international law—and thus extrajudicial under the TVPA. A rational jury could conclude that the "specific crises" Defendants cite as justification for the extreme military response were in fact distant—in time, space, and circumstances—from the killings of each of these innocent civilians. Indeed, that conclusion ineluctably follows from the Eleventh Circuit's findings that, notwithstanding demonstrations in some areas of Bolivia, the record supported the jury's verdict that each decedent was killed by "a member of the Bolivian military in the absence of just provocation," with "little to no evidence that members of the Bolivian military were in imminent danger." *Mamani III*, 968 F.3d at 1235.

On the second issue, the jury rationally concluded that each Defendant bore responsibility for the extrajudicial killings under the command-responsibility doctrine. First, a reasonable jury could find that Defendants had effective control (whether *de facto* or *de jure*) over the military

troops who committed the extrajudicial killings—based not only on evidence of their considerable power in a chain of command that was functioning at the relevant times, but also on Defendants' own statements and actions surrounding the military operations. Second, a rational jury could infer Defendants' actual or constructive knowledge of indiscriminate killings from multiple items in the record, including express warnings that Defendants cavalierly dismissed, testimony that they received regular reports on the details of civilian causalities (including the killings of these specific decedents), and the widespread contemporaneous media coverage and resignations of their government colleagues. Third, a reasonable jury could conclude that Defendants failed to prevent or punish the extrajudicial killings, based on, among other things, evidence that they rejected peaceful resolutions to the demonstrations, insisted on military operations that they acknowledged would likely result in civilian deaths, took no action in response to the killings, and then fled the country rather than holding anyone accountable.

Defendants seek to nullify the jury verdict by first ignoring—and then inverting—the Rule 50 standard. They fail to acknowledge even once in their brief that all conflicting evidence, inferences, and credibility determinations must be drawn in the jury's favor, under a standard heavily weighted toward preserving the verdict. They then ask this Court to draw conflicting inferences in *their* favor and to ignore evidence unfavorable to *them.* For example, Defendants retread their failed trial narrative that decedents' deaths were likely the result of misdirected fire during the military's response to violent demonstrations, and resurrect their argument that Defendants cannot be liable without proof of direct "orders" to kill civilians—even though both the jury and the Eleventh Circuit have rejected those precise arguments.

At bottom, Defendants ask this Court to decide contested evidentiary issues as if it had held a bench trial. But after the jury returns a verdict, the question is simply whether the evidence was

sufficient for a rational jury to find in Plaintiffs' favor. The answer is clearly yes. Because the evidence, viewed in the light most favorable to the jury, "establish[es] that there was an extrajudicial killing and then connect[s] Defendants to that wrongdoing" under the command responsibility doctrine, *Mamani III*, 968 F.3d at 1239, the Rule 50 motion should be denied. Further, as Defendants provide no separate basis for a new trial, Plaintiffs' weight-of-the-evidence Rule 59 motion should be denied as well. Accordingly, Plaintiffs respectfully request that the Court enter judgment in favor of the jury's TVPA verdict as to each Defendant.

BACKGROUND

The "lengthy history" of this case is set forth in the Eleventh Circuit's detailed background section in *Mamani III*, 968 F.3d at 1220–23, as well as in the two prior Eleventh Circuit decisions in this matter, *see Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011) ("*Mamani I*"), and *Mamani v. Berzain*, 825 F.3d 1304 (11th Cir. 2016) ("*Mamani II*"). As most relevant here, in early 2018 a federal jury "heard from nearly forty witnesses over a three-week trial about the deaths of the eight victims"—including testimony from several soldiers who were instructed to shoot indiscriminately. *Mamani III*, 968 F.3d at 1223. Drawing all inferences in the verdict's favor (and as explained in more detail throughout this brief), the evidence at trial demonstrated that the eight decedents whose relatives brought this case were murdered in five separate locations on three different days in 2003, gunned down by Bolivian soldiers who fired indiscriminately and over long periods of time while decedents were in their homes, hiding, or fleeing. Although parts of Bolivia saw intense protests during this period, eyewitnesses testified that these eight victims were all unarmed, uninvolved in protests, and away from conflicts when they were fatally shot:

- eight-year-old Marlene Nancy Rojas Ramos, who was killed in Warisata on September 20 inside her family's home;

- Lucio Santos Gandarillas Ayala, who was killed in the Senkata area of El Alto on October 12 as he sought refuge behind a kiosk;

- Teodosia Morales Mamani (and her unborn child), Marcelino Carvajal Lucero, and Roxana Apaza Cutipa, who were killed in the Río Seco area of El Alto on October 12 inside their families' homes;

- Arturo Mamani Mamani and Jacinto Bernabé Roque, who were killed in Ánimas Valley on October 13 while cowering in the straw near their families' farms; and

- Raúl Ramón Huanca Márquez, who was killed in Ovejuyo on October 13 as he sought cover on the street.

The jury additionally heard evidence that Lozada (the Captain General of the Armed Forces) and Berzaín (the Defense Minister) exercised both *de jure* and *de facto* authority over the Bolivian soldiers through a functioning chain of command, yet failed to prevent or punish the killings.

After six days of deliberation, the ten-member jury returned a unanimous verdict on Plaintiffs' claims under the Torture Victim Protection Act ("TVPA"). Though the parties had offered conflicting narratives, the jury determined for the TVPA claims that each decedent's killing was extrajudicial and that each Defendant was indirectly liable for the deaths under the command-responsibility doctrine. The jury returned a verdict for Defendants on Plaintiffs' other theories of indirect liability (agency and conspiracy), as well as on Plaintiffs' claims for "wrongful death" under Bolivian law.[1]

During and after trial, Defendants moved for judgment as a matter of law under Rule 50. Defendants never argued that any rational jury would have to conclude that the killings were lawful under international law. Instead, they argued (1) that Plaintiffs' failure to adduce legally sufficient evidence that Defendants had agreed to a "plan" fatally undermined the jury's finding that each

[1] The Eleventh Circuit remanded for a new trial on Plaintiffs' wrongful-death claims "based on the inappropriate admission of" certain "State Department cables." *Mamani III*, 968 F.3d at 1244-45. Only the jury's TVPA verdict is at issue in Defendants' current motion.

killing was "deliberated," and (2) that the evidence was insufficient to support liability under a "command responsibility" theory. After trial, this Court granted Plaintiffs' renewed Rule 50 motion, accepting the first argument and declining to reach the second.

The Eleventh Circuit reversed. It held that "Plaintiffs need not present evidence of the existence of a preconceived, meticulously coordinated plan," because, "[f]or each decedent, Plaintiffs presented [other] evidence that the cause of death was consistent with a deliberate shot from a member of the Bolivian military in the absence of just provocation." *Mamani III*, 968 F.3d at 1235, 1239. In addition to recounting evidence with respect to each decedent, the Eleventh Circuit summarized as follows:

> None of the decedents were armed, nor was there evidence that they posed a threat to the soldiers. Many were shot while they were inside a home or in a building. Others were shot while they were hiding or fleeing. There is little to no evidence that members of the Bolivian military were in imminent danger or acted out of sudden passion when they fired. Witnesses testified that they saw the armed members of the military, that there were not armed civilians in the area, and that the military aimed at or targeted each individual decedent or other civilians around the time of the incidents.

Id. at 1235. The court of appeals thus remanded for this Court "to consider in the first instance" "[1] whether, for each decedent, Plaintiffs produced sufficient evidence to demonstrate that each death was not lawful under international law and thus extrajudicial and, if so, [2] whether Plaintiffs produced sufficient evidence to link Defendants to that wrongdoing via the command-responsibility doctrine." *Id.* at 1240. This brief will address the two issues in that order.

LEGAL STANDARD

The Rule 50 "standard is heavily weighted in favor of preserving the jury's verdict," *Pensacola Motor Sales Inc. v. Eastern Shore Toyota, LLC*, 684 F.3d 1211, 1226 (11th Cir. 2012). The Court's "sole consideration is whether the evidence sufficiently supports the verdict," which "will not be overturned unless no rational trier of fact could have reached the same conclusion

based upon the evidence in the record." *Mamani III*, 968 F.3d at 1230 (internal quotations omitted). The Court may not "weigh conflicting evidence and inferences" or "determine the credibility of witnesses." *McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1254 (11th Cir. 2016). Moreover, the Court "must disregard all evidence favorable to [Defendants] that the jury [was] not required to believe," and instead may consider such evidence only if it is "uncontradicted and unimpeached, at least to the extent [it] comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-151 (2000).

Defendants never acknowledge anywhere in their brief that this Court must "consider all the evidence, and the inferences drawn therefrom, in the light most favorable to" Plaintiffs. *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 615 F.3d 1352, 1360 (11th Cir. 2010). Under that standard, a jury verdict should be nullified only if the evidence points so "overwhelmingly in favor of" Defendants "that reasonable people could not arrive at a contrary verdict." *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1312 (11th Cir. 2013). If a "rational" jury could find in Plaintiffs' favor based on a mere preponderance of the evidence—*i.e.*, more likely than not—the Rule 50 motion should be denied. *Mamani III*, 968 F.3d at 1230.

ARGUMENT

I. THE JURY RATIONALLY CONCLUDED THAT EACH DECEDENT'S DELIBERATED KILLING WAS EXTRAJUDICIAL

A. Killing Civilians In The Absence Of Just Provocation Or Proportionate Force Contravenes International Law And Thus Constitutes "Extrajudicial" Killing

After concluding that "Plaintiffs presented evidence that the cause of death was consistent with a deliberate shot from a member of the Bolivian military," the Eleventh Circuit remanded for this Court to determine whether the record was sufficient to show that each deliberated killing was "extrajudicial." *Mamani III*, 968 F.3d at 1235, 1240. "To determine whether these deliberated killings are extrajudicial, [the Court] must, per the terms of the text, look to international law."

Mamani III, 968 F.3d at 1237 (citing *Doe v. Drummond Co.*, 782 F.3d 576, 606 (11th Cir. 2015)); *see* 28 U.S.C. § 1350 note (The term "extrajudicial killing" in the TVPA "does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation."). The Eleventh Circuit's canvassing of the relevant authorities yields two fundamental principles of customary international law to guide this analysis, either of which is dispositive.

First, evidence of the use of military force "against civilians in the absence of just provocation would support a conclusion that the deaths were extrajudicial killings." *Mamani III*, 968 F.3d at 1240. Because "a balance must be struck between the aim pursued and the means employed to achieve it," military force must be provoked—meaning that use of force to quell civil protests is rarely justified under international law. *Id.* at 1238 (quoting Eur. Ct. H.R., *Güleç v. Turkey*, App. No. 54/1997/838/1044 (July 27, 1998) ¶ 71). For instance, international law has been violated when a military's extreme force is applied "to clear blockades of roadways by agricultural and union workers," *id.* (citing Human Rights Committee, *Florentino Olmedo v. Paraguay*, Commc'n No. 1828/2008, U.N. Doc. CCPR/C/104/D/1828/2008 (Apr. 26, 2012)), or "in an attempt to disperse [a] crowd" of demonstrators, *id.* (quoting Human Rights Committee, *Umetaliev v. Kyrgyzstan*, Commc'n No. 1275/2004 ¶ 2.2, U.N. CCPR/C/94/D/1275/2004 (Oct. 30, 2008)).

Second, even where the military is justly provoked, any use of force must be "proportionate"—*i.e.*, "no more than absolutely necessary." *Mamani III*, 968 at 1237-38 (citations omitted). Thus, "evidence of deaths caused by a soldier acting under orders to use excessive force or indiscriminate force could provide a legally sufficient foundation to support a TVPA claim." *Id.* at 1220; *see, e.g.*, *id.* at 1239 (noting "suppression operations in Venezuela" trampled international law where they resulted in "the deaths [that] were due to indiscriminate firings by agents of the Venezuelan State") (citing *Caracazo v. Venezuela*, Inter-Am. Ct. H.R. No. 58, ¶ 2(k) (Nov. 11,

1999)). Even in the face of "an ongoing civil uprising," use of military force is lawful under international law only "if the circumstances support" the particular measures taken to respond to a legitimate threat. *Id.* at 1237; *see id.* at 1238-39 (lethal force, "'without first having recourse to less life-threatening methods,'" is not proportionate even where demonstration "could be deemed a riot" and civilians are actively "causing damage" by "throwing stones and fire bombs") (quoting Eur. Ct. H.R., *Case of Şimşek v. Turkey*, App. No. 35072/97 and App. No. 37194/97 (July 26, 2005) ¶¶ 108, 113). The fact that demonstrators are "'far from peaceful,'" and are "attack[ing] *** security forces with sticks stones, and firearms," does not necessarily justify lethal force under international law. *Id.* at 1238 (citing Eur. Ct. H.R., *Güleç*, App. No. 54/1997/838/1044 ¶¶ 68, 73).

The Eleventh Circuit elaborated on the categories of evidence that would be sufficient to support a jury's finding that the use of force was disproportionate:

- *Indiscriminate firing.* "'[I]ndiscriminate firing' against unarmed persons violates the right to be free from the arbitrary deprivation of life, and thus is unlawful." *Mamani III*, 968 F.3d at 1237; *see id.* at 1237 n.20 ("'extrajudicial killing' in customary international law encompasses indiscriminate shootings by soldiers without justifiable provocation").

- *Orders to "shoot on sight."* "[A]ll orders to 'shoot on sight' must only be given as a measure of very last resort to protect lives," and "governments should withdraw all general orders to shoot on sight." *Mamani III*, 968 F.3d at 1239 (quoting United Nations Comm'n on Human Rights, Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, E/CN.4/2004/7 (Dec. 2003)).

- *Firing on fleeing civilians or civilians in homes.* Firing live ammunition against civilians "who were fleeing" constitutes presumptive evidence of disproportionate force, *Mamani III*, 968 F.3d at 1238 (quoting Human Rights Committee, *Florentino Olmedo*, Commc'n No. 1828/2008, U.N. Doc. CCPR/C/104/D/1828/2008 ¶¶ 2.5-2.6), as does evidence that "victims were killed in their homes," *id.* at 1239 (*Caracazo*, Inter-Am. Ct. H.R. No. 58, ¶ 2(k)).

Thus, under the *Mamani III* framework, the question is whether the evidence was sufficient for a rational jury to conclude that (i) the military used lethal force without just provocation, or (ii) the

military's use of such force was not proportionate to the threat (such as through evidence of indiscriminate firing, firing on fleeing or hiding civilians, or orders to shoot on sight).

Defendants appear to acknowledge that whether the killings were lawful under international law requires analyzing "whether Bolivian soldiers used 'proportionate force' in the circumstances of this case," Br. 23 & n.8. But Defendants incorrectly try to shift the focal point of the analysis to the Bolivian soldiers' adherence to "*Bolivian* law." Br. 23 n.8 (emphasis added); *see id.* at 46 (arguing that decedents' killings were not extrajudicial because "none of the decedent's deaths was unlawful under Bolivian law"). In fact, Defendants cite only a single international-law authority in their nearly 50-page brief. *Contra Mamani III*, 968 F.3d at 1237 (explaining customary international law "does not stem from any single, definitive, readily-identifiable source") (quoting *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1253 (11th Cir. 2012)).

But Defendants' argument cannot be squared with *Mamani III*'s holding that the analysis must focus on whether each death was "lawful under *international law* and thus extrajudicial." *Mamani III*, 968 F.3d at 1240 (emphasis added); *see id.* n.26 ("remand[ing] the case for a determination of whether the deliberated killings were committed in contravention of international law"); *see* S. REP. NO. 102-249, at 6 (1991) (TVPA's definition of extrajudicial killing "excludes killings that are lawful under international law," such as those "which do not violate the Geneva Convention"). Nor can it be squared with the text of the TVPA, which directs the court to look to "international law." 28 U.S.C. § 1350 note. Indeed, that argument even contradicts the views of *Defendants' own expert*. *See* DE 389-1, at 2 (Ku Rebuttal Report) ("[I]nternational law should be used, in accordance with the TVPA's text, solely to determine when lethal force by state agents is 'lawfully carried out' outside of the judicial process."); *see id.* at 10 (citing "international law

concepts such as 'necessity, proportionality, and precaution'").[2] Thus, even if orders to shoot indiscriminately at "anything that moved" somehow "complied with the Bolivian military's rules of engagement" or "the Organic Law of the Armed Forces of Bolivia," Br. 27, 24, that would have no bearing on the relevant question, which is whether a rational juror could conclude that such an order complied with international law.

Regardless, even if Defendants were correct that Bolivian law dictated what is lawful "under international law," 28 U.S.C. § 1350 note, the jury could easily conclude that the soldiers' actions violated Bolivian law as well. Defendants concede that Bolivian "rules of engagement *** call for proportionate responses to aggression and prohibit lethal force against an unarmed civilian." Br. 18; *see* DE 479-22 (Manual on use of Force) at 38-0010 ("Use of force must be proportional" and "Use of weapons must be in proportion to the aggression received or the degree of perceived threat"), 38-0014 ("[U]se of legal violence is only justified in situations of extreme necessity, and as a last resort[.]"), 38-0015 ("[U]se of firearms must be directed and controlled and not be indiscriminate."). A rational jury could easily conclude, based on evidence that included testimony from soldiers ordered to shoot even at civilians who posed no threat, that the use of force in this case was "indiscriminate," not "proportional," and not employed "as a last resort."

B. Plaintiffs Presented More Than Sufficient Evidence That Each Deliberated Killing Contravened International Law

Applying the foregoing principles to the record evidence leads to only one conclusion: the jury heard more than enough evidence to rationally conclude that each killing was unlawful under international law, and was thus extrajudicial. Indeed, although the Eleventh Circuit remanded with instructions for this court to consider the principles with respect to each decedent "in the first

[2] All docket citations refer to Case No. 08-21063, unless otherwise noted.

instance," the Eleventh Circuit's own findings establish that the evidence was sufficient to find an extrajudicial killing based on a lack of just provocation or disproportionate response (or both) for all of them.

With respect to "just provocation," the Eleventh Circuit has already concluded that, "*[f]or each decedent*, Plaintiffs presented evidence that the cause of death was consistent with a deliberate shot from a member of the Bolivian military *in the absence of just provocation*." *Mamani III*, 968 F.3d at 1235 (emphasis added). With respect to "proportionality," the Eleventh Circuit held that the evidence supported the rational jury conclusions that (i) "[n]one of the decedents were armed," (ii) "[m]any were shot while they were inside a home or in a building" or "while they were hiding or fleeing," (iii) they "were killed by soldiers acting under orders to shoot or kill civilians," and (iv) "[t]here is little to no evidence that members of the Bolivian military were in imminent danger *** when they fired." *Id.* at 1235, 1239. This Court, too, has recognized that Plaintiffs "present[ed] evidence at trial of *indiscriminate shootings by the Bolivian military* in the locations where the decedents were killed." Rule 50 Order, DE 488 at 18 (emphasis added).

As these findings reflect (and as the following summary shows), viewing the evidence and drawing all inferences in the light most favorable to Plaintiffs, the record was easily sufficient for a rational juror to find that each killing violated international law.

1. Marlene Nancy Rojas Ramos

Eight-year-old Marlene was fatally shot on September 20, 2003, when she looked out the window of her family home in the small Bolivian village of Warisata, northwest of La Paz. *See Mamani III*, 968 F.3d at 1223-24 (recounting evidence of Marlene's killing). "A reasonable jury could conclude that a member of the Bolivian military engaged in a purposeful act to take

Marlene's life." *Id.* at 1235. And the record contains more than sufficient evidence that her shooting was neither justly provoked nor the result of proportionate force.

The jury heard Marlene's father, Eloy, testify that "[t]here was nothing" happening in his neighborhood that day to justify the military's use of force near his home—"no protests" and no armed civilians in the vicinity, notwithstanding demonstrations in other parts of town. DE 450 (Trial Tr. 3/6/18) at 59:24-25, 61:18-62:7. Indeed, her mother, Etelvina Ramos Mamani, testified that Marlene was "playing" with her sisters inside her home when the military operation took her life. *Id.* at 54:9-17.

A reasonable jury could also conclude that the military's response was disproportionate to any threat posed to it. Eloy explained to the jury that soldiers emerged from 15 military vehicles outside his house, "were all getting in position," and immediately "started shooting with firearms." DE 450 (Trial Tr. 3/6/18) at 61:19-62:7. As the soldiers fired, "children, women, [and] men" fled to the hills "like scared rabbits." *Id.* at 62:7-15. The soldiers pursued the fleeing civilians, shooting continuously at the homes and hills for at least eight hours, although no civilian fired a weapon during this time. *Id.* at 62:20-63:25, 65:3-9. Shells littered the ground outside Eloy's home the following day, "all over the place." *Id.* at 64:5-12.

Edwin Aguilar Vargas, a Bolivian conscript, affirmed that account, testifying that over 100 soldiers entered the area prepared to fire lethal "war munitions," and were ordered "from the moment [they] entered the village" to "shoot at anything that moved." DE 474-1 (Aguilar Dep.) at 21:9-22:20, 26:11-21, 29:9-13. The jury heard Aguilar recount that he never saw armed civilians, *id.* at 36:23-37:10, but nevertheless was ordered to fire "below the belt" on civilians *who posed no threat*, *id.* at 77:17-21. The "sergeants, sublieutenants and lieutenant" shot indiscriminately at "anything that moved or screamed" over several hours, from "the whole

afternoon until it became evening," while camouflaged special forces "responded to the call" to shoot "back and forth" into homes. *Id.* at 34:9-16, 36:5-39:21. Indeed, Etelvina testified that, just after hearing the fatal gunfire, she saw two soldiers in green camouflage uniforms outside the window through which Marlene was shot. DE 450 (Trial Tr. 3/6/18) at 54:18-55:19.

Defendants contend that the use of military force in Warisata was justly provoked by an ambush on a military-led caravan "carrying hundreds of tourists who had been held hostage." Br. 26. But that evidence was squarely disputed: An American traveling on the caravan, who refuted that tourists were "hostages," stated that it passed through Warisata "safely," and he "did not see or hear any gunshots in Warisata when [it] went through the town"—notwithstanding an earlier confrontation outside of town. DE 451 (Trial Tr. 3/7/18) at 36:25-40:9, 53:19-54:14. Moreover, the jury heard that Marlene's neighborhood in Karisa Town (one of four towns in the broader Warisata District) was a "far" 20-to-25-minute distance from where a soldier was shot earlier by an unidentified assailant. DE 450 (Trial Tr. 3/6/18) at 52:11-20, 59:11-14.

Viewed under the proper standard, a rational jury was entitled to resolve the conflicting testimony and inferences in favor of Plaintiffs, and to conclude that Marlene died because the military "opened fire *** against homes, which caused the death of many children and innocent people who were not taking part in criminal acts." *Caracazo*, Inter-Am. Ct. H.R. No. 58, ¶ 2(k); *see Mamani III*, 968 F.3d at 1239 (discussing *Caracazo* as a relevant source of customary international law). Moreover, the jury was entitled to believe the first-person testimony that commanders issued "orders to 'shoot on sight," and that the orders were not "given as a measure of very last resort to protect lives." *Mamani III*, 968 F.3d at 1239 (quoting United Nations Comm'n on Human Rights, Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, E/CN.4/2004/7 (Dec. 2003)). Both factors are more than sufficient to find that the

"disproportionate use of the armed forces in the poor[] residential district[]" was a breach of international law. *Caracazo*, Inter-Am. Ct. H.R. No. 58, ¶ 2(m).

2. Lucio Santos Gandarillas Ayala

On October 12, 2003, Lucio was fatally shot while hiding behind a kiosk in the Senkata area of El Alto. *Mamani III*, 968 F.3d at 1225 (recounting evidence of Lucio's killing). Based on the testimony of Luis Castaño, an eyewitness to Lucio's killing, "a jury could reasonably infer that Lucio's death was not an accident or the result of a negligent firing," but a deliberated killing by a Bolivian soldier. *Id.* at 1235. The record further supports that his killing was extrajudicial.

Castaño testified that while "[h]e *** saw a large group of people protesting and blocking the road" near a Senkata gas plant, he "did not see any civilians with guns." *Mamani III*, 968 F.3d at 1225. Instead, Mr. Castaño witnessed a yellow tractor filled with Bolivian soldiers approach the unarmed protesters, and saw at least one solider "start[] shooting, shooting up in the air," causing the civilians to disburse. DE 474-4 (Castaño Dep.) at 20:12-17, 25:18-28:9. "He did not see anyone shoot at the tractor" or "see the civilians do anything to provoke the military" that day—"Some were escaping. Some were just standing. Some were walking." *Mamani III*, 968 F.3d at 1225 (quoting DE 474-4 at 44:8-10). He testified that soldiers gave chase to the fleeing civilians, firing "a whole shower or rain of bullets" at them. DE 474-4 (Castaño Dep.) at 29:23-32:14. As Castaño and other civilians sought to escape down an alleyway, he witnessed five officers "positioning themselves to shoot," *id.* at 34:11-35:13, and "pointing [their guns] at the [fleeing] civilians," *id.* at 41:14-15, while helicopters circled the area, *id.* at 36:7-8. He then saw a man, later identified as Lucio, shot just as Lucio "leaned over" from a street kiosk where he was attempting to hide from the bullets. *Id.* at 37:2-38:4. Despite the ongoing gunfire from the military, he "never" saw an armed civilian "at any point" that day. *Id.* at 20:12-17, 43:21-44:10.

Aguilar, whose unit had been deployed near the Senkata plant after being in Warisata, testified that his commander shot "gas grenades" at civilians that day. DE 474-1 (Aguilar Dep.) at 42:23-43:18, 47:20-48:14. He also confirmed that several soldiers complied with orders to fire at civilians with lethal munitions, shooting "bursts of weapon fire" at unarmed civilians with "tanks and machine guns." *Id.* at 50:6-53:8.

Defendants counter that "Lucio's death occurred *** in the midst of violent clashes between security forces and insurgents in the Senkata area" of El Alto related to "attacks" on gasoline tankers. Br. 37. But Castaño testified that, when and where Lucio was killed, Bolivian soldiers had approached unarmed protesters outside the Senkata gas plant, shot at them without provocation, and pursued them down alleys. DE 474-4 (Castaño Dep.) at 20:6-17, 25:18-28:9. Castaño "didn't see the civilians do anything to provoke the military." *Mamani III*, 968 F.3d at 1225. The eyewitness drew a map to show that Lucio's killing was removed from any purported crisis. DE 474-4 (Castaño Dep.) at 28:23-39:14; DE 479-72 (Trial Ex. 201) (circling Castaño's and Lucio's locations relative to locations of officers who had taken up shooting positions).

A rational jury was entitled to believe Plaintiffs' evidence, resolve any disputes of fact, and conclude that the heavy use of lethal weaponry and soldiers' firing indiscriminately at civilians "who were fleeing" led to Lucio's killing despite a lack of just provocation or due to a disproportionate use of military force. *See Mamani III*, 968 F.3d at 1238 (finding military action unlawful under international law where officials "used 'tear gas, firearms, and water cannons' to disperse the protesters," and "'fired indiscriminately at those who were fleeing' with live ammunition") (quoting Human Rights Committee, *Florentino Olmedo*, Commc'n No. 1828/2008, U.N. Doc. CCPR/C/104/D/1828/2008 ¶¶ 2.5-2.6).

3. Teodosia Morales Mamani, Marcelino Carvajal Lucero, and Roxana Apaza Cutipa

On October 12, 2003, Teodosia Morales Mamani, Marcelino Carvajal Lucero, and Roxana Apaza Cutipa were each fatally shot in the Rio Seco area of El Alto. *Mamani III*, 968 F.3d at 1226-27 (recounting evidence of all three killings). The Eleventh Circuit concluded that various witnesses' testimonies presented at trial "provide sufficient evidence that a jury could reasonably conclude that Roxana, Marcelino, and Teodosia were deliberately killed by members of the Bolivian military." *Id.* at 1226, 1235. That evidence (and more) also supports the reasonable conclusion that each killing was unlawful under international law.

As Defendants conceded, each decedent was killed while in his or her family's home, posing no risk to the military. *See* DE 479-84 (Stipulated Facts) at 309.0003. Teodosia's niece testified that Teodosia, a pregnant mother, was shot by a bullet that came through the wall as she prayed inside her sister's apartment, shortly after "soldiers and a tank" passed the apartment and "aimed" guns at anyone who "wanted to look out the window." DE 453 (Trial Tr. 3/9/18) at 87:10-88:9, 92:9-94:6. Marcelino's wife testified that he was shot when he went to close a window inside his home as she witnessed "three military trucks with soldiers with the position on both sides *** ready to shoot," passing along the street. DE 452 (Trial Tr. 3/8/18) at 73:17-76:15. Roxana's brother testified that she was shot in the head when she and her siblings went up to the roof of her family house to observe the commotion outside. DE 453 (Trial Tr. 3/9/18) at 73:17-75:15, 102:16-103:1. That these innocent "victims were killed in their homes" as the result of soldiers' firing provided a legally sufficient basis for the jury to conclude that each killing breached customary international law. *Mamani III*, 968 F.3d at 1239 (comparing "the Bolivian decedents" to "many of the Venezuelan victims" discussed in *Caracazo v. Venezuela*, Inter-Am. Ct. H.R. No. 58, ¶ 2(k) (Nov. 11, 1999)).

Moreover, the jury heard no evidence showing just provocation for military force in proximity to where any of the decedents were shot. Although there were "protests and people on the streets" in El Alto, Roxana's brother testified that he did not see any civilians "with any kind of weapon" in Rio Seco. DE 453 (Trial Tr. 3/9/18) at 72:16-17, 75:12-15. That account was affirmed by Fathers Zabala and Soria Paz, Catholic priests with local parishes, who testified that they never saw a single armed civilian. *Id.* at 22:10-12; DE 454 (Trial Tr. 3/12/18) at 70:7-9. Father Soria Paz testified that he heard gunfire and witnessed armed soldiers "some 50 to 70 meters away from the parish front door"—which the jury heard was approximately 700 meters from the main avenue and a full kilometer away from the Rio Seco Bridge, where demonstrations against the government occurred. DE 454 (Trial Tr. 3/12/18) at 75:12-77:4, 92:12-23. Even if "demonstrators attacked the security forces" in other parts of El Alto, the military's advance on—and use of live ammunition throughout—neighborhoods unconnected to any violence demonstrates, at a minimum, "more force than was necessary." *Mamani III*, 968 F.3d at 1238 (discussing Eur. Ct. H.R., *Güleç*, App. No. 54/1997/838/1044, which found "armored vehicles 'open[ing] fire in the main street, where the demonstration was taking place,'" to be disproportionate use of force).

Those accounts were consistent with testimony by Ela Trinidad Ortega Tarifa, who witnessed soldiers lining the highway, dispersing in alleys, and indiscriminately shooting innocent civilians. DE 455 (Trial Tr. 3/13/18) at 37:8-38:4, 41:14-42:1, 53:24-55:17, 57:9-12. She testified that "during October 12 and the days prior, she never saw any civilians with firearms." *Mamani III*, 968 F.3d at 1227; DE 455 (Trial Tr. 3/13/18) at 29:9-10. She recounted, nevertheless, that an officer ordered his conscripts "*to shoot at the civilians*," yelling, "Damn it. Shoot, shoot those people." DE 455 (Trial Tr. 3/13/18) at 42:3-19, 51:5-6 (emphasis added). When the conscripts

refused, the officer grabbed one of the soldier's guns and killed him with it. *Id.* at 51:4-52:15. Ortega attempted to escape but was captured by another group of conscripts. *Id.* at 53:18-23. They warned her to stay quiet because they were being "forc[ed]" by commanders to hurt civilians. *Id.* at 57:4-12. That group ultimately gave chase to another young civilian, whom they beat and shot. *Id.* at 53:25-54:8, 55:5-17.

Defendants argue that the killings of Teodosia, Marcelino, and Roxana were the result of the violent demonstrations along the main avenue in El Alto. Br. 30-37. But the jury could reasonably conclude that this account was undermined not only by the fact that all three decedents were killed while at home, but also by Roxana's brother's testimony that he "absolutely" did not see any civilians "with any kind of weapon" in the Rio Seco area. DE 453 (Trial Tr. 3/9/18) at 75:12-15. Moreover, he testified that Roxana was shot 6.5 blocks or 400 meters away from the avenue. *Id.* at 79:2-11. The jury also heard testimony by Father Zabala, Father Soria Paz, and Ortega corroborating the point that soldiers had fanned out throughout the city, far away from any demonstrations and into places where civilians had no weapons. *Id.* at 22:10-12; DE 454 (Trial Tr. 3/12/18) at 70:7-9, 75:12-77:4; DE 455 (Trial Tr. 3/13/18) at 37:8-38:4, 41:14-42:19, 51:4-55:17, 57:9-12. Ortega used a map to show the distance over which she saw the military attacking civilians. *See* DE 479-81 (Trial Ex. 304).

In sum, a reasonable jury could conclude from the accounts of Plaintiffs' witnesses that the killings of Teodosia, Marcelino, and Roxana were unlawful under international law because the "deaths result[ed] from the excessive use of force" or were unprovoked. *Mamani III*, 968 F.3d at 1239 (quoting United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/12 (1991)).

4. Arturo Mamani Mamani & Jacinto Bernabé Roque

On October 13, 2003, Arturo Mamani Mamani and Jacinto Bernabé Roque were both fatally shot while hiding in hills in the Ánimas Valley, an area to the south of La Paz. *Mamani III*, 968 F.3d at 1227-28 (recounting evidence of both killings). "A reasonable jury could find that Arturo and Jacinto were deliberately killed." *Id.* at 1235-36. The Eleventh Circuit affirmed that verdict based on the testimony of Arturo's son, Gonzalo Mamani Aguilar, who "witnessed members of the Bolivian military shoot Arturo, Jacinto, and two other men," and the testimony of Jose Limber Flores Limachi, a Bolivian solder who was "under orders to shoot at the civilians in the hills with lethal ammunition" in the area that day. *Id.* Testimony from Gonzalo, Flores, and other witnesses also provides more than adequate support for the conclusion that Arturo's and Jacinto's killings were extrajudicial.

Several witnesses recounted to the jury that the military's use of force over many hours and great distance was disproportionate to any threat. Gonzalo testified that he and his father saw military trucks "full of soldiers" descend into the Ánimas Valley before they left their home to tend to their potato crops in the surrounding hills. DE 454 (Trial Tr. 3/12/18) at 32:12-33:8. Many soldiers had "positioned themselves in a firing position" and were "shooting in every direction" at the villagers in the hills, *id.* at 37:17-18, even though none of the villagers were armed, *id.* at 56:12-20. Arturo and other villagers tried to cover themselves with "big straw pieces" to hide from the soldiers, *id.* at 38:21-23, and "every time the straw would move, [the soldiers] would fire," *id.* at 42:13-14. More than three hours after the convoys arrived, Gonzalo saw his father shot while cowering in the grass. *Id.* at 38:22-39:7, 40:19-20.

Gonzalo told the jury that he then hid behind Jacinto Bernabé Roque, an elderly man who was "laying" in the grass further down the hill, attempting to avoid the soldiers. DE 454 (Trial Tr.

3/12/18) at 40:12-16, 41:12-15. After several minutes passed and the soldiers continued to fire, Jacinto was shot, his blood "splatter[ing]" on Gonzalo's face. *Id.* at 41:23-42:4. Gonzalo testified that he saw two other unarmed civilians hit by lethal gunfire, with 20 to 30 minutes and considerable distance separating each killing from the next, *id.* at 42:16-44:1, 56:12-20, and that he later saw a helicopter "shooting," "dis[per]sing all of the people" who remained, *id.* at 44:5-13.

The jury heard multiple witnesses corroborate Gonzalo's testimony. Augustín Sirpa testified that he never saw any civilians firing weapons, DE 456 (Trial Tr. 3/14/18) at 65:17-19, though the military forced him to write a statement asserting otherwise after he was detained, tortured, and interrogated for hours, *id.* at 58:11-63:15, 74:11-75:23.

José Limber Flores Limachi, a Bolivian conscript whose unit was in Ánimas Valley that day, reinforced to the jury the excessive nature of the military's force. Flores Limachi testified that "[*a*]*fter* the 45 minutes of the clash" earlier that morning, his commanding officer "organized a group to climb the hill," ordered soldiers to pursue and shoot civilians as they climbed, and forbid them from assisting civilians wounded by the bullets. DE 454 (Trial Tr. 3/12/18) at 131:22-132:8. Although Flores Limachi did not see any armed civilians as the units climbed the hill, he testified that the soldiers complied with their orders, shooting "a lot of shots," "shot by shot," at the defenseless villagers. *Id.* at 131:9-132:14.[3]

Defendants assert that Jacinto's and Arturo's deaths were caused by precipitate shooting relating to a blockade on Animas Valley Road, where an unidentified assailant shot a soldier. Br.

[3] Like Sirpa, Flores Limachi testified that the military forced him to make a false statement of civilian violence. DE 454 (Trial Tr. 3/12/18) at 135:22-136:5, 142:20-23, 150:16-153:9. Though Defendants attempted to impeach him using that statement, the Eleventh Circuit observed that this Court must take his "testimony in the light most favorable to Plaintiffs," as "[i]t is for the jury to consider the conflicting police report as impeachment evidence and 'determine the credibility of witnesses.'" *Mamani III*, 968 F.3d at 1236 n.16 (quoting *McGinnis*, 817 F.3d at 1254).

39-41. Flores Limachi, however, told the jury that officers ordered soldiers to climb the hills and shoot unarmed villagers long "after" the clash at the roadblock. DE 454 (Trial Tr. 3/12/18) at 131:22-132:14. Sirpa also testified that although he never saw a civilian firing weapons, soldiers "continued to climb" into the hills and fire indiscriminately for hours. DE 456 (Trial Tr. 3/14/18) at 53:1-55:6, 56:12-20. Testimony revealed that Jacinto and Arturo were shot over two hours after the soldier had been shot far below, and that the shooting by soldiers (and resulting deaths) continued long after. *Compare* DE 454 (Trial Tr. 3/12/18) at 148:4-5 (soldier shot at "approximately 8 o'clock"), *with id.* at 40:19-20 (Jacinto shot sometime around "10:00, 10:15 or 10:20," and Arturo after). The jury saw maps showing that Arturo and Jacinto were killed in hills away from conflict. *Id.* at 33:20-36:11, 44:16-20.

The foregoing evidence amply supports the jury's reasonable determination that Arturo's and Jacinto's killings were unlawful under international law. That, "[d]uring all of this, the military kept shooting" over many hours and across great distance at unarmed villagers, *Mamani III*, 968 F.3d at 1228, refutes that the military's use of force was "no more than absolutely necessary" to respond to the attack on a solider earlier that morning, *id.* at 1237-38. The soldiers' "shooting in every direction" and "everywhere"—*i.e.*, "'indiscriminate firing' against unarmed persons"—is evidence that they "violate[d] the right to be free from the arbitrary deprivation of life, and thus is unlawful." *Id.* at 1227, 1237. And testimony that the victims were shot "with live ammunition" while fleeing belies that the use of force was the "very last resort to protect lives." *Id.* at 1238-39 (citation omitted).

5. Raúl Ramón Huanca Márquez

On October 13, 2003, Raúl Ramón Huanca Márquez was killed by Bolivian soldiers in Ovejuyo, a town south of La Paz. *See Mamani III*, 968 F.3d at 1228-29 (recounting evidence of

Raúl's killing). Reviewing the testimony of Juan Carlos Pari, an eyewitness who "saw soldiers on the bridge who shot at Raúl," and Mr. Flores Limachi, who "saw soldiers shooting at civilians in Ovejuyo" that day, the Eleventh Circuit affirmed the jury's reasonable determination that Raúl's killing was the product of a "purposeful acts by Bolivian soldiers to take civilian lives." *Mamani III*, 698 F.3d at 1236. Those witnesses' accounts are also more than sufficient to conclude that Raúl's death was unlawful under international law.

The record supports the finding that Raúl's killing was carried out "without justifiable provocation." *Mamani III*, 969 F.3d at 1237 n.20. Pari told the jury that there were no roadblocks in the area of Ovejuyo at the time, no civilians "attacking the military in any way," and no civilians even seen carrying a gun. DE 474-9 (Pari Dep.) at 37:19-38:14, 45:5-24. But he suddenly began to hear "noise and shooting," and, from his window, he saw nearly 50 soldiers descend into Ovejuyo from the bridge in front of his house. *Id.* at 24:19-25:3, 28:8-10. When "there were not many people around" apart from the soldiers, Pari saw around 15 soldiers "shooting from above" at Raúl as he attempted to hide by a shop near Pari's home. *Id.* at 26:19-29:14, 33:4-10.

The record also supports the finding that his killing was not the result of the military's "use of proportionate force." *Mamani III*, 968 F.3d at 1237. The jury heard Raúl's daughter testify that he left their home that day only to go "to the shop to buy a Coca-Cola to drink." DE 453 (Trial Tr. 3/9/18) at 117:13-25. He was unarmed and seeking shelter when killed. DE 474-9 (Pari Dep.) at 29:10-14, 37:8-18. The soldiers sustained their gunfire at a rapid clip, "like this, 'dat dat dat,'" for around 20 minutes. *Id.* at 35:15-18, 41:11-17. Indeed, Flores Limachi, the Bolivian conscript, stated that his unit was also in Ovejuyo that day and confirmed that soldiers were ordered to, and did, shoot at a "multitude of civilians." DE 454 (Trial Tr. 3/12/18) at 133:3-17. Several other civilians died in and around Ovejuyo that day. DE 453 (Trial Tr. 3/9/18) at 120:3-13.

Defendants claim "Raúl's death [also] occurred in the midst of the[] violent uprisings" in the Southern Zone, "'very close' to the spot on the Animas Valley road" where the soldier was shot. Br. 42-43. But the jury heard that Ovejuyo, where Raúl was killed, was a thirty-minute distance from where the solider had been shot in the Southern Zone. DE 474-9 (Pari Dep.) at 24:15-18, 38:5-22, 46:22-24. Pari testified that Ovejuyo had been a "very peaceful" zone, "nothing ever happened," and "there were not many people around" apart from the soldiers on the morning Raúl was shot. *Id.* at 27:20-22, 35:15-18, 37:19-38:14, 45:5-24. He drew a map to demonstrate that the military, initially shooting into the hills, changed the direction of their shooting to target Raúl. *See* DE 479-73 (Trial Ex. 203). As with the other killings, a rational jury could believe Plaintiffs' evidence, resolve any conflicts in Plaintiffs' favor, and conclude that Raul's death was unlawful under international law.

C. Defendants' Arguments Are Forfeited, Foreclosed By Precedent, And Irreconcilable With The Rule 50 Standard

1. Defendants forfeited the argument that the evidence was insufficient for a reasonable jury to find that the killings were unlawful under international law.

As an initial matter, because Defendants never moved under Rule 50 regarding the lawfulness of the Bolivian soldiers' actions under international law, their sufficiency argument should be deemed forfeited. The Eleventh Circuit "repeatedly has made clear that any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of the evidence and prior to the case being submitted to the jury." *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 813 (11th Cir. 2015) (quoting *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 903 (11th Cir. 2004)). In order "to ensure that opposing counsel is not 'ambushed' by a sufficiency of the evidence argument" after trial that the moving party "did not raise in the earlier motion,"

defendants who raise a sufficiency challenge with regard to only one element of a claim cannot later challenge sufficiency "relating to other elements of the claim." *Id.* at 813.

Defendants' prior Rule 50 motions—like their arguments on appeal—focused solely on the purported lack of evidence to show that a Bolivian soldier deliberately killed decedents; Defendants never argued that, even if the evidence was sufficient to show deliberation, it was still insufficient to show unlawfulness under international law. On the contrary, they conceded that it "would not be acceptable to use lethal force against an unarmed civilian that posed no threat." DE 421-1 (Defs.' Rule 50(a) Mem. Law) at 15; *see also* Br. 2 n.1 ("incorporat[ing] by reference previous arguments and briefing"). In renewing their Rule 50 motion before the case was submitted to the jury, Defendants again denied only that Plaintiffs had presented "evidence linking any death to any soldier," while they conceded there was "some evidence" that soldiers "overreacted." DE 462 (Trial Tr. 3/23/18) at 159:21-160:8, 161:23-24; *see also id.* 160:6-8 ("This case, Your Honor, has devolved into a claim for disproportion[ate] force *** . That's what we're really left with."). The Court can deny the Rule 50 motion with respect to whether the killings were "extrajudicial" based on this forfeiture alone.[4]

[4] Defendants have doubly forfeited their footnote-only argument that the proportionality inquiry "involves 'technical issues beyond a juror's ordinary knowledge.'" Br. 23 n.8 (quoting *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018)). First, "a footnote is an incorrect place for substantive arguments on the merits." *Espinoza v. Galardi S. Enters., Inc.*, No. 14-21244-CIV-GOODMAN, 2018 WL 1729757, at *4 (S.D. Fla. Apr. 10, 2018); *see Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 992 (11th Cir. 2010) (deeming argument waived because raised only in footnote). Second, Defendants did not move under Rule 50 based on a lack of evidence (expert or otherwise) of proportionality, and nothing in the Eleventh Circuit's remand order permits them to evade normal waiver principles. In any event, Defendants are wrong: Juries are regularly called on to weigh "the specific circumstances of an individual case" and assess the "reasonableness (proportionality)" of uses of force. *Mamani III*, 968 F.3d at 1237 (citation omitted); *see, e.g., Gomez v. Lozano*, 839 F. Supp. 2d 1309, 1323 (S.D. Fla. 2012) ("[T]he Eleventh Circuit has recognized that, under Florida law, the question of whether a police officer used 'reasonably necessary force' is a question for a jury.").

Finding forfeiture would be particularly appropriate here, given that the lawfulness of a deliberated killing under international law is an affirmative defense that the Defendants had the burden to raise. *See United States v. Johnson*, 981 F.3d 1171, 1184 (11th Cir. 2020) ("The difference between an element and an affirmative defense is important."). At trial, Defendants included as "Affirmative Defense[s]" in their answers that the military action was "a necessary and proportional response to violent protests." DE 219, at 30 (First Affirmative Defense); DE 237 (No. 07-22459) at 34 (Twentieth Affirmative Defense). That accords with domestic law, which regularly classifies "justification" and other similar defenses as affirmative defenses. *See, e.g.*, *United States v. Dicks*, 338 F.3d 1256, 1257 (11th Cir. 2003) (recognizing "defense of necessity or justification is an affirmative defense" in various statutes). And it accords with the text and structure of the TVPA. The "settled rule" is that "a proviso or other distinct clause" set apart from "a general provision defining the elements of an offense" establishes an affirmative defense, not an element. *McKelvey v. United States*, 260 U.S. 353, 357 (1922); *see United States v. Kloess*, 251 F.3d 941, 945-46 (11th Cir. 2001) (holding that clause that provides "a narrow exception to [a] general proscription" generally treated as affirmative defense); *cf. Meachem v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008) ("That longstanding convention is part of the backdrop against which the Congress writes laws[.]"). That is the case with respect to the distinct lawful-killing clause of the TVPA: after broadly "defin[ing] the proscribed conduct," Congress in a separate sentence "exclude[d] *** 'any *** killing that, under international law, is lawfully carried out under the authority of a foreign nation.'" *Owens v. Republic of Sudan*, 864 F.3d 751, 772-73 (D.C. Cir. 2017), *vacated on other grounds*, 140 S. Ct. 1601 (2020).

In sum, Defendants' failure to assert in their prior Rule 50 motions that the evidence was insufficient to find the killings unlawful under international law—particularly when it was their

burden "to raise the exception as an issue," *Johnson*, 981 F.3d at 1184—alone warrants rejecting this argument now.

2. Defendants improperly re-litigate the settled finding that a Bolivian soldier deliberately killed each decedent.

Defendants' arguments are meritless anyway. In the face of overwhelming evidence that decedents' killings were not "lawful under international law," *Mamani III*, 968 F.3d at 1240, Defendants repeatedly seek to re-litigate (at 29, 31-32, 34, 36, 38, 40, 44, 45-46) the now-settled issue of whether the record supports the jury's conclusion that a soldier deliberately killed each decedent. For instance, relying on their expert's testimony, they claim that "the only conclusion supported by the evidence is 'that Marlene was hit by misdirected fire coming from a rural inhabitant in Warisata that opened fire with long-range firearms.'" Br. 29. But the Eleventh Circuit flatly rejected that argument: "A reasonable jury could conclude that a member of the Bolivian military engaged in a purposeful act to take Marlene's life." *Mamani III*, 968 F.3d at 1235.

Indeed, the Eleventh Circuit could hardly have been clearer that, "*[f]or each decedent*, Plaintiffs presented evidence that the cause of death was consistent with *a deliberate shot from a member of the Bolivian military* in the absence of just provocation." *Mamani III*, 968 F.3d at 1235 (emphasis added); *but see* Defs. Br. at 45-46 ("For each decedent, the unrebutted forensic evidence shows that none of the deaths could have occurred in the manner that Plaintiffs contend."). Simply put, "Defendants' alternative explanation for the shots does not compel" a contrary conclusion on remand, any more than it did on appeal. *Mamani III*, 968 F.3d at 1236. This Court must ignore Defendants' (many) attempts to re-litigate their theory that decedents were likely killed by shots fired from protesters, rather than by "soldiers [who] deliberately fired deadly shots with measured awareness that they would mortally wound civilians who posed no risk of danger." *Id.* at 1235;

see Cambridge Univ. Press. v. Albert, 906 F.3d 1290, 1299 (11th Cir. 2018) (on remand, trial court "must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces").

3. Defendants disregard Plaintiffs' evidence and rely on contested evidence.

Defendants ultimately resort to relying on their own contested evidence to argue that the use of military force was justly provoked with respect to each killing or that the soldiers' actions were proportionate in each circumstance. But that ignores the Rule 50 standard and does not justify tossing out the jury's verdict.

Try as they might, Defendants cannot escape the Eleventh Circuit's conclusions or the extensive record evidence that a rational jury could have relied on. For example, Defendants contend that the Eleventh Circuit somehow recognized a "fundamental defect" (Br. 1) when it observed that "evidence about widespread casualties and a pattern of innocent deaths does not suffice to demonstrate that in any particular instance a death was an extrajudicial killing." *Mamani III*, 968 F.3d at 1240. But they neglect to quote the next sentence: "On the other hand, evidence indicating that the decedents were killed by soldiers indiscriminately shooting or using force against civilians in the absence of just provocation would support a conclusion that the deaths were extrajudicial killings." *Id.* As already described, the record contained a great deal of the latter.

Ignoring Plaintiffs' evidence, Defendants argue that "whether the force used was 'disproportionate'" must be considered "in the context of armed conflict during a violent civil uprising." Br. 23 n.8. As an initial matter, that argument contradicts Defendants' own insistence elsewhere in their brief that these killings occurred "*outside of times of armed conflict* as defined under international law." Br. 5 n.3 (emphasis added) (arguing without support for distinct standard of liability for "civilian leader[s] outside of times of armed conflict").

Regardless, Defendants' characterization of "armed conflict" at the relevant times and places is, at best, highly disputed. Because the court must take evidence "in the light most favorable to Plaintiffs," *Mamani III*, 968 F.3d at 1236 n.16, Defendants repeatedly err in mischaracterizing their evidence of "crises" as "unrebutted" or "undisputed." Defs.' Br. 46; *compare, e.g.*, Defs.' Br. 26, 31, 34, 37, 42, 45 (citing "dynamite"-armed protestors), *with* DE 454 (Trial Tr. 3/12/18) at 149:12-150:4 (soldier contradicting report of dynamite); DE 450 (Trial Tr. 3/6/18) at 70:13-75:16 (explaining demonstrations in Bolivia are commonplace); DE 457 (Trial Tr. 3/15/18) at 50:21-24 (La Paz mayor explaining "[t]here was a relative normalcy in the city" on October 12 before military action); DE 453 (Trial Tr. 3/9/18) at 9:13-15, 71:16-24 (protests did not prevent ordinary tasks like "go[ing] to the store and buy[ing] bread, soda, ice cream").[5]

Aside from that general evidence, the jury heard repeated testimony that there were *no* armed civilians at the specific times and places where the eight decedents were shot. *See, e.g.*, DE 474-4 (Castaño Dep.) at 20:12-17, 43:21-44:10; DE 474-9 (Pari Dep.) at 37:19-38:13; DE 450 (Trial Tr. 3/16/18) at 63:20-64:4; DE 453 (Trial Tr. 3/9/18) at 22:10-12, 75:12-15; DE 454 (Trial Tr. 3/12/18) at 56:12-20, 70:7-9, 132:9-14; DE 456 (Trial Tr. 3/14/18) at 65:17-19. The jury also heard that the military fired indiscriminately and extensively at civilians who were fleeing, seeking refuge, or at home. *See* pp. 11-23, *supra*. And there was evidence that the military coerced witnesses into making false statements to fabricate proof of supposed justification for the military's extreme actions. *See* DE 454 (Trial Tr. 3/12/18) at 135:22-136:5, 142:20-23, 150:16-153:9; DE

[5] Defendants also insist that photos they introduced were "unrebutted forensic evidence." Br. 44. But the jury was free to credit Plaintiffs' firsthand testimony disputing that Defendants' images accurately captured the situation on the ground. *See* DE 463 (Trial Tr. 3/26/18) at 184:1-17 ("[W]hen [Mr. Pari] was asked to identify all of the structures that weren't there in 2003, he put a black X on them. He put a green X where the bridge is and a red dot where he saw Raul get shot. There's a pretty straight line there [from the soldiers' vantage point to the place where Raúl was killed]."); *see also* DE 479-71 (Trial Ex. 139) (photo shown to jury with Mr. Pari's markings).

456 (Trial Tr. 3/14/18) at 74:11-75:23. Such evidence could lead a reasonable jury to question *all* of Defendants' evidence, as "[c]redibility determinations" and "the weighing of the evidence" are "jury functions, not those of a judge." *Reeves*, 530 U.S. at 150.

Even Defendants' supposedly "unrebutted" evidence must still be disregarded as long as the jury was not *required* to accept it. The law is clear that "[e]ven uncontradicted expert opinion testimony is not conclusive, and the jury has every right not to accept it." *Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1470 (11th Cir. 1989). Defendants repeatedly rely on their own forensics experts' testimony—which in turn relied on various hearsay documents not in the record, *see* DE 462 (Trial Tr. 3/23/18) at 130:22-131:4, 131:19-132:8—as "unrebutted evidence that 'insurgents on rooftops' fired down on the police and military" in El Alto, Br. 31 (quoting DE 462 at 130:21-131:4, 150:8-15). Putting aside Defendants' improper attempt to re-litigate the settled question of "who" fired the shots, the jury was permitted to credit the firsthand eyewitness testimony over the second-hand (and hardly "disinterested") accounts of Defendants' paid experts. *Reeves*, 530 U.S. at 150-151 (explaining that on Rule 50 motion, court "should give credence" to movant's unimpeached and uncontradicted evidence "to the extent that that evidence comes from disinterested witnesses").[6]

Finally, Defendants repeatedly lean on a post-incident report prepared by Bolivian prosecutors to contend that the military's response was proportionate with respect to each decedent's killing. *See* Br. 25-45. But the factfinder considered this evidence—and heard that the

[6] That is especially true given that cross-examination revealed that two of the three experts had never examined the scenes of the killings, that the other expert spent minimal time at each site and had not entered any of the homes where several decedents were shot, and that none of the experts actually interviewed any witnesses despite recognizing that "witness views are critical." DE 462 (Trial Tr. 3/23/18) at 105:2-113:7, 129:7-16 (Katz); *see* DE 461 (Trial Tr. 3/22/18) at 37:1-24 (Carter); *id.* at 67:2-19 (Fowler).

report was (1) "not based on the same case file" presented to the jury and (2) was fatally flawed because the Bolivian prosecutors were unable to secure cooperation from the Bolivian armed forces. *See* DE 463 (Trial Tr. 3/26/18) at 37:2-10 ("Exhibit 1002 was not based on the testimony from the people you heard from over the last three weeks."), 172:20-173:10 ("The prosecutor's report wasn't based on information from the military. They wouldn't cooperate."). Indeed, the Three Prosecutors' Report cautions that the military refused to cooperate "despite [the prosecutors'] persistent requests," and condemned the "lack of interest on the part of military authorities in helping to clear up the facts." DE 471-2 (Trial Ex. 1002) at 1002.21. In any event, Defendants ignore the report's conclusion that there was evidence of "disproportionality," "excesses," avoidable deaths, and possibly "criminal conduct" on the part of the military and police forces. *See id.* at 1002.32 ("The tragic outcome of these confrontations shows that in some instances, the actions of the joint military and police forces *** involved excesses whose irreparable outcome was death and grievous bodily harm ***, [which] *may be considered criminal conduct with direct regard to the perpetrators*[.]") (emphasis added); *id.* at 1002.28 ("[T]he Office of the Public Prosecutor has found excess, a failure to observe due care, and even disproportionality in the actions of the members of the joint forces, leading to deaths and injuries that could have been avoided."). Even Defendants' own evidence thus accords with the theory the jury accepted.[7]

***

Defendants' theory at trial was that the deaths were the result of accidental or precipitate shootings during an ongoing civil uprising. *See, e.g.*, DE 463 (Trial Tr. 3/26/18) at 91:12-21

[7] Defendants no longer rely on the State Department cables—once described as the "most important piece of evidence in this case," DE 463 (Trial Tr. 3/26/18) at 122:21-123:5—in light of the Eleventh Circuit's inadmissibility ruling. *Mamani III*, 968 F.3d at 1242-43.

("Now [Plaintiffs' counsel] told you this morning that there were no armed civilians, none as far as the eye could see. *** Of course they were armed. Of course."). The jury, however, was entitled to (and did) reject Defendants' "alternative explanation" for these deaths, and to believe Plaintiffs' evidence instead. *Mamani III*, 968 F.3d at 1236. Despite Defendants' hyperbolic contention that "there was *no* evidence that any of the decedents' deaths was the result of an unlawful shooting under international law," Br. 24 (emphasis added), the Eleventh Circuit has already recognized that the record contained evidence that each decedent was killed by soldiers "using force against civilians in the absence of just provocation" or using disproportionate force such as "indiscriminate[] shooting" at fleeing and unarmed civilians. *Mamani III*, 968 F.3d at 1240. Because a "rational" jury could find in Plaintiffs' favor, the Rule 50 motion should be denied, and the TVPA verdict should stand. *See id.* at 1230.

II. THE JURY RATIONALLY CONCLUDED THAT DEFENDANTS WERE LIABLE FOR THE EXTRAJUDICIAL KILLINGS UNDER THE COMMAND-RESPONSIBILITY DOCTRINE.

Given the jury's reasonable verdict "establish[ing] that there was an extrajudicial killing," "Plaintiffs need only *** connect Defendants to that wrongdoing" via the command responsibility doctrine. *Mamani III*, 968 F.3d at 1239. That doctrine imposes liability on civilian and military commanders who "neglect to take reasonable measures for the[] protection" of "civilian populations *** from brutality." *In re Yamashita*, 327 U.S. 1, 15 (1946). Under this Court's clear precedent, a superior who knows or should know about a subordinate's acts may be held liable for them even where that superior "did not order" them and was not directly involved. *Ford ex. rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002); *see id.* n.2 (explaining that "a higher official need not have personally performed or ordered the abuses in order to be held liable" under the TVPA because "*anyone* with higher authority who authorized, tolerated, or knowingly ignored those acts is liable for them") (emphasis added) (quoting S. REP. NO. 102-249, at 9); *see*

generally Br. of Amici Curiae Retired U.S. Military Commanders and Law of War Scholars, *Mamani III*, 968 F.3d 1216, 2018 WL 5043994 (Oct. 12, 2018) (providing detailed explanation of command-responsibility doctrine).

A. The Record Amply Supports The Jury's Command Responsibility Finding

Mamani III confirmed that the command-responsibility doctrine "could be demonstrated via evidence that Defendants (1) had a superior-subordinate relationship with the wrongdoer, (2) knew or should have known of the wrongdoing, and (3) failed to prevent or punish the wrongdoing." *Mamani III*, 968 F.3d at 1239 n.24; *see also, e.g.*, *Ford*, 289 F.3d at 1288. The jury rationally concluded that all three elements were satisfied.

1. The jury heard extensive evidence that each Defendant had a superior-subordinate relationship with the soldiers who committed the killings.

The "superior-subordinate" element of command-responsibility liability can be satisfied by showing either the Defendant's control (either *de jure* or *de facto* or both) over the troops that shot decedents. *Ford*, 289 F.3d at 1290-91; *see also* DE 404 (Pre-Trial Stip.) at 9 (quoting *Mamani v. Berzaín*, 21 F. Supp. 3d 1353, 1376 (S.D. Fla. 2014)). Defendants insist that they cannot be held liable for the extrajudicial killings because they did not have on-the-ground "operational" control or "order anyone in the Armed Forces directly," Br. 7, but that is not the standard. Instead, the inquiry turns on whether the Defendant had "effective control" over the forces committing the wrong—*i.e.*, "a material ability to prevent or punish criminal conduct, however that control is exercised." *Ford*, 289 F.3d at 1290 (quoting *Prosecutor v. Delalic* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 256). The jury rationally concluded that, as a legal or a practical matter (or both), the

President and Defense Minister each had the ability to prevent or punish the extrajudicial killings committed in September and October 2003.[8]

a. *De jure* authority

Where a commander has "*de jure* authority," it is "prima facie evidence of effective control," which may be rebutted only with sufficient proof of its absence. *Ford*, 289 F.3d at 1290-91. Extensive evidence showed that both Defendants had *de jure* authority.

As President, and therefore "Captain General of the Armed Forces," Lozada unquestionably had *de jure* authority. DE 479-24 (Bolivia Const.), art. 97; *see, e.g.*, DE 474-6 (Flores Dep.) at 80:6-18 (testimony that Lozada was "at the top of the chain of command in September, October 2003 in Bolivia," as "general captain of the armed forces, which is the president of the country"). Under the Bolivian Constitution and Organic Law, "the Armed Forces are subordinate to the President of the Republic and receive their orders from him." DE 479-24 (Bolivia Const.), art. 210; DE 479-11 (Organic Law), art. 18. Thus, as General Antezana testified, it is "a mandate of the Constitution" that "the military *** act[ed] only at the authorization of Gonzalo Sanchez de Lozada." DE 474-2 (Antezana Dep.) at 46:14-20. "[T]he person who gives the order is the General Captain or the President," "[a]ll officials within the rank and in their grade know their responsibilities and know who they have to report [to]," and "that [is] what happened in September, October of 2003." *Id.* at 35:2-4, 46:14-47:4, 154:4-8. Even the Three Prosecutors'

[8] Although Defendants do not appear to dispute this point, the jury heard testimony that the chain of command was functional during the relevant time. *See* DE 471-2 (Trial Ex. 1002) at 1002.28 ("[B]oth the Police and the Army acted based on specific orders from their natural hierarchical superiors"); *cf.* DE 471-17 (Trial Ex. 1023) (acknowledging administration's ability to withdraw the military). The jury was told that the military did not "improvise" or act absent direct orders at any point during September and October 2003. DE 459 (Trial Tr. 3/20/18) at 19:8-14. "Even to go into the bathroom and other places," the jury heard, soldiers had to receive authorization. DE 474-1 (Aguilar Dep.) at 77:10-12.

Report that Defendants rely on describes Lozada as a "*natural hierarchical superior*[]" of the "Armed Forces" that were mobilized. DE 471-2 (Ex. 1002) at 1002.28 (emphasis added) ("[T]he Army acted based on specific orders from their natural hierarchical superiors," including "written orders from the former President.").

Extensive evidence revealed Berzain's *de jure* authority as well. As Minister of National Defense, Berzaín was the second most senior member, next to the President, on the "High Military Command," "the top decision-making organism of the National Armed Forces," and he sat on the "Supreme Council on National Defense." DE 479-11, arts. 19, 22. His "principal powers" included "plan[ning], organiz[ing], direct[ing], and supervis[ing] Civil Defense in the National Territory," "full or partial Mobilization and Demobilization," "[e]nsuring the integrity of the National Territory," and "[e]nabling the execution of the Operating Plans." *Id.* arts. 22, 25. He was also one of the six Bolivian authorities who could "order the final investigatory phase" of military justice matters. DE 479-11 (Ex. 13) art. 28. The Eleventh Circuit has found similarly high-level defense officials liable under the command-responsibility doctrine. *See Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006) (affirming TVPA liability under command responsibility doctrine for former Minister of Defense and Director General of the National Guard who "neither ordered nor participated in" the predicate crimes); *see also Ford*, 289 F.3d at 1288-94 (accepting that former Salvadoran Ministers of Defense were eligible for liability under doctrine).

Defendants resist this clear evidence of "superior-subordinate relationships," principally on the ground that there were additional individuals—such as the Commander in Chief and various unit commanders—also in the chain of command. *See* Br. 7-8, Br. 21. But the jury reasonably accepted, based on the evidence above, that Defendants nevertheless had "effective control" over the military through the functioning chain of command—and it was the jury's job to "weigh

conflicting evidence and inferences" on that point. *McGinnis*, 817 F.3d at 1254. Defendants also contend that "Plaintiffs *conceded* during the original Rule 50 argument that Defendants did not have *de jure* authority over the Bolivian troops." Br. 6. That is wrong: Plaintiffs merely recognized that application of the command-responsibility doctrine in this case does not rely solely on Defendants' titles—*i.e.*, "the fact that [Defendants] were the President and the Minister of Defense"—but was instead supported by extensive testimony about these Defendants' roles in the chain of command. *See* DE 458 (Trial Tr. 3/19/18) at 27:23-25. That point thus undermines Defendants' contention that the jury verdict amounts to "strict liability akin to respondeat superior for national leaders." Br. 4 (quoting *Mamani I*, 654 F.3d at 1154).

b. *De facto* authority

The jury also heard substantial evidence showing that Defendants had *de facto* authority over the Bolivian armed forces, which independently supports the jury's "control" finding.

As the person at the top of the hierarchy, Lozada played a key role in overseeing and managing the government's response to the events of September and October 2003. *See* DE 455 (Trial Tr. 3/13/18) at 79:18-80:9 (Berzaín testifying that it was "expected and "understood" that Lozada's orders "would be followed by the Commander in Chief subordinates"). Indeed, Lozada is the one who first directed the military in September 2003 to "[m]obilize and immediately use the force necessary to restore public order and respect for the rule of law in the region" in response to demonstrations. DE 471-3 (Ex. 1004); DE 479-3 (Ex. 3).[9] Lozada also issued various tactical

[9] Defendants claim that Lozada's Sept. 20 order "could not possibly have played any role in the deaths of any decedents in this case" because Marlene died "at least an hour *before* the order was written" around 5:00 p.m. Br. 10. But the report Defendants cite is internally contradictory. *See* Ex. 9, at 9-0002 (stating "event occurred" at "6:00 p.m."—*i.e.*, *after* the order issued). Regardless of when issued, however, the order plainly demonstrates that Lozada exercised authority to mobilize the Bolivian troops and order them to use force.

orders to implement that directive. *See, e.g.*, DE 455 (Trial Tr. 3/13/18) at 98:5-19 (ordered domestic deployment of military). For example, the jury heard that Lozada rejected an alternative to bringing the tourist caravan through Warisata, proclaiming that "the state never retreats," DE 459 (Trial Tr. 3/20/18) at 80:1-24, and directed Berzaín to go to Sorata with military force to "extract[] the tourists" there, DE 450 (Trial Tr. 3/6/18) at 90:16-24. The jury also heard evidence from which it could reasonably infer that Lozada—the only person with authority to deploy special elite forces units—had in fact deployed those special forces units to Sorata and Warisata. DE 474-6 (Flores Dep.) at 18:13-19, 46:6-10. The jury further heard that Lozada had ordered the military to "restore order to the city of El Alto," DE 479-26 (Ex. 45), and that he issued "written orders *** in which he instructs the forces to be mobilized," DE 471-2 (Ex. 1002) at 1002.28.

As for Berzaín, the jury heard ample evidence of his *de facto* control through his exercise of actual strategic and tactical command. The jury heard that Berzaín announced his authority at the start of the Sorata operation by declaring, "[f]ucking Indians, I give the orders around here," DE 450 (Trial Tr. 3/6/18) at 91:6-9, and later repeatedly insisted that "the military were not going to move" without his direction, DE 459 (Trial Tr. 3/20/18) at 92:1-5. He oversaw the September 20 operation in Sorata, declaring his authority over the military deployed there, DE 450 (Trial Tr. 3/6/18) at 90:17-91:9, communicating constantly by phone with Lozada from the field, DE 459 (Trial Tr. 3/20/18) at 87:20-88:6, and dictating a formal letter to order the movement of the armed forces, *id.* at 89:19-90:16; DE 479-3 (Ex. 3).

Despite the civilian casualties that resulted under Berzaín's command in September, the jury heard that he presided over the meeting at the Ministry of Defense on October 10, at which he made the decision to deploy the military yet again the following month for the deadly Senkata operation. DE 456 (Trial Tr. 3/14/18) at 29:14-31:5, 35:4-37:10. In fact, Berzaín personally

composed another directive signed by Lozada that he stressed was "very important." DE 459 (Trial Tr. 3/20/18) at 92:1-23; DE 479-26 (Ex. 45). Unsurprisingly, the resulting Supreme Decree explicitly stated that the Ministry of Defense (*i.e.*, Berzaín) "shall establish the mechanisms necessary for its execution." *See* DE 479-1 (Ex. 1).

Defendants point to different portions of testimony from Bolivian military officers, *see* Br. 11, but overlook that those same witnesses provided the testimony above showing that Defendants had effective control of the troops, that each Defendant received regular information about civilian casualties, and that on the dates in question the troops did not act outside of the normal chain of command. *See, e.g.*, DE 459 (Trial Tr. 3/20/18) at 19:8-14 (Herrera testimony); DE 474-2 (Antezana Dep.) at 35:2-4, 46:14-47:4, 154:4-8; DE 474-6 (Flores Dep.) at 18:13-19, 92:15- 95:18. It was the factfinder's job to interpret and reconcile that testimony.

Defendants also contend that Plaintiffs "conceded" that the events in Warisata "preclude[d] a finding that either Defendant had *de facto* control over any soldiers who opened fire that day." Br. 12-13. Not so: Plaintiffs merely argued that, regardless whether Defendants foresaw the disproportionate use of force before the soldiers in Warisata opened fire, those events were still evidence from which the jury could infer Defendants' knowledge that additional killings were likely to result from the continued use of extreme force. *See* DE 458 (Trial Tr. 3/19/18) at 21:6-21; DE 463 (Trial Tr. 3/26/18) at 179:24-180:6. That alternative argument in no way constitutes a concession of a lack of *de facto* control over the soldiers in Warisata specifically or the military more generally.

2. Plaintiffs presented extensive evidence that each Defendant knew or should have known that soldiers committed the extrajudicial killings.

The jury also heard extensive evidence that each Defendant "knew or should have known" that soldiers with whom they had a superior-subordinate relationship "had committed, were

committing, or planned to commit" extrajudicial killings. *Ford*, 289 F.3d at 1288. Multiple witnesses testified to the jury that Defendants dismissed explicit warnings from other governmental officials that their brutal military operations would lead to "tragedy" and "generate deaths." DE 452 (Trial Tr. 3/8/18) at 56:12-17; DE 456 (Trial Tr. 3/14/18) at 35:2-14; DE 474-7 (Harb Dep.) at 78:17-81:25. In fact, the jury heard evidence that Berzaín expressly stated, in Lozada's presence, that their anticipated use of military force would result in innocent civilian deaths. *See* DE 456 (Trial Tr. 3/14/18) at 91:19-25 (testimony that Berzaín told Lozada and other top-level party officials that "[w]hat we're going to use are elite troops *** and we will kill 50, a hundred, a thousand"); *see also, e.g.*, *id.* at 35:2-14 (Berzaín responding to concerns about deploying military to escort gas tankers: "Well, there have to be deaths, but also gasoline."); DE 457 (Trial Tr. 3/15/18) at 26:22-27:6 (Berzaín dismissing concerns of mayor of La Paz, stating "if there are five dead, it doesn't matter if it's 50 more, as long as we solve the problem"). That evidence is sufficient for the jury to have concluded that Defendants knew or should have known that their use of military force to respond to civil demonstrations would result in civilian deaths.

The jury heard uncontroverted evidence that Defendants did, in fact, know as early as September 20 that their failure to cabin the use of military force caused innocent civilian deaths—including, specifically, Marlene's killing inside her home and other casualties in Warisata. DE 455 (Trial Tr. 3/13/18) at 101:2-13 (Berzaín's admitting he spoke with Lozada about Marlene's death). Both Lozada and Berzaín personally received contemporaneous reports on the military operations and resulting deaths. *See id.* at 99:8-21, 101:2-13, 111:7-17 (Berzaín's testifying about "multiple meetings" throughout each day concerning military operations); DE 459 (Trial Tr. 3/20/18) at 154:7-14 (Lozada's testifying he received regular reports and was "well-informed *** of what was happening in the military"). The jury heard testimony that any killing of a civilian by

the armed forces would be automatically reported up the chain of command, including details down to the ammunition used. DE 474-6 (Flores Dep.) at 92:15-21, 95:13-18.

Additionally, the jury reasonably could infer from widespread, contemporaneous media accounts of the deaths that Defendants knew or should have known that the use of military force was, at a minimum, disproportionate to any legitimate threat posed by or near decedents. *See, e.g.*, DE 474-7 (Harb Dep.) at 142:12-15; DE 453 (Trial Tr. 3/9/18) at 73:5-11. That inference was also permitted from the reaction of the horrified public, which organized hunger strikes and large-scale demonstrations and demanded Lozada's resignation. DE 453 (Trial Tr. 3/9/18) at 39:4-19; DE 457 (Trial Tr. 3/15/18) at 62:14-63:12. The jury could also draw the same conclusion from the fact that, while Lozada and Berzaín were overseeing the military operations, several members of their cabinet, including the Vice President, resigned or otherwise denounced the actions; a previously aligned party left Defendants' political coalition; the Catholic Church withdrew its support; and Defendants were forced to flee the country. *See, e.g.*, DE 459 (Trial Tr. 3/20/18) at 93:4-94:8; DE 452 (Trial Tr. 3/8/18) at 58:25-60:6 (describing church-organized hunger strike); *see also* S. REP. NO. 102-249, at 9 & n.18 (knowledge can be imputed from evidence that the "crimes [were] notorious, numerous and widespread" or "pervasive").

Defendants repeatedly point to a supposed "dearth of evidence as to Defendants' actual or constructive knowledge of any extrajudicial killings" specifically, because, in their view, the deaths "could have occurred for a variety of reasons." Br. 15-17. But determining whether an official "had the requisite knowledge *** is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). Indeed, "knowledge must almost always be proved[] by circumstantial evidence." *United States v. Santos*, 553 U.S. 507, 521 (2008). Defendants' contrary claim not only contravenes Supreme

Court precedent, but also contradicts this Court's instruction to the jury not to "be concerned about whether the evidence is direct or circumstantial" because "there's no legal difference in the weight you may give to either." DE 429 at 3. Regardless, under the deferential Rule 50 standard, the fact that Defendants' evidence purportedly supported a "variety of reasons" for the killings is irrelevant. The record before the jury—including unrebutted evidence of contemporaneously reported indiscriminate firing by soldiers—is compelling, if not conclusive, proof supporting the jury's "knew or should have known" finding.

In sum, the jury could reasonably conclude that Berzaín and Lozada each knew—or at least should have known—that decedents' killings were extrajudicial because they resulted from Bolivian soldiers' use of unprovoked or disproportionate force.

3. Plaintiffs presented extensive evidence that each Defendant failed to prevent or punish the Bolivian soldiers who unlawfully killed decedents.

Finally, the jury heard that neither Lozada nor Berzaín took any action either to "prevent" the wrongdoing before it happened, or to "punish" the soldiers who committed it. *Ford*, 289 F.3d at 1288. On the contrary, at various points leading up to and during the military operations, Defendants escalated tensions, rejected peaceful alternatives, and disregarded growing alarm from other officials—with Lozada declaring the "state never retreats," DE 459 (Trial Tr. 3/20/18) at 80:4-22, and Berzaín dismissing concerns by stating, "[w]ell, there have to be deaths, but also gasoline," DE 456 (Trial Tr. 3/14/18) at 35:2-14. The jury heard that, shortly after coming to power, Lozada's government defined "roadblocks, marches, [and] demonstrations" as subversive acts and directed troops to "apply the Principles of Mass and Shock" to control civil disturbances. DE 479-22 (Ex. 38) at 13; DE 479-23 (Ex. 39) at 1. Notwithstanding Berzaín's statement at Lozada's home regarding the "50, a hundred, a thousand" civilian casualties that he anticipated would result from his military strategy to quell dissent, DE 456 (Trial Tr. 3/14/18) at 91:23-25,

Lozada promoted Berzaín to the exact position, Minister of Defense, where he could best carry out the strategy.

The jury also heard that after civic leaders brokered a peaceful resolution to allow the peaceful passage of tourists whose movement had been restricted by demonstrations, Lozada insisted on a military operation, with Berzaín at the helm, which ultimately resulted in Marlene's death. DE 450 (Trial Tr. 3/6/18) at 87:23-91:10. Berzaín—ordered by, and in communication with, Lozada—arrived by helicopter and announced that he had been commanded to use force to dismantle the demonstrations and transport the tourists. *Id.* at 90:16-22; DE 455 (Trial Tr. 3/13/18) at 95:25-97:6. Negotiations that had been ongoing to resolve national protests ended as news of the military action spread. DE 474-7 (Harb Dep.) at 33:12-23, 35:5-8, 41:5-11. Lozada authorized the elite special forces to descend upon Warisata on September 20, DE 474-6 (Flores Dep.) at 18:16-19, 46:6-10, and sent a letter to the Commander in Chief of the Armed Forces specifically instructing the Commander to mobilize and use force to advance the government's agenda, DE 479-3 (Ex. 3); DE 471-3 (Ex. 1004); *see also* DE 479-14 (Ex. 17); DE 479-15 (Ex. 18). In the face of this record, the jury reasonably could conclude that Defendants failed to take actions to prevent Marlene's resulting death (and the other civilian casualties in Warisata).

Extensive evidence further demonstrated that Defendants failed to prevent subsequent extrajudicial killings in October. Even after the first civilian deaths were reported, Defendants issued a "Supreme Decree," which authorized continued military operations. DE 479-1 (Ex. 1) at 2 (stating that Berzaín's ministry "shall establish the mechanisms necessary for [the military operations'] execution"). The jury heard that, as social tensions continued to rise in early October, Defendants rejected attempts by others in government to deescalate the conflict, and instead "approved" "the line of force, *** [and] military intervention." DE 457 (Trial Tr. 3/15/18) at

43:14-44:20 (other government ministers "unable to modify" military approach advocated by Berzaín). In the days before the killings in October, Lozada ignored "many, many" calls to his personal cellular phone from the mayor of La Paz, who wanted to express his concerns as "[t]he situation was becoming more grave." *Id.* at 39:21-40:2. In sum, despite widespread shock over the killings of civilians in September, Defendants repeatedly approved and oversaw the extreme application of military force for several more weeks in circumstances that they knew (or should have known) would lead to more civilian casualties, absent any sincere attempt to prevent further bloodshed by mitigating the troops' unprovoked aggression, indiscriminate firing, or shooting into homes. *Cf. Mamani III*, 968 F.3d at 1239 (under customary international law, "governments should withdraw all general orders to shoot on sight."). The record was more than adequate for the jury to reasonably conclude that Defendants failed to prevent the resulting deaths of Lucio, Teodosia, Marcelino, Roxana, Arturo, Jacinto, and Raúl.[10]

Beyond their failure to prevent the deaths, the jury also heard that, after September 20, Defendants took no meaningful steps to investigate or punish the extrajudicial killings, despite available measures like recalling military units responsible for civilian deaths or suspending commanders of those units. And though Defendants were in power for several days after the October killings, the jury heard that Defendants again took no action to punish any wrongdoing or even participate in or otherwise facilitate investigations; instead, they fled to the United States. DE 459 (Trial Tr. 3/20/18) at 93:1-94:8; *see* DE 450 (Trial Tr. 3/6/18) at 9:7-17.

[10] Even Defendants' "examples of the undisputed evidence of Defendants' efforts to resolve conflict peacefully," Br. 20 n.7, show that Defendants could have taken, but did not timely take, steps to prevent these decedents' extrajudicial killings. *E.g.*, DE 471-8 (Ex. 1012) (agreement signed by Lozada on October 13, *after* killings, stating that "the Government commits to *** withdrawing the military contingent deployed in El Alto").

Defendants argue that "[t]he law requires only that Defendants employ *reasonable* measures to prevent extrajudicial killings." Br. 21; *see also* Br. 20 n.7 (pointing to evidence of Defendants' ostensible "efforts to resolve conflict peacefully through dialogue"). But reasonableness is a quintessential question for the *jury*. And the reasonableness of Defendants' efforts was very much disputed—including by, among many other things, their own statements. *See, e.g.*, DE 459 (Trial Tr. 3/20/18) at 80:1-22 (Lozada rejecting alternative to military escorting tourists by proclaiming "the state never retreats"); DE 456 (Trial Tr. 3/14/18) at 35:2-14 (Berzaín dismissing concerns: "Well, there have to be deaths."). Again, the jury was free to disregard—and reviewing courts *must* disregard—testimony from Defendants and other "[]interested" witnesses that the jury was not required to believe. *Reeves*, 530 U.S. at 150-151.

Defendants also cast their decision to flee to the United States as an effort to "escape death threats" that limited their ability to facilitate any investigation or punishment of the extrajudicial killings. Br. 20. Setting aside that this argument does not address Defendants' responsibility for failing to prevent the deaths, it also ignores the jury's conclusion that Defendants were liable for Marlene's killing (which occurred weeks prior to the others), as well as the fact that Defendants remained in power for several days after even the October 13 killings. More importantly, the jury heard this argument, considered it, and rejected it. It was free to do so. Defendants cite no authority for the proposition that a leader's resignation and flight can excuse him or her of command responsibility. After all, the TVPA was enacted specifically to "prevent[] the United States from becoming a safe harbor" for those directly or indirectly liable for grievous breaches of

international law. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 530 (4th Cir. 2014).[11]

B. Defendants Mischaracterize The Standard And Ignore Plaintiffs' Evidence

1. Defendants distort the proper standard for command responsibility.

Defendants attempt to distort the governing command-responsibility standard in this Circuit in at least three respects.

First, Defendants continue to argue that the "command responsibility doctrine does not apply" to them, or that a "different standards" should be afforded to a "civilian leader." Br. 5 n.3. Both contentions are foreclosed multiple times over by this Court's precedent, including as applied to these Defendants in this case. *Mamani III*, 968 F.3d at 1239 n.24; *see also Drummond Co.*, 782 F.3d at 609-610.

Second, Defendants repeatedly knock down a straw man by pointing to a (supposed) lack of "evidence of any *order by Defendants* for any Bolivian solider to kill any of the decedents, or any other civilians." Br. 11 (emphasis added); *see, e.g.*, Br. 9 ("There is no evidence that Defendants had any authority to order any Bolivian soldiers to open fire against any individuals" or "gave such an order."); *id.* at 11 ("[T]here is no evidence of any order by Defendants for any Bolivian soldier to kill any of the decedents, or any other civilians," and any "orders came from" other military commanders) (formatting omitted); *id.* at 12 ("There is thus no evidence that

[11] Defendants' evidence and argument are actually limited to Lozada; they point to nothing indicating Berzaín was under threat or otherwise was limited in his ability to facilitate the investigation of the extrajudicial killings, or took any action after departing Bolivia. Regardless, Defendants' claim (at 20) that each "did what he could under the circumstances," rings hollow in light of their outright refusal to participate in any judicial investigation in Bolivia. *See Mamani II*, 825 F.3d at 1307 ("Lozada and Berzaín had fled, the United States has refused to extradite them, and Bolivia does not permit trials in absentia. As a result, the two of them have not been tried. Bolivia has declared them fugitives from justice.").

Defendants had anything to do with giving the order to open fire in Warisata."); *id.* at 14 (same for Southern Zone).

But again, Eleventh Circuit law is clear: "Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]" in order to "make[] a commander liable for acts of his subordinates, *even where the commander did not order those acts*." *Ford*, 289 F.3d at 1286, 1289 (emphasis added). Indeed, the jury instructions themselves explained that Defendants may be liable under the command-responsibility doctrine "even if the commander did not commit or order the acts." DE 429, at 12. Simply put, the theory of *indirect* liability the jury accepted does not require that Defendants "gave any orders," issued "operational directives," or otherwise directly "played any role in the deaths of any decedents in this case." Br. 9-11 (capitalization omitted); *see Arce*, 434 F.3d at 1259 (affirming TVPA liability for former officials who "neither ordered *** nor participated in" underlying crimes). For the same reason, "[t]he law of command responsibility does not require proof that a commander's behavior proximately caused the victim's injuries." *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009); *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996).

In all events, the jury *did* hear evidence that each Defendant issued orders that resulted in these extrajudicial killings. Contrary to Defendants' claim that "unrebutted evidence shows" that Lozada "gave only two general orders," Br. 9, the jury heard evidence that he issued various tactical orders, *see* pp. 35-36, *supra*. Likewise, several of Berzaín's own statements—*e.g.*, assertions that he "give[s] the orders," DE 450 (Trial Tr. 3/6/18) at 91:6-9, and that the military "were not going to move" without a letter he drafted, DE 459 (Trial Tr. 3/20/18) at 89:19-90:16, 92:1-23—undermine Defendants' carefully worded assertion that "there is no evidence at all that Sánchez Berzaín gave any oral or written orders to the Armed Forces or any soldier." Br. 9.

Defendants' attempt (at 8) to cabin Berzaín to a purely "administrative" role also fails in view of the testimony that he issued threats against community leaders as his helicopter fired machine-gun rounds at unarmed civilians. DE 450 (Trial Tr. 3/6/18) at 92:19-93:3, 95:1-2, 97:11-20.

Third, Defendants compound their mistaken view of the command-responsibility doctrine by attempting to restrict its application only to *foreseeable* wrongdoing. Defendants repeatedly point to a lack of evidence that they knew "that extrajudicial killings *would occur*." Br. 17 (emphasis added); *see also id.* at 16 n.6 ("[T]here was no basis to have any knowledge that soldiers might engage in extrajudicial killings with respect to Marlene" or that "Defendants were ever on notice of any [other] extrajudicial killings.").

But a key tenet of command responsibility is the obligation to punish wrongful acts, whether or not they were foreseeable, in addition to the obligation to prevent future wrongdoing. Under governing law, the jury was tasked with deciding whether Defendants had the ability either "to prevent" *or* to "punish criminal conduct," as well as whether they knew or should have known that their subordinates "had committed" unlawful acts. *Ford*, 289 F.3d at 1288, 1290. Whether Defendants "were on notice of any [likely] extrajudicial killing" before those killings occurred, Br. 16 n.6, is simply not a prerequisite to holding them liable for killings they learned of (or should have learned of) after the fact. Accepting Defendants' contention would excuse a wide swath of conduct plainly encompassed by the command-responsibility doctrine and would "inappropriately superimpose[] a deliberation requirement on the theory of indirect liability." *Mamani III*, 968 F.3d at 1240. It would also blur the line between the command-responsibility doctrine the jury accepted and the other indirect-liability doctrines that the jury rejected. *See* DE 429 at 16 (conspiracy, which requires "knowing of at least one of the goals"); *id.* at 21 (agency, which requires "manifestation by the Defendant that the Bolivian solider should act for him"). As the jury instructions

recognized, however, "[e]ach of these is a separate theory of liability" and the jury "only need[ed] to find in a Plaintiff's favor on one of these" to hold Defendants liable. *Id.* at 11.

Regardless, the jury heard extensive evidence that these killings were foreseeable—including, as noted, evidence that Defendants dismissed explicit warnings from other officials that their military operations would lead to "tragedy" and "generate deaths," and even from evidence that Berzaín made predictions of civilian violence in Lozada's presence, *see* pp. 37-38, *supra*. Viewed in the verdict's favor, the record easily supports the finding that Defendants either foresaw or should have foreseen that civilian deaths were a material risk of the military's operations, both with respect to Marlene's killing in Warisata and the subsequent killings that occurred weeks later.

2. Defendants mischaracterize the record and rely on contested evidence.

Like their arguments on extrajudicial killing, Defendants' command-responsibility argument boils down to selective characterizations of the record that the jury was free to (and did) reject and on highly contested evidence that the jury was free to (and did) disregard. For example, Defendants again rely heavily on the Bolivian prosecutors' investigation and report to eclipse Plaintiffs' evidence of their liability. *See, e.g.*, Br. 16 (arguing prosecutors' purported conclusion that deaths were not extrajudicial precluded Defendants' requisite knowledge); Br. 19-20 (arguing prosecutors' role barred Defendants' "authority or ability" to investigate or punish). But, as explained, the jury considered that report alongside evidence that undermined the significance of its findings, including that the Bolivian army's refusal to cooperate with the Bolivian prosecutors. DE 471-2, at 1002.21; *see* DE 463 (Trial Tr. 3/26/18) at 172:22-173:10. Defendants also neglect to mention that the prosecutors' report explicitly excludes any examination of *their* liability. DE 471-2 at 1002.22 (explaining constitutional provision restricted investigation's scope). And Defendants ignore that, in addition to concluding that the "death and grievous bodily harm" resulting from the military's use of force "may be considered criminal conduct with *direct* regard

to the perpetrators," *id.* at 1002.32 (emphasis added), the same report supports *indirect* liability under the command-responsibility doctrine: "the Army acted based on specific orders from their natural hierarchical superiors[,] *** *[including] written orders from the former President [Lozada] in which he instructs the forces to be mobilized*," *id.* at 1002.28 (emphasis added). A jury was free to weigh all the evidence and side with Plaintiffs' theory over Defendants.'

***

As they did at trial, Defendants offer competing interpretations of selective portions of the record to undermine the jury's verdict. But the proper question under Rule 50 is simply whether, viewing the facts and inferences in Plaintiffs' favor, and "disregard[ing] all evidence favorable to [Defendants] that the jury [was] not required to believe," *Reeves*, 530 U.S. at 151, "reasonable people" could find for Plaintiffs by a preponderance of the evidence. *Lamonica*, 711 F.3d at 1312. The answer is yes. Defendants' "alternative explanation" "does not compel" a different conclusion than the one reasonably reached by the jury. *Mamani III*, 968 F.3d at 1236.

III. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL

At the end of their motion, Defendants present a single-paragraph, perfunctory request for a new trial under Rule 59, merely referencing the sufficiency-of-the-evidence arguments contained in their Rule 50 motion. *See* Br. 46. Indeed, the only support Defendants offer for a new trial is their insistence that the Court may "weigh the evidence" when considering whether to grant one. Br. 46 (quoting *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982)). But the case Defendants quote makes clear that the proper standard is whether "the verdict [is] contrary to the great, and not merely the greater, weight of the evidence." *Williams*, 689 F.2d at 973; *see also, e.g., Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1104 (11th Cir. 2018) (explaining this "minimum" requirement). Even under this standard, the Court still "should not substitute [its] own credibility choices and inferences for the reasonable credibility choices and inferences made by

the jury." *Williams*, 689 F.2d at 973 n.7; *see Redd v. City of Phenix Cty., Ala.*, 934 F.2d 1211, 1215 (11th Cir. 1991).

To guard against the risk that the court will intrude on the "province of the jury," review of a new trial motion is most "rigorous when the basis for the motion [i]s the weight of the evidence." *Williams*, 689 F.3d at 974 & n.8; *see, e.g.*, *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 571 F.3d 1143, 1145 (11th Cir. 2009) (standard is "extremely stringent"). Where, as here, the trial involved "highly disputed facts, and there is an absence of 'pernicious occurrences,' trial courts should be considerably less inclined to disturb a jury verdict." *Williams*, 689 F.3d at 974. Conversely, where "the trial judge dismisses a jury verdict solely because in his view the evidence was insufficient, it is more likely that he has abused his discretion" when "there is no doubt that all evidence was properly before the jury and that the proceedings were decorous." *Id.* n.8.

This case has spanned thirteen years, several weeks of trial, expert testimony, a jury verdict, and multiple levels of legal review before this Court and the Eleventh Circuit. But Defendants' motion does not so much as point to a single instance of "legal error, prejudicial conduct, or pernicious behavior" to justify a new trial. *Williams*, 689 F.3d at 974 n.8. In these circumstances, there is no reason to "negat[e] the jury's verdict," since granting Defendants' motion would risk, "to some extent at least, substitut[ing] [the Court's] judgment of the facts and the credibility of the witnesses for that of the jury." *Id.* at 974 (citation omitted); *see Hardin v. Hayes*, 52 F.3d 934, 938 (11th Cir. 1995) (explaining "application of this more rigorous standard of review 'protect[s] a party's right to a jury trial'") (quoting *Redd*, 934 F.2d at 1215). As the foregoing discussion of the evidence makes clear, the fact-intensive record is not so heavily weighted in favor of Defendants to disregard the jury's careful and reasonable decision to side with Plaintiffs' version of events. Defendants are not entitled to a new trial on the jury's TVPA verdict.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Rule 50 and Rule 59 motions and enter judgment on the jury's verdict on Plaintiffs' TVPA claims.

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Miami, Florida

Respectfully submitted,

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I hereby certify that on January 22, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record on the Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or via e-mail.

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