No. 09-16246 & 10-13071

IN THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ELOY ROYAS MAMANI, ET AL.,

Plaintiffs and Appellees,

v.

JOSE CARLOS SÁNCHEZ BERZAÍN AND GONZALO SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMENTE,

Defendants and Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
HON. ADALBERTO JORDAN, J., JUDGE
CASE NO. NO. 07-22459 & 08-21-63

PETITION FOR REHEARING AND REHEARING EN BANC

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

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I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Supreme Court and the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)

Randall v. Scott, 610 F.3d 701 (11th Cir. 2010)

Speaker v. U.S. Dept. of Health & Human Services Centers for Disease Control & Prevention, 623 F.3d 1371 (11th Cir. 2010)

Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. The panel's holding that *Iqbal and Twombly* require dismissal of a claim at the pleading stage as implausible whenever the defendant or the court can conceive of an equally plausible "alternative explanation" for the defendant's alleged misconduct is contrary to those two Supreme Court precedents and deepens a conflict in the precedents of this Court interpreting the pleading standards of *Iqbal and Twombly.*

2. The panel's holding that command responsibility is not a basis for liability on human rights claims brought under the Alien Tort Statute conflicts with *Ford*.

Dated: September 16, 2011

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STATEMENT OF ISSUES

1. Whether the panel's holding, in conflict with prior decisions of this Court, that a civil claim must be dismissed as "implausible" at the pleading stage whenever there are plausible "alternative explanations" for the challenged conduct is contrary to the pleading standard that the Supreme Court established in *Iqbal and Twombly*.

2. Whether, as this Court held in *Ford* and in conflict with the panel decision here, international law recognizes command responsibility as a basis for liability in human rights claims brought under the Alien Tort Statute.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Defendants Lozada and Sánchez Berzaín, the former President and Defense Minister of Bolivia, respectively ("Defendants"), and now long-term residents of the United States, moved to dismiss claims for extrajudicial killing and crimes against humanity that Plaintiffs brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.[1] The District Court denied the motion, but certified its decision for interlocutory review. This Court agreed to hear the appeal. A panel of this Court reversed and remanded with instructions to dismiss the complaint on the grounds that (1) Plaintiffs failed to state plausible ATS claims under the pleading standard

[1] The ATS provides for federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350.

of *Iqbal and Twombly*, and (2) contrary to *Ford*, command responsibility is not a basis for liability in human rights claims brought under the ATS.

STATEMENT OF FACTS

Plaintiffs' Complaint.

Plaintiffs are Bolivian citizens who allege that Bolivian armed forces under Defendants' command intentionally targeted and killed Plaintiffs' relatives (also Bolivian citizens). R77-2 to R77-4. Although the killings occurred while other civilians were engaged in protests against the Bolivian government, Plaintiffs' decedents (including an eight-year-old child) were neither involved in the protests nor near the protests when they were killed. R135-25 to R135-26.

Plaintiffs allege that Lozada authorized policies and promulgated orders leading to the intentional, targeted killing of civilians, including Plaintiffs' relatives, and that Sánchez Berzaín implemented these policies and orders. R77, ¶¶ 36, 47-50, 79. Plaintiffs further allege that Defendants together "'exercised command and control over the armed forces of Bolivia . . . and ha[d] the actual authority and practical ability to exert control over subordinates in the security forces,'" including the authority to appoint, remove, and discipline personnel. R135-33 (quoting R77, ¶¶ 79-80). According to the complaint, Defendants met with leaders of the armed forces under their command and other Government ministers to plan widespread attacks involving the use of high-caliber weapons "to

silence opposition and intimidate the civilian population," and "to terrorize the indigenous Aymara population of the La Paz region." R135-30; *see* R77, ¶¶ 30, 34, 36, 38, 39, 52, 69, 98. The attacks took place in multiple locations over a two month period. R77, ¶¶ 8-16. Sánchez Berzaín was physically present during many of the killings. Circling in a helicopter that supplied ammunition to troops attacking peaceful, unarmed civilians, Sánchez Berzaín told the soldiers "where to fire their weapons." *Id.* ¶¶ 34, 38, 42, 69. Even when Defendants were not physically present, they knew that their armed forces were carrying out attacks on the civilian population because of extensive television coverage of the violence and Defendants' meetings with human rights groups. *Id.* ¶¶ 42, 86-87, 88-91.

Despite the outcry that followed the growing number of civilian deaths, Lozada did not order an end to the violence, investigate the atrocities, or take steps to punish the perpetrators. R77, ¶¶ 59-60, 87-88. To the contrary, he and Sánchez Berzaín pressed forward with the attacks even after it was clear that their armed forces were intentionally killing civilians. R77, ¶¶ 42-49, 59, 61-73, 87-88. At the end of two months, 67 civilians were dead and over 400 injured. R135-29 to R135-30.[2]

[2] In 2003, Defendants fled to the United States, where they still reside. R77, ¶¶ 5,6, 74.

District Court Proceedings.

In 2007, Plaintiffs sued Defendants in the United States under the ATS asserting, *inter alia*, claims for extrajudicial killing and crimes against humanity. R77, ¶¶ 92-99. Defendants moved to dismiss, *inter alia*, on the ground that Plaintiffs failed to plead their claims sufficiently. R81-31 to R81-40. The District Court denied Defendants' motion. Relying in large part on this Court's decisions in *Aldana v. Fresh Del Monte Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), and *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), which sustained claims for extrajudicial killing and crimes against humanity under the ATS, the District Court ruled that Plaintiffs had stated plausible ATS claims based on allegations that military forces under the direction of Defendants deliberately targeted Plaintiffs' family members without provocation and without authorization from a regularly constituted court (extrajudicial killing) and did so as part of a widespread or systematic attack directed against civilians (crimes against humanity). R135-23 to R135-31. Relying on this Court's decision in *Ford*, the District Court further held that the Defendants were responsible for the actions of the Bolivian military forces under the doctrine of command responsibility. R135-31 to R135-34.[3]

[3]The District Court also denied Defendants' motion to dismiss on political question, act of state, and immunity grounds.

Panel Decision.

The panel reversed and remanded with instructions to dismiss, holding that Plaintiffs had failed to plead facts sufficient to state a claim for extrajudicial killing or crimes against humanity under the ATS. Opin. 6, 19. According to the panel, any civil claim must be dismissed at the pleading stage under *Iqbal* and *Twombly* if a defendant can suggest (or the court can imagine) an equally plausible "alternative explanation" for the challenged conduct. *Id.* 15. Consistent with this reading of *Iqbal* and *Twombly*, the panel ruled out Plaintiffs' claim for extrajudicial killing because the facts alleged "plausibly" support "alternative explanations" for Defendants' conduct. *Id.* 15-16, *see also id.* 13 n.6 and 15 n.8. Likewise, the panel ruled out Plaintiffs' claim for crimes against humanity because the facts alleged support the possibility that Defendants merely responded to civil unrest and did not order "widespread and systematic killings" of civilians, despite the alleged killing of 67 civilians and the injury of 400 more. *Id.* 16.

In an alternative holding, the panel ruled that even if Plaintiffs had pleaded plausible claims that satisfied the panel's reading of *Iqbal* and *Twombly*, Defendants could not be held liable under the ATS on the basis of command

responsibility because, in the panel's view, international law does not recognize the concept of command responsibility. *Id.* 13-14.[4]

ARGUMENT

I. THE PANEL DECISION MISINTERPRETS IQBAL AND TWOMBLY AND DEEPENS AN INTRA-CIRCUIT CONFLICT ON THE MEANING OF THE PLEADING STANDARD THOSE CASES ESTABLISHED.

A. *Iqbal* and *Twombly* Do Not Require Dismissal Of A Claim At The Pleading Stage As Implausible Whenever There Are Plausible Alternative Explanations For The Challenged Conduct.

In a decision that affects all cases governed by Federal Rule of Civil Procedure 8(a)(2), not just ATS cases, the panel held that *Iqbal* and *Twombly* require complaints to be dismissed at the pleading stage as "implausible" whenever there is a plausible "alternative explanation" for the alleged misconduct. Opin. 15. Applying that interpretation of *Iqbal* and *Twombly*, the panel ordered dismissal of the complaint, *id.* 6, 19, because plausible alternative explanations for Defendants' conduct – some of which Defendants themselves did not even advance but the panel itself thought up – rendered Plaintiffs' claim implausible. *Id.* 13 n.6 (Sánchez Berzaín could just as well have been directing soldiers not to fire at uninvolved civilians as telling soldiers to fire at them when he told them where to shoot); *id.* 15 ("[P]laintiffs' decedents' deaths could plausibly have been the result

[4] The panel affirmed the District Court's political question doctrine and immunity rulings. Opin. 6-7 n.4. This Court declined interlocutory review of the act of state ruling, and so that issue was not before the panel.

of precipitate shootings during an ongoing civil uprising."); *id.* ("alternative explanations (other than extrajudicial killing) for the pertinent seven deaths easily come to mind; for instance, the alleged deaths are compatible with accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others), individual motivations (personal reasons) not linked to defendants, and so on."); *id.* 17 (inference that the seven deaths came in response to unrest defeats inference that the attacks were widespread or systematic).

The panel's holding is directly contrary to *Iqbal* and *Twombly*. Those decisions do not require dismissal of a claim at the pleading stage as implausible whenever a defendant advances or a court can imagine plausible alternative explanations for the challenged conduct. Instead, they hold that a complaint is plausible – and thus must survive a motion to dismiss – if it "'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 556); *accord*, *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1312 (2011) (complaint survived motion to dismiss because it alleged facts "suffic[ient] to 'raise a reasonable expectation that discovery will reveal [relevant] evidence', [citation] and to 'allo[w] the court to draw the reasonable inference that the defendant is liable,'" [citation]) (quoting *Twombly*, 550 U.S. at 556, and *Iqbal*, 129 S. Ct. at 1949). Under *Iqbal* and *Twombly*, a claim can be dismissed as implausible at the

pleading stage only if the plaintiff fails to allege facts to support a reasonable inference that the defendant is liable and there is an "*obvious* alternative explanation" for the alleged misconduct, not simply a plausible one. *Iqbal*, 129 S. Ct. at 1951 (emphasis added); *Twombly*, 550 U.S. at 567 (emphasis added).[5]

Reading *Iqbal* and *Twombly*, as the panel did, to require the dismissal of a complaint at the pleading stage as implausible whenever there are plausible alternative explanations for the challenged conduct would radically reshape civil procedure by making it easier for a defendant to have a claim thrown out on a Rule 12(b)(6) motion than on a motion for summary judgment under Rule 56. Even at the close of discovery, summary judgment cannot be granted when "there are any

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[5] In *Iqbal*, the plaintiff, an Arab Muslim, alleged that he was arrested and held after September 11, 2001, because defendants had a policy of labeling certain detainees as "high interest" on account of their race, religion, or national origin. 129 S. Ct. at 1951-52. But the complaint did not plead facts to show "or even intimate" that such a policy existed. *Id.* at 1952. Given this gap in the pleadings, the Supreme Court ruled that the complaint was implausible and thus should be dismissed for failure to state a claim because there was an "obvious alternative explanation" for plaintiff's detention – namely, that it was the result of a legitimate policy that had a disparate impact on Arab Muslims. *Id.*

In *Twombly*, consumers brought antitrust claims against certain telephone and/or Internet service companies based on allegations the companies engaged in parallel conduct. But the plaintiffs pled no facts indicating that the defendants' conduct (which was legal in itself) was based on any actual agreement or conspiracy to reduce competition. Because there was "no reason to infer that the companies had agreed among themselves to do what was only natural anyway," the Court held the antitrust claims were not plausible and thus had to be dismissed in view of the "obvious alternative explanation" for defendants' conduct. 550 U.S. at 566-68.

genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). It is inconceivable that *Iqbal* and *Twombly* licensed district courts to do at the pleading stage what they cannot do at the summary judgment stage, namely, to dismiss claims simply because equally plausible and competing inferences can be drawn from the allegations.

Contrary to the panel decision here, prior opinions of this Court have recognized that *Iqbal* and *Twombly* did no such thing. In *Speaker v. U.S. Dept' of Health and Human Services Centers for Disease Control*, 623 F.3d 1371 (11th Cir. 2010), the plaintiff alleged that the Centers for Disease Control ("CDC") had unlawfully shared his private information with the press. *Id.* at 1374-75. Although the complaint left open the possibility that someone outside the CDC was responsible for the disclosure (an equally plausible alternative inference), this Court held that the CDC's motion to dismiss should be denied. The Court stated: "[Plaintiff] need not prove his case on the pleadings – his [complaint] must merely provide enough factual material to raise a reasonable inference, and thus a plausible claim, that the CDC was the source of the disclosures at issue." *Id.* at 1386. *Randall v. Scott*, 610 F.3d 701 (11th Cir. 2010), is in the same vein. There, this Court explained that, "[a]fter *Iqbal*, it is clear that there is 'no heightened pleading standard' as it relates to cases governed by Rule 8(a)(2)[.]" 610 F.3d at

710. It thus remains the rule that courts should "assume . . . that well pleaded factual allegations are true, and then determine whether they plausibly give rise to an entitlement to relief." *Id.*[6]

In short, in conflict with the panel decision here, both *Speaker* and *Randall* make clear that, under *Iqbal* and *Twombly*, plausible alternative explanations will not defeat claims at the pleading stage when the plaintiff has stated sufficient facts to allow the court to draw a plausible inference in the plaintiff's favor. This reading of *Iqbal* and *Twombly* maintains a critical symmetry between the pleading and summary judgment stages: as at summary judgment, all conflicting inferences

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[6] Other Circuits interpreting *Iqbal* and *Twombly* have likewise rejected the notion that "a plaintiff [must] rule out every possible lawful explanation for the conduct he challenges" at the pleading stage. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) (requiring dismissal at the pleading stage on account of plausible alternative explanations "would invert the principle that the complaint is construed most favorably to the nonmoving party," and "impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject.") (citing *Iqbal*, 129 S.Ct. at 1949-50); *see also Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12-13 (1st Cir. 2011) ("[C]ourt may not disregard properly pled factual allegations, 'even if it strikes a savvy judge that actual proof of those facts is improbable'. . . Nor may a court attempt to forecast a plaintiff's likelihood of success on the merits. . . . The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint.") (quoting *Twombly*, 550 U.S. at 556); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 2011 WL 2462833, at *1 (6th Cir. June 22, 2011) ("to survive a motion to dismiss, [an antitrust plaintiff] needs to allege only that the defendants' agreement plausibly explains the refusals to sell, not that the agreement is the probable or exclusive explanation").

at the pleading stage must be drawn in the plaintiff's favor. *See Fraser v. Smith*, 594 F.3d 842, 846 (11th Cir. 2010).

The panel decision deepens a pre-existing split among this Court's precedents interpreting *Iqbal* and *Twombly*. In conflict with *Speaker* and *Randall*, but in accord with the panel decision here, this Court in *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010), read *Iqbal* and *Twombly* as requiring dismissal at the pleading stage if "alternative inferences that could be drawn from the facts . . . [are] at least equally compelling" as inferences that could be drawn from plaintiff's allegations. 605 F.3d at 1290. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (11th Cir. 2010), likewise construed *Twombly* to mean that "competing inferences" will defeat a complaint at the pleading stage. *Id.* at 1342-43.

In sum, rehearing or rehearing en banc is necessary to bring this Court's jurisprudence into harmony with *Iqbal* and *Twombly* and resolve the intra-circuit conflict on the meaning of those two Supreme Court decisions. Absent rehearing, courts and litigants in *all* civil cases, not just ATS cases, brought in this Circuit will lack critical guidance concerning the most basic rules of procedure.

B. Plaintiffs' Claims Are Plausible.

Under the pleading requirements established in *Iqbal and Twombly*, Plaintiffs' allegations state facts that create the reasonable inference that

Defendants are liable for extrajudicial killing and crimes against humanity and raise the reasonable expectation that discovery will reveal evidence necessary to prove those claims.

The elements of an extrajudicial killing are a "deliberated killing" that is not authorized by a regularly constituted court. *See, e.g.*, 28 U.S.C. § 1350 note. Plaintiffs' allegations that Defendants deliberately targeted civilians outside of authorized judicial proceedings satisfy those elements. R77, ¶¶ 40, 54-58, 70, 72, 73.[7] The elements of a crime against humanity are "a widespread or systematic attack directed against any civilian population." *Cabello*, 402 F.3d at 1161. Plaintiffs' allegations of a pattern of attacks on civilians, lasting over two months in multiple locations, and resulting in 67 deaths and more than 400 injuries, satisfy those elements as well. R77, ¶¶ 8-16, 30, 34, 36, 38, 39, 52, 69, 98. These were not mere "isolated events," as the panel called them. *See Cabello* (violence resulting in 72 deaths was widespread and systematic).

Falling back on the Supreme Court's call for "caution" when determining whether a claim is actionable under the ATS, the panel expressed concern that this

[7] The panel states that the complaint alleges only "some targeting." Opin. 14. That is incorrect. The complaint alleges that *all* of Plaintiffs' relatives were targeted by soldiers under Defendants' command. The panel also suggests that the allegations do not meet the elements of extrajudicial killing because, unlike in *Cabello*, the victims were not targeted based on political beliefs. *Id.* 16 n.9, citing *Cabello*. But nothing in *Cabello* (or any other authority for that matter) remotely suggests that political assassination is the *sine qua non* of a claim for extrajudicial killing.

case threatens "to broaden the offenses of extrajudicial killings and crimes and humanity" beyond what is recognized in international law. Opin. 19 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)). The panel's concern was misplaced. The violations of the norms alleged in the complaint have the "definite content" and widespread "acceptance among civilized nations" that the Supreme Court in *Sosa* held are the hallmarks of actionable ATS claims, *Sosa*, 542 U.S. at 732, and they fit comfortably within the post-*Sosa* parameters that this Court established in *Cabelllo* and *Aldana* for claims brought under the ATS for extrajudicial killing and crimes against humanity.

II. THE PANEL'S RULING THAT COMMAND RESPONSIBILITY IS NOT A BASIS FOR LIABILITY ON HUMANS RIGHTS CLAIMS BROUGHT UNDER THE ATS SQUARELY CONFLICTS WITH THIS COURT'S DECISION IN *FORD*.

As an alternative holding, the panel ruled that even if Plaintiffs had pleaded plausible claims that satisfied the panel's reading of *Iqbal and Twombly*, Defendants could not be held liable under the ATS on the basis of command responsibility for the actions of the military forces they led. Specifically, the panel stated: "We do not accept that, even if some soldiers or policemen committed wrongful acts, present international law embraces strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one." Opin. 13-14.

The panel's rejection of the doctrine of command responsibility as a basis for liability on human rights claims brought under the ATS directly conflicts with *Ford*, a decision of this Court on which Plaintiffs relied but the panel did not mention. In *Ford*, this Court unequivocally held that the doctrine of command responsibility provides a basis "for liability of commanders for human rights violations of their troops." 289 F.3d at 1288-89.[8]

The elements of liability of command responsibility for human rights violations are: (1) there was a superior-subordinate relationship between the commander and the perpetrator of the acts; (2) the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit the acts; and (3) the commander failed to prevent the commission of the acts, or failed to punish the subordinates after the acts were committed. *Ford*, 289 F.3d at 1288. Plaintiffs' allegations satisfy these elements. Lozada issued the orders that led to the killings and Sánchez Berzaín implemented them. R77, ¶ 36. Defendants were well aware of the attacks on civilians through extensive television coverage and meetings with human rights groups. *Id.* ¶¶ 42, 86-91. Sánchez Berzaín was personally present and directing the military during many of the killings. *Id.* ¶¶ 34, 38, 69. Lozada issued a decree establishing a state of emergency and providing indemnification for

[8] The Court stated in *Ford* that the doctrine of command responsibility applies in both civil and criminal cases. 289 F.3d at 1289 & n.6.

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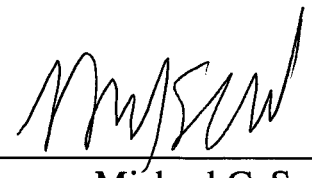
damages to persons and property resulting from the government's actions. *Id.* ¶¶ 47-50. Despite the outcry that followed the growing number of deaths, including the Bolivian Vice President's public criticism, Lozada did not order an end to the violence; instead, he went on television to accuse protesters of being traitors and subversives and of attempting a coup funded by international financiers. *Id.* ¶¶ 59-60. Thus, with Defendants' knowledge, the violence continued. *Id.* ¶¶ 61-74.

Because these allegations state a plausible claim for command responsibility under *Ford*, and because the panel's rejection of command responsibility as a basis for liability in ATS litigation cannot be squared with *Ford*, rehearing or rehearing en banc is needed to resolve this intra-circuit conflict.

CONCLUSION

For the reasons set forth above, the petition for rehearing and rehearing en banc should be granted.

Respectfully submitted,

Dated: September 16, 2011 By 

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ADDENDUM: PANEL OPINION

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 29, 2011
JOHN LEY
CLERK

No. 09-16246

D. C. Docket Nos. 07-22459-CV-AJ,
08-21063-CV-AJ

07-22459-CV-AJ:

ELOY ROJAS MAMANI,
ETELVINA ROMAS MAMANI,
SONIA ESPEJO VILLALOBOS,
HERNAN APAZA CUTIPA,
JUAN PATRICIO QUISPE MAMANI, et al.,

Plaintiffs-Appellees,

versus

JOSE CARLOS SANCHEZ BERZAIN,

Defendant-Appellant.

08-21063-CV-AJ:

ELOY ROYAS MAMANI,
Warisata, Bolivia,
ETELVINA RAMOS MAMANI,
Warisata, Bolivia,
SONIA ESPEJO VILLALOBOS,

El Alto, Bolivia,
JUAN PATRICIO QUISPE MAMANI,
El Alto, Bolivia,
TEOFILO BALTAZAR CERRO,
El Alto, Bolivia, et al.,

Plaintiffs-Appellees,

versus

GONZALO DANIEL SANCHEZ DE
LOZADA SANCHEZ BUSTAMANTE,

Defendant-Appellant.

No. 10-13071

D.C. Docket Nos. 1:07-cv-22459-AJ,
1:08-cv-21063-AJ

ELOY ROYAS MAMANI,
Warisata, Bolivia,
ETELVINA RAMOS MAMANI,
Warisata, Bolivia,
SONIA ESPEJO VILLALOBOS,
El Alto, Bolivia,
HERNAN APAZA CUTIPA,
JUAN PATRICIO QUISPE MAMANI,
El Alto, Bolivia, et al.,

Plaintiffs-Appellees,

versus

JOSE CARLOS SANCHEZ BERZAIN,
GONZALO SANCHEZ DE LOZADA SANCHEZ BUSTAMANTE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(August 29, 2011)

Before EDMONDSON and MARCUS, Circuit Judges, and FAWSETT,* District Judge.

EDMONDSON, Circuit Judge.

Plaintiffs are the relatives of persons killed in Bolivia in 2003. All are citizens and residents of Bolivia. Plaintiffs bring suit under the Alien Tort Statute ("ATS") against two of the former highest-level leaders of Bolivia--the former president of Bolivia, Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante ("President"), and the former defense minister of Bolivia, José Carlos Sánchez Berzaín ("Defense Minister," and together with the President, "defendants")--for decisions these leaders allegedly made while in high office. Given the indefinite

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* Honorable Patricia C. Fawsett, United States District Judge for the Middle District of Florida, sitting by designation.

state of the pertinent international law and the conclusory pleadings, we decide that plaintiffs have failed to state a claim against these defendants.

I. BACKGROUND

Plaintiffs' claims arise out of a time of severe civil unrest and political upheaval in Bolivia--involving thousands of people, mainly indigenous Aymara people--which ultimately led to an abrupt change in government. Briefly stated, a series of confrontations occurred between military and police forces and protesters. Large numbers of protesters were blocking major highways, preventing travelers from returning to La Paz, and threatening the capital's access to gas and presumably other needed things. Over two months, during the course of police and military operations to restore order, some people were killed and more were injured. The President ultimately resigned his responsibilities, and defendants withdrew from Bolivia. The entire complaint is attached as an appendix to this opinion.

Plaintiffs filed suit in federal district court against the President and Defense Minister personally but on account of their alleged acts as highest-level military and police officials. Plaintiffs do not contend that defendants personally killed or

injured anyone. In their corrected amended consolidated complaint ("Complaint"), plaintiffs brought claims under the ATS, asserting that defendants violated international law by committing extrajudicial killings; by perpetrating crimes against humanity; and by violating rights to life, liberty, security of person, freedom of assembly, and freedom of association.[1] Plaintiffs sought compensatory and punitive damages.

Defendants moved to dismiss, asserting that the Complaint raised political questions; that the act-of-state doctrine barred resolution of the suit; and that defendants were immune from suit under common law head-of-state immunity and the Foreign Sovereign Immunities Act. Defendants also argued that plaintiffs failed to state a claim under the ATS and that plaintiffs' state law claims failed under both Maryland and Florida law.

The United States government notified the district court that it had received a diplomatic note from the current government of Bolivia in which the government of Bolivia formally waived any immunity that defendants might otherwise enjoy. The United States government accepted the waiver but took no official position on the litigation.

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[1] Plaintiffs also alleged violations of the Torture Victim Protection Act ("TVPA") and brought state law claims of wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. These claims are not at issue in this limited interlocutory appeal.

The district court granted in part and denied in part defendants' motion to dismiss.[2] Defendants petitioned this Court for permission to bring an interlocutory appeal. We granted defendants' petition and allowed them to appeal the issue of the applicability of the political question doctrine and the issue of whether plaintiffs had stated a claim under the ATS.[3] We now reverse and conclude that plaintiffs have failed to state a plausible claim for relief against these defendants.

II. DISCUSSION

On appeal, defendants argue that plaintiffs' suit is barred by the political question doctrine, that plaintiffs have failed to state a claim under the ATS, and that defendants are immune from suit. We conclude that plaintiffs have failed to plead facts sufficient to state a claim under the ATS against these defendants.[4]

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[2] The district court concluded that neither the political question doctrine nor the act-of-state doctrine barred resolution of the suit; that defendants were not immune to suit; that seven of the nine plaintiffs had pleaded facts sufficient to state a claim under the ATS for extrajudicial killings; that plaintiffs had pleaded facts sufficient to state a claim under the ATS for crimes against humanity; and that plaintiffs' wrongful death claims were timely. The district court concluded that plaintiffs had not stated a claim for violations of the rights to life, liberty, security of persons, freedom of assembly, and association under the ATS. The district court also concluded that plaintiffs' state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence were time-barred.

[3] Defendants appeal as of right the district court's decision of no immunity.

[4] We accept that the present government of Bolivia has waived any immunity that defendants might otherwise enjoy. For background, see In re Doe, 860 F.2d 40, 44-46 (2d Cir.

A.

The ATS is no license for judicial innovation. Just the opposite, the federal courts must act as vigilant doorkeepers and exercise great caution when deciding either to recognize new causes of action under the ATS or to broaden existing causes of action. See Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2764 (2004). "[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to [violation of safe conducts, infringement of the rights of ambassadors, and piracy]." Id. at 2761-62 (emphasis added). This standard is a high one.

For a violation of international law to be actionable under the ATS, the offense must be based on present day, very widely accepted interpretations of international law: the specific things the defendant is alleged to have done must

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1988) (cited in United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997)); In re Grand Jury Proceedings, Doe No. 700, 817 F.2d 1108, 1110-11 (4th Cir. 1987). This case presents no political question: plaintiffs' tort claims require us to evaluate the lawfulness of the conduct of specific persons towards plaintiffs' decedents, not to decide the legitimacy of our country's executive branch's foreign policy decisions. Cf. Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992) (concluding plaintiffs' allegations of tort liability did not present a non-justiciable political question where "the complaint challenge[d] neither the legitimacy of the United States foreign policy toward the contras, nor d[id] it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war"). See also Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).

violate what the law already clearly is. High levels of generality will not do.

To determine whether the applicable international law is sufficiently definite, we look to the context of the case before us and ask whether established international law had already defined defendants' conduct as wrongful in that specific context. See id. at 2768 n.27. Claims lacking sufficient specificity must fail. See id. at 2769 ("Whatever may be said for the broad principle [the plaintiff] advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.").

We do not look at these ATS cases from a moral perspective, but from a legal one. We do not decide what constitutes desirable government practices. We know and worry about the foreign policy implications of civil actions in federal courts against the leaders (even the former ones) of nations. And we accept that we must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." Id. at 2763. Although "modern international law is very much concerned

with just such questions, and apt to stimulate calls for vindicating private interests in [ATS] cases," the Supreme Court instructs us that federal courts are to exercise "great caution" when deciding ATS claims. Id.

Broadly speaking, this Court has decided that "crimes against humanity" and "extrajudicial killings" may give rise to a cause of action under the ATS. See, e.g., Romero v. Drummond Co., 552 F.3d 1303, 1316 (11th Cir. 2008) (stating that an extrajudicial killing is actionable under the ATS where it is committed in violation of international law); Cabello v. Fernandez-Larios, 402 F.3d 1148, 1151-52 (11th Cir. 2005) (affirming judgment under the ATS for extrajudicial killing and crimes against humanity). But general propositions do not take us far in particular ATS cases. Allegations amounting to labels are different from well-pleaded facts, and we must examine whether what this Complaint says these defendants did--in non-conclusory factual allegations--amounts to a violation of already clearly established and specifically defined international law.

B.

To state a claim for relief under the ATS, a plaintiff must (1) be an alien (2) suing for a tort (3) committed in violation of the law of nations. Sinaltrainal v.

Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir. 2009).[5] To avoid dismissal of an ATS claim, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007)).

Stating a plausible claim for relief requires pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged": this obligation requires "more than a sheer possibility that a defendant has acted unlawfully." Id. While plaintiffs need not include "detailed factual allegations," they must plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id.

"Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 127 S. Ct. at 1966).

Following the Supreme Court's approach in Iqbal, we begin by identifying conclusory allegations in the Complaint. See id. at 1950. Legal conclusions without adequate factual support are entitled to no assumption of truth. See id.;

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[5] The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Randall v. Scott, 610 F.3d 701, 709-10 (11th Cir. 2010).

In their "Preliminary Statement," plaintiffs begin the Complaint by alleging that defendants "order[ed] Bolivian security forces, including military sharpshooters armed with high-powered rifles and soldiers and police wielding machine guns, to attack and kill scores of unarmed civilians." Then, plaintiffs go on to allege in a conclusory fashion many other things: that defendants "exercised command responsibility over, conspired with, ratified, and/or aided and abetted subordinates in the Armed Forces . . . to commit acts of extrajudicial killing, crimes against humanity, and the other wrongful acts alleged herein"; that defendants "met with military leaders, other ministers in the Lozada government to plan widespread attacks involving the use of high-caliber weapons against protesters"; that defendants "knew or reasonably should have known of the pattern and practice of widespread, systematic attacks against the civilian population by subordinates under their command"; and that defendants "failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under their command for committing such abuses."

These allegations sound much like those found insufficient by the Supreme Court in Iqbal: statements of legal conclusions rather than true factual allegations. Formulaic recitations of the elements of a claim, such as these, are conclusory and

are entitled to no assumption of truth. See Iqbal, 129 S. Ct. at 1951 (describing as conclusory allegations that "petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin'" and that one defendant was a "principal architect" of and another was "'instrumental' in adopting and executing" the policy at issue (internal citations omitted)).

Plaintiffs here base their claims on allegations that defendants knew or should have known of wrongful violence taking place and failed in their duty to prevent it. Easy to say about leaders of nations, but without adequate factual support of more specific acts by these defendants, these "bare assertions" are "not entitled to be assumed true." Id. See also Sinaltrainal, 578 F.3d at 1268.

Next, we "consider the factual allegations in [plaintiffs'] complaint to determine if they plausibly suggest an entitlement to relief." Iqbal, 129 S. Ct. at 1951. Defendants were facing a situation where many of their opponents in Bolivia were acting boldly and disruptively (for example, blocking major highways to the nation's capital and forcing the Defense Minister out of at least one town), not merely holding--or talking about--political opinions. Plaintiffs pleaded facts sufficient to show that the President, in the face of significant conflict and

thousands of protesters, ordered the mobilization of a joint police and military operation to rescue trapped travelers; authorized the use of "necessary force" to reestablish public order; and authorized an executive decree declaring the transport of gas to the capital city to be a national priority.

Plaintiffs also pleaded facts sufficient to show that the Defense Minister, in the face of significant conflict and thousands of protestors, ordered the mobilization of a joint police and military operation to rescue trapped travelers; directed military personnel; authorized an executive decree declaring the transport of gas to the capital city to be a national priority; and, at times, accompanied military personnel in a helicopter from which shots were fired and directed them where to fire their weapons. Plaintiffs do not allege that a connection exists between the Defense Minister's directing of where to fire weapons and the death of plaintiffs' decedents.[6]

We must determine whether these facts, taken as a whole and drawing reasonable inferences in favor of plaintiffs, are sufficient to make out a plausible claim that these defendants did things that violated established international law and gave rise to jurisdiction under the ATS. We do not accept that, even if some

[6] That the Defense Minister may have been directing military personnel not to fire at uninvolved civilians is consistent with the pleadings about his helicopter directives. See Iqbal, 129 S. Ct. at 1950-51 (discussing pleadings that are compatible with lawful inferences).

soldiers or policemen committed wrongful acts, present international law embraces strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one. But before we decide who can be held responsible for a tort, we must look to see if an ATS tort has been pleaded at all.

We look first to plaintiffs' claims of extrajudicial killing, relying--as did plaintiffs--on the TVPA definition for guidance.[7] Briefly stated, the TVPA states that an extrajudicial killing must be "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." TVPA § 3(a), 28 U.S.C. § 1350.

The district court "conclude[d] that seven of the plaintiffs . . . stated claims for extrajudicial killings by alleging sufficient facts to plausibly suggest that the killings were targeted." D. Ct. Order 25. Facts suggesting some targeting are not enough to state a claim of extrajudicial killing under already established and specifically defined international law. But even if the Complaint includes factual

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[7] Extrajudicial killings are actionable under the TVPA if the killing falls within the statutory definition, and under the ATS if committed "in violation of the law of nations." Romero, 552 F.3d at 1316. We assume for purposes of this discussion that an extrajudicial killing falling within the statutory definition of the TVPA would also likely violate established international law. But this may not be true under all circumstances. See Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1252 (11th Cir. 2005) ("[N]either Congress nor the Supreme Court has urged us to read the TVPA as narrowly as we have been directed to read the Alien Tort Act generally.").

allegations that are consistent with a deliberated killing by someone (for example, the actual shooters), not all deliberated killings are extrajudicial killings.

Plaintiffs allege no facts showing that the deaths in this case met the minimal requirement for extrajudicial killing--that is, that plaintiffs' decedents' deaths were "deliberate" in the sense of being undertaken with studied consideration and purpose. On the contrary: even reading the well-pleaded allegations of fact in the Complaint in plaintiffs' favor, each of the plaintiffs' decedents' deaths could plausibly have been the result of precipitate shootings during an ongoing civil uprising.[8]

Given these pleadings, alternative explanations (other than extrajudicial killing) for the pertinent seven deaths easily come to mind; for instance, the alleged deaths are compatible with accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others), individual motivations (personal reasons) not linked to defendants, and so on. For

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[8] The Complaint may possibly include factual allegations that seem consistent with ATS liability for extrajudicial killing for someone: for example, the shooters. But to decide whether plaintiffs have stated a claim for extrajudicial killing against these defendants, we must look at the facts connecting what these defendants personally did to the particular alleged wrongs. For extrajudicial killings, we do not accept the following statement of the district court as correct as a matter of international law or of federal court pleading: "The plaintiffs here allege that their relatives were killed by the Bolivian armed forces and that at all relevant times the armed forces acted under the authority of [defendants]. This is sufficient." D. Ct. Order 27 (citation omitted). We believe it is insufficient. We do not, in principle, rule out aiding and abetting liability or conspiratorial liability and so on under the ATS, but the pleadings here are too conclusory to make out such a claim against these defendants.

background, see Iqbal, 129 S. Ct. at 1950-51. Plaintiffs have not pleaded facts sufficient to show that anyone--especially these defendants, in their capacity as high-level officials--committed extrajudicial killings within the meaning of established international law. See generally Belhas v. Ya'alon, 515 F.3d 1279, 1293 (D.C. Cir. 2008) (Williams, J., concurring) ("[Plaintiffs] point to no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute . . . extrajudicial killing under international law.").[9]

Nor have plaintiffs pleaded facts sufficient to state a claim for a crime against humanity pursuant to established international law. "[T]o the extent that crimes against humanity are recognized as violations of international law, they occur as a result of 'widespread or systematic attack' against civilian populations." Aldana, 416 F.3d at 1247 (quoting Cabello, 402 F.3d at 1161).

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[9] We note the district court said in its Order that "it is not clear what constitutes an extrajudicial killing." D. Ct. Order 24. We agree. When the law applicable to the circumstances is unclear, we have been warned not to create or broaden a cause of action. See Sosa, 124 S. Ct. at 2766 n.21 (noting the "requirement of clear definition" for seeking relief from a violation of customary international law). The only case from this Circuit to give detailed consideration to the merits of a claim of extrajudicial killing under the ATS was different and clearer than this case. In Cabello, we concluded that there was sufficient evidence to support a jury verdict where the former military officer defendant personally commanded a "killing squad" that killed civilian prisoners who had opposed the military junta; where the defendant assisted in selecting the plaintiff's decedent (a political prisoner) for execution after reviewing his prisoner file; and where the political prisoner was then tortured and killed by the defendant. Cabello, 402 F.3d at 1159-60. The specific targeting of the victim based on his political beliefs, direct involvement of the defendant, and premeditated and deliberate circumstances of the victim's death set Cabello apart from the facts alleged in this case.

The scope of what is, for example, widespread enough to be a crime against humanity is hard to know given the current state of the law.

The Complaint's factual allegations show that defendants ordered military and police forces to restore order, to rescue trapped travelers, to unblock roads (including major highways), and to ensure the capital city's access to gas and presumably to other necessities during a time of violent unrest and resistance. According to plaintiffs, the toll--one arising from a significant civil disturbance--was fewer than 70 killed and about 400 injured to some degree, over about two months. The alleged toll is sufficient to cause concern and distress. Nevertheless, especially given the mass demonstrations, as well as the threat to the capital city and to public safety, we cannot conclude that the scale of this loss of life and of these injuries is sufficiently widespread--or that wrongs were sufficiently systematic, as opposed to isolated events (even if a series of them)--to amount definitely to a crime against humanity under already established international law.

Allowing plaintiffs' claims to go forward would substantially broaden, in fact, the kinds of circumstances from which claims may properly be brought under the ATS. As we understand the established international law that can give rise to federal jurisdiction under the ATS, crimes against humanity exhibit especially wicked conduct that is carried out in an extensive, organized, and deliberate way,

and that is plainly unjustified. It is this kind of hateful conduct that might make someone a common enemy of all mankind. But given international law as it is now established, the conduct described in the bare factual allegations of the Complaint is not sufficient to be a crime against humanity under the ATS.

The possibility that--if even a possibility has been alleged effectively--these defendants acted unlawfully is not enough for a plausible claim. And the well-pleaded facts in this case do not equal the kind of conduct that has been already clearly established by international law as extrajudicial killings or as crimes against humanity. Plaintiffs "would need to allege more by way of factual content to 'nudg[e]' [their claims] . . . 'across the line from conceivable to plausible.'" Iqbal, 129 S. Ct. at 1952 (quoting Twombly, 127 S. Ct. at 1974). The Complaint does not state a plausible claim that these defendants violated international law, and these claims must be dismissed.

III. CONCLUSION

The Complaint in this case has all of the flaws against which Iqbal warned. In addition, the case runs into the limitations that Sosa set for ATS cases: judicial creativity is not justified. See Sosa, 124 S. Ct. at 2763. For ATS purposes, no tort

has been stated.

Plaintiffs, through their claims, seek to have us broaden the offenses of extrajudicial killings and crimes against humanity. Given the context, the pleadings are highly conclusory; and the international law applicable to the specific circumstances is not clearly defined. As we see it, the criteria to judge what is lawful and what is not lawful, especially for national leaders facing thousands of people taking to the streets in opposition, is largely lacking.

In a case like this one, judicial restraint is demanded. See id. at 2762. The ATS is only a jurisdictional grant; it does not give the federal courts "power to mold substantive law." Id. at 2755. Because the pertinent international law is not already clear, definite, or universal enough to reach the alleged conduct (especially after the pleadings are stripped of conclusory statements), we decline to expand the kinds of circumstances that may be actionable under the ATS to cover the facts alleged in this case. The denial of the motion to dismiss these claims is REVERSED.

REVERSED and REMANDED with instructions to dismiss.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, CA 90067. On September 16, 2011, I served the foregoing document(s) described as: Petition for Rehearing and Rehearing En Banc on the interested party(ies) below, using the following means:

Kannon K Shanmugam
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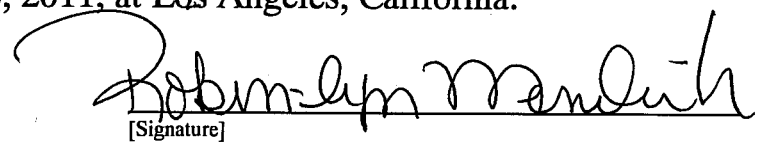
I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 16, 2011, at Los Angeles, California.

Robin-lyn Mendick
[Print Name of Person Executing Proof]


[Signature]