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. 07-22459 & 08-21-63

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEES' MOTION FOR REHEARING *EN BANC*

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INTEREST OF *AMICI CURIAE*

Amici are retired military professionals, scholars and professors of military law.

Professor Victor Hansen teaches at New England Law School. Before joining that faculty in 2005, he served 20 years in the Army, primarily as a JAG Corps officer. He was a regional defense counsel for the U.S. Army Trial Defense Service. His previous assignments included work as a military prosecutor and supervising prosecutor. He also served as an associate professor of law at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. He is the author of articles and books on military law and national security issues.

Professor Richard Rosen teaches at Texas Tech University School of Law and joined the faculty after completing a career as an officer in the Judge Advocate General's Corps, U. S. Army. Before retiring from the military, Professor Rosen was Commandant of the Judge Advocate General's School, U.S. Army in Charlottesville, VA, where he commanded the Army's ABA-recognized law school. Other military positions held by Professor Rosen include Staff Judge Advocate of the III Armored Corps and Fort Hood, Fort Hood, TX; Chief of Personnel, Plans and Training, The Pentagon, Washington, DC; Special Counsel to the Assistant Attorney General for the Civil Division, Department of Justice,

Washington, DC; Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, The Pentagon, Washington, DC; and Staff Judge Advocate of the 1st Cavalry Division, Fort Hood, TX.

Colonel Morris Davis served as an Air Force Judge Advocate for twenty five years. He is currently the Executive Director and Counsel for the Crimes of War Education Project, a non-profit organization that seeks to increase understanding of the laws of armed conflict worldwide, and a member of the faculty at the Howard University School of Law. Colonel Davis served as the Chief Prosecutor for the military commissions at Guantanamo Bay, Cuba, from 2005 to 2007, and was the Director of the Air Force Judiciary, where he oversaw the Air Force criminal justice system and supervised 265 people at sites around the world, from 2007 to 2008. Colonel Davis was a senior specialist in national security at the Congressional Research Service from December 2008 to January 2010.

Professor Geoffrey S. Corn is a Professor of Law at South Texas College of Law in Houston Texas, and a retired U.S. Army Lieutenant Colonel. His last position with the Army was as the Special Assistant to the US Army Judge Advocate General for Law of War Matters – the Army's senior law of war expert advisor. Other Army assignments included tactical intelligence officer, supervisory defense counsel for the Western United States; Chief of International Law for US Army Europe; Professor of International and National Security Law at

the US Army Judge Advocate General's School, and Chief Prosecutor for the 101st Airborne Division. Professor Corn's publications focus on the Law of Armed Conflict, National Security Law, Criminal Procedure, and Criminal Ethics. He is the lead author of The Laws of War and the War on Terror, published by Oxford University Press, a co-author of Principles of Counter-Terrorism Law published by Thompson-West, and the lead author of the textbook The Law of Armed Conflict: An Operational Perspective, forthcoming with Aspen Publishers. He has published more than 30 articles and essays.

Professor Sean Watts is an associate professor of law at Creighton Law School. He served as an active duty Army officer for 15 years, including service as an Armor Officer in a tank battalion and as a member of the Judge Advocate General's Corps. He was a professor of law at the Judge Advocate General's School. In addition to postings in the United States, he served in Germany, South Korea, and Afghanistan.

In light of their background and experience, *Amici* are uniquely qualified to address the doctrine of command responsibility and its importance to the U.S. military and U.S. national security interests. As the Supreme Court has made clear,

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations

> and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.

In re Yamashita, 327 U.S. 1, 14-16 (1946).

Amici submit that the doctrine of command responsibility is a fundamental tenet of U.S. law, customary international law, and the law of armed conflict. In the judgment of *Amici*, the Panel's decision undermines the venerable doctrine in a manner that would be detrimental to U.S. national security interests. Thus, *Amici* respectfully request that the Court grant the Petitioner's petition for rehearing *en banc*.

SUMMARY OF ARGUMENT

By requiring Plaintiffs to show that Defendants had specific knowledge of, or involvement in, the Plaintiffs' harms, the Panel's decision conflicts with well-established precedent of this Circuit, as well as domestic, and customary international law. In *Ford v. Garcia*, this Court set forth the elements for attaching one form of secondary liability, known as command responsibility, to high-ranking officials whose subordinates commit human rights abuses. The elements set forth in *Ford* reflect the long history of enforcement of command responsibility in US courts, dating back to the Supreme Court case of *In re Yamashita,* which held that a high ranking commander can be liable for acts of his subordinates even if he did

not order or direct the specific wrongful conduct. Since *In re Yamashita*, the doctrine of command responsibility has been codified in numerous international statutes and has been repeatedly upheld as a basis for liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note).

The doctrine of command responsibility ensures that leaders, both military and civilian, within the chain of command -- even leaders at the very top of the chain of command -- can be held accountable for crimes committed by those under their effective command. While there are slight variations in the precise contours of the doctrine, the central premise of the doctrine is that commanders can be held liable when they knew or should have known of the unlawful conduct and failed to take any measures to prevent the misconduct, or to investigate and punish the perpetrators. Significantly, then, Defendants need not have knowledge of the actual perpetrators of the wrongful acts or the precise details of the alleged misconduct. Knowledge on the part of the defendant must be established but can be imputed through, *inter alia*, evidence of the widespread or systematic nature of the violence; and constructive knowledge has been established when, as in this case, the crimes are widely reported. Furthermore, Petitioners do not need to show that the Defendants themselves directed or ordered the deaths of Plaintiffs' decedents.

Because the Panel's decision essentially eviscerates the command responsibility doctrine without even a citation to *Ford,* or other jurisprudence that demonstrates how well established the doctrine is, this Court should order rehearing *en banc*.

ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH PRIOR CIRCUIT HOLDING THAT HIGH RANKING OFFICIALS CAN BE HELD LIABLE FOR THE MISCONDUCT OF THEIR SUBORDINATES UNDER THE DOCTRINE OF COMMAND RESPONSIBILITY

The Panel decision in this case -- that liability cannot be established without allegations linking the Defendants' specific knowledge and acts to Plaintiff's particular harms -- contravenes *Ford v. Garcia* as well as domestic, military, and customary international law of command responsibility.

As here, in *Ford,* the plaintiffs brought an action under the doctrine of command responsibility, against two former Salvadoran Ministers of Defense, for the torture and extrajudicial killing of four churchwomen by members of the Salvadoran National Guard. Although the guardsmen were convicted for the murders, the plaintiffs alleged that the deaths were part of a widespread pattern of killings committed by the Salvadoran National Guard, who were under the command and control of the defendants. In affirming the trial court's jury instructions, this Court held that to hold a defendant/commander liable, when that

official neither ordered nor directed the specific wrongful acts, the plaintiff must allege and prove:

> (1) That persons under defendant's effective command had committed, were committing, or were about to commit torture and extrajudicial killing; and
> (2) That defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command had committed, were committing, or were about to commit torture and extrajudicial killing; and
> (3) The defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing or failed to investigate the events in an effort to punish the perpetrators.
> "Effective command" means the commander has the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control.

Ford v. Garcia, 289 F.3d 1283, 1287 n.3 (11th Cir. 2002). In adopting that standard, *Ford* relied heavily upon the Supreme Court decision of *In re Yamashita*, the legislative history of the TVPA, and jurisprudence and statutes of international tribunals.[1]

[1] The *Ford* Court cited the statutes and jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as the Rome Statute of the International Criminal Court, which state, in relevant part: (1)"The fact that any of the acts referred to in article 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."Art. 7(3), Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) (May 25, 1993); (2) "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Art. 6(3), Statute of the International Criminal Tribunal for Rwanda (ICTR) (Nov. 8, 1994); and (3) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her *effective command and control,* or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander either knew or, owing to the circumstances at the time, should have

In *Yamashita*, the Supreme Court reviewed the conviction of General Yamashita, the commander of the Japanese forces in the Philippines during World War II, for crimes committed by military forces under his command. Yamashita's defense argued that the charges against him did not allege that he "either committed or directed the commission of such acts, and consequently that no violation is charged as against him." In re Yamashita, 327 U.S. 1, 15 (1946). In upholding the verdict against General Yamashita, the Supreme Court considered international law and held that commanders have an affirmative duty to protect civilians and prisoners of war from atrocities committed by members of his command:

> The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and *whether he may be charged with personal responsibility for his failure to take such measures when violations result*….. [International Law][2] plainly imposed on petitioner, who at the time

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known that the forces were committing or about to commit such crimes; and (ii) That military commander or person *failed to take all necessary and reasonable measures* to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution." Art. 28(a), Rome Statute of the International Criminal Court (July 17, 1998) (emphasis added).

[2] Here, the Supreme Court reviewed the Hague Conventions of 1907 in coming to a reasoned decision on establishing an affirmative duty of commanders to prevent or punish subordinates for war crimes. "This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be 'commanded by a person responsible for his subordinates.' 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels 'must see that the above Articles are properly carried out.' 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it 'the duty of the commanders-in-chief of the belligerent*16 armies to provide for the details of execution of the foregoing articles (of the convention), as well as for unforeseen cases.'

> specified was military governor of the Philippines, as well as commander of the Japanese forces, *an affirmative duty to take such measures* as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.

In re Yamashita, 327 U.S. at 14-16 (emphasis added).

This Court in *Ford* also relied upon the TVPA to support its conclusion that a defendant may be liable for the acts of his subordinates under a theory of command responsibility. The Court noted that although command responsibility is not specifically enumerated in the TVPA or the ATS, the legislative history of the TVPA demonstrates that Congress intended liability to extend to high-ranking officials:

> Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts-anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

S.Rep. No. 249, 102d Cong., 1st Sess. at 9 (1991) (footnote omitted) (citing *Forti* and *In re Yamashita*); *Ford*, 289 F.3d at 1286 n.2 (11th Cir. 2002).[3] In applying command responsibility to torture and extrajudicial killing, *Ford* also recognized that superior liability is not limited to war crimes, as allegations of torture and

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And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'" *Yamashita*, 327 U.S. at 15-16.

[3] *See also* Cabello v. Fernandez-Larios, 402 F.3d 1148, 1157 (11th Cir. 2005) ("by their terms, the [ATS] and the TVPA are not limited to claims of direct liability."); Hilao v. Estate of Marcos, 103 F.3d 767, 776-777 (9th Cir. 1996) (recognizing that command responsibility is well established in US and international law and that a former president can be held accountable for torture and execution committed by the military during times of war or peace if he "knew of such conduct by the military and failed to use his power to prevent it.").

extra judicial killing do not require proof of an armed conflict. *Ford*, 289 F.3d at 1283.[4]

Furthermore, *Ford* is consistent with the definition of command responsibility espoused in U.S. Army Field Manual 27-10, which is used to educate US military personnel on the laws of war. Section 501 defines command responsibility as follows:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible *if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.*

The U.S. Army Field Manual 27-10, The Law of Land Warfare, 18 July 1956, section 501 (emphasis added). While Section 501 has not been incorporated into the Military Code of Justice, it does reflect the Army's understanding of the international standard of command responsibility. Indeed, under US army regulations, the "ultimate authority, responsibility,

[4] *Hilao*, 103 F.3d at 777 (the "United States has moved toward recognizing similar command responsibility for torture that occurs in peacetime, perhaps because the goal of international law regarding the treatment of noncombatants in wartime -- to protect civilian populations and prisoners . . . from brutality -- is similar to the goal of international human-rights law.").

and accountability" for actions committed by subordinates rests with the commander. U.S. Dep't of Army, Field Manual 101-5, *Staff Org. and Operations*, 1-1 (May 1997).

A. PLAINTIFFS NEED NOT ALLEGE THAT DEFENDANTS HAD ACTUAL KNOWLEDGE OF THE SPECIFIC CRIMES AGAINST PLAINTIFFS TO BE RESPONSIBLE FOR THE WRONGFUL ACTS OF THEIR SUBORDINATES

Pursuant to the standard in *Ford*, commanders may only be held responsible if they "knew, or owing to the circumstances at the time, should have known, that persons under his effective command had committed, were committing, or were about to commit torture and extrajudicial killing." *Ford*, 289 F. 3d at 1287 n.3.[5] While the Panel is correct in noting that international law does not recognize a strict liability form of responsibility for superiors. Mamani v. Berzain, No. 10-13071, 2011 WL 3795468, at *5 (11th Cir. 2011), Plaintiffs do not need to show that the Defendant knew about the specific harms against the Plaintiffs, nor that Defendant was aware of the identity of the specific perpetrators under his command. Instead, the jurisprudence on the *mens rea* as set forth in *Ford*,

[5] It is worth noting that the defendants in *Ford* were the Salvadoran Ministers of Defense and therefore non-military civilian superiors. The ICC has set out a separate *mens rea* standard for military commanders and non-military commanders. Pursuant to Article 28(a) of the ICC Statute, the *mens rea* for military superiors is that the accused "knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes." With regards to civilian superiors, the Statute requires that the civilian superior "knew or consciously disregarded information that clearly indicated, that the subordinates were committing or about to commit such crimes." Article 28(a), Rome Statute of the International Criminal Court,

establishes that the Defendant need only be aware that their subordinates are committing abuse or are about to commit abuse.

For example, in a companion case to *Ford*, *Romagoza v. Arce*, the jury was instructed that with respect to the knowledge element:

> [T]he plaintiff does not have to prove that the defendant/military commander knew or should have known of the *plaintiffs' torture*. Rather, the knowledge element would be satisfied if the plaintiff proved, by a preponderance of the evidence, that the defendant/military commander knew, or should have known, that his subordinates had committed, were committing, or were about to commit, torture and/or extrajudicial killing.

Romagoza v. Arce, No. 99-8364 (S.D. Fla. Feb 17, 2000) (jury instructions available at http://www.cja.org/downloads/Romagoza_Jury_Instructions_242.pdf) (emphasis added), judgment affirmed *Arce v. Romagoza*, 434 F.3d 1254 (11th Cir. 2006).[6] Similarly, in the trial against General Yamashita, the U.S. Military Commission acknowledged that General Yamashita had not visited the prison camps in the Philippines. Nevertheless, he was still found liable for the crimes committed by his subordinates within those camps. Trial of General Tomoyuki Yamashita, Law Reports of Trials of War Criminals, United Nations War crimes Commission Volume IV 1948 at 30.[7]

[6] *See also Hilao,* 103 F.3d at 776 (in a class action lawsuit against the former president of the Philippines, Ferdinand Marcos was found liable for approximately ten thousand instances of torture, disappearance, and summary execution committed by members of military; plaintiffs were not required to prove that he was aware of each individual act of violence).

[7] After being convicted by the Military Commission, General Yamashita filed a habeas petition before the Supreme Court. The Supreme Court affirmed the conviction.

The U.S. Army Field Manual (No. 27-10, Law of Land Warfare) similarly provides: "The commander is…responsible, *if he had actual knowledge, or should have had knowledge, through reports received by him or through other means* that persons under his control committed war crimes." Section 501. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Delalic (Celibici*)[8] cited the U.S. Army Field Manual as support for the notion that command responsibility does not require knowledge of the specific wrongful conduct committed by subordinates; rather the commander should be presumed to have had knowledge if he had information that would put him on notice of such crimes – such as reports or other means of communication. Prosecutor v. Delalic (Celibici Case), Case No. IT-96-21-A, Judgment on Appeal, ¶ 230 (Feb. 20, 2001).[9]

In the absence of evidence of a commander's actual knowledge of a crime, many factors have been relied upon to impute the requisite knowledge to a commander. For example, the widespread or systematic nature of attacks can be used to impute knowledge of such crimes to a high ranking official. *See* S.Rep.

[8] This Court in *Ford* as well as the court in *Doe v. Qi* relied heavily upon the *Prosecutor v. Delalic* (Celibici case) to determine the elements of command responsibility. *Ford*, 289 F.3d at 1290-1292 (explaining that **"**We quote from *Delalic* because it states the matter [on command responsibility] with great clarity."); Doe v. Qi, 349 F.Supp.2d 1258, 1330-32 (N.D. Cal. 2004) (relying on *Delalic* in finding that command responsibility is a well established principle of customary international law)

[9] The ICTY's interpretation of this element requires that either the defendant had actual knowledge or "where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates." Prosecutor v. Delalic, Case No: IT-96-21-T, Trial Chamber Judgment, ¶ 383 (16 Nov 1998), *Delalic*, Case No. IT-96-21-A, at ¶ 223.

No. 102–249, at 9 ("'command responsibility' is shown by evidence of a pervasive pattern and practice of torture...").[10] In *Yamashita*, the United States Military Commission found that the widespread nature of crimes is sufficient to establish the "should have known" element of command responsibility:

> […] the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either prima facie evidence that the accused *knew* of their perpetration, or evidence that he must have failed to fulfill a duty to *discover* the standard of conduct of his troops….Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded *means of knowledge* as being the same as knowledge itself.

Trial of General Tomoyuki Yamashita, Law Reports of Trials of War Criminals, United Nations War crimes Commission Volume IV 1948 at 94.[11]

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[10] Other factors may be used to impute knowledge to a commander; including, *inter alia*, (1) evidence of an organized military plan of human rights abuses can be used to establish the knowledge element of command responsibility. *Xuncax*, 886 F.Supp. at 173; and (2) established reporting and monitoring systems within the military. Prosecutor v. Ntagerura, et al., ICTR-99-46T, Judgment and Sentence, ¶ 654 (Feb. 25, 2004)("Given the relatively small size of the camp, [Defendant]'s control over his soldiers, and the fact that he remained in regular contact with his soldiers stationed away from the camp, the Chamber cannot accept that fifteen or more soldiers would have participated in such a systematic, large-scale attack without the knowledge of their commander.")

[11] *See also Delalic* IT-96-21-A, at ¶ 229; Xuncax v. Gramajo, 886 F.Supp. 162, 172 (D. Mass. 1995) (knowledge element was satisfied based on this widespread occurrence of the torture and summary executions throughout Guatemala under Gramajo's regime and that as Minister of Defense, "at a minimum, Gramajo was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths). *Qi*, 349 F.Supp.2d at1332-1333 (holding that Mayor and Deputy Mayor of Beijing were responsible for human rights violations committed by the local police and that the knowledge element of command responsibility was satisfied due to the fact that the "patterns of repression and abuse were widespread, pervasive, and *widely reported*, and that both Defendants actively encouraged and incited the crackdown on Falun Gong supporters…. Under these circumstances, it may be inferred that both defendants either 'knew or should have known' of the human rights violations committed by their subordinate police and security forces) (emphasis added).

Here, Petitioners plead that the atrocities committed by the Bolivian military in 2003 were: (1) widespread and systematic (R77, ¶¶78-79, 81, 84-85, 97); (2) that the violence committed by government forces was repeatedly shown on major Bolivian television stations and documented in newspapers, (*Id.* at ¶87); (3) that community and human rights leaders met with Defendants specifically to discuss the violence by military forces, (*Id.* at ¶87); and (4) that the Vice President publicly admonished the Defendants for the violence committed against unarmed civilians (*Id.* at ¶60). The Petitioners even alleged that one of the Defendants was in a helicopter directing his troops when those troops fired gun shots at unarmed civilians. These allegations are sufficient to establish actual and constructive knowledge under this Court's articulation of the theory of command responsibility in *Ford*.[12]

Amici thereby respectfully submit that the Panel's decision directly conflicts with *Ford*, and thus rehearing *en banc* is necessary to resolve this conflict.

B. PLAINTIFFS NEED NOT ALLEGE THAT DEFENDANTS DIRECTED OR ORGANIZED AN ATTACK IN ORDER FOR LIABILITY TO ATTACH

It is likewise well established in this Court that a defendant need not participate in, order or direct an attack to be responsible for the harm. *See Ford*, 289 F.3d at 1286 n.2, *quoting* S.Rep. No. 249 at 9 ("[A] higher official need not

[12] Amici do not concede that these facts do not likewise satisfy even the erroneous standard set out in the Panel's decision.

have personally performed or ordered the abuses in order to be held liable."). Such an order would only be necessary to find defendants *directly* liable for the harms alleged. Instead, *Ford's* interpretation of the doctrine of command responsibility holds that a high-ranking official may be responsible for failing to prevent the crimes or punish subordinates for committing same, regardless of how high the defendant's rank in the chain of command.

The Supreme Court acknowledged the commander's duty to act in *Yamashita*, finding that General Yamashita had "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." 327 U.S. at 13-14. The Court relied on the Article 43 of the Annex of the Fourth Hague Convention in finding that a commander "shall take *all the measures in his power* to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws of force in the country." *Id.*, at 16 (emphasis added).

The US Army Field Manual contains a similar admonition; Section 507(b) of Field Manual 27-10 states that "[c]ommanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are *promptly and adequately* punished." (emphasis added). The Operational Law Handbook, a treatise for Judge Advocates explains that the

doctrine of command responsibility requires that: "[a]lleged violations of the [Laws of War]…are to be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action." Operational Law Handbook 2011 at 37.

Furthermore, creating a permissive environment for abuse by failing to investigate allegations of wrongful conduct is indicative of the superior's failure to punish. In the jury instructions for *Romagoza v. Arce*, the court stated that "[f]ailure to punish may be established by proof that the defendant…failed to investigate reliable allegations of torture and/or extrajudicial killing by subordinates, or failed to submit these matters to competent authorities for investigation and prosecution." *Romagoza*, No. 99-8364, jury instructions available at http://www.cja.org/downloads/Romagoza_Jury_Instructions_242.pdf).[13]

Thus, the *actus reus* element of command responsibility may be established through a failure to prevent, investigate or punish subordinates under a defendant's command and Plaintiffs need not, as the Panel suggests, allege a direct connection between the defendant's actions and the death or torture of plaintiffs' decedents. *Mamani*, 2011 WL 3795468, at *5. Plaintiffs in the case at bar allege that despite the widespread violence against protestors, the Defendants did not order a single

[13] S*ee also Hilao*, 103 F.3d at 779 (attaching liability if Marcos "knew of such conduct by the military and failed to use his power to prevent it" and that "Congress intended to impose exactly the type of liability that the jury instructions allowed in this case.")

investigation into the violence nor did the Defendants order an end to the violence. R77, ¶¶1, 59-60, 87-88. Instead, the Defendants continued to utilize the armed forces to suppress political demonstrations. *Id.* at ¶ 36. Moreover, one of the Defendants went on national television to accuse protestors of being traitors and established a system of indemnification for damages to persons and property resulting from government misconduct. *Id.* at ¶¶ 47-50. These allegations more than meet the criteria set forth in *Ford* for holding commanders liable for the misconduct committed by those under their effective command.[14]

CONCLUSION

Amici respectfully submit that the Court grant Petitioners' request for rehearing *en banc to* reconsider the application of command responsibility in this case. In creating a more onerous standard for command responsibility, the panel decision will create an intra-circuit conflict that may limit responsibility for human rights abuses to only low level actors. Such a limitation, could in turn, create an environment of impunity that is contrary to purpose of the doctrine of command responsibility litigation as it has developed in this Court, other federal courts, and customary international law.

[14] Amici do not concede that these facts do not likewise satisfy even the erroneous standard set out in the Panel's decision.