

No. 18-12728

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**ELOY ROYAS MAMANI, ETELVINA RAMOS MAMANI, SONIA ESPEJO
VILLALOBOS, JUAN PATRICIO QUISPE MAMANI, TEÓFILO BALTAZAR CERRO,
JUANA VALENCIA DE CARVAJAL, HERMÓGENES BERNABÉ CALLIZAYA,
GONZALO MAMANI AGUILAR, FELICIDAD ROSA HUANCA QUISPE, HERNÁN
APAZA CUTIPA,**

Plaintiffs-Appellants,

v.

**GONZALO DANIEL LOZADA SANCHEZ BUSTAMENTE,
JOSE CARLOS SANCHEZ BERZAIN,**

Defendants-Appellees.

**On Appeal from the United States District Court
For the Southern District of Florida
Case Nos. 1:07-cv-22459-JIC & 1:08-cv-21063-JIC**

**BRIEF OF CURRENT AND FORMER U.N. SPECIAL RAPPORTEURS
ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SEEKING
REVERSAL OF THE DISTRICT COURT'S DECISION**

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Dated: October 11, 2018

/s/ William J. Aceves

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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INTEREST OF *AMICI CURIAE*

This Brief of Current and Former United Nations Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29.¹ It is filed in support of Plaintiffs-Appellants and seeks reversal of the district court's decision. All parties have consented to the participation of *Amici* in this case.

Amici are the current and former U.N. Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions (“U.N. Special Rapporteur”).² The U.N. Special Rapporteur was first established in 1982 by the U.N. Commission on Human Rights and has been continuously renewed by the United Nations. Its mandate is “to examine situations of extrajudicial, summary or arbitrary executions in all circumstances and for whatever reason.” Human Rights Council, Resolution 26/12: Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, at ¶ 7(a), U.N. Doc. A/HRC/RES/26/12 (2014).

¹ No party or party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that funded the preparation or submission of this Brief. No person other than *Amici* and their counsel contributed money that funded the preparation and submission of this Brief.

² This brief is provided by the current and former U.N. Special Rapporteurs on a voluntary basis for the court's consideration without prejudice to, and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials, and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Agnes Callamard was appointed the current U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on August 1, 2016. Dr. Callamard has a distinguished career in human rights and humanitarian work. She has advised senior levels of multilateral organizations, including the U.N. Office on Genocide Prevention, the Office of the High Commissioner for Human Rights, and is the former *Chef de Cabinet* for the Secretary-General of Amnesty International. She has led human rights investigations in more than 50 countries around the world and was an expert on the international Joint Evaluation of the Rwandan genocide. She is the current Director of the Global Freedom of Expression Project at Columbia University and is a Special Adviser to the President of Columbia University.

Christof Heyns is a Professor of Human Rights Law and the Director of the Institute for International and Comparative Law in Africa at the University of Pretoria in South Africa. He is a current member of the U.N. Human Rights Committee. He has also served as the chair of the U.N. Independent Investigation on Burundi. Professor Heyns previously served as the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions from 2010-2016.

Philip Alston is the John Norton Pomeroy Professor of Law at New York University School of Law. He is the current U.N. Special Rapporteur on Extreme Poverty and Human Rights. He has also served in numerous international capacities, including as Special Adviser to the U.N. High Commissioner for

Human Rights on the Millennium Development Goals and as Chairperson of the U.N. Committee on Economic, Social, and Cultural Rights. Professor Alston previously served as the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions from 2004-2010.

Amici recognize the importance of the prohibition against extrajudicial killing under international law. *Amici* further recognize that U.S. law incorporates this norm in several federal statutes, including the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (“TVPA”). Accordingly, *Amici* would like to provide this Court with an additional perspective on these issues. They believe this submission will assist the Court in its deliberations.

STATEMENT OF THE ISSUES

1. Whether the claims in this case meet the requirements for extrajudicial killing under international law.

SUMMARY OF ARGUMENT

After 10 years of litigation and a unanimous jury verdict, the district court granted the defendants’ motion for judgment as a matter of law. *Mamani v. Berzain*, 2018 WL 2435173 (S.D. Fla. May 30, 2018). Despite significant evidence, the district court determined the plaintiffs had failed to present any evidence that the defendants had killed civilians pursuant to a plan and that the evidence presented at trial was “legally insufficient to support the jury verdict

rendered in their favor.” *Id.* at *13. The district court found that absence of evidence of a plan to kill civilians precluded TVPA liability because it meant the killings were not deliberated. *Id.* at *9.

This was error. As set forth in the TVPA, international law informs the definition of extrajudicial killing. And the killings in this case meet the requirements for extrajudicial killing under international law. In countless pronouncements, international human rights bodies have indicated the use of lethal force by state actors must be carefully regulated. It is only permissible when strictly unavoidable. Security forces may not use lethal force to disperse unarmed protestors or individuals who do not pose an imminent threat of serious harm. Security forces may not shoot indiscriminately into populated areas. Indeed, the killing of innocent civilians who are hiding in their homes is a classic example of an extrajudicial killing. An official plan or direct targeting are not required. Extrajudicial killings can be established in the absence of explicit orders that security forces target specific individuals. Similarly, extrajudicial killings can be established even when the actual shooter has not been identified. Finally, security forces are required to abide by the prohibition against extrajudicial killing in times of civil disturbance or armed conflict.

While extrajudicial killings are often captioned in different ways—murder, arbitrary deprivation of life, intentional killing, summary execution, arbitrary

execution—they maintain a common core: the lethal use of force without justification under international law. The killings in this case meet the requirements for extrajudicial killing under international law.

ARGUMENT

I. THE TVPA INCORPORATES THE PROHIBITION AGAINST EXTRAJUDICIAL KILLING UNDER INTERNATIONAL LAW

On March 12, 1992, President George H.W. Bush signed the Torture Victim Protection Act, which was adopted by Congress to implement U.S. obligations under several international human rights agreements. The TVPA commences with the following words: “An Act [t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.” Pub. L. No. 102-256. The legislation culminated a seven-year effort to bolster and extend the rights provided by the Alien Tort Statute (“ATS”). While the ATS was limited to claims by foreign nationals, the TVPA provides a right of action to both U.S. citizens and foreign nationals.

The TVPA establishes a cause of action for torture and extrajudicial killing when such acts are committed by an individual acting under actual or apparent

authority or color of law of any foreign nation. *Id.* at § 2(a). Extrajudicial killing is defined as:

a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

Id. at § 3(a).

Significantly, the term “deliberated killing” is undefined in the statute. Instead, the TVPA indicates which killings are excluded from the definition of extrajudicial killing. Thus, the TVPA designates an extrajudicial killing as: (1) a deliberated killing; (2) that is not authorized; (3) by a previous judgment; (4) pronounced by a regularly constituted court; and (5) that affords all the judicial guarantees recognized as indispensable by civilized peoples. *Id.* Some of these elements track Common Article 3 of the 1949 Geneva Conventions, which requires States Parties to ensure that protected persons are only subjected to criminal proceedings that afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 1287 (“Third Geneva Convention”). *See generally* Louise Doswald-Beck, *Judicial Guarantees*

³ While the Geneva Conventions informed the statutory language, courts have indicated the TVPA reaches a “broader range of conduct.” *See Owens v. Republic of Sudan*, 864 F.3d 751, 772 (D.C. Cir. 2017).

under Common Article 3, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 469 (Andrew Clapham et al. eds., 2015).

The TVPA's definition of extrajudicial killing also excludes any killing that "under international law, is lawfully carried out under the authority of a foreign nation." Pub. L. No. 102-256, at § 3(a). This provision requires reference to international law. For example, international law recognizes the legality of lawful killings committed by privileged combatants in times of armed conflict. EMILY CRAWFORD, *IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT* 12-13 (2015). In contrast, international law does not recognize the legality of killings committed by government forces against individuals who do not pose an imminent threat of serious harm. PROTECTION OF CIVILIANS (Haidi Willmot et al. eds., 2016); *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (Dieter Fleck ed., 3d. ed., 2013).

The TVPA's legislative history offers more clarity on the meaning of extrajudicial killing and reveals the relevance of international law for purposes of interpreting the statute. Indeed, the legislative history is replete with references to international law. For example, the 1988 House Report recognized that the TVPA was proposed "to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights" H.R. REP. NO. 100-693, at 1 (1989). The 1989 House Report

indicated that extrajudicial killing is defined “in accordance with international standards.” H.R. REP. NO. 101-55, at 4 (1990). It added that “[t]he concept of ‘extrajudicial killing’ is derived from article 3 common to the four Geneva Conventions of 1949.” *Id.* The 1991 House Report affirmed these understandings. H.R. REP. NO. 102-367, at 4–5 (1991).

The Senate’s understanding of the TVPA was nearly identical. The Senate Report indicated that “[t]he TVPA incorporates into U.S. law the definition of extrajudicial killing found in customary international law.” S. REP. NO. 102-249, at 6 (1991). The report added that only killings that violated international law were considered “actionable under the TVPA.” *Id.* Thus, the definition excluded “killings that are lawful under international law—such as killings by armed forces during declared wars which do not violate the Geneva Convention and killings necessary to effect a lawful arrest or prevent the escape of a person lawfully detained.” *Id.*

The TVPA’s legislative history indicates that a “deliberated killing” encompasses all killings that demonstrate extrajudicial intent. The 1989 House Report states that the word “deliberated” was included in the definition “to exclude killings that lack the requisite extrajudicial intent, such as those caused by a police officer’s authorized use of deadly force.” H.R. REP. NO. 101-55, at 4. The House Report indicates that the “color of law” requirement makes clear that the TVPA

“deals only with officially condoned, tolerated or encouraged acts of torture or extrajudicial killings.” H.R. REP. NO. 101-55, at 4. The 1991 House Report mirrors this understanding of “deliberated killing.” H.R. REP. NO. 102-367, at 4–5. This interpretation is also supported by the 1991 Senate Report on the TVPA, which acknowledges that liability for an extrajudicial killing extends “beyond the person or persons who actually committed” the act to include “anyone with higher authority who authorized, tolerated or knowingly ignored those acts” S. REP. NO. 102-249, at 7.

In sum, the TVPA’s legislative history and text establish that the TVPA incorporates the prohibition against extrajudicial killing under international law.

II. THE PROHIBITION AGAINST EXTRAJUDICIAL KILLING IS BOTH FIRMLY ESTABLISHED AND WELL-DEFINED IN INTERNATIONAL LAW

The right to life and the corollary right to be free from the arbitrary deprivation of life constitute the defining human right. Indeed, the right to life norm has been characterized “as the supreme human right, since without effective guarantee of this right, all other rights of the human being would be devoid of meaning.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY 121 (2d ed. 2005); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty, in* THE INTERNATIONAL BILL OF RIGHTS 114 (Louis Henkin ed., 1981). The prohibition against extrajudicial killing is an extension of

the right to life norm and represents a manifestation of the right to be free from the arbitrary deprivation of life. Its status is evidenced throughout international law, including an overwhelming number of multilateral instruments, regional sources, and statements from U.N. bodies, including the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁴

A. Multilateral Instruments

The right to life and the corollary right to be free from the arbitrary deprivation of life were formally codified in the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (“ICCPR”). Article 6(1) provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” *Id.* art. 6(1). Significantly, the ICCPR indicates the right to life norm is non-derogable. *Id.* art. 4(2).

The U.N. Human Rights Committee, which was established by the ICCPR to oversee compliance by States Parties, has issued several pronouncements regarding the nature and scope of the right to life. In 1982, for example, the Human Rights Committee issued its General Comment No. 6, which addressed the right to life norm in detail. Human Rights Committee, General Comment No. 6: Article 6 (The

⁴ The well-regarded Restatement (Third) of the Foreign Relations of the United States recognizes the prohibition against extrajudicial killing. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 cmt. f (1986).

Right to Life), U.N. Doc. HRI/GEN/1/Rev.1, at 6 (1982). According to the Committee, this right “is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation” *Id.* ¶

1. The Committee indicated that the deprivation of life by the state is a matter of significant concern. “Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”

Id. ¶ 3. The Committee added “that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.” *Id.* ¶ 5.

In several cases, the U.N. Human Rights Committee has addressed the right to life and the obligation to prevent the arbitrary deprivation of life. In *Florentino Olmedo v. Paraguay*, Comm. No. 1828/2008, U.N. Doc. CCPR/C/104/D/1828/2008 (Apr. 26, 2012), the Committee considered an alleged violation of Article 6 arising out of the government’s use of force against protestors. In this case, agricultural workers and union members calling for agrarian reform were engaged in a public protest against the government. Their peaceful protest sought to block a local highway when they were confronted by security forces. *Id.* ¶ 2.4. The demonstrators found themselves facing a large group of police and military personnel who ordered the demonstrators to unblock the

road. While negotiations between the demonstrators and the government were ongoing, the police began using force to clear the road. “The police attack was immediate and violent, and involved the use of tear gas, firearms and water cannons.” *Id.* ¶ 2.5. The police fired indiscriminately into the crowd and killed several protestors. Individuals who were fleeing or had already surrendered were also shot. The decedent was beaten and shot at close range by police. *Id.* ¶ 2.7.

In assessing the government’s use of force, the Committee acknowledged that states have an obligation “to prevent arbitrary killing by their own security forces.” *Id.* ¶ 7.3. In this case, Paraguay had an “obligation to protect the life of the demonstrators.” *Id.* ¶ 7.5. Given the grave circumstances surrounding the killing, Paraguay also had an obligation to conduct a thorough investigation. For these reasons, the Committee determined Paraguay had violated the right to life norm.

In *Umetaliev v. Kyrgyzstan*, Comm. No. 1275/2004, U.N. Doc. CCPR/C/94/D/1275/2004 (Oct. 30, 2008), a government militia opened fire with automatic weapons on demonstrators in an attempt to disperse a crowd of people engaged in a political demonstration. Eldiyar Umetaliev was shot and killed, and several other demonstrators were wounded. The Committee acknowledged that the use of firearms by public authorities can have serious consequences for the right to life. *Id.* ¶ 9.4. “Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.” *Id.* ¶ 9.5. The

Committee further acknowledged that Kyrgyzstan had not provided “any arguments that it took effective and feasible measures in compliance with its obligation to protect the right to life under Article 6, paragraph 1, to prevent and to refrain from the arbitrary deprivation of life.” *Id.* ¶ 9.4. Accordingly, the Committee determined that Kyrgyzstan had violated Article 6.

2. Regional Instruments

The right to life is also addressed in several regional human rights agreements. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (“European Convention”) is of particular significance because it was cited in the TVPA’s legislative history. *See, e.g.*, S. REP. NO. 102-249, at 5. The European Convention provides that “[e]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” *Id.* art. 2(1). The European Convention then adds a significant qualification to this norm.

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Id. art. 2(2).

In *Solomou and Others v. Turkey*, Application No. 36832/97, Eur. Ct. H.R. (June 24, 2008), the European Court of Human Rights considered whether Turkey had violated the prohibition against the arbitrary deprivation of life when an unarmed civilian was shot and killed during a public demonstration. While some demonstrators were armed with sticks and iron bars and some were throwing stones at Turkish forces, the decedent was not. He was unarmed and not attacking or threatening anyone. The Court concluded there had been a violation of the right to life norm because “a potential illegal or violent action from a group of persons cannot, as such, justify the immediate shooting and killing of one or more other individuals who are not themselves posing a threat.” *Id.* ¶ 77. While the European Convention authorized the use of lethal force for the purpose of quelling a riot or insurrection, the Court indicated that the use of force must be “absolutely necessary” and that “potential or illegal violent action from a group of persons cannot, as such, justify the immediate shooting and killing of one or more other individuals who are not themselves posing a threat.” *Id.* ¶ 78.

In *Gul v. Turkey*, App. No. 22676/93, Eur. Ct. H.R. (Dec. 14, 2000), a special operations unit of a police force that was conducting a search for suspected terrorists was given faulty intelligence that led them to the house of Mehmet Gul. When Gul approached the front door in response to light knocking by the police, several officers opened fired and shot repeatedly through the closed door, killing

him. Approximately 50-55 shots were fired at the door, and Gul was hit multiple times. *Id.* ¶¶ 23, 28, 82. Gul had posed no threat to the police and, in fact, he was innocent of any terrorist activity. In considering whether the use of force violated Article 2 of the European Convention, the Court noted “[t]he text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life.” *Id.* ¶ 77. The Court indicated that the use of force must be no more than absolutely necessary and must be strictly proportionate to the achievement of the permitted aims in Article 2. *Id.* Examining the facts of the case, the Court determined it did not need “to determine whether the police officers had formulated the intention of killing or acted with reckless disregard for the life of the person behind the door.” *Id.* ¶ 80. Rather, the Court determined the police officers had used a disproportionate degree of force. Accordingly, the Court determined Turkey had violated the right to life norm set forth in Article 2 of the European Convention.

In *Güleç v. Turkey*, App. No. 54/1997/838/1044, Eur. Ct. H.R. (July 27, 1998), the European Court made clear that states can be held responsible for killings even in the absence of evidence that security forces directly targeted specific individuals. The decedent in *Güleç* was shot and killed in the midst of spontaneous public demonstrations against the Turkish government. According to

the decedent's family, the deadly shot was fired by security forces. In response, the government alleged the decedent had been killed by a bullet fired by armed protestors. The European Commission on Human Rights, which initially reviewed the claim, concluded the decedent was killed by security forces. *Id.* ¶ 68. Specifically, it determined that an "armoured vehicle had opened fire in the main street, where the demonstration was taking place, either in the air or at the ground, in order to disperse the demonstrators, and that Ahmet Güleç had been hit by a fragment of a bullet fired from that vehicle that had ricocheted off the ground or a wall." *Id.* Significantly, the Commission did not believe the killing was intentional. The European Court accepted the Commission's findings even in the absence of direct evidence that government forces fired the deadly shot or that the decedent was directly targeted. And while the Court acknowledged the public demonstration was "far from peaceful," it concluded the use of deadly force was disproportionate and was not absolutely necessary. *Id.* ¶¶ 73, 83.

In *Mocanu v. Romania*, App. Nos. 10865/09, 45886/07, and 32431/08, Eur. Ct. H.R. (Sept. 17, 2014), Romanian security forces were ordered to disperse demonstrators at an anti-government protest by firing at them. Several shots ricocheted and struck the victim while he was walking near the demonstration. Despite the victim's death, the government failed to conduct a meaningful investigation. The European Court indicated that the prohibition against the

arbitrary deprivation of life “would be ineffective in practice if there existed no procedure either for reviewing the lawfulness of the use of lethal force by State authorities, or for investigating arbitrary killings” *Id.* ¶ 316. Accordingly, some form of effective official investigation is required. This obligation exists even in cases of armed conflict or generalized violence where circumstances may make it difficult to engage in a thorough investigation. *Id.* ¶ 319. To be effective, the investigation must be independent. *Id.* ¶ 320. It must be thorough. And, it must be able to punish perpetrators. *Id.* ¶ 321. In the *Mocanu* case, the investigation was neither independent nor thorough. Accordingly, the European Court held that Romania had violated the right to life norm.

The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (“American Convention”) recognizes the right to life and its ensuing obligations. According to Article 4(1), “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

In *Caracazo v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 58 (Nov. 11, 1999), the Inter-American Court of Human Rights considered a case involving the use of force by police during a state of emergency proclaimed by the Venezuelan government. In response to civil protests arising out of government economic policies, the Venezuelan government declared a state of emergency and imposed a

curfew. During the state of emergency, police and military personnel conducted a series of operations to suppress the protests. As part of their suppression operations, police and military personnel engaged in indiscriminate shootings which resulted in the death of numerous civilians in their villages and surrounding communities. *Id.* ¶ 2(k). Significantly, some of the victims were not even engaged in civil protests but were instead hiding in their homes. *Id.* ¶ 2(k)(1). The Inter-American Court found that such actions constituted extrajudicial killings and violated the right to life norm. *Id.* ¶ 42.

In *Neira Alegría v. Peru*, the Inter-American Court examined the applicability of the right to life norm in a case involving the government's use of force to quell a prison uprising. *Neira Alegría v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 20 (Jan. 19, 1995). In that case, the Peruvian military used overwhelming force to crush a prison riot. To suppress the uprising, the military destroyed the building that was occupied by the inmates. Over 100 inmates were killed. The Court indicated this case concerned the right of the state to use force "to maintain law and order" when it deprives people of their lives. *Id.* ¶ 74. Although the Court acknowledged the inmates were "highly dangerous and, in fact armed," it did not find these facts "constitute sufficient reasons to justify the amount of force used" *Id.* The Court then quoted from its prior decisions regarding a government's obligation to refrain from the excessive use of force.

Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends.

Id. ¶ 75 (quoting *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 154 (July 29, 1988), *Godínez Cruz v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 162 (Jan. 20, 1989)). Accordingly, the Court concluded the use of lethal force violated the right to life norm. *Id.* ¶ 76. *See also Nadege Dorzema v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 251 (Oct. 24, 2012); *Massacres at El Mozote and Nearby Places v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012).

3. United Nations Statements

Along with its codification in multilateral and regional instruments and its recognition by their attendant human rights bodies, the prohibition against extrajudicial killing has been recognized in numerous statements by U.N. bodies.

In 1989, for example, the U.N. Economic and Social Council adopted the well-regarded Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, U.N. Doc. E/RES/1989/65 (May 24, 1989) (“1989 U.N. Principles”) to reinforce the substantive obligation of states to protect life and to prevent extrajudicial killings. The Principles require states to prohibit “all extra-legal, arbitrary and summary executions” and to “ensure that

any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences.” *Id.* ¶ 1. To prevent extrajudicial killings, governments must ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody, and imprisonment, as well as those officials authorized by law to use force and firearms. *Id.* ¶ 2. In addition, governments must “prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions.” *Id.* ¶ 3. Significantly, “[e]xceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of . . . [extra-legal] executions.” *Id.* ¶ 1.

The United Nations adopted the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/12 (1991) (“1991 U.N. Manual”) to complement the 1989 Principles. The Manual defined executions to include: “(a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention; (c) death resulting from enforced ‘disappearances;’ (d) deaths resulting from the excessive use of force by law-enforcement personnel; (e) executions without due process; and (f) acts of genocide.” *Id.* at 3. In 2016, the United Nations published the

Minnesota Protocol on the Investigation of Potentially Unlawful Death, Office of the U.N. High Commissioner for Human Rights (2017), <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>, to reaffirm and extend the principles contained in the 1991 U.N. Manual.

Another relevant international instrument is the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 (1990) (“1990 U.N. Basic Principles”), which was adopted by the United Nations in 1990. This document recognizes that law enforcement officials must occasionally use force to ensure public safety. When the use of force is unavoidable, law enforcement officials must adhere to specific standards of conduct. They must “[e]xercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; . . .” *Id.* ¶ 5(a). They must also “minimize damage and injury, and respect and preserve human life; . . .” *Id.* ¶ 5(b). The 1990 U.N. Basic Principles contain extensive requirements regarding training on the use of force and standards to be followed when firearms are used. These principles are relevant in assessing whether a state’s use of force that leads to loss of life is lawful or constitutes an extrajudicial killing.

4. U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (“U.N. Special Rapporteur”) was first established in 1982 by the U.N. Commission on Human Rights to address “summary and arbitrary executions.” In 1992, the Commission on Human Rights broadened the mandate to include “extrajudicial executions.” Commission on Human Rights, Extrajudicial, Summary or Arbitrary Executions, at ¶¶ 1, 7, U.N. Doc. E/CN.4/RES/1992/72 (Mar. 5, 1992). The U.N. Special Rapporteur now examines all situations of extrajudicial, summary, or arbitrary executions.

Significantly, the terms “extrajudicial, summary, or arbitrary executions” are not meant to limit the U.N. Special Rapporteur’s work. Human Rights Council, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, Report of Special Rapporteur, Philip Alston, at ¶ 6, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004). Instead, they represent the historical evolution of the mandate, which now requires the Special Rapporteur to address “a range of contexts in which killings have taken place in circumstances which contravene international law” *Id.* However, the Special Rapporteur has indicated the “central concern of the mandate remains ‘executions:’ the use of lethal force by one human being against another.” U.N. General Assembly, Report

of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, at ¶ 17, U.N. Doc. A/71/372 (Sept. 2, 2016) (“2016 U.N. Special Rapporteur Report”).

Since its creation, the U.N. Special Rapporteur has issued numerous statements on the prohibition against extrajudicial killing. *See, e.g.*, U.N. General Assembly, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/68/382 (Sept. 13, 2013); Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, U.N. Doc. A/HRC/14/24 (May 20, 2010). The U.N. Special Rapporteur has noted, for example, that states often have a monopoly on the use of force and that such force can easily be abused. Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, at ¶ 51, U.N. Doc. A/HRC/32/39 (May 6, 2016); (“2016 II U.N. Special Rapporteur Report”); *see also* Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, at ¶ 43, U.N. Doc. A/HRC/17/28 (May 23, 2011). To avoid such abuses, the U.N. Special Rapporteur has stated that “those using force need to function within domestic legal frameworks on the use of force that comply with international human rights law and, where applicable, international humanitarian law.” 2016 II U.N. Special Rapporteur Report, *supra*, at ¶ 51.

When a life has been taken, the U.N. Special Rapporteur has indicated that states must show their actions complied with international standards. Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, at ¶ 55, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) (“2014 U.N. Special Rapporteur Report”). If any of the relevant standards are not met, the deprivation of life will be deemed arbitrary and a violation of international law. *Id.* ¶ 55. Accordingly, there must be sufficient legal basis for the use of lethal force. *Id.* ¶ 56. Lethal force may only be used for legitimate objectives, which is limited to saving a person from serious injury or death. *Id.* ¶ 58. The use of lethal force must be necessary, which “means that force should be the last resort . . . and if it is needed, graduated force (the minimum required) should be applied.” *Id.* ¶ 59. It must be proportionate to the interest that is being protected, which means “[t]he interest harmed by the use of force is measured against the interest protected; . . .” *Id.* ¶ 65.

Significantly, deliberate targeting is not required for a killing to be deemed arbitrary. “Quite the opposite: killings in circumstances of unnecessary or disproportionate excessive use of force by the police are likely to be arbitrary, even though the police may not have killed intentionally.” U.N. General Assembly, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings, at ¶ 34, U.N.

Doc. A/HRC/35/23 (June 6, 2017) (2017 U.N. Special Rapporteur Report”); *see also* U.N. General Assembly, Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions: Saving Lives is Not a Crime, at ¶ 15, U.N. Doc. A/73/314 (Aug. 7, 2018). The Special Rapporteur has added that states must take all possible measures to avoid situations where loss of life may occur. “A failure to take proper precautions in such a context constitutes a violation of the right to life.” 2014 U.N. Special Rapporteur Report, *supra*, ¶ 64.

In sum, the prohibition against extrajudicial killing is firmly established under international law. This prohibition regulates the use of lethal force by law enforcement, security forces, and military personnel. It applies in times of peace and armed conflict. While such killings are often captioned in different ways—murder, arbitrary deprivation of life, intentional killing, summary execution, arbitrary execution, extrajudicial killing—they maintain a common core: the lethal use of force without justification under international law. *See, e.g.*, INTERNATIONAL COMMISSION OF JURISTS, ENFORCED DISAPPEARANCE AND EXTRAJUDICIAL EXECUTION: INVESTIGATION AND SANCTION: PRACTITIONERS GUIDE NO. 9, at 63 (2015); Philip Alston, *The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston*, 2 J. HUM. RTS. PR. 355 (2010); NIGEL RODLEY &

MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 246-51 (3d ed. 2009).

III. THE KILLINGS IN THIS CASE MEET THE REQUIREMENTS FOR EXTRAJUDICIAL KILLING UNDER INTERNATIONAL LAW

A review of international practice reveals how the deaths in this case meet the requirements for extrajudicial killing. Indeed, the facts in this case are strikingly similar to several cases where human rights bodies found the use of force against civilians to violate the prohibition against extrajudicial killing.

To begin with, the use of lethal force must be carefully regulated. INTERNATIONAL COMMISSION OF JURISTS, *supra*, at 73-74; 2016 U.N. Special Rapporteur Report, *supra*, at ¶ 51; 2014 U.N. Special Rapporteur Report, *supra*, at ¶ 65. States are obligated to provide robust training and careful planning to minimize potential harm to civilians. 1989 U.N. Principles, *supra*, at ¶ 2; *Nadege Dorzema v. Dominican Republic*, *supra*, at ¶ 87.

The intentional use of lethal force is only permissible when “strictly unavoidable in order to protect life.” 2014 U.N. Special Rapporteur Report, *supra*, at ¶ 58; 1990 U.N. Basic Principles, *supra*, at Principle 9. Its use must be necessary and proportionate. 2016 U.N. Special Rapporteur Report, *supra*, at ¶ 51. Significantly, security forces cannot automatically resort to the use of lethal force when other options are available. 2014 U.N. Special Rapporteur Report, *supra*, at ¶ 59-62; 1990 U.N. Basic Principles, *supra*, at Principle 4; 1989 U.N. Principles,

supra, at ¶ 4. When force is authorized, security forces must use restraint and seek to minimize injury and loss of life. 2014 U.N. Special Rapporteur Report, *supra*, at ¶ 65; 1989 U.N. Principles, *supra*, at ¶ 5.

Security forces may not shoot indiscriminately into populated areas. Indeed, the killing of innocent civilians who are hiding in their homes is a classic example of an extrajudicial killing. *Caracazo v. Venezuela*, *supra*, at ¶ 42. Security forces may not use lethal force to disperse unarmed protestors. *Umetaliev v. Kyrgyzstan*, *supra*, ¶ 9.5; 2014 U.N. Special Rapporteur Report, *supra*, at ¶ 75. They may not shoot at individuals who pose no risk or threat. *Gul v. Turkey*, *supra*, at ¶ 77; 2016 U.N. Special Rapporteur Report, *supra*, at ¶ 53. They also may not shoot at some individuals simply because others may pose a risk or threat. *Solomou and Others v. Turkey*, *supra*, at ¶¶ 77–78; 2014 U.N. Special Rapporteur Report, *supra*, at ¶ 75. Indeed, even individuals who may pose some risk to the general public or security forces are still entitled to protection. *Neira Alegria v. Peru*, *supra*, at ¶ 74.

The unnecessary or disproportionate use of force may be considered arbitrary even if security forces did not deliberately target a victim. 2017 U.N. Special Rapporteur Report, *supra*, at ¶ 34. *Gul v. Turkey*, *supra*, at ¶ 80. Extrajudicial killings can be established in the absence of an official plan or explicit orders that security forces were asked to target specific individuals. *Güleç v. Turkey*, *supra*, at ¶ 68. Similarly, extrajudicial killings can be established even

when the actual shooter has not been identified. *Id.*; *Olmedo v. Paraguay, supra*, at ¶¶ 2.7, 7.2; *Umetaliev v. Kyrgyzstan, supra*, at ¶¶ 2.2, 9.3. Finally, security forces are required to abide by the prohibition against extrajudicial killing in times of civil disturbance or armed conflict. 2014 U.N. Special Rapporteur Report, *supra*, at ¶ 54; 1989 U.N. Principles, *supra*, at ¶ 1.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the district court's ruling and reinstate the jury's verdict on behalf of the Plaintiffs-Appellants.

Dated: October 11, 2018

Respectfully Submitted,

/s/ _____

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I hereby certify that:

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Dated: October 11, 2018

/s/ William J. Aceves

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I hereby certify that I caused this document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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