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## When Death Becomes Murder: A Primer on Extrajudicial Killing

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# WHEN DEATH BECOMES MURDER: A PRIMER ON EXTRAJUDICIAL KILLING

William J. Aceves\*

## ABSTRACT

*International law prohibits the arbitrary deprivation of life, which includes extrajudicial killing. This norm is codified in every major human rights treaty and has attained jus cogens status as a non-derogable norm in international law. In the United States, the Torture Victim Protection Act (“TVPA”) establishes civil liability for extrajudicial killing. As evidenced in the TVPA’s text and legislative history, the definition of extrajudicial killing is based on international law. Despite the clear meaning of the TVPA’s text and the clarity of international law, the TVPA’s definition of extrajudicial killing is still contested in litigation, and some courts express uncertainty about its meaning. This raises a simple question: what constitutes an extrajudicial killing? This Article reviews the status of extrajudicial killing and clarifies its discrete elements under international law. It then considers the status of extrajudicial killings in the case of Mamani v. Berzain, a TVPA case involving the responsibility of the former President and Defense Minister of Bolivia for the killing of civilians in a 2003 government crackdown.*

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## INTRODUCTION

The execution of a political prisoner; the murder of a civilian through indiscriminate attacks on her village; the killing of a soldier who is *hors de combat*—each of these deaths constitutes an extrajudicial killing.<sup>1</sup> There are, of course, some instances when a death does not rise to the level of an unlawful killing.<sup>2</sup> But, these deaths are not lawful. They are inhumane, unnecessary, and illegitimate. They fail to comply with the most basic principles of humanity and offer no due process to victims—no opportunity to defend themselves through the rule of law. Because of this, extrajudicial killings represent an arbitrary deprivation of life. They constitute the *raison d'être* for the human rights framework established after the Second World War.<sup>3</sup>

The right to life and the corollary right to be free from the arbitrary deprivation of life represent the defining human right. This norm is now codified in every major human rights treaty and has attained *jus cogens* status as a non-derogable norm that binds all

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1. See generally NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 246–78 (3d ed. 2009) (describing and explaining the various types of “extra-legal executions” and their consequences); EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 31–37 (2010) (explaining the principals used to distinguish lawful and unlawful actions).

2. For example, capital punishment is not specifically prohibited under international law even though it is subject to extensive criticism. See generally WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2003) (analyzing the universal norms, developments, and regional approaches surrounding the abolition of the death penalty). It is prohibited by some regional human rights treaties as well as the Second Optional Protocol to the International Covenant on Civil and Political Rights. See Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, art. 1, Mar. 5, 2002, E.T.S. 187; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, art. 1, June 8, 1990, O.A.S.T.S. 73; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414, 415.

3. See generally Franciszek Przetacznik, *The Right to Life as a Basic Human Right*, 9 REV. DES DROITS DE L'HOMME 585 (1976) (noting that the Second World War “caused intensive regulation of human rights by way of international instruments, such as the 1948 Universal Declaration of Human Rights, and the 1966 Covenants on Human Rights adopted by the General Assembly of the United Nations.”).

states.<sup>4</sup> The prohibition against extrajudicial killing is an extension of the right to life norm. It applies in times of peace and places strict limits on the use of force by law enforcement and security personnel.<sup>5</sup> It also applies in times of armed conflict as evidenced by its codification as a basic principle of international humanitarian law.<sup>6</sup> It can give rise to individual criminal responsibility and state responsibility in national courts as well as international criminal tribunals.<sup>7</sup> Few norms have generated greater consensus.

In the United States, the Torture Victim Protection Act (“TVPA”) establishes civil liability for extrajudicial killings as well as torture.<sup>8</sup> The TVPA defines extrajudicial killing by reference to international law.<sup>9</sup> Despite overwhelming international consensus, the definition of extrajudicial killing has been contested in litigation.<sup>10</sup>

4. See, e.g., Hum. Rts. Comm., General Comment No. 29, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (asserting the peremptory nature of the “right to life” provisions in the ICCPR); Hum. Rts. Comm., General Comment No. 24, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (listing the arbitrary deprivation of life as an example of a peremptory norm).

5. See generally THE RIGHT TO LIFE IN INTERNATIONAL LAW (B.G. Ramcharan ed. 1985) (analyzing the right to life in multiple dimensions of international law).

6. See generally IAN PARK, THE RIGHT TO LIFE IN ARMED CONFLICT (2018); WEIGHING LIVES IN WAR (Jens David Ohlin et al. eds., 2017).

7. Rome Statute of the International Criminal Court, opened for signature July 17, 1998, art. 25, 37 I.L.M. 999, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute] (detailing individual criminal responsibility for violations of the Rome Statute).

8. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). See Rachael E. Schwartz, “And Tomorrow?” *The Torture Victim Protection Act*, 11 ARIZ J. INT’L & COMP. L. 271, 273–74 (1994); see generally Yoav Gery, Note, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT’L L. & ECON. 597 (1993) (discussing the history and provisions of the TVPA and examining relevant international law); Kathryn L. Pryor, Note, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?*, 29 VA. J. INT’L L. 969 (1989) (discussing the impact of the TVPA on the Alien Torts Claims Act and comparing the two pieces of legislation); Matthew H. Murray, Note, *The Torture Victim Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts*, 25 COLUM. J. TRANSNAT’L L. 673 (1987) (examining the TVPA and advocating for its passage).

9. See Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 5 PACE INT’L L. REV. 197, 208 (1994); Christopher W. Haffke, *The Torture Victim Protection Act: More Symbol than Substance*, 43 EMORY L.J. 1467, 1479 (1994).

10. However, there are many cases where courts have established that victims were subjected to extrajudicial killing under the TVPA. See, e.g., *Cabello v.*

As noted by one federal court, “it is not clear what constitutes an extrajudicial killing.”<sup>11</sup> This perceived lack of clarity stems, in part, from the failure to conduct a robust review of international law and its constitutive sources.

It is true that no treaty specifically defines extrajudicial killing.<sup>12</sup> But numerous international sources offer details on this well-established norm. To understand the meaning of extrajudicial killing, therefore, courts must engage in a more rigorous analysis of international sources, including the decisions of human rights courts and the statements of human rights bodies.<sup>13</sup> Such a review would reveal the right to life norm affords broad protection against the arbitrary deprivation of life. It would reveal that the prohibition against extrajudicial killing represents one formulation of this norm.<sup>14</sup> It would also reveal the enumerated elements of this norm. While some courts have asserted that an extrajudicial killing requires a “deliberated killing,” this statement does not capture the full range of behavior that can give rise to responsibility under international law.

This Article reviews the status of extrajudicial killing and clarifies its discrete elements under international law. Part I reviews the definition of extrajudicial killing presented in the TVPA. Because the TVPA’s legislative history and text rely upon international law, Part II examines the prohibition against extrajudicial killing under

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Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996).

11. *Mamani v. Berzain*, 2009 WL 10664387, at \*15 (S.D. Fla. Nov. 25, 2009). *See also Mamani v. Berzain*, 654 F.3d 1148, 1155–57 (11th Cir. 2011) (reversing the district court’s denial of the motion to dismiss the claims and stating that the killings must be “deliberate” to meet the minimal requirements for extrajudicial killings).

12. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 456 F.Supp. 2d 457, 465 (S.D.N.Y. 2006) (“Plaintiffs have not directed the Court to any international authority establishing the elements of extrajudicial killing, and the Court is aware of none.”).

13. *Cf. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 301 (2d ed. 1999) (“The customary practice of states . . . reveals that murder is not intended to mean only those specific intentional killings without lawful justification. Instead, state practice views murder in its *largo senso* meaning as including the creation of life-endangering conditions likely to result in death according to reasonable human experience.”).

14. Other formulations of the norm include extrajudicial execution, summary execution, summary killing, willful killing, unlawful killing, arbitrary deprivation of life, and murder.

international law and considers its status in both human rights law and international humanitarian law. Based on this review, Part III offers a detailed definition by reaching beyond treaty provisions to consider the decisions of human rights courts and other international bodies. It establishes that the prohibition against extrajudicial killing includes both substantive and procedural components. Part IV reviews the contested nature of extrajudicial killing in *Mamani v. Berzain*, a recent TVPA case involving the responsibility of the former President and Defense Minister of Bolivia for the killing of dozens of civilians in a 2003 government crackdown.<sup>15</sup> The *Mamani* litigation offers an instructive (yet puzzling) narrative on how some federal courts assess claims of extrajudicial killing. Finally, Part V examines the claims of extrajudicial killing in *Mamani* through the framework of established international law and practice.

While this Article considers the TVPA, the benefits of clarifying the meaning of extrajudicial killing extend well beyond the TVPA. Claims of extrajudicial killing can also be brought under the Foreign Sovereign Immunities Act (“FSIA”) and the Alien Tort Statute (“ATS”).<sup>16</sup> Courts routinely cross-reference case law from these statutes when interpreting the meaning of extrajudicial killing. Thus, a clear understanding of extrajudicial killing will affect the application of several federal statutes. At the same time, the TVPA is unique in its scope and application. The FSIA is only available against foreign governments, and the Supreme Court has significantly curtailed the availability of ATS relief.<sup>17</sup> Accordingly, the TVPA is an important mechanism for human rights victims seeking redress for extrajudicial killing. A clear explanation of what constitutes an extrajudicial killing is essential for affirming this fundamental norm and protecting it from diminution. Ensuring the TVPA’s provisions are well-understood and correctly applied has now become even more important.

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15. *Mamani v. Berzain*, 654 F.3d 1148, 1150–51 (11th Cir. 2011). See Curt Anderson, *U.S. Court Finds Former Bolivian President Responsible for Civilian Deaths*, TIME (Apr. 4, 2018), <http://amp.timeinc.net/time/5227151/bolivia-sanchez-de-lozada-lawsuit> [<https://perma.cc/3AH7-QQKL>]; David Ovalle, *Landmark Case in Florida Pits Bolivia’s Ex-Leader against Villagers Attacked by His Army*, MIAMI HERALD (Mar. 6, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/article203804364.html> [<https://perma.cc/E7WY-V9JA>].

16. 28 U.S.C. § 1350 (2017); 28 U.S.C. § 1605A (2008).

17. See, e.g., *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1406 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117–18 (2013); *Samantar v. Yousuf*, 560 U.S. 305, 309 (2010); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); see also *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 453 (2012).

Though this Article considers extrajudicial killing in the context of U.S. legislation and litigation, its analysis extends far beyond our own borders. The prohibition against extrajudicial killing is an international norm, reflected in treaties and customary international law. U.S. law and practice can thus influence, and be influenced by, this fundamental norm.

### I. EXTRAJUDICIAL KILLING UNDER THE TORTURE VICTIM PROTECTION ACT

On March 12, 1992, President George H.W. Bush signed the TVPA, which was adopted by Congress to implement U.S. obligations under several international human rights agreements.<sup>18</sup> 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."<sup>19</sup> The legislation culminated a seven-year effort to bolster and extend the rights provided by the ATS.<sup>20</sup> While the ATS was limited to claims by foreign nationals, the TVPA was intended to provide 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

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18. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992).

19. *Id.* The TVPA's preamble appears in the original slip law and Statutes at Large, but it was not included in the United States Code.

20. In 1985, the House of Delegates of the American Bar Association passed a resolution calling for the adoption of federal legislation establishing a right of action for torture or extrajudicial killing. The first versions of the TVPA were introduced in the House and Senate in 1986. *See* Torture Victim Protection Act of 1989: Hearing Before the S. Comm. on the Judiciary, 101st Cong. 38, 42 (1989) (statement of Father Robert Drinan, American Bar Association). *See generally* THE LAWYERS COMM. FOR HUMAN RIGHTS, BRIEFING BOOK: THE TORTURE VICTIM PROTECTION ACT OF 1986 (1986) (providing a detailed account of Torture Victim Protection Act of 1986 and the "substantive, procedural, and policy implications" of the bill); COMM. ON INT'L HUMAN RIGHTS, THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, TORTURE VICTIM PROTECTION ACT (1987) (providing a detailed account of Torture Victim Protection Act of 1987 and the "substantive, procedural, and policy implications" of the bill).



acting under actual or apparent authority or color of law of any foreign nation.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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.”<sup>24</sup>

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.”<sup>25</sup> 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.<sup>26</sup> In contrast, international law does not

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21. § 2(a), 106 Stat. 73.

22. *Id.* § 3(a).

23. *See id.*

24. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6, 75 U.N.T.S. 1287 [hereinafter Third Geneva Convention]. *See generally* Louise Doswald-Beck, *Judicial Guarantees under Common Article 3*, THE 1949 GENEVA CONVENTIONS: A COMMENTARY 469 (Andrew Clapham et al. eds., 2015) (discussing the importance of judicial guarantees during peacetime as applied to rebel groups).

25. § 3(a), 106 Stat. 73.

26. *See generally* EMILY CRAWFORD, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 12–13 (2015) (lawful combatants are entitled to immunity if their actions are taken in compliance with the laws of armed conflict,

recognize the legality of killings committed by government forces against unarmed civilians.<sup>27</sup>

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.<sup>28</sup> 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 . . . ."<sup>29</sup> The 1989 House Report indicated that extrajudicial killing is defined "in accordance with international standards."<sup>30</sup> It added that "[t]he concept of 'extrajudicial killing' is derived from article 3 common to the four Geneva Conventions of 1949."<sup>31</sup> The 1991 House Report echoed these points.<sup>32</sup>

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."<sup>33</sup> The report added that the definition was drafted to be consistent with the 1949 Geneva Conventions.<sup>34</sup> Only killings that violated international law were considered "actionable under the TVPA."<sup>35</sup> Thus, the definition excluded "killings that are lawful under international law—such as killings by armed forces during declared

including the avoidance of targeting innocent civilians); Mark D. Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of its Customariness*, 2007 ARMY LAW. 1 ("Compliance with this concept of distinction is the fundamental difference between heroic Soldier and murderer.")

27. See generally PROTECTION OF CIVILIANS 141–76 (Haidi Willmot et al. eds., Oxford University Press 2016) (discussing the protections afforded to civilians under international human rights and international humanitarian law); THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 501–87 (Dieter Fleck ed., 3d. ed., 2013) (discussing the protection of civilian populations).

28. See, e.g., *Torture Victim Protection Act of 1988: Hearing and Markup on H.R. 1417 Before the H. Comm. on Foreign Affairs*, 100th Cong. (1988) (suggesting that the standards of international law are well known and that Congress must act in accordance with the law of nations).

29. H.R. REP. NO. 100-693, pt. 1, at 1 (1988).

30. H.R. REP. NO. 101-55, pt. 1, at 4 (1989).

31. *Id.*

32. H.R. REP. NO. 102-367, pt. 1, at 4–5 (1991).

33. S. REP. NO. 102-249, at 5 (1991).

34. *Id.* at 6.

35. *Id.*

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.”<sup>36</sup>

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.”<sup>37</sup> This definition also excluded “executions carried out under proper judicial authority.”<sup>38</sup> 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.”<sup>39</sup> The 1991 House Report mirrors this understanding of “deliberated killing.”<sup>40</sup>

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36. *Id.*

37. H.R. REP. NO. 101-55, at 4 (1989). During 1988 hearings before the House Committee on Foreign Affairs, Father Robert Drinan who was appearing on behalf of the American Bar Association, referenced the European Convention on Human Rights as a model for the TVPA definition of extrajudicial killing. *Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. on Human Rights and Int’l. Orgs. of the Comm. on Foreign Affairs*, 100th Cong. 9–10 (1988) [hereinafter *1988 House Hearings*] (statement of Father Robert Drinan, American Bar Association). According to Father Drinan, “[a] killing by a soldier in wartime, for example, or by a police officer in the context of legitimate law enforcement activity, would constitute extrajudicial killing under authority of their government, but we would not want those possibly legitimate actions to give rise to private suits in U.S. courts.” To address this concern, he added that “[t]he exclusionary language found in Article 2 of the European Convention on Human Rights may be instructive . . .” *Id.* at 7. See also *id.* at 39–40 (statement of the Association of the Bar of the City of New York, Committee on International Human Rights) (“Other international instruments confirm the international consensus that life cannot be taken by extrajudicial means.”) (citations omitted).

38. *1988 House Hearings*, *supra* note 37, at 39. (“In the event there remains any doubt whether such legally-authorized killings were intended to be excluded, the definition of ‘extrajudicial killing’ could be further qualified by adding the term ‘unlawful.’ Properly understood, this concept should be interpreted as unlawful under national or international law.”) (citation omitted).

39. H.R. REP. NO. 101-55, at 4 (1989).

40. H.R. REP. NO. 102-367, at 4–5 (1991). The 1991 House Report includes a small but significant typographical error in its discussion of extrajudicial killing. The word “exclude” has been transposed with “include” in the following sentence: “[t]he inclusion of the word ‘deliberated’ is sufficient also to include killings that lack the requisite extrajudicial intent . . .” *Id.* at 5. This is likely a typographical error because this language is inconsistent with the 1989 House Report as well as the Senate report.

This interpretation of “deliberated killing” 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 . . . .”<sup>41</sup> The Senate Report references the potential liability of high ranking officials under the doctrine of command responsibility. Thus, “a higher official need not have personally performed or ordered the abuses in order to be held liable.”<sup>42</sup> Civil liability can extend to the commander who is aware of killings and does nothing to prevent them or punish the perpetrator.

There is another provision in the TVPA that offers further insight into the nature of the claims brought under the statute. When someone subjects an individual to extrajudicial killing, the TVPA indicates that person “shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”<sup>43</sup> While this provision addresses the individuals who may be claimants under the statute, it suggests a relationship between extrajudicial killing and wrongful death.

In sum, the TVPA’s legislative history and text establish that an extrajudicial killing is a deliberated killing not authorized by a regularly constituted court that affords all the applicable due process protections or that is not otherwise justified under international law. Accordingly, international law must be considered when interpreting the statute and assessing the legality of a deliberated killing.

## II. EXTRAJUDICIAL KILLING UNDER 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.”<sup>44</sup> The

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41. S. REP. NO. 102-249, at 9 (1991).

42. *Id.*

43. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a)(2), 106 Stat. 73 (1992).

44. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY 121 (2d ed. 2005); Yoram Dinstein, *The Right to Life, Physical*

prohibition of 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.<sup>45</sup> Its status is evidenced in both human rights law and international humanitarian law, including in an overwhelming number of multilateral and regional sources.<sup>46</sup>

## A. Human Rights Law

### 1. Multilateral Instruments

The right to life was first addressed by the U.N. General Assembly in the Universal Declaration of Human Rights (“UDHR”).<sup>47</sup> The experiences of the Second World War influenced the drafting process, including discussions on the right to life.<sup>48</sup> Because the UDHR was meant to serve as the precursor to a more detailed treaty on human rights, its provisions were brief. In fact, efforts to provide a more comprehensive review of the underlying rights were soundly rejected during the drafting process.<sup>49</sup> Accordingly, the UDHR simply states “[e]veryone has the right to life, liberty, and the security of

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*Integrity, and Liberty, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114, 114–15 (Louis Henkin ed., 1981).

45. VERNON VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY 9–10 (1969) (“The statement that virtually everyone acknowledges a right to life means that they acknowledge a right not to be killed—a right to be safeguarded against arbitrary execution or murder.”).

46. The Restatement (Third) of the Foreign Relations of the United States recognizes the prohibition against extrajudicial killing. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 cmt. f (AM. LAW INST. 1986) (stating that it constitutes a violation of international law for “a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime.”).

47. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948) [hereinafter UDHR].

48. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 39–41 (1994).

49. See, e.g., U.N. GAOR, 3d Sess., Third Committee, Draft International Declaration of Human Rights: Recapitulation of Amendments to Article 3 of the Draft Declaration (E/800), U.N. Doc. A/C.3/259/Add.1 (Oct. 13, 1948) (outlining proposed, but rejected, amendments broadening the scope of human rights).

person.”<sup>50</sup> Every subsequent human rights instrument has been informed by the UDHR’s text and spirit.<sup>51</sup>

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 (“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.”<sup>52</sup> Significantly, the ICCPR indicates the right to life norm is non-derogable.<sup>53</sup> To be sure, the term “arbitrarily” was criticized by some delegates during the drafting process as ambiguous and open to interpretation.<sup>54</sup> Indeed, the term was highly contested during the drafting process.<sup>55</sup> But according to the *travaux préparatoires*, the term “arbitrarily” was chosen instead of “intentional” because it was understood “to cover more than cases of intentional killings.”<sup>56</sup> In addition, “it obviated the problem of having to list all cases of permissible deprivation of life.”<sup>57</sup> For this reason, the delegates

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50. UDHR, *supra* note 47, art. 3.

51. Louis Henkin, *Introduction*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, *supra* note 44, at 1, 27.

52. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 6(1), S. Exec. Doc. E, 95-2, at 25 (1978), 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

53. *Id.* art. 4(2).

54. U.N. GAOR, 10th Sess., Draft International Covenants on Human Rights: Annotation 83, U.N. Doc. A/2929, at 82–83 (July 1, 1955); *see also* Dinstein, *supra* note 44, at 116 (discussing the ambiguity of the term “arbitrary”); C.K. Boyle, *The Concept of Arbitrary Deprivation of Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 5, at 221, 224–26 (exploring previous uses of the term “arbitrary” in international texts).

55. *See generally* Laurent Marcoux, Jr., *Protection from Arbitrary Arrest and Detention under International Law*, 5 B.C. INT’L & COMP. L. REV. 345, 364 (1982) (focusing on the debate that occurred during the drafting process of Article 6 of the ICCPR as to whether “arbitrary” simply meant unlawful under domestic law, or whether the term created a higher international standard); Parvez Hassan, *The Word “Arbitrary” As Used In the Universal Declaration of Human Rights: “Illegal” or “Unjust?”*, 10 HARV. INT’L L.J. 225, 234–36 (1969) (examining the meaning of the word “arbitrary” as it is used in the UDHR).

56. NOWAK, *supra* note 44, at 127. Nowak notes that unintentional killings can be arbitrary, but that intention is not a requirement for establishing arbitrariness; *see also* MARC BOSSUYT, *GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 121–24* (1987) (stating that in the debate between use of the word “intentionally and “arbitrarily,” the latter won out because it had been used in the UDHR, and because it meant both “illegally” and “unjustly”).

57. NOWAK, *supra* note 44, at 127–28.

rejected proposals to offer a detailed list of exceptions to the right to life.<sup>58</sup> The *travaux préparatoires* also reveal that “arbitrarily” meant without due process of law and included both illegal and unjust actions.<sup>59</sup>

The U.N. Human Rights Committee, which was established by the ICCPR to oversee compliance by States Parties, has issued several official 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. 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 . . . .”<sup>60</sup> 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.”<sup>61</sup> 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.”<sup>62</sup>

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 *Florentina Olmedo v. Paraguay*, 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

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58. Boyle, *supra* note 54, at 228–32.

59. BOSSUYT, *supra* note 56, at 122–24. During the drafting process, delegates viewed the term “arbitrarily” as encompassing various meanings, including “fixed or done capriciously or at pleasure; without adequate determining principle; depending on the will alone; tyrannical; despotic; without cause upon law; not governed by any fixed rule or standard.” *Id.* at 123 (citing various Inter-American Commission on Human Rights session reports, including UN Doc. A/C.3/SR.812, para. 15; UN Doc. A/C.3/SR.813, para. 43; UN Doc. A/C.3/SR.81, para. 1).

60. Hum. Rts. Comm., General Comment No. 6: Article 6 (The Right to Life), ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1, at 6 (1982). The Human Rights Committee is in the process of drafting a new General Comment that would provide greater details regarding the right to life norm and its attendant obligations on states.

61. *Id.* ¶ 3.

62. *Id.* ¶ 5.

in a public protest against the government.<sup>63</sup> Their peaceful protest sought to block a local highway when they were confronted by security forces.<sup>64</sup> 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."<sup>65</sup> The police fired indiscriminately into the crowd and killed several protestors. Individuals who were fleeing or had already surrendered were also shot. The decedent, Eulalio Blanco Domínguez, was beaten and shot at close range by police.<sup>66</sup>

In assessing the government's use of force, the Human Rights Committee acknowledged that states have an obligation "to prevent arbitrary killing by their own security forces."<sup>67</sup> In this case, Paraguay had an "obligation to protect the life of the demonstrators."<sup>68</sup> Given the grave circumstances surrounding Blanco Domínguez's death, Paraguay also had an obligation to conduct a thorough investigation. For these reasons, the Committee determined Paraguay had violated the right to life norm.<sup>69</sup>

## 2. Regional Instruments

The right to life is also addressed in several regional human rights agreements.<sup>70</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") is of particular significance because it was cited in the TVPA's legislative history.<sup>71</sup> The European Convention provides that "[e]veryone's right to life shall be protected by law. No one shall be

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63. *Florentina Olmedo v. Paraguay*, Comm'n No. 1828/2008, ¶ 2.1 (Hum. Rts. Comm. 2012).

64. *Id.* ¶ 2.4.

65. *Id.* ¶ 2.5.

66. *Id.* ¶ 2.7.

67. *Id.* ¶ 7.3.

68. *Id.* ¶ 7.5.

69. *Id.*

70. *See, e.g.*, African Charter on Human and Peoples' Rights art. 4, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5 (stating "[e]very human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.").

71. S. REP. NO. 102-249, at 6 (1991).



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.”<sup>72</sup> 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.<sup>73</sup>

Because of its impact on the right to life, this qualification is interpreted narrowly.

In *Solomou and Others v. Turkey*, 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.<sup>74</sup> 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.”<sup>75</sup> 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.”<sup>76</sup>

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72. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

73. *Id.* art. 2(2).

74. *Solomou and Others v. Turkey*, App. No. 36832/97, Eur. Ct. H.R. (2008).

75. *Id.* ¶ 78.

76. *Id.* See also *Gülüç v. Turkey*, App. No. 54/1997/838/1044, Eur. Ct. H.R. 3, 35–39 (1998) (finding a breach of art. 2 when an individual was killed by security forces during a demonstration).

Both the American Declaration of the Rights and Duties of Man ("American Declaration") and the American Convention on Human Rights ("American Convention") recognize the right to life and its ensuing obligations.<sup>77</sup> Adopted in 1948 by the International Conference of American States, the American Declaration provides that "[e]very human being has the right to life, liberty and security of his person."<sup>78</sup> In 1969, the Inter-American Conference on Human Rights completed its work on the American Convention, and the right to life norm was an integral feature of the treaty.<sup>79</sup> 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."<sup>80</sup>

In *Neira Alegria v. Peru*, the Inter-American Court of Human Rights examined the applicability of the right to life norm in a case involving the government's use of force to quell a prison uprising.<sup>81</sup> 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 doing so "implies depriving people of their lives."<sup>82</sup> Although the Court acknowledged the inmates were "highly dangerous and, in fact armed," it did not find these facts "constitute[d] sufficient reasons to justify the amount of force used . . . ."<sup>83</sup> The Court then quoted from its prior decisions regarding a government's obligation to refrain from the excessive use of force.

77. See American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 4(1), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 145 (entered into force July 18, 1978); *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, 9th Int'l Conference of American States art. 1, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc.21 rev.6 (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

78. American Declaration, *supra* note 77, at art. I.

79. J. Colon-Collazo, *A Legislative History of the Right to Life in the Inter-American Legal System*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 33, 39 (B.G. Ramcharan ed., 1985).

80. American Convention, *supra* note 77, at art. 4(1).

81. *Neira Alegria v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶¶ 74–76 (Jan. 19, 1995).

82. *Id.* ¶ 74.

83. *Id.*

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. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.<sup>84</sup>

Accordingly, the Court concluded the use of lethal force violated the right to life norm.<sup>85</sup>

Along with the Inter-American Court, the Inter-American Commission on Human Rights has also addressed the scope of the right to life norm.<sup>86</sup> Its work highlights the breadth of the norm, including its applicability in times of peace or armed conflict. In its 2002 Report on Terrorism and Human Rights, for example, the Inter-American Commission examined the right to life under both human rights law and humanitarian law.<sup>87</sup> While the Inter-American Commission acknowledged that “the contours of the right to life may change in the context of an armed conflict,” the prohibition on the “arbitrary deprivation of life remains absolute.”<sup>88</sup> Accordingly, the right to life may not be suspended.<sup>89</sup> In addition, the Commission indicated that the use of lethal force must be necessary and proportionate “where strictly unavoidable to protect against imminent threat of death . . . .”<sup>90</sup> Otherwise, the use of force would constitute “an arbitrary deprivation of life or a summary execution . . . .”<sup>91</sup> The Commission affirmed these

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84. *Id.* ¶ 75 (quoting *Velásquez-Rodríguez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 154 (July 29, 1988); *Godínez-Cruz v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 162 (Jan. 20, 1989)).

85. *Id.* ¶ 76.

86. *See, e.g.,* *Arturo Ribon Avila v. Colombia*, Case 11.142, Inter-Am. Comm’n H.R., Report No. 26/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 135 (1997) (noting that Article 4 of the American Convention prohibits extrajudicial killings even in situations of armed conflict).

87. Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002).

88. *Id.* ¶ 86.

89. *Id.*

90. *Id.* ¶ 87.

91. *Id.* ¶ 88.

principles in its 2009 Report on Citizen Security and Human Rights.<sup>92</sup> It noted that states violate their obligation under the right to life norm when their security forces “use lethal force that is beyond internationally recognized boundaries.”<sup>93</sup> Accordingly, the use of force must be necessary and proportionate.<sup>94</sup> States also violate their obligation when they fail to adopt effective measures “against the actions of private parties who threaten or violate the right to life of persons subject to its jurisdiction . . . .”<sup>95</sup>

### 3. U.N. 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 (“1989 U.N. Principles”) to reinforce the substantive obligation of states to protect life and to prevent extrajudicial killings.<sup>96</sup> 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.”<sup>97</sup> 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.”<sup>98</sup> 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

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92. Report on Citizen Security and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 57 (2009).

93. *Id.* ¶ 107.

94. *Id.* ¶ 114.

95. *Id.* ¶ 107.

96. Economic and Social Council Res. 1989/65, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (May 24, 1989).

97. *Id.* ¶ 1.

98. *Id.* ¶ 2.

executions.”<sup>99</sup> 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.”<sup>100</sup>

The United Nations adopted the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (“1991 U.N. Manual”) to complement the 1989 Principles.<sup>101</sup> 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.”<sup>102</sup> The Manual then offered a set of model protocols for how states should address claims of extrajudicial killings. These protocols addressed the manner in which states should conduct investigations, disinterment, and autopsies in cases of extrajudicial killings. While not binding, these protocols were meant to assist states in complying with the 1989 U.N. Principles.

In 2016, the United Nations adopted the Minnesota Protocol on the Investigation of Potentially Unlawful Death (“Minnesota Protocol”), which revised the 1991 U.N. Manual.<sup>103</sup> In contrast to the U.N. Manual, the Minnesota Protocol offers a much broader approach to the issue of extrajudicial killings. It applies to all potentially unlawful deaths, which include situations where: (1) “[t]he death may have been caused by acts or omissions of the State, its organs or agents, or may otherwise be attributable to the State, in violation of its duty to respect the right to life;” (2) “[t]he death occurred when a person was detained by, or was in the custody of, the State, its organs, or agents;” or (3) “[t]he death occurred where the State may have failed to meet its obligations to protect life.”<sup>104</sup> The Minnesota Protocol provides several examples of what constitutes an unlawful death.

99. *Id.* ¶ 3.

100. *Id.* ¶ 1.

101. U.N. Ctr. for Soc. Dev. and Humanitarian Affairs, Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/12, U.N. Sales No. E.91.IV.1 (1991).

102. *Id.* at 3.

103. Office of the U.N. High Comm’r for Human Rights, Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), U.N. Doc. HRPUB/17/4 (May 24, 2017) [hereinafter Minnesota Protocol].

104. *Id.* at 1.

This includes, for example, all deaths possibly caused by law enforcement personnel or other agents of the state; deaths caused by paramilitary groups, militias or “death squads” suspected of acting under the direction or with the permission or acquiescence of the State; and deaths caused by private military or security forces exercising State functions.<sup>105</sup>

The Minnesota Protocol makes clear that states have an affirmative obligation to protect human life. This includes “any situation where a state fails to exercise due diligence to protect an individual or individuals from foreseeable external threats or violence by non-State actors.”<sup>106</sup>

Another relevant international instrument is the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“1990 U.N. Basic Principles”), which was adopted by the United Nations in 1990.<sup>107</sup> 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 . . . .”<sup>108</sup> They must also “minimize damage and injury, and respect and preserve human life . . . .”<sup>109</sup> The U.N. Basic Principles contain extensive requirements regarding training on the use of force, protocols to be followed when firearms are used, and the use of force to disperse assemblies.<sup>110</sup> These

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105. *Id.*

106. *Id.*

107. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1 (Sept. 7, 1990).

108. *Id.* ¶ 5(a).

109. *Id.* ¶ 5(b).

110. *See generally* UNITED NATIONS OFFICE ON DRUGS AND CRIME, RESOURCE BOOK ON THE USE OF FORCE AND FIREARMS IN LAW ENFORCEMENT (2017) (examining law enforcement sources relevant to the use of force and suggesting how to promote accountability in the use of force and firearms by law enforcement).

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.<sup>111</sup>

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions ("U.N. Special Rapporteur") was established by the U.N. Commission on Human Rights "to examine situations of extrajudicial, summary or [arbitrary executions] in all circumstances and for whatever reason."<sup>112</sup> The original mandate addressed "summary and arbitrary executions."<sup>113</sup> In 1992, the Commission on Human Rights broadened the mandate to include "extrajudicial executions."<sup>114</sup> Significantly, the terms "extrajudicial, summary, or arbitrary executions" are not meant to limit the Special Rapporteur's work.<sup>115</sup> 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 . . ."<sup>116</sup> 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."<sup>117</sup>

Since its creation, the U.N. Special Rapporteur has issued numerous statements on the prohibition against extrajudicial killing.<sup>118</sup> The Special Rapporteur has noted, for example, that states

111. *Id.* at 1–11. See also G.A. Res. 34/169, Code of Conduct for Law Enforcement Officials, at 185 (1979) (exploring international law sources and the general responsibility of law enforcement authorities relevant to the use of force").

112. Human Rights Council Res. 26/12, U.N. Doc. A/HRC/RES/26/12, ¶ 7(a) (July 11, 2014).

113. Comm'n on Human Rights, Rep. on the Thirty-Eighth Session, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/1982/30, at 2 (Mar. 11, 1982).

114. Comm'n on Human Rights, Rep. on the Forty-Eighth Session, Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. E/CN.4/1992/84, at 169–71 (1992).

115. Human Rights Council, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, U.N. Doc. E/CN.4/2005/7, ¶ 6 (Dec. 22, 2004) ("The terms of reference of this mandate are not best understood through efforts to define individually the terms 'extrajudicial', 'summary' or 'arbitrary', or to seek to categorize any given incident accordingly.").

116. *Id.*

117. U.N. Secretary-General, *Extrajudicial, Summary or Arbitrary Executions*, ¶ 17, U.N. Doc. A/71/372 (Sept. 2, 2016).

118. See, e.g., Christof Heyns (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) [hereinafter 2014 Special Rapporteur Report] (reporting on and condemning

often have a monopoly on the use of force and that such force can easily be abused.<sup>119</sup> The Special Rapporteur has also raised concerns about deaths caused by the excessive use of force by law enforcement personnel, deaths committed by security forces, and violations of the right to life during armed conflict.<sup>120</sup> To avoid such abuses, the 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.”<sup>121</sup> Significantly, the Special Rapporteur has indicated that deliberate intent 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.”<sup>122</sup>

When a life has been taken, the U.N. Special Rapporteur has indicated that states must show their actions complied with

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the use of extrajudicial killing); U.N. Secretary-General, *Extrajudicial, Summary or Arbitrary Executions*, ¶ 17, U.N. Doc. A/68/382 (Sept. 13, 2013); Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/14/24 (May 20, 2010) (reporting on and condemning the use of extrajudicial killing).

119. Christof Heyns (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts*, ¶ 51, U.N. Doc. A/HRC/32/39 (May 6, 2016) [hereinafter 2016 Special Rapporteur Report]; see also Christof Heyns (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 43, U.N. Doc. A/HRC/17/28 (May 23, 2011) (“The primary purpose of the recognition of the right to life is to protect people from being killed by the State, the entity that claims and, to a large extent, exercises monopoly on the use of force.”).

120. United Nations, Fact Sheet No. 11 (Rev. 1), *Extrajudicial, Summary or Arbitrary Executions*, <https://www.ohchr.org/Documents/Publications/FactSheet11rev.1en.pdf> [<https://perma.cc/57DF-G57X>] [hereinafter United Nations Fact Sheet No. 11].

121. 2016 Special Rapporteur Report, *supra* note 119, ¶ 51.

122. 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); 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).



international standards.<sup>123</sup> If any of the relevant standards are not met, the deprivation of life will be deemed arbitrary and a violation of international law.<sup>124</sup> Accordingly, there must be sufficient legal basis for the use of lethal force.<sup>125</sup> Lethal force may only be used for legitimate objectives, which are limited to saving a person from serious injury or death.<sup>126</sup> 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.”<sup>127</sup> 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 . . . .”<sup>128</sup> Special provisions must be made in cases of public demonstrations or when individuals are detained by the state.<sup>129</sup> Laws regulating the use of force must be published and accessible.<sup>130</sup> 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.”<sup>131</sup>

Human rights law addresses extrajudicial killing in other ways. The prohibitions against crimes against humanity and genocide also address extrajudicial killing. Murder was first recognized as a crime against humanity in the Charter of the International Military Tribunal at Nuremberg.<sup>132</sup> Killing was first recognized as a form of

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123. 2014 Special Rapporteur Report, *supra* note 118, ¶ 55. The Special Rapporteur identified two “soft law” sources that describe the conditions for use of force by law enforcement officers: Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

124. *Id.*

125. *Id.* ¶ 56.

126. *Id.* ¶ 58.

127. *Id.* ¶ 59.

128. *Id.* ¶ 65.

129. *Id.* ¶¶ 75, 76. The U.N. Human Rights Council has indicated that “states have the responsibility, including in the context of peaceful protests, to promote and protect human rights and to prevent human rights violations, including extrajudicial, summary or arbitrary executions, . . . .” Human Rights Council Res. 25/38, The Promotion and Protection of Human Rights in the Context of Peaceful Protests, ¶ 2, U.N. Doc. A/HRC/RES/25/38 (Apr. 11, 2014).

130. 2014 Special Rapporteur Report, *supra* note 118, ¶ 57.

131. *Id.* ¶ 64.

132. Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 82 U.N.T.S. 279.

genocide in the Genocide Convention.<sup>133</sup> These norms have since been codified in the statutes of various ad hoc international criminal tribunals as well as the Rome Statute of the International Criminal Court. Genocide includes killing members of an enumerated group with the intent to destroy that group, in whole or in part.<sup>134</sup> Murder constitutes a crime against humanity when it is committed as part of a widespread or systematic attack directed against a civilian population.<sup>135</sup> The Elements of Crimes document adopted under the Rome Statute indicates that murder or killing has occurred when “[t]he perpetrator killed one or more persons.”<sup>136</sup> The term “killed” is used interchangeably with the term “caused death.”<sup>137</sup> This language is repeated with respect to both genocide and crimes against humanity.

## B. International Humanitarian Law

The prohibition against extrajudicial killing is not limited to human rights law. It is also addressed in international humanitarian law, although there are nuances to its application in times of armed conflict.<sup>138</sup> On the one hand, the killing of combatants in hostilities is lawful when such acts comply with the applicable principles of necessity, distinction, proportionality, and precaution.<sup>139</sup> On the other

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133. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

134. Rome Statute, *supra* note 7, art. 6(a).

135. *Id.* art. 7(a)–(b).

136. International Criminal Court, Elements of Crimes, at 5, U.N. Doc. ICC-PIDS-LT-03-002/11\_Eng (2011) (footnote omitted) [hereinafter ICC Elements of Crimes].

137. *Id.* n.7.

138. See generally THE GREY ZONE: CIVILIAN PROTECTION BETWEEN HUMAN RIGHTS AND THE LAWS OF WAR (Mark Lattimer & Philippe Sands eds., 2018) (examining the shortcomings in human rights and humanitarian law with respect to civilian protection in modern armed conflicts); ALEXANDER B. DOWNES, TARGETING CIVILIANS IN WAR (2012) (exploring the norms surrounding use of force on non-combatants as well as when and why those norms are broken).

139. See generally INTERNATIONAL AND OPERATIONAL LAW DEPT., U.S. ARMY JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DESKBOOK (David Lee ed., 5th ed. 2015) (discussing use of force in conjunction with these principles); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN L. 1, 5 (2010) (considering the function of these principles in international humanitarian law and human rights law); Ryan Goodman, *The Power to Kill or*

hand, killings that do not comply with these principles constitute extrajudicial killings. Non-combatants, including civilians, are thus protected by international humanitarian law. In sum, “human rights and IHL [international humanitarian law] regulate the resort by States to lethal force based on the same fundamental principles.”<sup>140</sup>

Within international humanitarian law, the 1949 Geneva Conventions merit special consideration because of their significance in the drafting of the TVPA. Common Article 3, which was specifically referenced in the TVPA’s legislative history, provides that “violence to life and person, in particular murder of all kinds” is “prohibited at any time and in any place whatsoever.”<sup>141</sup> Commentary provided by the International Committee of the Red Cross (“ICRC”) on the Geneva Conventions does not offer an explicit definition regarding the elements for murder as set forth in Common Article 3.<sup>142</sup> But, it emphasizes the prohibition against murder is absolute and there are no loopholes, exceptions, or “attenuating circumstances” to justify such acts.<sup>143</sup> While Common Article 3 is limited to non-international armed conflicts, a similar prohibition applies to international armed conflicts. The Geneva Conventions designate willful killing as a grave breach, which subjects the perpetrator to criminal liability and imposes an obligation on States Parties to prosecute.<sup>144</sup> The prohibitions against murder and willful killing were affirmed in the 1977 Additional Protocols to the Geneva Conventions.<sup>145</sup> More recently, these

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*Capture Enemy Combatants*, 24 EUR. J. INT’L L. 819 (2013) (discussing restraints on use of force, including necessity and proportionality).

140. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 176 (2008). See also THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 45–55, 473–526 (2006) (discussing the similarities and interaction between human rights and international humanitarian law); Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence*, 19 EUR. J. INT’L L. 161, 161–82 (2008) (exploring the extent and consequences of convergence of human rights law and international humanitarian law).

141. Third Geneva Convention, *supra* note 24, art. 3(1).

142. OSCAR M. UHLER ET AL., COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 38 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

143. *Id.*

144. Third Geneva Convention, *supra* note 24, art. 129–30.

145. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, June 8, 1977, 1125 U.N.T.S. 3, 37 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and

prohibitions were codified as war crimes in the Rome Statute of the International Criminal Court ("Rome Statute").<sup>146</sup> The practice of international criminal tribunals reveals there is no meaningful distinction between murder and willful killing.<sup>147</sup>

The prohibition against extrajudicial killing in times of armed conflict is not limited to treaty law; it has attained the status of customary international law.<sup>148</sup> This status is reflected in a multitude of established norms. For example, it is well-established that combatants must distinguish between civilian and military objectives.<sup>149</sup> Combatants may not direct attacks against civilians.<sup>150</sup> And, they must verify that targets are, in fact, military targets.<sup>151</sup> Moreover, international humanitarian law prohibits indiscriminate attacks,<sup>152</sup> which are defined as attacks that are not directed or cannot be directed at a specific military objective.<sup>153</sup>

In sum, the right to life and the corresponding right to be free from the arbitrary deprivation of life provide the foundation for the prohibition against extrajudicial killing. This prohibition regulates the use of lethal force by law enforcement, security forces, and military personnel. It applies in times of peace, as well as in times of armed conflict. While such killings are often captioned in different ways—murder, arbitrary deprivation of life, unlawful killing, summary execution, arbitrary execution, extrajudicial killing—they maintain a common core. The International Commission of Jurists has

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Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4, June 8, 1977, 1125 U.N.T.S. 609, 612 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II]. See also 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 311 (2005) (noting the prohibition of willful killing and murder by the Geneva Conventions and 1977 Additional Protocols).

146. Rome Statute, *supra* note 7, art. 8.

147. KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 39–40 (2003).

148. HENCKAERTS & DOSWALD-BECK, *supra* note 145, at 37.

149. *Id.* at 25.

150. *Id.* at 3.

151. *Id.* at 55.

152. *Id.* at 37.

153. *Id.* at 40.

recognized that the right to life norm covers “a broad spectrum of phenomena and practices.”<sup>154</sup>

Thus, for example, the following are considered to constitute a violation of this right: the imposition of the death penalty in conditions prohibited by international law; the deaths of persons deprived of their liberty as a result of abandonment, excessive use of force and/or detention conditions that endanger the personal integrity of detainees; deaths due to excessive use and/or unlawful use of lethal force by law enforcement officials; deaths resulting from attacks by State security forces, paramilitary groups, death squads or other groups of individuals acting with the authorization, tolerance or acquiescence of the state; and the deliberate and intentional killings of civilians, combatants *hors de combat* and ‘protected persons’ under international humanitarian law.<sup>155</sup>

Scholars have also recognized the broad range of conduct that implicates the right to life norm.<sup>156</sup> As noted by Sarah Knuckey,

[i]nternational law regulates all killings committed during peacetime or armed conflict, and killings of many different forms are prohibited by a variety of distinctly named international violations and crimes. The different constructions often capture a key characteristic of a particular form of unlawful killing. Terminology and the elements of different unlawful killing offences often overlap, however, and clearly separating legal offences, as well as conceptually

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154. INT’L COMM’N OF JURISTS, ENFORCED DISAPPEARANCE AND EXTRAJUDICIAL EXECUTION: INVESTIGATION AND SANCTION, PRACTITIONERS GUIDE NO. 9, at 63 (2015).

155. *Id.*

156. See generally RODLEY & POLLARD, *supra* note 1, at 246–51 (discussing the meaning of the “the right to life” norm in the international sphere); Interview, *The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston*, 2 J. HUM. RTS. PR. 355, 355–73 (2010) (addressing the complexities of extrajudicial killings); Edy Kaufman & Patricia Weiss Fagan, *Extrajudicial Executions: An Insight into the Global Dimensions of a Human Rights Violation*, 9 HUM. RTS. Q. 81, 81 (1981) (discussing regional practices of different countries that can be construed as violating the obligation to protect the right to life). Cf. MELZER, *supra* note 140, at 3–8.

separating forms of killings, can in practice be challenging. The content of offences and names of killings have also shifted over time, and there have been explicit attempts to both harmonize and distinguish.<sup>157</sup>

This overview provides a foundation for a more detailed assessment of the prohibition against extrajudicial killing.

### III. DEFINING EXTRAJUDICIAL KILLING

International practice reveals that the prohibition against extrajudicial killing has two components: a substantive component and a procedural component.<sup>158</sup> The substantive component places limits on the use of force by states to prevent the arbitrary deprivation of life.<sup>159</sup> The procedural component requires states to conduct investigations and pursue accountability when there is reason to believe an arbitrary deprivation of life has occurred. An extrajudicial killing can thus implicate both components.<sup>160</sup>

#### A. The Substantive Component

The prohibition against extrajudicial killing encompasses a variety of situations involving the arbitrary deprivation of life. While its application will vary based upon particular circumstances, there is a common core to the prohibition.<sup>161</sup> An extrajudicial killing occurs when:

1. a public official or other person acting at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity;
2. whose acts were intentional or negligent;

157. Sarah Knuckey, *Murder in Common Article 3*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 449, 466 (Andrew Clapham et al., eds. 2015).

158. See WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* 134 (2015) [hereinafter SCHABAS II]; SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 167, 176 (3d ed., 2013); LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY* 342–43 (Rosalind Greenstein trans., 2011).

159. 2014 Special Rapporteur Report, *supra* note 118, ¶ 46.

160. *Id.*

161. See PARK, *supra* note 6, at 22.

3. and resulted in one or more deaths;
4. and who knew or should have known that death may result from their acts;
5. and who failed to comply with any relevant standards regarding the use of force, including the principles of necessity, distinction, proportionality, and precaution;
6. and whose acts were not authorized by legal process or complied with the rule of law.

These elements constitute the substantive component of the prohibition against extrajudicial killing. Each element must be established for a claim of extrajudicial killing.

Extrajudicial killing requires some form of state action.<sup>162</sup> This requirement is consistent with most international norms. However, it is well-established that the state action requirement can be implicated when non-state actors operate with the consent or acquiescence of public officials or other persons acting in an official capacity.<sup>163</sup> In these cases, states can be held responsible for violations committed by non-state actors.<sup>164</sup> Claims of command or superior responsibility are distinct from this element because they constitute a theory of liability rather than a separate offense.<sup>165</sup>

The *actus reus* for extrajudicial killing involves acts or omissions that result in death. While most cases of extrajudicial killing will involve affirmative acts by perpetrators, there may be occasions when the failure to act also results in death. And, of course, there must

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162. See United Nations Fact Sheet No. 11, *supra* note 120, at 1.

163. See generally NON-STATE ACTORS IN INTERNATIONAL LAW 164 (Math Noortmann et al. eds., 2015) (explaining that a sufficiently strong link to a non-state actor can justify the attribution of non-state conduct to the state); NON-STATE ACTORS AND INTERNATIONAL LAW 454 (Andrea Bianchi ed., 2009) (noting that the state actor requirement can be fulfilled when the state acquiesces to human rights violations by private actors).

164. See, e.g., Comm'n on Human Rights, *Report of the Special Rapporteur on civil and political rights, including the questions of disappearances and summary executions*, ¶20, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (holding a number of states accountable for death threats carried out by paramilitary groups tolerated by the state).

165. Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, 13 MELBOURNE J. INT'L L. 1, 32–36 (2012).

be a causal link between the act or omission and the death.<sup>166</sup> The *mens rea* for extrajudicial killing includes several elements. The acts or omissions that give rise to an extrajudicial killing must be deliberate. To qualify as deliberate, an act or omission must involve intentional or negligent behavior.<sup>167</sup> The perpetrators must also know or have reason to know that death may result from their acts or omissions.

The principles of necessity, distinction, proportionality, and precaution are essential for assessing the legitimacy of state action in cases of extrajudicial killing.<sup>168</sup> They provide a set of independent standards for determining whether the use of lethal force is lawful or a violation of international law. These principles are particularly significant because they confirm that not all deaths are unlawful. On some occasions, the use of lethal force may be justified. For example, the U.N. Special Rapporteur has indicated that “[t]he intentional lethal use of force by law enforcement officials and others is permissible in very exceptional cases only, namely when its use against a perpetrator is strictly unavoidable in order to protect human life from unlawful attack (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary).”<sup>169</sup> The

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166. See generally Vladislava Stoyanova, *Causation Between State Omission and Harm Within the Framework of Positive Obligations Under the European Convention on Human Rights*, 18 HUM. RTS. L. REV. 309 (2018).

167. See generally PARK, *supra* note 6, at 22, 34 (explaining that even where the term “negligence” is not explicitly used, deprivations of the right to life include negligent as well as intentional deprivations by the state).

168. See generally GENEVA ACADEMY, *USE OF FORCE IN LAW ENFORCEMENT AND THE RIGHT TO LIFE: THE ROLE OF THE HUMAN RIGHTS COUNCIL 6–10* (2016) (noting that necessity, proportionality, and precaution are the three main principles governing the use of force); Juana Maria Ibanez Rivas, *Use of Force: Requirements, Limitations and Pending Challenges from the Perspective of the Jurisprudence of the Inter-American Court of Human Rights*, in *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE* 193, 206–07 (Yves Haeck et al. eds., 2015) (explaining that any authorized use of force must be in accordance with principles of legality, legitimacy, necessity, and proportionality); SCHABAS II, *supra* note 158, at 156–58 (noting that a court must not only decide whether the use of force was for a legitimate aim but also whether the measures used were proportionate); MELZER, *supra* note 140, at 100–02 (discussing sufficient legal basis, necessity, proportionality, and precaution as elements to determine “arbitrariness” of deprivation of life).

169. U.N. Secretary-General, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts*, ¶ 51, U.N. Doc. A/HRC/32/39 (Sept. 6, 2016) (“The evaluation of necessity is a factual cause and effect assessment of whether the use of force is actually required to achieve the



U.N. Special Rapporteur has also noted that the principle of precaution is an additional consideration for assessing whether the lethal use of force by state officials is legitimate or whether it constitutes an extrajudicial killing. According to the Special Rapporteur's 2016 Report, "[i]t is not enough for a State or its agents to say that they had no choice but to use force if the escalation of that situation could reasonably have been avoided through precautionary measures."<sup>170</sup> Thus, the principles of necessity, distinction, proportionality, and precaution offer essential guides for regulating the use of lethal force and for determining when an extrajudicial killing has occurred.

Finally, an extrajudicial killing is an act that has not been authorized by legal process or complies with the rule of law. This generally means approval by a regularly constituted court that affords the full panoply of due process protections. It is not always sufficient for an extrajudicial killing to be authorized by a legislative or executive act. Judicial review offers a check against excessive government authority by providing individualized assessment.<sup>171</sup> In sum, this is a fact-intensive and rule-based inquiry to determine whether the deprivation of life is arbitrary.

Various human rights courts and other human rights bodies have examined the substantive component of the prohibition against extrajudicial killing and have applied it in specific cases.

In *Umetaliev v. Kyrgyzstan*, for example, the U.N. Human Rights Committee considered a claim of extrajudicial killing in relation to Article 6 of the ICCPR.<sup>172</sup> In this case, a government militia opened

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desired outcome (qualitative necessity) and, if so, how much force is unavoidable for that purpose (quantitative necessity). The requirement of necessity raises the question of whether the threat could not be averted by resort to less harmful means and thus requires a graduated approach to the use of force.”)

170. *Id.* ¶ 55. See also INT'L COMM'N OF JURISTS, *supra* note 154, at 72 (listing the basic principles that govern the use of force by state actors).

171. See generally SCHABAS II, *supra* note 158, at 126–27 (explaining that the positive obligation on States to protect life includes a duty to have appropriate legal and administrative frameworks in place to deter the commissions of offences against persons); NOWAK, *supra* note 44, at 122–24 (discussing the legislative bodies' specific obligation to protect the right to life, under Art.6(1) of the CCPR); see also Hugo van Alphen v. The Netherlands, Commc'n No. 305/1988, Hum. Rts. Comm., ¶ 5.8 (July 23, 1990) (noting that “arbitrariness” of deprivation “is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.”).

172. *Umetaliev v. Kyrgyzstan*, Commc'n No. 1275/2004, Hum. Rts. Comm. (Oct. 30, 2008).

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 Human Rights Committee acknowledged that the use of firearms by public authorities could have serious consequences for the right to life.<sup>173</sup> “Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”<sup>174</sup> 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.”<sup>175</sup> Accordingly, the Committee determined that Kyrgyzstan had violated Article 6.

The European Court of Human Rights has also developed an extensive jurisprudence on extrajudicial killing. In *Gul v. Turkey*, for example, a special operations unit of a police force that was conducting a search for suspected terrorists received faulty intelligence that led them to the house of Mehmet Gul.<sup>176</sup> 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.<sup>177</sup> 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.”<sup>178</sup> 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.<sup>179</sup> Examining the facts of the case, the Court stated it did not need “to determine whether the police officers had formulated the intention of killing or acted with

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173. *Id.* ¶ 9.4.

174. *Id.* ¶ 9.5.

175. *Id.* ¶ 9.4.

176. *Gul v. Turkey*, App. No. 22676/93, ¶12 (Eur. Ct. H.R. 2000).

177. *Id.* ¶¶ 23, 28, 82.

178. *Id.* ¶ 77.

179. *Id.*

reckless disregard for the life of the person behind the door.”<sup>180</sup> Rather, the Court determined the police officers had used a disproportionate degree of force. Accordingly, the Court concluded that Turkey had violated the right to life norm set forth in Article 2 of the European Convention.

In *Güleç v. Turkey*, the European Court made clear that states can be held responsible for extrajudicial killings even in the absence of evidence that security forces directly targeted specific individuals.<sup>181</sup> 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.<sup>182</sup> 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.”<sup>183</sup> Significantly, the Commission did not believe the killing was intentional. The 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.<sup>184</sup>

The Inter-American Court of Human Rights has developed a similar jurisprudence on extrajudicial killing. In *Caracazo v. Venezuela*, the Inter-American Court considered a case involving the use of force by police during a state of emergency proclaimed by the Venezuelan government.<sup>185</sup> The state of emergency, and an accompanying curfew, was in response to civil protests arising out of government economic policies. During the state of emergency, police

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180. *Id.* ¶ 80.

181. *Güleç v. Turkey*, App. No. 54/1997/838/1044, ¶ 80 (Eur. Ct. H.R. July 27, 1998).

182. *Id.* ¶ 68.

183. *Id.*

184. *Id.* ¶¶ 70, 73, 83.

185. *Case of the Caracazo v. Venezuela*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 58, ¶ 1 (Nov. 11, 1999).

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.<sup>186</sup> Significantly, some of the victims were not even engaged in civil protests but were instead hiding in their homes.<sup>187</sup> The Inter-American Court found that such actions constituted extrajudicial killings and violated the right to life norm.<sup>188</sup>

As evidenced through this diverse array of international instruments and as reflected in the practice of human rights courts and human rights bodies, an extrajudicial killing is a deliberated killing that is not authorized by a regularly constituted court that affords all the applicable due process protections or that is not otherwise justified under international law. This definition applies in times of peace and times of armed conflict.<sup>189</sup> The intentional targeting of victims is but one form of extrajudicial killing. Other forms of extrajudicial killing include indiscriminate attacks using lethal force and excessive use of lethal force by state actors.<sup>190</sup>

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186. *Id.* ¶¶ 2(h), 2(k).

187. *Id.* ¶ 2(k).

188. *Id.* ¶ 42. See also *Nadege Dorzema v. Dominican Republic, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶¶ 96–97 (Oct. 24, 2012)* (finding that the shooting of fleeing individuals constituted extrajudicial killings and was a violation of the right to life norm); *Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶¶ 4, 70–72 (Oct. 25, 2012)* (finding the indiscriminate killing of civilians in a village violated the same norm); *Montero-Aranguren et al. v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 63, 72 (July 5, 2006)* (finding that the excessive use of force by law enforcement officials against inmates that resulted in deaths constituted violations of the right to life).

189. SCHABAS II, *supra* note 158, at 153 (“The [European] Court has not left any doubt about the fact that it considers the obligations imposed by the European Convention, including the procedural obligation of article 2, to apply during armed conflict.”) (citation omitted); BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 158, at 334 (“The Inter-American Court has consistently stated that ‘instead of exonerating the State from its obligations to respect and guarantee human rights,’ the existence of a conflict, be it armed or international, ‘obliged it to act in accordance with such obligations.’”) (citation omitted).

190. See MELZER, *supra* note 140, at 3–5; INT’L COMM’N OF JURISTS, *supra* note 154, at 66; Office of the U.N. High Commissioner for Human Rights, Human Rights and Law Enforcement: A Trainer’s Guide on Human Rights, 15, U.N. Doc. HR/P/PT/5/Add.2 (2002).

## B. The Procedural Component

The prohibition against extrajudicial killing includes a procedural component. The procedural component creates an obligation on states to “investigate potentially unlawful deaths, assign responsibility and remedy violations.”<sup>191</sup> When a state knows or should know that an unlawful killing has occurred, it is required to conduct a prompt, effective, impartial, and transparent investigation.<sup>192</sup> This obligation “gives practical effect to the duties to respect and protect the right to life, and promotes accountability and remedy where the substantive right may have been violated.”<sup>193</sup> Where appropriate, the procedural component also requires prosecution of perpetrators who commit an extrajudicial killing. “Where an investigation reveals evidence that a death was caused unlawfully, the State must ensure that identified perpetrators are prosecuted and, where appropriate, punished through a judicial process.”<sup>194</sup> Finally, the procedural component requires states to provide the families of victims with a full and effective remedy, including reparations.<sup>195</sup>

The procedural component of the prohibition against extrajudicial killing has been recognized in numerous cases. In *Florentina Olmedo v. Paraguay*, the U.N. Human Rights Committee acknowledged a violation of the procedural component when Paraguay failed to conduct a meaningful investigation following the lethal use of force by state actors. In this case, the National Police attacked a group of demonstrators who had blocked a road to protest government policies.<sup>196</sup> The police used overwhelming force, including tear gas, water cannons, and firearms, to disperse the crowd. The decedent was shot and killed at point blank range by the police. While the

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191. *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, ¶ 20, U.N. Doc. A/71/372 (Sept. 2, 2016).

192. Minnesota Protocol, *supra* note 103, at 7–8. *See generally* MELZER, *supra* note 140, at 431 (“All major human rights bodies have held that the obligations flowing from the right to life necessarily entail a duty of the State to investigate deprivations of life on the part of its agents, and that non-compliance with this duty may in and of itself amount to a violation of the right to life.”) (citation omitted); *see also* BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, *supra* note 158, at 345–47.

193. Minnesota Protocol, *supra* note 103, at 4.

194. *Id.*

195. *Id.*

196. *Florentina Olmedo v. Paraguay*, Commc’n No. 1828/2008, ¶ 2.6 (Hum. Rts. Comm. 2012).

government opened an inquiry into the death, it made little progress and reached no conclusions. The U.N. Human Rights Committee indicated that the government had an obligation to protect the lives of the demonstrators.<sup>197</sup> But, the Committee also indicated the government had an obligation to conduct a meaningful investigation. “The Committee refers to its jurisprudence, according to which both a criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.”<sup>198</sup> For these reasons, the Committee concluded that a violation “may therefore arise as a result of a State party’s failure to take appropriate measures to investigate and punish or redress such a violation.”<sup>199</sup>

In *Mocanu v. Romania*, the European Court of Human Rights made a similar determination. In this case, 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 . . . .”<sup>200</sup> 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.<sup>201</sup> To be effective, the investigation must be independent.<sup>202</sup> It must be thorough.<sup>203</sup> And, it must be able to lead to the punishment of the perpetrators.<sup>204</sup> In *Mocanu*, the investigation was neither independent nor thorough. Accordingly, the Court held

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197. *Id.* ¶ 7.5.

198. *Id.* ¶ 7.3 (citations omitted).

199. *Id.* See also JOSEPH & CASTAN, *supra* note 158, at 176–79 (summarizing various cases before the HRC in which the Committee affirmed that states have positive obligations to investigate and provide redress for violations of human rights).

200. *Mocanu v. Romania*, App. Nos. 10865/09, 45886/07, and 32431/08, ¶ 316 (Eur. Ct. H.R. Sept. 17, 2014) (citations omitted).

201. *Id.* ¶ 319.

202. *Id.* ¶ 320.

203. *Id.* ¶ 325.

204. *Id.* ¶ 321.

that Romania had violated the procedural component of the right to life norm.<sup>205</sup>

In *Montero-Aranguren v. Venezuela*, the Inter-American Court of Human Rights examined the state's obligation to provide an effective remedy when claims of extrajudicial killing are raised.<sup>206</sup> In this case, security personnel used excessive force in responding to an alleged disturbance at a prison, resulting in the death of dozens of prisoners. The Inter-American Court indicated that “[u]pon learning that members of the security forces have used firearms causing lethal consequences, the State must immediately initiate a rigorous, impartial and effective investigation *ex officio*.”<sup>207</sup> According to the Court, the failure of state authorities to take such action violated the right to life norm contained in the American Convention.<sup>208</sup>

In sum, the prohibition against extrajudicial killing regulates a state's use of lethal force at every stage. States must train their security forces on the proper use of lethal force. When lethal force is used, it must comply with the principles of necessity, distinction, proportionality, and precaution. Finally, states must conduct a thorough investigation when lethal force is used and hold perpetrators of extrajudicial killings accountable for their actions.

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205. See also *McCann and Others v. United Kingdom*, App. No. 18984/91, ¶ 161 (Eur. Ct. H.R., Sept. 27, 1995) (noting that states must carry out an “effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.”); see generally Juliet Chevalier-Watts, *Effective Investigations Under Article 2 of the European Convention on Human Rights*, 21 EUR. J. INT'L L. 701 (2010) (considering the jurisprudence of the duty to investigate deaths resulting from the actions of state agents).

206. *Montero-Aranguren v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

207. *Id.* ¶ 79.

208. See also *Nadege Dorzema v. Dominican Republic*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 101 (Oct. 24, 2012) (stating “[t]he general prohibition for State officials to arbitrarily deprive life would be ineffective if no procedures existed to verify the legality of the use of lethal force exercised by State agents.”); *Myrna Mack Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 157 (Nov. 25, 2003) (stating “[s]afeguarding the right to life requires conducting an effective official investigation when there are persons who lost their life as a result of the use of force by agents of the State.”).

#### IV. *MAMANI V. BERZAIN*: A PUZZLING INTERPRETATION

While the prohibition against extrajudicial killing is firmly established and its meaning well-defined under international law, the definition has been subject to some dispute in U.S. courts. *Mamani v. Berzain* offers an instructive (yet puzzling) narrative on how some federal courts assess claims of extrajudicial killing.

In *Mamani v. Berzain*, a group of Bolivian nationals filed separate lawsuits against Gonzalo Sánchez de Lozada, the former President of Bolivia, and José Carlos Sánchez Berzaín, the former Defense Minister of Bolivia, alleging extrajudicial killing, crimes against humanity, and several other claims.<sup>209</sup> The allegations of extrajudicial killing were raised under the ATS and TVPA. The two lawsuits were eventually consolidated in the federal district court for the Southern District of Florida, and the plaintiffs filed an Amended Consolidated Complaint on May 16, 2008.<sup>210</sup>

The claims in *Mamani* arose out of public protests against the Bolivian government's economic and energy policies. The plaintiffs alleged the defendants had planned and ordered military operations in several villages to suppress the protests. These military operations resulted in the extrajudicial killing of dozens of civilians.

The Defendants' response to the protests of September and October 2003 was to order 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, many of whom—including the victims on whose behalf Plaintiffs are suing—were not involved in the protests at all, and who were not even in the vicinity of the protests. In all, security forces under the direction of Defendants intentionally killed 67

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209. Complaint, *Mamani v. Sanchez Berzain*, No. 07-22459-Civ-Jordan (S.D. Fla. Sept. 19, 2007); Complaint, *Mamani v. Sanchez de Lozada*, No. 07-cv-2507 (D. Md. Sept. 19, 2007). While the complaints addressed extrajudicial killing as a discrete claim, they also raised separate claims of violations of the right to life, liberty, and security of person.

210. Amended Consolidated Complaint, *Mamani v. Sanchez de Lozada*, Nos. 08-21063-Civ & 07-22459-Civ (S.D. Fla. May 16, 2008).



and injured over 400, primarily members of Bolivia's indigenous Aymara communities.<sup>211</sup>

The plaintiffs alleged the two defendants were responsible for these killings under several theories of liability, including command responsibility, conspiracy, and aiding and abetting.<sup>212</sup> They alleged that the defendants possessed and exercised command and control over the Bolivian military as well as the police.<sup>213</sup> They further alleged the defendants had planned the widespread attacks against civilians and knew that civilians had been targeted with lethal force.<sup>214</sup> In addition, the plaintiffs alleged the defendants failed to stop the extrajudicial killings and failed to investigate these acts or punish personnel for committing these acts.<sup>215</sup>

In response to the Amended Consolidated Complaint, the defendants filed a motion to dismiss, asserting that the court lacked jurisdiction to hear the case and that the plaintiffs had not pled sufficient facts to support their claims.<sup>216</sup> The defendants asserted the court lacked jurisdiction pursuant to the political question doctrine, the act of state doctrine, and immunity principles. They also asserted the plaintiffs had failed to allege any violations of international law. They argued, *inter alia*, that the TVPA claims should be dismissed because the plaintiffs had not exhausted their domestic remedies in Bolivia as required by the TVPA.<sup>217</sup>

The district court issued two separate opinions addressing the defendants' challenges to the lawsuit. On June 19, 2009, the district court agreed to dismiss the TVPA claims.<sup>218</sup> It noted that the exhaustion of domestic remedies is an explicit requirement under the TVPA. Accordingly, the plaintiffs were required to seek compensation in Bolivia before they could proceed with their TVPA claims. Because the plaintiffs had failed to do so, the court dismissed their TVPA claims.<sup>219</sup> However, the dismissal was without prejudice, thereby

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211. *Id.* at 1.

212. *Id.* at 18–20.

213. *Id.* at 18.

214. *Id.* at 19.

215. *Id.* at 20.

216. Defendants' Joint Motion to Dismiss, *Mamani v. Sanchez de Lozada*, Nos. 07-22459 & 08-21063 (S.D. Fla. May 30, 2008).

217. *Id.* at 34–36.

218. *See Mamani v. Berzain*, 636 F. Supp. 2d 1326, 1332 (S.D. Fla. 2009).

219. *Id.* at 1333.

allowing the plaintiffs the opportunity to refile their TVPA claims after they exhausted their remedies under Bolivian law.<sup>220</sup>

On November 25, 2009, the district court addressed the defendants' remaining challenges.<sup>221</sup> The court began by rejecting the defendants' jurisdictional challenges regarding the political question doctrine and the act of state doctrine.<sup>222</sup> The court determined there were judicially manageable standards available to assess the plaintiffs' claims and that comity principles did not prevent the court from considering these claims. The court also rejected the defendants' assertions that the FSIA or the common law doctrine of head-of-state immunity applied to bar the lawsuit.<sup>223</sup>

The district court then assessed whether the claims of extrajudicial killing met the standards for ATS liability and whether the plaintiffs had pled sufficient facts to support such claims.<sup>224</sup> While the district court acknowledged that extrajudicial killing is a violation of international law and actionable under the ATS, the court also noted "it is not clear what constitutes an extrajudicial killing."<sup>225</sup> The court reviewed several cases litigated under the ATS, TVPA, and FSIA to identify examples of extrajudicial killings.<sup>226</sup> It determined that "courts have upheld claims for extrajudicial killings when a political opponent has been specifically targeted (most commonly through assassinations) or when innocent civilians have been attacked without provocation."<sup>227</sup>

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220. *Id.*

221. *See Mamani v. Berzain*, 2009 WL 10664387 (S.D. Fla. Nov. 25, 2009).

222. *Id.* at \*4–12.

223. *Id.* at \*12–13. The Bolivian government had previously waived any immunity that the defendants could claim as former foreign government officials which is a prerequisite for jurisdiction under 28 U.S.C. § 1605(a)(1) (2016).

224. *Id.* at \*14–15.

225. *Id.* at \*15.

226. *Mamani*, 2009 WL 10664387, at \*15. The FSIA incorporates the TVPA's definition of extrajudicial killing.

227. *Id.* The district court referenced several cases that addressed claims of extrajudicial killings under the TVPA and FSIA. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1152 (11th Cir. 2005) (holding that a jury could conclude that the decedent was a victim of an extrajudicial killing where defendant selected him—a political prisoner—for execution, drove him out of prison in a truck, and repeatedly stabbed him to death); *Wachsman ex rel. Wachsman v. Islamic Republic of Iran*, 603 F. Supp. 2d 148, 155 (D.D.C. 2009) (finding abduction and execution of unarmed civilian falls within the FSIA's definition of extrajudicial killing); *Lizarbe v. Hurtado*, Case No. 07-21783, Order [D.E. 33] (S.D. Fla. Mar. 4, 2008) (Jordan, J.) (awarding damages for extrajudicial killings where Peruvian security forces entered village, rounded up unarmed civilians, beat the men, raped some of the

On the other hand, “a soldier’s killing of an armed attacker in self-defense” would not be considered an extrajudicial killing.<sup>228</sup>

The district court then considered the allegations of extrajudicial killing set forth in the Amended Consolidated Complaint to determine whether they alleged “sufficient facts to plausibly suggest that the killings were targeted.”<sup>229</sup> The court determined that seven plaintiffs had pled sufficient facts to support their claims. However, two of the plaintiffs had not pled sufficient facts, and their claims were accordingly dismissed.<sup>230</sup>

The district court also considered the defendants’ argument that an “extrajudicial killing requires a showing of custody or control.” It rejected this argument, noting that “[c]ourts have generally required that claims for extrajudicial killing be conducted under actual or apparent authority, or color of law, of a foreign nation.”<sup>231</sup> According to the court, it was sufficient that the plaintiffs alleged “their relatives were killed by the Bolivian armed forces” and that the armed forces acted under the defendants’ authority.<sup>232</sup>

In addition to the extrajudicial killing claim, the district court allowed the claim for crimes against humanity to proceed. The court found that “crimes against humanity are recognized as violations of

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women, and ultimately used machine guns and grenades to kill villagers who had done nothing to present a public threat); *Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27, 34 (D.D.C. 2008) (former prime minister’s murder and mutilation met the definition of an extrajudicial killing under the TVPA); *Oveissi v. Islamic Republic of Iran*, 498 F. Supp. 2d 268, 275–76 (D.D.C. 2007) (gunning down former chief of armed forces on a street qualified as an extrajudicial killing); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1248 (S.D. Fla. 1997) (Cuban Air Force committed extrajudicial killings in violation of the TVPA when it shot down unarmed, civilian airplanes on a humanitarian mission in international waters: “[T]he unprovoked firing of deadly rockets at defenseless, unarmed civilian aircraft undoubtedly comes within the statute’s meaning of ‘extrajudicial killing.’”); *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (assuming that the assassination of political opponent fell within TVPA’s definition of extrajudicial killing).

228. *Mamani*, 2009 WL 10664387, at \*15.

229. *Id.* at \*16.

230. *Id.* at \*16–17.

231. *Id.* at \*17 (citing *Doe v. Saravia* and *Tachiona v. Mugabe* for support. In both cases, the victims’ deaths constituted extrajudicial killings even though they were not in the custody or control of state actors. *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002)).

232. *Id.*

international law.”<sup>233</sup> According to the court, crimes against humanity require “a widespread or systematic attack directed against any civilian population.”<sup>234</sup> The court then determined the plaintiffs had pled sufficient facts to support their claims.<sup>235</sup>

In contrast, the district court dismissed the claims involving the rights to life, liberty, and security of persons as well as the freedom of assembly and association.<sup>236</sup> Unlike extrajudicial killing and crimes against humanity, the court found that these other claims lacked the required specificity for litigation. Notably, the court did not acknowledge the connection between the right to life norm and extrajudicial killing. The cases cited by the court in support of dismissal also did not acknowledge the connection.<sup>237</sup>

Finally, the district court found that command responsibility offered a viable theory of secondary liability. Relying on circuit precedent, the court identified three elements to command responsibility:

- (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime;
- (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the laws of war; and
- (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.<sup>238</sup>

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233. *Mamani*, 2009 WL 10664387, at \*17 (citing *Cabello*, 402 F.3d at 1161; *Aldana v. Del Monte Fresh Produce, NA, Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005)).

234. *Id.*

235. *Id.* at \*17–20.

236. *Id.* at \*21.

237. The court referenced the following cases: *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254 (2d Cir. 2003); *Bowoto v. Chevron Corporation*, 557 F. Supp. 2d 1080, 1095 (N.D. Cal. 2008); *Saperstein v. Palestinian Auth.*, 2006 WL 3804718, at \*8 (S.D. Fla. Dec. 22, 2006); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006). *Id.*

238. *Id.* at \*20 (quoting *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002)).

The court rejected the defendants' arguments that command responsibility was limited to violations of the laws of war.<sup>239</sup> It concluded that the plaintiffs had pled sufficient allegations to support a claim under the theory of command responsibility.<sup>240</sup>

The defendants subsequently petitioned the Eleventh Circuit for interlocutory review of the district court's decision regarding the extrajudicial killing claims.<sup>241</sup> The Eleventh Circuit granted the request for interlocutory review and, on August 29, 2011, it reversed the district court's ruling on extrajudicial killing.<sup>242</sup> Its analysis can be divided into three sections.

First, the Eleventh Circuit acknowledged that extrajudicial killing and crimes against humanity are recognized violations of international law.<sup>243</sup> In support, it cited circuit precedent that had already established the viability of such claims under the ATS.<sup>244</sup> Despite this acknowledgement, the court made several statements implying that extrajudicial killing may not be sufficiently clear to justify such a finding. It noted, for example, that "the pertinent international law is not already clear, definite, or universal enough to reach the alleged conduct."<sup>245</sup> The court seemed to distinguish between extrajudicial killing as a general matter and the extrajudicial killing claims as alleged by the plaintiffs.

Second, the Eleventh Circuit considered the meaning of extrajudicial killing.<sup>246</sup> Even though the district court dismissed the TVPA claims, the Eleventh Circuit relied on the statute's definition of extrajudicial killing to inform its analysis of the corresponding ATS claims. The court assumed "for purposes of this discussion that an extrajudicial killing falling within the statutory definition of the TVPA

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239. *Id.*

240. *Id.* at \*21.

241. The district court granted the defendants' motion for certification for interlocutory appeal on Mar. 17, 2010. *Mamani v. Berzain*, No. 07-22459-CIV, 2010 WL 11442696, at \*3 (S.D. Fla. Mar. 17, 2010).

242. *Mamani v. Berzain*, 654 F.3d 1148, 1157 (11th Cir. 2011).

243. *Id.* at 1152.

244. *Id.* (citing *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151–52 (11th Cir. 2005)).

245. *Id.* at 1157.

246. The Eleventh Circuit expressed its agreement with the district court's statement that the meaning of extrajudicial killing is not clear. *Id.* at 1155.

would also likely violate established international law.”<sup>247</sup> It noted, however, that this may not always be true.<sup>248</sup>

The Eleventh Circuit stated that not all deliberated killings constitute an extrajudicial killing.<sup>249</sup> According to the court, something more is required: deaths must be “‘deliberate’ in the sense of being undertaken with studied consideration and purpose.”<sup>250</sup> Thus, “some targeting [is] not enough to state a claim of extrajudicial killing under already established and specifically defined international law.”<sup>251</sup>

Third, the Eleventh Circuit considered the nature of the plaintiffs’ claims against the defendants and whether the Amended Consolidated Complaint offered plausible claims for relief or only conclusory allegations.<sup>252</sup> The court based its analysis on the heightened pleading standards set forth by the Supreme Court in *Ashcroft v. Iqbal*.<sup>253</sup>

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 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.<sup>254</sup>

Reviewing the allegations in the Amended Consolidated Complaint, the court indicated they resembled “statements of legal conclusions rather than true factual allegations.”<sup>255</sup> The court noted

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247. *Id.* at 1154 n.7.

248. In support, the court cited to *Aldana v. Del Monte Fresh Produce, NA.*, where the Eleventh Circuit acknowledged the distinction between the TVPA’s definition of torture and the definition under international law. *Id.* (citing *Aldana v. Del Monte Fresh Produce, NA, Inc.*, 416 F.3d 1242, 1252 (11th Cir. 2005)).

249. *Id.* at 1155.

250. *Id.*

251. *Id.*

252. *Id.* at 1153.

253. *Ashcroft v. Iqbal*, 556 U.S. 662, 662–65 (2009); *Mamani v. Berzain*, 654 F.3d 1148, 1153 (11th Cir. 2011).

254. *Mamani*, 654 F.3d at 1154 (emphasis in original).

255. *Id.* at 1153.

the defendants were not accused of directing soldiers to target the decedents.

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.’<sup>256</sup>

With respect to the individual deaths, the court suggested that each of them “could plausibly have been the result of precipitate shootings during an ongoing civil uprising,” and no facts showed the “deaths were ‘deliberate’ in the sense of being undertaken with studied consideration and purpose.”<sup>257</sup> The court also suggested the deaths could have been the result of an “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.”<sup>258</sup> Finally, the court stated that the “[p]laintiffs 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.”<sup>259</sup>

In a footnote, the Eleventh Circuit offered a slight qualification to its analysis.<sup>260</sup> It acknowledged the factual allegations in the complaint could establish liability for extrajudicial killing by the actual

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256. *Id.* at 1153–54 (emphasis in original) (citing *Iqbal*, 556 U.S. at 681).

257. *Id.* at 1155.

258. *Id.* The Eleventh Circuit distinguished this case from its prior decision in *Cabello v. Fernandez-Larios*, which upheld an ATS claim for extrajudicial killing. *Id.* (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005)). According to the court, “[t]he 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.” *Mamani*, 654 F.3d at 1155 n.9.

259. *Mamani*, 654 F.3d at 1155 (emphasis in original) (referencing *Belhas v. Ya’alon*, 515 F.3d 1279, 1293 (D.C. Cir. 2008) (William 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.”)).

260. *Id.* at 1155 n.8.

shooters. But, this case involved different allegations against a different group of defendants. While the court did not preclude the possibility of aiding and abetting liability or conspiratorial liability, it found the pleadings did not offer sufficient facts to support such claims.<sup>261</sup>

On remand, the district court granted the plaintiffs leave to amend their complaint. And, on June 21, 2013, the plaintiffs filed their Second Amended Consolidated Complaint under the ATS and TVPA alleging extrajudicial killing, crimes against humanity, and wrongful death under state law.<sup>262</sup> In response to the Eleventh Circuit's earlier decision, the plaintiffs offered additional factual allegations in support of their claims. For example, the complaint identified specific decisions made by the defendants that resulted in extrajudicial killings:

[O]n more than one occasion, the defendants candidly discussed with each other and with advisors how many civilian deaths would be necessary to effectively block active opposition to their plans. Defendants made a conscious decision that thousands of unlawful killings would be both necessary and acceptable to deter protests. For example, in a meeting before the 2002 elections, the defendants agreed that they would have to kill 2,000 or 3,000 people in order to ensure that popular opposition would not block their proposals.

[A]s part of the implementation of their plan, once in office the defendants issued secret decrees that authorized the Bolivian Armed Forces to respond to protests in civilian communities with lethal military tactics, rather than law enforcement procedures. The unlawful decrees authorized the Armed Forces to treat unarmed Bolivian civilians as if they were armed, enemy combatants who could be shot and killed on sight.<sup>263</sup>

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261. *Id.*

262. Second Amended Consolidated Complaint at 1, *Mamani v. Sanchez de Lozada*, Nos. 08-21063-CV & 07-22459-CV (S.D. Fla. June 21, 2013).

263. *Id.* at 1–2.



The plaintiffs further alleged that “the troops were ordered to use lethal munitions and to shoot ‘at anything that moved.’”<sup>264</sup> As a result of these policies, the plaintiffs alleged that several innocent civilians were killed, none of whom were armed or threatening the security forces. The complaint described several civilian deaths, including the death of an eight-year-old child who was fatally shot inside her home and a pregnant woman who was also killed while sitting in her home.<sup>265</sup> The complaint described how other individuals were killed as they sought to hide from the attacks or fled into the surrounding countryside. In total, the plaintiffs’ alleged military operations had killed 58 people and wounded over 400 others.<sup>266</sup> In response, the defendants filed a motion to dismiss the Second Amended Consolidated Complaint.<sup>267</sup>

On May 20, 2014, the district court dismissed the ATS claims pursuant to the Supreme Court’s 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.*, which precluded ATS claims that did not “touch and concern” the United States with sufficient force to overcome the presumption against extraterritoriality.<sup>268</sup> However, the court allowed the TVPA claims to proceed. The court rejected the defendants’ assertion that the plaintiffs’ receipt of compensation in Bolivia precluded them from now bringing TVPA claims in the United States.<sup>269</sup>

In assessing the claims of extrajudicial killing, the court interpreted the Eleventh Circuit’s prior decision as establishing a two-step inquiry: “(1) do the non-conclusory factual allegations in the Complaint plausibly suggest that Plaintiffs’ relatives’ deaths were extrajudicial killings; and (2) if so, do they also plausibly suggest that Defendants are secondarily liable for the killings?”<sup>270</sup>

With respect to the first prong, the district court determined that the Second Amended Consolidated Complaint plausibly suggested that the victims were subjected to extrajudicial killings. The court

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264. *Id.* at 18–19.

265. *Id.* at 19, 29.

266. *Id.* at 2.

267. Defendants’ Joint Motion to Dismiss Plaintiffs’ Second Amended Consolidated Complaint and Incorporated Memorandum of Law, *Mamani v. Sanchez*, Nos. 08-21063 & 07-22459 (S.D. Fla. Sept. 19, 2013).

268. *Mamani v. Berzain*, 21 F. Supp. 3d 1353, 1369 (S.D. Fla. 2014) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013)).

269. *Id.* at 1373.

270. *Id.* at 1374.

noted that the Bolivian military had been ordered to shoot “at anything that moved” and to “shoot at any head that you see.”<sup>271</sup> Reviewing each of the alleged killings, the court determined the facts plausibly suggested that each killing was deliberate and, therefore, that they constituted extrajudicial killings.<sup>272</sup>

With respect to the second prong, the district court determined the complaint also plausibly suggested that the defendants were responsible for extrajudicial killing under the doctrine of command responsibility. The court indicated that if certain elements are met, commanders can be held liable for the acts of their subordinates “even where the commander did not order those acts . . . .”<sup>273</sup> The court then identified the three elements for command responsibility: (1) a superior-subordinate relationship; (2) knowledge; and (3) failure to act.<sup>274</sup> The court found the facts in the Second Amended Consolidated Complaint plausibly suggested each element had been met, which would subject the defendants to secondary liability.<sup>275</sup>

The Eleventh Circuit subsequently granted the defendants’ request for interlocutory review of the district court’s decision on two issues: (1) whether the plaintiffs had met the exhaustion of domestic remedies requirement as required by the TVPA; and (2) whether the plaintiffs had adequately pled claims under the TVPA.<sup>276</sup> On June 16, 2016, the Eleventh Circuit affirmed the district court’s ruling that the plaintiffs had fulfilled the TVPA’s exhaustion of domestic remedies requirement.<sup>277</sup> However, it declined to consider the district court’s denial of the motion to dismiss for failure to state a claim because the defendants’ challenges did not involve a pure question of law. The court concluded that interlocutory review was inappropriate because the defendants were seeking review of the factual allegations supporting the claims of extrajudicial killing and command responsibility.<sup>278</sup>

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271. *Id.* at 1374–75.

272. *Id.*

273. *Id.* at 1375 (citing 1991 Senate TVPA Report).

274. *Mamani*, 21 F. Supp. 3d at 1376.

275. *Id.* at 1377–78.

276. *Mamani v. Berzain*, 825 F.3d 1304, 1308 (11th Cir. 2016).

277. *Id.* at 1309–12.

278. *Id.* at 1312–13.

Following the Eleventh Circuit's decision, the district court scheduled the case for trial in March 2018 and authorized discovery.<sup>279</sup> At the conclusion of discovery, the defendants renewed the arguments raised in their motion to dismiss by filing a motion for summary judgment.<sup>280</sup> In their motion, they argued, *inter alia*, that the plaintiffs could not support their TVPA claims and that there was no support for their claims of secondary liability.

On February 14, 2018, the district court denied the defendants' motion for summary judgment and scheduled the case for trial.<sup>281</sup> The court addressed several issues. First, the district court considered whether there was a genuine dispute regarding the deliberated nature of the killings. It noted that, "a reasonable jury, considering the evidence of Defendants' plan to kill civilians to quash public opposition to their policies, could find that decedents' deaths were deliberated because they were the expected and desired outcome of this plan."<sup>282</sup> The court referenced several factual assertions proffered by the plaintiffs which supported such an inference.

(1) changes in Bolivian military doctrine during Defendant Lozada's administration to define protesters as subversives who could be targeted with military force; (2) a pattern of soldiers being ordered to shoot unarmed civilians in multiple different locations, including each location where decedents were killed, on multiple different dates; (3) a pattern of soldiers shooting indiscriminately at civilians at times when witnesses saw no armed protesters or anything indicating that the soldiers were firing defensively; (4) Defendants' repeated refusal to seriously commit to achieving peaceful, negotiated solutions to protests; and (5) consistent

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279. Order Lifting Stay and Setting Case for Trial and Order of Reference to United States Magistrate Judge for Pretrial Discovery Matters, Nos. 08-21063-CV & 07-22459-CV (S.D. Fla. Oct. 4, 2016).

280. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, Mamani v. Sanchez, Nos. 08-21063 & 07-22459 (S.D. Fla. Nov. 28, 2017).

281. Mamani v. Berzain, 309 F. Supp. 3d 1274, 1280, 1317 (S.D. Fla. 2018).

282. *Id.* at 1301.

with Defendants' plan, the utilization of troops from eastern Bolivia.<sup>283</sup>

In addition, the district court dismissed the defendants' efforts to narrow the meaning of deliberated killings. It concluded that the plaintiffs need not "identify the specific soldier who fired each lethal shot and introduce evidence regarding what that soldier was 'doing, seeing, hearing . . . processing,' or thinking at the time of the shooting."<sup>284</sup> While the district court acknowledged that decedents must have been intentionally killed by the Bolivian military, such intent "need not necessarily be shown with evidence regarding each individual shooter's state of mind."<sup>285</sup> Rather, intent could be inferred from the specific facts of the case. For example, intent could be inferred "by proof that decedents' deaths resulted from the implementation of Defendants' plan to use military force to kill unarmed civilians."<sup>286</sup> The court cited several cases that recognized "that individualized targeting is not required to make out a claim under the TVPA's definition of extrajudicial killing."<sup>287</sup>

Second, the district court considered whether the plaintiffs had introduced sufficient evidence to raise jury questions as to whether the decedents were killed by the Bolivian military and whether "the killings were incompatible with accidental or negligent shootings, 'precipitate shootings during an ongoing civil uprising' and shootings based on 'individual motivations . . . not linked to defendants.'"<sup>288</sup> On this question, the court concluded that the plaintiffs had introduced sufficient evidence to create a genuine dispute for the jury to consider. The court noted, for example, that the plaintiffs were not required to show that only the military was shooting in the areas where decedents were killed.

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283. *Id.* at 1302.

284. *Id.* (citations omitted). The court added that superior officers can be held liable for the actions of their subordinates even if their subordinates cannot be specifically identified. *Id.*

285. *Id.* at 1302.

286. *Id.*

287. *Id.* (citing *Owens v. Republic of Sudan*, 864 F.3d 751, 770 (D.C. Cir. 2017); *Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138, 163 (D.D.C. 2016); *Jaramillo v. Naranjo*, No. 10-21951-CIV, 2014 WL 4898210, at \*13 (S.D. Fla. Sept. 14, 2014)).

288. *Id.* at 1303 (citations omitted).

Even though there is evidence in this case that, in certain of the areas where decedents were killed, there was an isolated shot at the military or, in other locations, a more substantial clash between the military and armed protesters, this does not foreclose a jury from reasonably finding that decedents were intentionally killed by the military—as opposed to by an armed protester, a member of the military who believed he was shooting at an armed protester, or a member of the military who was shooting at an armed protester but accidentally or negligently struck one of the decedents.<sup>289</sup>

According to the court, a jury could reasonably infer that a decedent had been intentionally killed by the military by weighing “the proximity of decedents’ deaths to any armed conflict” with “the evidence of the location and actions of troops in relation to where decedents were shot.”<sup>290</sup> A jury could also infer a decedent was intentionally killed because of evidence “that troops were ordered to shoot, and did shoot, indiscriminately at civilians in the immediate vicinity of the decedent at the time of his or her death and [there was] an absence of evidence of armed protesters in the area.”<sup>291</sup> The court determined the plaintiffs had offered sufficient evidence to make such findings with respect to each decedent.

Having addressed the extrajudicial killing claims, the district court then considered whether the plaintiffs could proceed with their claims of secondary liability. It determined that sufficient evidence had been presented for a jury to conclude that the defendants were liable under the doctrine of command responsibility as well as under theories of agency and conspiracy.<sup>292</sup> Finally, the court concluded that the plaintiffs’ state law claims for wrongful death could proceed. Under traditional conflict of law principles, the court determined Bolivian law would provide the substantive law for assessing these claims.<sup>293</sup>

The *Mamani* trial began on March 5, 2018 and lasted three weeks. Dozens of witnesses testified about the military attacks that killed their family members and friends.

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289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 1310–12.

293. *Id.* at 1317.

Eight plaintiffs testified about the deaths of their family members, including: Etelvina Ramos Mamani and Eloy Rojas Mamani, whose eight-year-old daughter Marlene was killed in front of her mother when a single shot was fired through the window; Teófilo Baltazar Cerro, whose pregnant wife Teodosia was killed after a bullet was fired through the wall of a house; Felicidad Rosa Huanca Quispe, whose 69-year-old father Raul was shot and killed along a roadside; and Gonzalo Mamani Aguilar, whose father Arturo was shot and killed while tending his crops.<sup>294</sup>

In addition to testimony from family members of the deceased, witnesses described the military operations and the role of the defendants in the planning and execution of these operations.

One witness, a former soldier in the Bolivian military, testified about being ordered to shoot at “anything that moves” in a civilian community, while another recounted witnessing a military officer kill a soldier for refusing to follow orders to shoot at unarmed civilians. Witnesses recounted how tanks rolled through in the streets and soldiers shot for hours on end. Others testified about how the president and minister of defense committed to a military option instead of pursuing dialogue with community leaders to reach a peaceful resolution.<sup>295</sup>

At the conclusion of the trial proceedings, the court provided the jury with instructions on various legal issues, including the distinct theories of liability as well as the legal bases for the plaintiffs’ claims.<sup>296</sup> To establish liability under the TVPA, the jury instructions indicated the plaintiffs had to establish: (1) that their relative had died as a result of an extrajudicial killing committed by a member of the Bolivian military; and (2) that the defendant is liable for that death under one

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294. Press Release, Center for Constitutional Rights, Jury Finds Former Bolivian President and Defense Minister Responsible for Extrajudicial Killings of Indigenous People in 2003 (Apr. 3, 2018), <https://ccrjustice.org/home/press-center/press-releases/jury-finds-former-bolivian-president-and-defense-minister> [<https://perma.cc/RM7G-QCMK>].

295. *Id.*

296. Court’s Instructions to the Jury, *Mamani v. Berzain*, 825 F.3d 1304 (11th Cir. 2016) (Nos. 07-22459-CIV and 09-21063-CIV).

of the alleged theories of liability.<sup>297</sup> The jury instructions defined “extrajudicial killing” pursuant to the TVPA definition. To establish that the defendants were liable for extrajudicial killing, the plaintiffs were required to establish by a preponderance of the evidence that:

(1) The relative’s death was the result of a deliberated killing. A “deliberated killing” is one that is undertaken with studied consideration and purpose. A deliberated killing is not one that is the result of 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’ or precipitate shootings during an ongoing civil uprising.

(2) A member of the Bolivian military deliberately killed that relative while acting under the actual or apparent authority, or color of law, of the Plurinational State of Bolivia. Acts are done under color of law when a person acts or purports to act in the performance of official duties under any law, ordinance, or regulation.

*and*

(3) The killing was not previously authorized by a judgment of a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. A “regularly constituted court” is an independent and impartial court established and organized in accordance with the laws and procedures already in force in a country, and it excludes all special tribunals (that is, courts or tribunals created for a specific event).<sup>298</sup>

The court noted the parties had stipulated that none of the killings were authorized by a regularly constituted court.

On April 3, 2018, the jury issued a unanimous verdict after deliberating for six days, finding the two defendants, Gonzalo Sánchez de Lozada and José Carlos Sánchez Berzaín, responsible for the extrajudicial killings of the victims.<sup>299</sup> The jury found that

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297. *Id.* at 8.

298. *Id.* at 9–10.

299. Tim Elfrink, *South Florida Jury Finds Bolivian President Responsible for Civilian Massacre by Military*, MIAMI NEW TIMES (Apr. 4, 2018, 10:25 AM), <https://www.miaminewtimes.com/news/florida-jury-finds-bolivian-ex-president-defense-minister-responsible-for-black-october-civilian-killings-10234324> [https://perma.cc/CZD2-JASX].

Bolivian soldiers had committed extrajudicial killings and that the defendants were responsible for these deaths under the doctrine of command responsibility. The plaintiffs were awarded \$10 million in compensatory damages.

The jury's verdict was short-lived.

On May 30, 2018, the district court granted the defendants' motion for judgment as a matter of law.<sup>300</sup> Under Federal Rule of Civil Procedure 50(a)(1)(B), a court should grant judgment as a matter of law when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action.<sup>301</sup> While the court had rejected similar efforts during the trial, the defendants renewed their request after the jury verdict. This time, the court agreed, determining the plaintiffs had failed to present any evidence that the defendants had killed civilians pursuant to a plan and that the evidence that was presented at trial was "legally insufficient to support the jury verdict rendered in their favor."<sup>302</sup>

The district court's decision to grant a judgment to the defendants as a matter of law was informed by the Eleventh Circuit's 2011 decision that an extrajudicial killing is a deliberated killing that is "undertaken with studied consideration and purpose."<sup>303</sup> Based on this requirement, 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.<sup>304</sup> The district court made this determination for three reasons.

First, it found that evidence of multiple shootings resulting in a total of fifty deaths, in the absence of additional information, is not evidence of extrajudicial killings.<sup>305</sup> According to the district court, it would be unreasonable to infer from the timing, location, and number of troops involved in these killings that the degree of timing and coordination needed to establish deliberated killings was present. And,

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300. *Mamani v. Berzain*, No. 07-22459-CIV, 2018 WL 2435173, at \*13 (S.D. Fla. May 30, 2018).

301. FED. R. CIV. P. 50(a)(1)(B) (The district court rejected similar motions by the defendants at the conclusion of the plaintiffs' case as well as at the close of evidence).

302. *Mamani*, 2018 WL 2435173, at \*13.

303. *Id.* at \*2 (quoting *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011)).

304. *Id.* at \*9.

305. *Id.*



the magnitude of harm was insufficient to support an inference of deliberateness. Something more is required from which the jury “could reasonably infer (not merely speculate) that the shootings” were not simply “disproportionate reactions to civil unrest or attacks on the military . . . .”<sup>306</sup> Second, the district court determined that evidence the defendants were advised against using military force but continued to employ the military after civilians were killed is not evidence of extrajudicial killings.<sup>307</sup> Again, the district court stated that additional information was necessary for a reasonable jury to infer that the “[d]efendants chose the path of military intervention out of a desire to intentionally kill unarmed civilians.”<sup>308</sup> Third, the court concluded that the totality of the evidence did not support a reasonable inference that the victims were deliberately killed.<sup>309</sup> “At most, the evidence in these cases supports an inference that Defendants responded to civil unrest in their country with a heavy hand, and that some unidentified members of the Bolivian military fired upon civilians for unknown reasons.”<sup>310</sup> According to the district court, such an inference is insufficient to impose TVPA liability.

The district court acknowledged it did not “lightly set aside the jury’s verdict in these cases where each Plaintiff has suffered a tragic loss and fought undeterred for justice—in both the United States and Bolivia—for almost fifteen years.”<sup>311</sup> But it concluded that the plaintiffs’ failure to “present a legally sufficient evidentiary basis for TVPA liability” compelled judgment as a matter of law.<sup>312</sup> The district court’s dismissal of the jury’s unanimous verdict will inevitably be appealed to the Eleventh Circuit, meaning the court will have another opportunity to consider its earlier ruling and perhaps clarify its approach to extrajudicial killing.

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306. *Id.* at \*10.

307. *Id.* at \*11.

308. *Id.* at \*12.

309. *Id.*

310. *Id.*

311. *Id.* at \*9.

312. *Id.*

## V. ASSESSING *MAMANI* AND THE MEANING OF EXTRAJUDICIAL KILLING

*Mamani v. Berzain* offers a valuable framework for assessing the prohibition against extrajudicial killing. While this Part focuses on the Eleventh Circuit's 2011 decision in *Mamani*, its analysis is relevant to other circuits as well as to other legal systems that consider claims of extrajudicial killing.

### A. Deconstructing the *Mamani* Litigation

At the outset, it is important to recognize that the district court and the Eleventh Circuit were addressing the claims of extrajudicial killing under different statutes (and different standards). Filed in 2008, the Amended Consolidated Complaint raised the extrajudicial killing claims under both the ATS and TVPA. The TVPA claims were initially dismissed by the district court for failure to exhaust domestic remedies, leaving the ATS claims. In its 2011 decision, the Eleventh Circuit considered the extrajudicial killing claims under the ATS. After the case was dismissed by the Eleventh Circuit, the plaintiffs filed a Second Amended Consolidated Complaint, again raising the extrajudicial killing claims under both the ATS and TVPA. This time, the ATS claims were dismissed pursuant to the *Kiobel* standard, leaving the TVPA claims. Accordingly, the district court's 2014 and 2018 decisions considered the extrajudicial killing claims under the TVPA.

While the Eleventh Circuit examined the extrajudicial killing claims under the ATS in its 2011 decision, it still relied on the TVPA's definition of extrajudicial killing to inform its analysis. The court assumed "for purposes of this discussion that an extrajudicial killing falling within the statutory definition of the TVPA would also likely violate established international law."<sup>313</sup> It noted, however, that this assumption may not always hold true.<sup>314</sup> In fact, the court suggested it might read ATS claims more narrowly than TVPA claims.<sup>315</sup> In

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313. *Mamani v. Berzain*, 654 F.3d 1148, 1154 n.7 (11th Cir. 2011).

314. *Id.* The Eleventh Circuit was distinguishing between the distinct sources used for establishing ATS and TVPA claims. ATS claims are based on either a U.S. treaty or customary international law and are defined by those sources. In contrast, TVPA claims are defined by the statute. *Id.* (citing *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008)).

315. *Id.* at 1154 n.7.

support, the court cited to its decision in *Aldana v. Del Monte Fresh Produce, N.A.*<sup>316</sup> Relying on the Supreme Court's earlier decision in *Sosa v. Alvarez-Machain*, the Eleventh Circuit in *Aldana* noted "that neither 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."<sup>317</sup>

The distinct objectives of the ATS and TVPA reinforce the need to interpret claims under the two statutes using different standards. According to the Supreme Court, the principal objective of the ATS is "to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."<sup>318</sup> For this reason, the Supreme Court has been reluctant to interpret the ATS in a manner that might result in disputes with foreign governments. The principal objective of the TVPA is far different: "[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."<sup>319</sup> Since the principal objective of the TVPA is to carry out U.S. obligations under international human rights law and provide a civil remedy to victims of torture and extrajudicial killing, the statute should be interpreted accordingly.<sup>320</sup> It should be interpreted consistent with U.S. obligations under international

316. *Id.* (citing *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1252 (11th Cir. 2005)).

317. *Aldana*, 416 F.3d at 1252 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)); *see also* *Doe v. Drummond Co.*, 782 F.3d 576, 606–07 (11th Cir. 2015) (discussing the differing scopes of the TVPA and ATS).

318. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018) (citation omitted).

319. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

320. This language appears in the enrolled bill and the Statutes at Large as a preamble to the TVPA, but it was omitted by the Office of Law Revision Counsel when the TVPA was placed in the U.S. Code. *See* Torture Victim Protection Act of 1991, H.R. 2092, 102d Cong. (1992). However, the preamble is considered part of the legislative enactment and, therefore, it should be accorded some weight in statutory interpretation. *See generally* NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:4 (7th ed. 2017) (stating that while the preamble of an act may not restrain or extend the meaning of an act where no ambiguity exists, it may nonetheless be given some weight as part of the "whole act" method of construction).

human rights law. Additionally, it should be interpreted to provide a remedy to victims of torture and extrajudicial killings. And, it should certainly be interpreted more broadly than the ATS, which was presumably adopted to avoid foreign entanglements.

The Supreme Court's decision in *Jesner v. Arab Bank, PLC* further highlights the distinction between the ATS and TVPA.<sup>321</sup> In *Jesner*, the Supreme Court held that foreign corporations are not subject to civil liability under the Alien Tort Statute, thereby reinforcing its desire to avoid foreign entanglements absent an explicit congressional mandate.<sup>322</sup> The plurality in *Jesner* found such a mandate in the TVPA, which Congress drafted to "establish an unambiguous and modern basis for a cause of action' under the ATS" and which "reflects Congress' considered judgment of the proper structure for a right of action under the ATS."<sup>323</sup> In her dissenting opinion, Justice Sotomayor acknowledged the significance of the TVPA as well as the status of the prohibition against extrajudicial killing as a norm that has generated international consensus.<sup>324</sup>

In sum, courts should interpret the TVPA consistently with its congressional mandate which, as indicated, is quite different from the ATS.<sup>325</sup> This understanding should inform both the meaning of the Eleventh Circuit's 2011 *Mamani* decision as well as future interpretations of the TVPA.

According to the Eleventh Circuit, not all deliberated killings constitute an extrajudicial killing.<sup>326</sup> This is an accurate statement if it is referencing the TVPA's text, which states that an extrajudicial killing is a "deliberated killing not authorized by previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized

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321. *Jesner*, 138 S. Ct. at 1389–91.

322. *Id.* at 1389, 1407.

323. *Id.* at 1403 (Kennedy, J.) (citations omitted). For a critique of the plurality's analysis of the relationship between the ATS and TVPA, see William J. Aceves, *Correcting an Evident Error: A Plea to Revise Jesner v. Arab Bank, PLC*, 107 GEO. L.J. ONLINE 63 (2018).

324. *Jesner*, 138 S. Ct. at 1420 (Sotomayor, J., dissenting).

325. *Cf.* *Owens v. Republic of Sudan*, 864 F.3d 751, 772 (D.C. Cir. 2017) (holding that Congress intended the TVPA to reach a broader range of conduct than what is prohibited under international law).

326. *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011).

peoples.”<sup>327</sup> In other words, a deliberated killing that *is* authorized through such judicial proceedings *does not* constitute an extrajudicial killing. The Eleventh Circuit’s statement is also accurate if it is referencing a second exception contained in the TVPA’s text. According to the TVPA, a deliberated killing “does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”<sup>328</sup> In other words, a deliberated killing that *is* lawfully carried out under international law *does not* constitute an extrajudicial killing. If, however, the Eleventh Circuit’s statement that not all deliberated killings constitute an extrajudicial killing is not limited to these two exceptions, this interpretation would be contrary to the TVPA and international law.

Indeed, the Eleventh Circuit’s approach to extrajudicial killing moves far beyond the TVPA’s text, legislative history, and international law. For example, the Eleventh Circuit asserted that an extrajudicial killing must be “undertaken with studied consideration and purpose.”<sup>329</sup> Offered with no explanation, this interpretation finds no support in the text or legislative history of the TVPA. It is also contrary to international law. It suggests a level of intentionality and planning for an extrajudicial killing that is simply not required.<sup>330</sup> While some extrajudicial killings can take days or weeks of preparation, others can happen with little planning and no warning. Thus, there is no temporal element in the definition of extrajudicial killing. The *mens rea* for extrajudicial killings does require an intentional or negligent decision on the part of the perpetrator to act or refrain from acting. But, this decision can be made with little deliberation. Liability exists for individuals who knew or should have known that death may result from their acts or omissions.

The Eleventh Circuit’s puzzling approach is further evidenced by the examples it provides of killings that do not meet its definition of extrajudicial killing. Reviewing the plaintiffs’ allegations, the court indicated that the deaths could plausibly have been “the result of precipitate shootings during an ongoing civil uprising,” implying that such deaths would not constitute extrajudicial killings.<sup>331</sup> Similarly,

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327. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(a), 106 Stat. 73 (1992).

328. *Id.*

329. *Mamani*, 654 F.3d at 1155.

330. At its most extreme, this requirement could absolve those who “shoot first, ask questions later.”

331. *Id.*

the court indicated that an “accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others)” would not constitute an extrajudicial killing.<sup>332</sup> These examples also appeared in the district court’s jury instructions. But, as evidenced by international practice, these examples can sometimes constitute extrajudicial killings. Human rights bodies have found that precipitate shootings during public protests or even negligent shootings can constitute extrajudicial killings when the state fails to comply with the relevant standards on the use of force.<sup>333</sup> Such shootings can also implicate the procedural component of the right to life norm when a state fails to conduct a proper investigation.

Perhaps the Eleventh Circuit’s approach to extrajudicial killing can be understood in light of the limited factual allegations in the Amended Consolidated Complaint as well as the plaintiffs’ efforts to establish the defendants’ liability through the doctrine of command responsibility. The court assessed the allegations in the Amended Consolidated Complaint under the plausibility standard set forth in *Ashcroft v. Iqbal* and found them lacking.<sup>334</sup> For example, the court suggested the factual allegations in the Complaint could establish liability for extrajudicial killing by the actual shooters.<sup>335</sup> But the *Mamani* complaint, the court noted, involved different allegations against a different group of defendants.<sup>336</sup> “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.”<sup>337</sup> The court also expressed concern that government leaders could be accused based solely on “bare assertions.”<sup>338</sup>

The Eleventh Circuit also seemed troubled that the claims of extrajudicial killing were brought against high-ranking government officials. For example, the court repeatedly referenced the *Iqbal* case, which involved claims against high-ranking U.S. government officials, and which the court found analogous to the claims in *Mamani*.<sup>339</sup> In

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332. *Id.*

333. INT’L COMM’N OF JURISTS, *supra* note 154, at 73–79; SCHABAS II, *supra* note 158, at 139–40, 151–53.

334. *Mamani*, 654 F.3d at 1153–56.

335. *Id.* at 1155.

336. *Id.*

337. *Id.* (emphasis in original).

338. *Id.* at 1154 (quoting *Iqbal*, 556 U.S. at 681).

339. *Id.* at 1153–56.

addition, the court referenced the D.C. Circuit's decision in *Belhas v. Ya'alon*, as well as the concurring opinion in that case, which noted the plaintiffs had pointed "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."<sup>340</sup> The Eleventh Circuit noted that the "[p]laintiffs do not allege that a connection exists between the Defense Minister's directing of where to fire weapons and the death of plaintiffs' decedents."<sup>341</sup> And, the court rejected the possibility of strict liability "for national leaders at the top of the long chain of command" if "some soldiers or policemen committed wrongful acts . . ."<sup>342</sup>

But, these statements prove too much.<sup>343</sup> Command responsibility has never required proof that military (or government) leaders gave specific targeting orders to their subordinates.<sup>344</sup> Few cases could ever meet this high evidentiary threshold. It would certainly thwart the TVPA's stated purpose to require the production of such detailed evidence, particularly when state actors are involved. On several occasions, courts have shown reluctance to impose heightened evidentiary requirements in cases of extrajudicial killing.<sup>345</sup> And, as a legal matter, direct targeting orders are not required to establish a claim of command responsibility.<sup>346</sup> As stated

340. *Id.* at 1155 (quoting *Belhas*, 515 F.3d at 1293 (D.C. Cir. 2008) (Williams, J., concurring) (alteration in original)).

341. *Id.* at 1154.

342. *Id.*

343. *Cf.* John W. Brooker, *Ford v. Garcia: A Puzzling Fusion of the Command Responsibility Doctrine with the Torture Victim Protection Act*, 28 N.C. J. INT'L L. & COM. REG. 701, 724 (2002) (concluding that an abundance of material suggests that international law only requires plaintiffs to prove that a military leader exercised *de jure* command).

344. *See generally* GUENAELE METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 129 (2009) (discussing the elements of the doctrine of superior responsibility); Jamie Allan Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, 90 INT'L REV. RED CROSS 303, 306–12 (2008) (detailing the conditions necessary for establishing command responsibility).

345. *See, e.g.*, *Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1045 (D.C. Cir. 2014). In *Han Kim*, the D.C. Circuit acknowledged the relationship between the TVPA and FSIA. It held that always requiring direct or firsthand evidence of murder or torture would thwart the purpose of the FSIA. *Id.* *But see* *Sullivan v. Republic of Cuba*, 289 F. Supp. 3d 231, 246 (D. Me. 2017) (denying plaintiff relief for Cuba's extrajudicial killing of her father for failing to meet the evidentiary standard).

346. This is also evident from the "knew or should have known language" that is used for establishing command responsibility in international law. *See, e.g.*,

in the TVPA's legislative history, "a higher official need not have personally performed or ordered the abuses in order to be held liable."<sup>347</sup> Moreover, a direct targeting order would implicate the commander as a direct perpetrator, which represents a different theory of liability.<sup>348</sup>

In addition, command responsibility does not impose strict liability on commanders.<sup>349</sup> Plaintiffs must establish that the commander knew or should have known that subordinates had committed, were committing, or planned to commit human rights abuses and that the commander failed to prevent the commission of the crimes or failed to punish subordinates after the commission of the crimes.<sup>350</sup> Thus, commanders are only responsible for their acts or omissions when they knew or should have known of the abuses and failed to act. There is no liability without fault.<sup>351</sup>

Throughout its opinion, the Eleventh Circuit seems to conflate the underlying claim (extrajudicial killing) with the theory of liability (command responsibility). As noted, the court indicated the "[c]omplaint may possibly include factual allegations that seem consistent with ATS liability for extrajudicial killing for someone: for example, the shooters."<sup>352</sup> Presumably, this means the shooters committed the killings "with studied consideration and purpose."<sup>353</sup> In contrast, the court concluded that the plaintiffs had not pled sufficient facts to show that "*these defendants*, in their capacity as high-level

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Rome Statute, *supra* note 7, art. 28(a)(i) ("That military commander or person either knew or . . . should have known that the forces were committing or about to commit such crimes").

347. S. REP. NO. 102-249, *supra* note 33, at 9.

348. CHANTAL MELONI, COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 194–95, 209–12 (2009).

349. Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 20–21 (2012); Timothy Wu & Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 280–81, 292–93 (1997).

350. See generally MARIA L. NYBONDAS, COMMAND RESPONSIBILITY AND ITS APPLICABILITY TO CIVILIAN SUPERIORS 30–38 (2010) (discussing the legal basis for command responsibility); Jeremy Dunnaback, Note, *Command Responsibility: A Small-Unit Leader's Perspective*, 108 NW. U. L. REV. 1385, 1391–96 (2014) (discussing the history and elements of command responsibility).

351. METTRAUX, *supra* note 344, at 223.

352. *Mamani v. Berzain*, 654 F.3d 1148, 1155 n.8 (11th Cir. 2011).

353. *Id.* at 1155.



officials—committed extrajudicial killings within the meaning of established international law.”<sup>354</sup> In support of this statement, the court referenced *Belhas v. Ya’alon* and quoted from the concurring opinion: “[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.”<sup>355</sup>

This passage is problematic for two reasons. First, it conflates the underlying claim with the theory of liability. Command responsibility requires a predicate act: in this case, an extrajudicial killing.<sup>356</sup> Once the predicate act has been established, a court must then determine whether the commander can be held responsible for this act. “There must be a ‘nexus’ between a commander’s failure to properly command and control his subordinates and the latter’s commission of crimes.”<sup>357</sup> But the Eleventh Circuit never acknowledges this distinction. In fact, the court never mentions command responsibility in its opinion, even though this theory of liability represented a critical aspect of the Amended Consolidated Complaint.

Second, this passage is also problematic because it disregards decades of national and international jurisprudence regarding the potential liability of commanders for the actions of their subordinates. Many ATS and TVPA cases have established that “high-level officials” can be held responsible for strategic decisions that lead to extrajudicial killings. In *Forti v. Suarez-Mason*, for example, the U.S. district court for the Northern District of California held that the ATS provided a cause of action against an Argentine general for an extrajudicial killing committed by military personnel under his command.<sup>358</sup> In *Xuncax v. Gramajo*, the U.S. district court for the District of Massachusetts found a Guatemalan Defense Minister liable under the ATS and TVPA for extrajudicial killings committed by military personnel under his command.<sup>359</sup> The *Xuncax* decision is particularly instructive because it reviewed the TVPA’s legislative history and rightly noted how

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354. *Id.* (emphasis in original).

355. *Id.* (alteration in original) (quoting *Belhas v. Ya’alon*, 515 F.3d 1279, 1293 (D.C. Cir. 2008) (Williams, J., concurring)).

356. See Otto Triffterer, *Article 28: Responsibility of Commanders and other Superiors*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1056, 1084 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

357. *Id.* at 1087.

358. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540–42 (N.D. Cal. 1987).

359. *Xuncax v. Gramajo*, 886 F. Supp. 162, 197–99 (D. Mass. 1995).

command responsibility was considered by Congress as a distinct theory of liability.<sup>360</sup> Indeed, the TVPA's legislative history specifically differentiates between the actions of the shooters and those of their commanders. "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."<sup>361</sup>

Several circuit courts have made similar determinations. In *Kadic v. Karadzic*, the Second Circuit held that the leader of the Bosnian-Serb government in Bosnia-Herzegovina could be held responsible for human rights abuses committed by military forces under his command.<sup>362</sup> And in *Hilao v. Estate of Marcos*, the Ninth Circuit affirmed a jury verdict against Ferdinand Marcos, the former leader of the Philippines, for thousands of human rights abuses committed by military and paramilitary forces under his command.<sup>363</sup> Both *Kadic* and *Marcos* accepted the theory of command responsibility and its application to high-level officials. And both cases referenced the same source in support, *In re Yamashita*, where the Supreme Court determined that a military leader had an "affirmative duty" to "protect prisoners of war and the civilian population" through control of his subordinates.<sup>364</sup> In sum, command responsibility is a well-recognized principle of international law and one that has long been recognized in U.S. legal proceedings, including ATS and TVPA cases.

## B. Extrajudicial Killing in *Mamani*

A review of international practice reveals how the deaths in *Mamani* 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 both the

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360. *Id.* at 172 (quoting S. REP. NO. 102-249, at 9 (1991)).

361. S. REP. NO. 102-249, at 9 (footnote omitted).

362. *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995).

363. *Hilao v. Estate of Marcos*, 103 F.3d 767, 787 (9th Cir. 1996).

364. *In re Yamashita*, 327 U.S. 1, 15-16 (1946). See generally Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond*, 5 J. INT'L CRIM. JUST. 638, 648-50 (2007) (discussing the evolution of the requirement of mens rea in the context of command responsibility); Michael Schmitt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MILITARY L. REV. 155, 177-81 (2000) (looking at command responsibility as applied to U.S. domestic policy).

substantive and procedural components of the prohibition against extrajudicial killing.

### 1. The Substantive Component

To begin with, the use of force, whether lethal or not, must be carefully regulated.<sup>365</sup> States are obligated to provide robust training and careful planning to minimize potential harm to civilians.<sup>366</sup>

The intentional use of lethal force is only permissible when “strictly unavoidable in order to protect life.”<sup>367</sup> It must be necessary and proportionate. Significantly, security forces cannot automatically resort to the use of lethal force when other options are available.<sup>368</sup> When force is authorized, security forces must use restraint and seek to minimize injury and loss of life.<sup>369</sup>

These rules have practical consequences. Security forces may not shoot indiscriminately into populated areas.<sup>370</sup> Indeed, the killing of civilians who are hiding in their homes is a classic example of an extrajudicial killing.<sup>371</sup> Security forces may not use lethal force to

365. See generally INT’L COMM’N OF JURISTS, *supra* note 154, at 73–74 (discussing the parameters of arbitrary executions); GENEVA ACADEMY, *supra* note 168, at 6 (discussing the three general principles that govern the use of force: necessity, proportionality, and precaution); 2016 U.N. Special Rapporteur Report, *supra* note 119, ¶ 51 (emphasizing the need of holding those who use force accountable to domestic legal frameworks and international human rights law in order to avoid abuse); 2014 Special Rapporteur Report, *supra* note 118, ¶ 65 (noting that the use of force must also “meet the requirement of proportionality”).

366. See *Nadege Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶¶ 81–85, 87 (Oct. 24, 2012) (outlining the principles that must be adhered to when determining whether to use force); *Montero-Aranguren v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 67–68 (July 5, 2006) (explaining the general principles surrounding the right to life).

367. 2014 Special Rapporteur Report, *supra* note 118, ¶ 58; 1990 U.N. Basic Principles, *supra* note 107, Principle 9; GENEVA ACADEMY, *supra* note 168, 13–14.

368. 2014 Special Rapporteur Report, *supra* note 118, ¶ 59–62; 1990 U.N. Basic Principles, *supra* note 107, Principle 4; 1989 U.N. Principles, *supra* note 96, ¶ 4; GENEVA ACADEMY, *supra* note 168, at 6–7.

369. 2014 Special Rapporteur Report, *supra* note 118, ¶ 65; 1989 U.N. Principles, *supra* note 96; GENEVA ACADEMY, *supra* note 168, at 7–8.

370. This prohibition also applies in times of armed conflict. See, e.g., *Henckaerts & Doswald-Beck*, *supra* note 145, at 37–40 (explaining the prohibition against indiscriminate attacks in armed conflicts).

371. See generally *Case of the Caracazo v. Venezuela*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 58, ¶ 42 (Nov. 11, 1999) (finding that Venezuela was responsible

disperse unarmed protestors.<sup>372</sup> They may not use lethal force against individuals who pose no risk or threat.<sup>373</sup> They also may not shoot at non-threatening individuals simply because others may pose a threat.<sup>374</sup> Even individuals who may pose some risk to the general public or to security forces are still entitled to protection.<sup>375</sup>

Significantly, the use of force may be considered arbitrary and a violation of international law even if security forces did not deliberately target a victim. Extrajudicial killings can be established in the absence of an official plan or explicit orders that security forces target specific individuals. Similarly, extrajudicial killings can be established even when the actual shooter has not been identified.<sup>376</sup> Finally, security forces are required to abide by the prohibition against extrajudicial killing in times of civil disturbances or armed conflict.<sup>377</sup>

In *Mamani*, Bolivian security forces failed to abide by the international norms regulating the use of lethal force. They intentionally targeted some victims, and others were killed by indiscriminate fire. Their actions resulted in multiple deaths. The use of force did not comply with the principles of necessity, distinction, proportionality, and precaution. The use of force was unnecessary; there was no effort to distinguish lawful targets from innocent civilians; the force used was not proportionate to the perceived threat; and no precautions were taken to prevent the loss of life.

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for causing the deaths of 276 individuals through indiscriminate firing and extrajudicial executions).

372. *Umetaliev v. Kyrgyzstan*, Commc'n No. 1275/2004, Hum. Rts. Comm., ¶¶ 9.1–12 (Oct. 30, 2008); 2014 Special Rapporteur Report, *supra* note 118, ¶ 75.

373. *See generally* *Gul v. Turkey*, App. No. 22676/93, Eur. Ct. H.R., ¶77 (2000) (finding that the firing of 50–55 shots at a door, behind which complainant stood, was a disproportionate use of force in regard to the threat posed); *Suarez de Guerrero v. Colombia*, Commc'n No. 45/1979 (Hum. Rts. Comm. Mar. 31, 1982) (finding that complainants were intentionally deprived of their right to life and that such force was unnecessary to effect an arrest or prevent escape).

374. *Solomou and Others v. Turkey*, App. No. 36832/97, ¶¶ 77–78 (Eur. Ct. H.R. 2008); 2014 Special Rapporteur Report, *supra* note 118, ¶ 75.

375. *Neira Alegria v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 74 (Jan. 19, 1995).

376. *Güleç v. Turkey*, App. No. 54/1997/838/1044, ¶¶ 68–73 (Eur. Ct. H.R. July 27, 1998).

377. 2014 Special Rapporteur Report, *supra* note 118, ¶ 1; *SCHABAS II*, *supra* note 158, at 153; *BURGORGUE-LARSEN & UBEDA DE TORRES*, *supra* note 158, at 334–35.

## 2. The Procedural Component

The prohibition against extrajudicial killing includes a procedural component. Meaningful investigations must be conducted when a potentially wrongful death occurs.<sup>378</sup> Individuals responsible for these deaths must be held accountable through a criminal process.<sup>379</sup> Proceedings must be effective, transparent, and impartial. Punishment must be commensurate with the offense. In addition, victims are entitled to reparations, including compensation.<sup>380</sup> The government is obligated to disclose the truth of what happened and take steps to ensure that the violations are not repeated.<sup>381</sup>

In *Mamani*, no meaningful investigations or prosecutions occurred after the use of force. Innocent civilians were killed with no commensurate accountability. By authorizing the use of force in security operations that targeted a civilian population and by failing to investigate or prosecute anyone for the ensuing deaths, the *Mamani* defendants are properly subject to liability for extrajudicial killing under the TVPA and international law.

## CONCLUSION

In *Jesner v. Arab Bank, PLC*, the Supreme Court held that foreign corporations are not subject to civil liability under the Alien Tort Statute. *Jesner* represents the latest restriction on ATS claims by the Supreme Court. With the continuing decline of the ATS as a viable mechanism for redress, the TVPA will become even more important for addressing claims of extrajudicial killing. Moreover, the TVPA's ability to address extrajudicial killings in the context of genocide, war crimes, and crimes against humanity further highlights its unique role in promoting accountability. TVPA case law will also affect the

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378. *Nadege Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 101 (Oct. 24, 2012); *Montero-Aranguren v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 79 (July 5, 2006); see also Economic and Social Council Res. 1989/65, *supra* note 96, at Principle 9 (requiring investigation of extra-legal, arbitrary and summary executions and specifying certain factors that such an investigation must fulfill).

379. *Florentina Olmedo v. Paraguay*, Comm'n No. 1828/2008, ¶ 7.3 (Hum. Rts. Comm. Mar. 22, 2012); *Mocanu v. Romania*, App. Nos. 10865/09, 45886/07, and 32431/08, ¶ 316 (Eur. Ct. H.R. Sept. 17, 2014).

380. *Minnesota Protocol*, *supra* note 103, at 4–5.

381. *Id.*

interpretation of other statutes that reference extrajudicial killing, such as the FSIA.<sup>382</sup> Accordingly, it is essential for courts to interpret the TVPA as Congress intended—consistent with U.S. obligations under international human rights law and as a mechanism for providing a civil remedy to victims of extrajudicial killing.<sup>383</sup>

When confronted with TVPA claims, courts must not rely on a stilted interpretation of the statute and must engage in a more rigorous analysis of international law.<sup>384</sup> By moving beyond codification and into the realm of international practice, courts will find a robust jurisprudence that can help them determine when death becomes murder.

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382. *Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1045, 1047 (D.C. Cir. 2014).

383. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992).

384. Several courts have cited the Eleventh Circuit's limited approach to deliberated killings; *see, e.g.*, *Fritz v. Islamic Republic of Iran*, No. 15-456 (RDM), 2018 WL 3687959, at \*25 (D.D.C. Aug. 2, 2018) (holding that plaintiffs met the standard for "deliberated" only because they demonstrated a militant group could not have conducted an attack with the support and direction of the government of Iran); *Owens v. Republic of Sudan*, 864 F.3d 751, 770 (D.C. Cir. 2017) (adopting the Eleventh Circuit's limited definition of "deliberated" from *Mamani v. Berzain*, 645 F.3d 1148, 1148 (11th Cir. 2011)).