

Nos. 09-16246 & 10-13071

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

ELOY ROYAS MAMANI et al.,

Plaintiffs and Appellees

v.

JOSE CARLOS SANCHEZ BERZAIN and
GONZALO SANCHEZ DE LOZADA SANCHEZ BUSTAMENTE,

Defendants and Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

**BRIEF OF PROFESSORS PHILIP ALSTON AND SARAH KNUCKEY,
NEW YORK UNIVERSITY SCHOOL OF LAW, AS *AMICI CURIAE* IN
SUPPORT OF REHEARING AND REHEARING EN BANC**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Amici are law school professors who teach, research, and write about international human rights law, specializing in extrajudicial killings.

Pursuant to FRAP 26.1, Amici Curiae, through their undersigned counsel, hereby certify:

1. No Amicus is a publicly held corporation or other publicly held entity.
2. Amici have no parent corporations.
3. No publicly held corporation or other publicly held entity owns 10% or more of any Amicus.
4. None of the Amici has a financial interest in the outcome of the case.

Pursuant to 11 Cir. R. 26.1-1, in addition to the persons and entities listed in Appellee's Petition for Rehearing or Rehearing en banc, the following parties, acting in their individual capacities, have a non-financial interest in the outcome of this case:

Alston, Philip, Professor of Law, New York University School of Law, former Special Rapporteur on extrajudicial, arbitrary, or summary executions;

Knuckey, Sarah, Adjunct Professor of Clinical Law, New York University School of Law, Advisor to the UN Special Rapporteur on extrajudicial, arbitrary, or summary executions, Director of the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice, New York University School of Law.

MAMANI V. BERZAIN
DOCKET NO. 09-16246 & 10-13071

Rebecca Sharpless, Attorney for *Amici Curiae*.

Rebecca Sharpless
Attorney for Amici Curiae

Dated: September 28, 2011

RULE 35.5 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that (1) the panel decision regarding extrajudicial killings is contrary to the Alien Torts Statute jurisprudence of the United States and contrary to the well-established and universal norm of international law prohibition against extrajudicial killings and (2) consideration by the full court is necessary.

I also express a belief, based on a reasoned and studied professional judgment, that this case involves a question of exceptional importance: whether the prohibition on extrajudicial killings is universal, obligatory, and clearly defined as a norm of customary international law.

Rebecca Sharpless

Attorney for *Amici Curiae*

Dated: September 28, 2011

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STATEMENT OF ISSUES MERITING REHEARING

This case merits rehearing or rehearing en banc to determine whether the international law prohibition on “extrajudicial killing” is universal, obligatory, and clearly defined and therefore actionable under the U.S. Alien Tort Statute, 28 U.S.C. § 1350 (ATS), and whether intentional killings by state forces of protestors, bystanders, or others posing no threat fall clearly within the definition of “extrajudicial killing.”

INTEREST OF AMICI CURIAE

Philip Alston is a Professor of Law at New York University (NYU) School of Law, and has over thirty years of experience working, writing, and teaching in the field of international human rights law. From 2004-2010, he was the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions. Sarah Knuckey is an Adjunct Professor of Clinical Law at NYU School of Law, teaching human rights. Since 2006, she has been an Advisor to the U.N. Special Rapporteur on extrajudicial executions, and since 2008, has been the Director of the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice, NYU. Professors Alston and Knuckey have prepared many reports to governments on the law relevant to killings by government forces of protestors and bystanders, and have applied that law to hundreds of specific incidents.

Amici submit this brief out of concern that the panel erred in its conclusion that the international law relating to extrajudicial killings was not clear, and erred in stating that killings of the form pleaded by the Plaintiffs are not actionable under the ATS. These conclusions dramatically impact the ability of victims of the most serious human rights violations to seek redress. *Amici* have an interest in ensuring the prohibition against extrajudicial killings is properly understood and applied.

STATEMENT OF FACTS

Amici incorporate by reference Plaintiff-Appellee Mamani's Statement Of Facts. *See* Plaintiff-Appellee's Br. 6-11.

SUMMARY OF ARGUMENT

The panel found that "extrajudicial killing" at international law is not clearly defined and did not clearly encompass the pleaded facts. These findings conflict with ATS jurisprudence and international law. Contrary to the panel's decision, the prohibition on extrajudicial killings is unambiguously universal, obligatory, and clearly defined, and the pleaded facts fall squarely within the core of the definition of extrajudicial killing. International human rights law plainly provides that intentional lethal force is only permissible where necessary to protect an imminent threat to life. Killings in violation of that standard are extrajudicial killings.

ARGUMENT

Amici request en banc review of the panel’s decision in *Mamani v. Berzain*, 2011 WL 3795468 (11th Cir. Aug. 29, 2011), which is contrary to U.S. ATS jurisprudence and seriously flawed in its analysis of international law. The panel stated that the definition of an extrajudicial killing was “not clear,” *id.* at *6 n.9, that the international law relevant to the facts as pleaded was “not clearly defined,” *id.* at *7, that “the criteria to judge what is lawful and what is not lawful, especially for national leaders facing thousands of people taking to the streets in opposition, is largely lacking,” *id.*, and that applying the law to the pleaded facts would “broaden the offence[] of extrajudicial killings.” *Id.*

These statements are contrary to ATS jurisprudence and international law. International law unambiguously prohibits extrajudicial killings—including killings specifically of the form pleaded by Plaintiffs in this matter—under the specific, obligatory, and universal standard set out in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). While there are a variety of “forms” of extrajudicial killings at international law and gray areas with respect to the full scope or applicability of the prohibition in certain cases, the facts pleaded by the Plaintiffs fall squarely within the *core* definition of extrajudicial killing.

I. THE PANEL DECISION CONTRADICTS ATS JURISPRUDENCE RECOGNIZING THE PROHIBITION AGAINST

EXTRAJUDICIAL KILLINGS.

The specific, obligatory, and universal nature of the prohibition against extrajudicial killings has been repeatedly affirmed in ATS jurisprudence, including in cases following *Sosa*. See *Forti v. Suarez-Mason*, 672 F. Supp. 1539, 1542 (N.D. Cal. 1987) (“The proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory.”); *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 n.29 (D. Mass. 1995) (finding that indiscriminate summary executions by members of the Guatemalan military on civilians “constitute fully recognized violations of international law . . . not only are proscriptions of these acts universal and obligatory, they are adequately defined to encompass the instant allegations”); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1144 (E.D. Cal. 2004) (holding the commander of a death squad paid to assassinate an individual liable for extrajudicial killings, and stating that “extrajudicial killing . . . meet[s] the specific, universal, and obligatory standard”); *Wiwa v. Royal Dutch Petroleum*, 626 F. Supp. 2d 377, 383-84 n.4 (S.D.N.Y. 2009) (referring to an expert declaration prepared by Professor Philip Alston and concluding that extrajudicial killing is actionable under the ATS); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (finding defendant liable for extrajudicial killings).

II. INTERNATIONAL LAW PROHIBITS EXTRAJUDICIAL KILLINGS OF THE FORM PLEADED BY PLAINTIFFS.

The Plaintiffs pleaded that, in the context of general protests, Bolivian forces intentionally targeted and killed their deceased relatives, even though the Plaintiffs' relatives were not involved in the protests, engaging in criminal acts, or posing a threat. The prohibition on extrajudicial killings clearly encompasses—at its core—such unjustified killings.

International law recognizes the crucial role of law enforcement and other state forces in providing security and enables them to use force, including in controlling demonstrations. However, international law unambiguously and specifically circumscribes the lawful use of force by state forces. State forces may only use intentional lethal force when it is clear an individual is about to kill someone and cannot be detained by other means.¹ See U.N. Special

¹ These binding standards are incorporated into standard training manuals for police the world over. See Commonwealth Secretariat, *Commonwealth Manual on Human Rights Training for Police* 65 (2006) (“There has evolved an international prohibition on the State . . . itself depriving a person of their life arbitrarily (without any cause in law: a lawful justification would be self-defence or defence of others) . . . Unnecessary and unlawful use of deadly force by a police officer would therefore constitute a violation of the right to life”); Organization for Security and Cooperation in Europe, *Guidebook on Democratic Policing* 23 (2d ed. 2008) (“Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”); International Committee for the Red Cross, *Human Rights and Humanitarian Law in Professional Policing Concepts* 22 (2002) (“Firearms may be used only in specific circumstances involving an imminent threat of death or serious injury.

Rapporteur on extrajudicial, summary or arbitrary executions, *Report to General Assembly*, ¶¶33-45, U.N. Doc. A/61/311 (Sept. 5, 2006) (reviewing the international law on lawful force); U.N. Human Rights Committee, General Comment 6, 16th Sess., art. 6 (1982) (“The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”); *Code of Conduct for Law Enforcement Officials*, G.A. Res. 34/169, U.N. Doc. A/RES/34/169, Annex I, art. 3 (Dec. 17, 1979); Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27-Sept. 7, 1990, Havana, Cuba, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, art. 5 (1990).

These limits are fundamental aspects of the right to life and represent a principled balance between security and individual rights. The limits are applicable during all peacetime security operations, including during protests. See U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Report to the Human Rights Council*, U.N. Doc A/HRC/17/28 (reviewing the law in relation to protests). Killings that violate these limits violate the right to life and are one of the core forms of “extrajudicial killings” defined by

The intentional lethal use of firearms is allowed only when strictly unavoidable to protect life.”).

international law.

In determining the content and status of a norm of international law for the purposes of the ATS, U.S. courts look to the accepted evidence of customary international law. As listed in the Restatement (Third) of Foreign Relations Law of the United States §§ 102, 103(2)(a)-(d), 701 Reporters' Notes 2 (1990), this evidence includes treaties, international jurisprudence, international resolutions, actions by states reflecting the view that practices violate the law (such as condemnation), and the writing of scholars. The prohibition against killings of the form pleaded by Plaintiffs is demonstrated by an overwhelming number of sources of evidence of international law, and we refer below to only a sample of that evidence.

A. The Restatement (Third) Of Foreign Relations Lists Unnecessary Killings As A Violation Of International Law.

The Restatement (Third) of Foreign Relations Law of the United States §702 comment f provides that:

[I]t is 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.

Comment n notes that this is a peremptory norm.

B. The Practice And Statements Of The United States And Other Governments Affirms The Universally Obligatory Prohibition Under International Law Of The Acts Alleged By The Plaintiffs.

The U.S. Government has repeatedly affirmed the obligatory nature of the prohibition on extrajudicial killings, condemned extrajudicial killings by other governments (including killings of protesters and others), and reported extensively on such incidents. *See* Barack Obama, Nicholas Sarkozy & David Cameron, *Joint Op-Ed by Presidents Obama, Sarkozy, and Prime Minister Cameron, “Libya’s Pathway to Peace,”* U.S. Dep’t St. Official Blog (Apr. 15, 2011) (condemning violence by security forces in Libya, and stating “the International Criminal Court is rightly investigating the crimes committed against civilians and the grievous violations of international law”); President Barack Obama, *Statement by the President on the Attempted Attack on Christmas Day and Recent Violence in Iran* (Dec. 28, 2009) (“The United States joins with the international community in strongly condemning the violent and unjust suppression of innocent Iranian citizens, which has apparently resulted in . . . death”); Robert Pear, *Crackdown in Beijing*, N.Y. Times, June 4, 1989, at A21 (quoting President George H.W. Bush regarding Tiananmen Square) (“I deeply deplore the decision to use force against peaceful demonstrators and the consequent loss of life”); Press Release, U.S. Dep’t of State, *U.S. Condemns Ongoing Violence in Syria* (July 25, 2011) (“The United States condemns the ongoing violence in Syria, particularly the brutality practiced by the Syrian Government against its own citizens—peaceful

protesters and bystanders alike.”); U.N. GAOR, 65th Sess., 71st plen. mtg. at 11, U.N. Doc. A/65/PV.71 (Dec. 21, 2010) (quoting Ambassador Rick Barton, U.S. Representative to the Economic and Social Council of the United Nations) (“[A]ll persons have the right to be free from extrajudicial killing.”). The U.S. Department of State includes in its annual reporting intentional killings of civilians by state security forces. *See, e.g.*, Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Country Report on Human Rights Practices 2000, Appendix A: Notes on the Preparation of the Reports* (Feb. 23, 2001) (noting that extrajudicial killings are “deliberate, illegal, or excessive use of lethal force” by state agents, and also are “killings committed by police or security forces in operations . . . that result[] in the death of persons without due process of law (for example . . . killing of bystanders)”); Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Country Report on Human Rights Practices 2010, Peru* at 2 (2011) (recording that while there had been no “politically motivated” killings, there had been unlawful killings of protestors and suspects); Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, *Country Report on Human Rights Practices 2010, Cote D’Ivoire* at 3 (Mar. 30, 2011) (noting allegations that several killings by security forces “took place as persons fled the demonstration areas and inside private residences”).

Resolutions passed by a broad spectrum of governments at the U.N. Security Council, General Assembly, and Human Rights Council also affirm the specific prohibition. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (condemning and demanding an end to the violent repression of protesters by Libyan security forces, and referring the situation to the Prosecutor of the ICC); *Prosecutor v. Gaddafi*, Case No. ICC-01/11, Warrant of Arrest (June 27, 2011) (issuing an arrest warrant for Gaddafi on the basis of his suspected criminal responsibility for killings of protestors committed by Libyan security forces). Since 1980, the U.N. General Assembly has annually passed a resolution condemning extrajudicial killings and calling on states to observe their international obligations. G.A. Res 65/208, U.N. Doc. A/RES/65/208, ¶ 6 (Dec. 21, 2011) (calling on states to “take all measures required by international human rights law . . . to prevent loss of life, in particular that of children, during public demonstrations”). *See also* G.A. Res. 62/222, U.N. Doc. A/Res/62/222, ¶ 1 (Dec. 22, 2007) (condemning killings of peaceful demonstrators in Myanmar); G.A. Res. 60/174, U.N. Doc. A/Res/60/174, ¶ 3 (Dec. 16, 2005) (expressing grave concern about deaths of civilians during government troop efforts to quell demonstrations in Uzbekistan); U.N. Human Rights Council Res. S-16/1, U.N. Doc A/HRC/RES/S-16/1, ¶¶ 1, 3, 4 (May 4, 2011) (condemning “the use of lethal violence against peaceful protesters by the

Syrian authorities”).

C. Treaties Evidence The Prohibition Against Extrajudicial Killings And Proscribe The Acts Alleged By The Plaintiffs.

Treaties affirm the right to life and the prohibition against extrajudicial killings. International Covenant on Civil and Political Rights, art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“No one shall be arbitrarily deprived of his life.”).² The right to life under Article 6(1) of the ICCPR is non-derogable, even during times of public emergency. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

Jurisprudence of the Inter-American Court, the European Court of Human Rights, the African Commission on Human Rights, and the U.N. Human Rights Committee interpreting the treaty prohibitions against the unlawful deprivation of life consistently affirm that extrajudicial killings includes the specific form pleaded by Plaintiffs. *See Neira-Alegria et al. v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶¶ 74-76 (Jan. 19, 1995) (finding that while security forces had a duty to quell a riot, they used unlawful force and violated the right to life); *Villagran-Morales et al. v.*

²This fundamental right is mirrored in other treaties. *E.g.*, Convention on the Rights of the Child, art. 6(1), Nov. 20, 1989, 1577 U.N.T.S. 3; European Convention on Human Rights, art. 2, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights, art. 4(1), Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights, art. 4, 26 June 1981, 1520 U.N.T.S. 217.

Guatemala (The Street Children Case), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 139-147 (Nov. 19, 1999) (holding that the right to life is fundamental and *jus cogens*, and finding that unjustified police killings of children violated the norm); *Güleç v. Turkey*, 1998-IV Eur. Ct. H.R. 1698 (1998) (finding that security forces, even though they were otherwise legitimately attempting to stop a violent protest, used unlawful force with respect to the killing of a fifteen-year-old boy); *Musayev and Others v. Russia*, Eur. Ct. H.R. ¶¶ 141, 155 (2007) (finding that the right to life was violated when Russian security forces killed several unarmed civilians without any lawful justification); *McCann v. United Kingdom*, 21 Eur. Ct. H.R. 97 (1995) (looking to the planning and control of operations, and not merely the actions of the shooters, when finding a violation of the right to life); *Camargo v. Colombia*, U.N. Human Rights Committee, Communication No. 45/1979, ¶¶ 13.1-13.3, U.N. Doc. CCPR/C/OP/1 (1985) (finding a violation of the right to life where police killings of suspected criminals were intentional, without warning, not justified by self-defense or any other ground); *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order for Provisional Measures ¶¶ 2-3 (Afr. Ct. on Human and Peoples' Rights Mar. 25, 2011) (concluding that Libyan security forces' act of "open[ing] fire at random on . . . demonstrators," killing some, constituted a "serious violation[] of the

right to life”).

The clear prohibition of such killings expressed in international case law is unsurprising given that national legal systems around the world, including the U.S. legal system, prohibit similar conduct. In *Tennessee v. Garner*, 471 U.S. 1, 3, 11 (U.S. 1985), for example, the Court held the use of deadly force is only permissible when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.” See Aimee Sullivan, *The Judgment Against Fujimori for Human Rights Violations*, 25 Am. U. Int’l L. Rev. 657, 765-66 (2010) (translating the Supreme Court of Peru’s decision finding former President Alberto Fujimori responsible for killings committed by Peruvian security forces of unarmed and innocent individuals); *Ex parte Minister of Safety and Security and Others: In re S v. Walters and Another* 2002 (4) SA 613 (CC) at para. 37-40 (S. Afr.) (citing with approval to *Tennessee v. Garner* and other similar foreign court decisions limiting the use of lawful lethal force).

D. The Writings Of Scholars Indicate That The Acts Alleged By The Plaintiffs Violate The Norm Against Extrajudicial Killing.

Leading international law experts have consistently written that extrajudicial killings are among the clearest of customary international law violations. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *The Current*

Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 366 (1997) (describing prohibition against extrajudicial killing as a “settled and central” human rights norm); Rachael Schwartz, *And Tomorrow - The Torture Victim Protection Act*, 11 Ariz. J. Int’l & Comp. L. 271, 290 (1994) (“[T]he prevalence of legal prohibitions against torture and extrajudicial killing in the domestic law of many countries make those prohibitions not only ‘international law’ as that phrase is used in Articles I and III of the U.S. Constitution, but *jus cogens* as well.”).

Scholars have affirmed that intentional use of lethal force by state forces is prohibited unless required to protect life. Ralph Crawshaw et al., *Human Rights and Policing* 155-157 (2d ed. 2007).

CONCLUSION

Customary international law universally prohibits extrajudicial killings, including killings of the form pleaded by Plaintiffs. Intentional lethal force by state forces not justified by the need to protect life are prohibited “extrajudicial killings” in violation of the right to life, and are universally prohibited by international law. Accordingly, we respectfully submit that the petition for rehearing or rehearing *en banc* should be granted.

Dated: September, 28 2011

Respectfully submitted,³

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CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2011 I served one copy of the foregoing BRIEF OF PROFESSORS PHILIP ALSTON AND SARAH KNUCKEY, NEW YORK UNIVERSITY SCHOOL OF LAW, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING *EN BANC*, by First Class Mail, postage prepaid, on each of the following:

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