Case No. 14-15128

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELOY ROJAS MAMANI, *et al.*,
Plaintiffs-Appellees,

v.

JOSE CARLOS SANCHEZ BERZAIN
AND GONZALO SANCHEZ DE LOZADA SANCHEZ BUSTAMENTE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, THE HON. JAMES I. COHN PRESIDING,
CIV. NOS. 07-22459 & 08-21063

BRIEF OF AMICI CURIAE THE CENTER FOR JUSTICE AND ACCOUNTABILITY & TORTURE SURVIVORS ABUKAR HASSAN AHMED, DR. JUAN ROMAGOZA ARCE, ALDO CABELLO, AZIZ MOHAMED DERIA, CARLOS MAURICIO, CECILIA SANTOS MORAN, AND ZENAIDA VELASQUEZ IN SUPPORT OF APPELLEES AND SUPPORTING AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1–1-3, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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CORPORATE DISCLOSURE STATEMENT OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae state that they are all natural persons except for The Center for Justice and Accountability, which states that it is a nonprofit organization, has no parent companies, and has not issued shares of stock.

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IDENTITY AND INTEREST OF AMICI

Amici curiae Abukar Hassan Ahmed, Dr. Juan Romagoza Arce, Aldo Cabello, Aziz Mohamed Deria, Carlos Mauricio, Cecilia Santos Moran, and Zenaida Velasquez are survivors of gross human rights violations who have prevailed in lawsuits under the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"), against the individuals responsible for perpetrating those abuses. Amicus curiae The Center for Justice and Accountability ("CJA") is a non-profit organization dedicated to advancing the rights of survivors to seek truth, justice, and redress. Since its founding in 1998, CJA has successfully represented survivors of torture and extrajudicial killing in TVPA suits, including suits brought by amici, against individuals who have come to the United States seeking a safe harbor from accountability for those crimes.

This case will determine whether the TVPA remains a viable avenue for holding individuals accountable for human rights abuses, as Congress intended in enacting the TVPA, when victims have received a remedy from the State where the harms occurred, but not from the individual perpetrator. Amici have a strong interest in the proper resolution of these questions because the abuses at issue occur in foreign territories where judicial accountability against the persons responsible for their harm is often unavailable or inadequate. Thus, closing the courthouse doors to claimants who have fulfilled the TVPA's exhaustion

requirement would contravene the TVPA's purpose, and upend the longstanding policy of the United States to prevent this country from becoming a safe haven for perpetrators of egregious human rights abuses.

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This brief is filed with the consent of all parties, pursuant to Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As Congress intended when it enacted the Torture Victim Protection Act of 1991 ("TVPA"), this Court's interpretation of the TVPA should be informed by international human rights law. Under the jurisprudence of international human rights courts, Plaintiffs' receipt of humanitarian aid from the Bolivian government does not preclude their TVPA claims against Defendants. Amici thus support affirmance of the district court's finding that the TVPA's "exhaustion-of-local-remedies requirement does not have any preclusive effect under the circumstances of this case." R. 203-27.

International human rights courts hold that the exhaustion requirement is merely a procedural prerequisite to bringing claims. In the exhaustion context, international human rights courts only assess the "adequacy" and "availability" of domestic remedies when a plaintiff claims that failure to exhaust those remedies should be excused. Accordingly, satisfaction of the exhaustion requirement has no preclusive effect. The district court acknowledged this when it found that Plaintiffs' prior recoveries from the Bolivian government "do not preclude them from seeking to hold Defendants liable under the TVPA." R. 203-30.

While international human rights courts do not assess the preclusive effect of prior remedies under the exhaustion doctrine, they do evaluate the completeness of prior remedies in the context of other international law doctrines. Unlike the

exhaustion doctrine, these separate international law doctrines have not been incorporated into the TVPA. However, even under these other doctrines, international human right courts hold that, for gross human rights violations like extrajudicial killing, humanitarian aid is not preclusive because it does not constitute a full and effective remedy for the harms suffered by victims. International human rights courts recognize that a full and effective remedy includes the fundamental right to satisfaction and accountability from the individual perpetrators. Here, where Plaintiffs are relatives of victims of extrajudicial killing, the humanitarian aid from the Bolivian government was not a full and effective remedy because it did not hold the Defendants accountable for their violations of the Plaintiffs' basic human rights.

For these reasons, this Court should affirm the district court's holding that Plaintiffs are not precluded from seeking relief from the Defendants under the TVPA.

ARGUMENT

I. The TVPA Incorporates the Exhaustion Requirement as Applied Under Customary International Law by Human Rights Courts.

International law recognizes the universal human right to live free from state-sanctioned extrajudicial killing and torture. Congress, aware of this right, passed the Torture Victim Protection Act of 1991 ("TVPA"), which allows victims of extrajudicial killing and torture to bring claims in United States courts against individual perpetrators. 28 U.S.C. § 1350 note. When Congress passed the TVPA, international human rights courts had already developed a robust jurisprudence governing claims of extrajudicial killing and torture, which included the procedural requirement that a victim must exhaust local remedies before bringing those claims to an international court. Aware of this jurisprudence, Congress included in the TVPA an exhaustion clause, which provides that "[a] court shall decline to hear a claim under this section if the claimant has not **exhausted adequate and available remedies** in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note § 2(b) (emphasis added). In passing this provision, Congress noted:

> as this legislation involves international matters and judgments regarding the adequacy of procedures in foreign courts, the interpretation of section 2(b) [the exhaustion provision], like the other provisions of this act, should be informed by general principles of international law. **The procedural practice of international human rights tribunals** generally holds the respondent has the

> burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use.

S. Rep. No. 102-249, at 11 (1991) (emphasis added).

The terms "exhaustion" and "adequate and available remedies" have a specific meaning within international human rights courts applying the exhaustion requirement, and that meaning should guide this Court's interpretation of the TVPA's exhaustion clause. As this Court recognized in 2005, Congress intended that the TVPA's exhaustion requirement "should be informed by general principles of international law." *Jean v. Dorelien*, 431 F.3d 776, 782 (11th Cir. 2005) (quoting S. Rep. No. 102-249, at 9–10).

II. The Exhaustion Requirement, as Applied Under Customary International Law by Human Rights Courts, Has No Preclusive Effect

Under customary international law, an exhaustion requirement developed from disputes between nation-states because, historically, states were the primary locus of international rights and duties. Because of the focus on states as the subjects of international law, the original purpose of the exhaustion requirement was to give states an opportunity to redress their violations before being held accountable in an international forum. *See Velasquez Rodriguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 61 (Jul. 29, 1988), *available at* http://www1.umn.edu/humanrts/iachr/b_11_12d.htm.

In the 20th century, for the first time, multilateral treaties granted individuals the right to bring international human rights claims against states. *See*, *e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 221 (the "European Convention"); American Convention on Human Rights art. 46(2), Nov. 22, 1969, O.A.S.T.S. No. 36 (the "American Convention"); African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (the "African Charter"). These treaties and subsequent amendments have established three international human rights courts to hear claims: the European Court of Human Rights ("ECHR"), the Inter-American Court of Human Rights ("IACHR") and the African Court on Human and Peoples' Rights ("ACHPR").[1] All three of these courts require that an "applicant"[2] exhaust domestic remedies as "generally recognized" under international law before the court will admit the claim for consideration on the merits. European Convention art. 35 § 1; American Convention art. 46 § 1(a); African Charter, art. 50.[3] Because claims made by an individual against a state

[1] Complaints of human rights violations may also be brought to international treaty bodies. For example, individuals may file a complaint before the Committee against Torture alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[2] This brief refers to individual claimants before international human rights courts as "applicants," in accord with international human rights courts' jurisprudence.

[3] Because the ECHR's case law on exhaustion is the most developed, amici cite primarily to that court's jurisprudence.

present concerns distinct from claims made by a state against another state, exhaustion jurisprudence in international human rights courts developed to address the specific concerns that arise when an individual brings a human rights claim, such as extrajudicial killing and torture, in an international forum against a state.[4]

A. International Human Rights Courts are the Most Persuasive International Authorities on the Application of the TVPA's Exhaustion Requirement.

International human rights courts are the only international courts that apply the exhaustion requirement in the specific context of human rights claims brought by individuals.[5] Accordingly, they are the most persuasive international authority for interpreting the TVPA.

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[4] Because the exhaustion requirement in human rights courts focuses on individual claims it is not coextensive with the requirement applied by other international tribunals that focus on state claims. *Accord* Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 Colum. Hum. Rts. L. Rev. 223, 238 (1987) (the "unique features of human rights protection preclude a strictly parallel application of the customary local remedies rule").

[5] In contrast, modern international criminal tribunals require claims to be brought by a prosecutor or referred by an international body. These tribunals do not apply an exhaustion requirement and instead apply a distinct concept of "complementarity." *See* Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S 90; Coalition for the International Criminal Court, *Fact Sheet: The International Criminal Court* ¶ 13, *available at* www.iccnow.org/documents/ CICCFS_Caribbean_current1.pdf (noting that unlike the IACHR or other regional human rights mechanisms, the ICC does not operate under the principle of exhaustion of local remedies); c*f.* The International Court of Justice, *Handbook* 33 (6th ed. 2014) (noting that only states may bring claims before that court).

Moreover, Congress specifically incorporated the practice of these "international human rights tribunals" into the TVPA's exhaustion provision. S. Rep. No. 102-249, at 11. At the time the TVPA was passed, the primary international human rights tribunals were the ECHR and the IACHR.[6] In contrast, many international tribunals, including modern international criminal tribunals such as the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia, were not established until after Congress passed the TVPA.[7]

The fact that international human rights courts adjudicate claims brought against states rather than against individuals does not limit their persuasiveness in the TVPA context. Just the opposite. As the Defendants acknowledge, the purpose of the exhaustion rule is to allow the state an opportunity to provide redress before a victim brings a claim to an international tribunal. Br. of

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The principle of exhaustion is also found in several treaty bodies. *See*, *e.g.*, Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

[6] A contemporary law review article, cited by Congress, examined the exhaustion rule and noted that the ECHR had "produced the most concrete results to date." *See* Schochet, *supra*, at 243.

[7] *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (establishing the ICC); S.C. Res. 977, U.N. Doc. S/RES/977 (Feb. 22, 1995) (establishing international criminal tribunal for Rwanda); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing International Criminal Tribunal for the former Yugoslavia).

Appellants, at 44 ("AOB"). When the state itself is the defendant and is being held to account in an international forum these comity concerns are at their highest. *See Velasquez Rodriguez* ¶ 61. Thus, if in cases against states international human rights courts hold that exhaustion is merely a procedural condition precedent to bringing a claim, then all the more so in cases against an individual defendant, where the state is not a party and the concerns of comity and respect for sovereign states are reduced.

B. International Human Rights Courts Apply the Exhaustion Requirement as a Procedural Condition Precedent to Admissibility on the Merits

Human rights courts generally divide their proceedings into an initial procedural "admissibility" phase and a subsequent "merits" phase for cases that are determined to be admissible. *See generally*, European Court of Human Rights, *Practical Guide on Admissibility Criteria* (2014) (hereinafter "ECHR Guide"). At the admissibility phase, the human rights court decides whether the applicant has successfully alleged the elements of a claim, one of which is exhaustion of domestic remedies.[8] Article 35 of the European Convention on Human Rights is typical. Entitled "Admissibility criteria," Article 35 § 1 specifies that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted."

[8] Note that "it is not uncommon for an objection on grounds of non-exhaustion to be joined to the merits" judgment. *See* ECHR Guide ¶ 83.

Nowhere does Article 35 provide that the successful exhaustion of domestic remedies, or any domestic remedy obtained, may render an application inadmissible.[9] *Accord* American Convention art. 46; African Charter art. 50. Thus, in international human rights courts, the exhaustion requirement serves merely as a condition precedent to admissibility. This understanding of the exhaustion requirement is consistent with the district court's finding that the exhaustion requirement under the TVPA is only a "procedural hurdle." R. 203-27.

In numerous cases, international human rights courts have indeed held that applicants may proceed to the merits of their claims even after obtaining a significant domestic remedy. For example, in *Romanov v. Russia*, Eur. Ct. H.R. Appl. No. 41461/02, filed Oct. 21, 2002, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87836 (2008 merits judgment), the applicant brought a domestic tort action for abuses he suffered in a Russian prison. Domestic courts had awarded the applicant 30,000 Russian rubles as compensation for violations of his rights. *Id.* ¶¶ 31–33. When he subsequently brought a claim to the ECHR, the court, aware of the earlier award, found simply that because the applicant had brought a domestic tort action, "[i]t follows that the application

[9] Article 35 also provides for inadmissibility where an applicant has "not suffered a significant disadvantage." Article 35 § 3(b). This provision addresses *de minimis* injuries, and is unrelated to redress obtained through exhaustion. *See* ECHR Guide ¶ 405.

cannot be declared inadmissible for non-exhaustion of domestic remedies." *Id.* ¶ 52.[10]

The ECHR and IACHR have routinely declared cases admissible on similar facts. For example, in *Almeida v. Argentina*, Petition 325-00, Inter-Am Comm'n H.R., Report No. 45/14, OEA/Ser.L/V/II.151, doc. 10 ¶ 9 (2014), the applicant who alleged he was detained, tortured, and placed under surveillance after release, received compensation from an administrative body. Believing the compensation was insufficient, he subsequently sought review of the administrative body's decision, including an appeal to Argentina's Supreme Court; these appeals upheld the administrative decision. *Id.* ¶¶ 11, 22. When he later brought a petition to the Inter-American Commission, the commission held that the case was admissible, without discussing the nature of the domestic remedy received, noting only that the applicant "presented the claims that are the subject of his petition to the IACHR through a sequence of [domestic] remedies, reviewed by the judicial branch in multiple forums, and accordingly the [exhaustion] requirement has been met." *Id.* ¶ 47. *See also Scordino et al. v. Italy*, Eur. Ct. H.R. Appl. No. 36813/97, filed Jul.

[10] Because the applicant brought the tort action, the ECHR rejected the state's contention that the applicant's failure to bring a challenge to the prosecutor's decision not to institute criminal proceedings constituted a failure to exhaust. *Romanov* ¶ 52. This finding accords with the ECHR's well-established principle that "[i]f more than one potentially effective remedy is available, the applicant is only required to have used one of them" to meet the exhaustion requirement. ECHR Guide ¶ 66.

21, 1993, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23731 (2003 admissibility decision finding exhaustion and admissible petition after plaintiff received compensation from domestic appellate court).

C. In the Exhaustion Context, International Human Rights Courts Only Consider the Adequacy and Availability of a Domestic Remedy When an Applicant Claims an Excuse for Non-Exhaustion.

Appellants misconstrue the meaning of the term "adequate and available remedies" under customary international law when they suggest that, rather than only defining the remedies that a plaintiff must exhaust, the words "adequate and available" also describe remedies which, once obtained, preclude a TVPA claim. *See* AOB, at 23. This argument by Appellants is contrary to international human rights courts' jurisprudence on the exhaustion requirement, which holds that successful exhaustion has no preclusive effect.

In the context of exhaustion, international human rights courts consider the nature of domestic remedies only when an applicant claims that pursuing those remedies would be futile. Because these courts hold that the exhaustion requirement should be applied "with some degree of flexibility and without excessive formalism, given the context of protecting human rights," they have developed jurisprudential and statutory exceptions to the exhaustion requirement when domestic remedies would not be "adequate," "available," or "effective."

ECHR Guide, *supra*, ¶ 64; *see also* Rules of Procedure of the Inter-American Commission on Human Rights, OAS/Ser. L/V/I.4 No. 5 rev.12, art. 31 (2013).[11]

For example, in *Yasa v. Turkey*, Eur. Ct. H.R. Appl. No. 22495/93 ¶¶ 114, 128(3), filed Jul. 12, 1993, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58238 (1998 merits judgment), the ECHR found that the applicant's failure to exhaust a civil administrative remedy for the murder of his uncle was excused because the remedy could not provide all the elements of "adequate" redress, including investigating, identifying, and punishing the responsible individuals. Similarly, the ECHR recently found that an applicant was excused from pursuing domestic remedies which could only provide compensation because, without "identification and punishment of those responsible," those remedies were "not adequate and effective." *Mocanu et al. v. Romania*, Eur. Ct. H.R. Appl. No. 10865/09, filed Jan. 28, 2009, ¶ 227, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146540 (2014 merits judgment); *see also Tanase v. Moldova*, Eur. Ct. H.R. Appl. No. 7/08, filed Dec. 27, 2007, ¶ 122, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98428 (2010 merits judgment, holding applicant was

[11] Similarly, this Court has held that the "legislative history of the TVPA indicates that the exhaustion requirement 'was not intended to create a prohibitively stringent condition precedent to recovery under the statute.'" *Jean*, 431 F.3d at 782 (quoting *Cabiri v. Assasie–Gyimah*, 921 F. Supp. 1189, 1197 n.6 (S.D.N.Y. 1996)).

excused from lodging a domestic complaint with an ombudsman because this non-judicial process "was not an effective remedy"); *Plan de Sanchez Massacre v. Guatemala*, Case 11.763, Inter-Am. Comm'n. H.R., Report No. 31/99, OEA/Ser.L/V/II.102, doc. 6 ¶ 28 (1999) (applicants need not exhaust remedies before Guatemala's Commission for Historical Clarification because that body was non-judicial and could not attribute responsibility to any individual).

Because the TVPA specifically incorporates international human rights courts' application of the exhaustion requirement, the words "adequate and available" in the TVPA's exhaustion clause only modify the remedies that must be exhausted, and do not describe remedies that, once exhausted, have a preclusive effect. This is consistent with a plain reading of the TVPA, which states, "[a] court shall decline to hear a claim under this section if the claimant has not **exhausted adequate and available remedies** in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note § 2(b) (emphasis added). The district court correctly held that Plaintiffs' prior remedies actually exhausted and obtained from the Bolivian government "do not preclude them from seeking to hold Defendants liable under the TVPA." R. 203-30. This Court should follow international human rights courts' jurisprudence and the plain language of the TVPA in affirming the district court's decision.

III. Humanitarian Aid Alone Does Not Preclude International Human Rights Claims For Extrajudicial Killing and Torture Because It Does Not Provide a Full and Effective Remedy Including Accountability and Satisfaction from the Perpetrators

As discussed above in section II.C, in the exhaustion context, human rights courts assess the adequacy of a domestic remedy only to determine whether non-exhaustion of that remedy may be excused. Because exhaustion is only a procedural hurdle with no preclusive effect, and because the question the district court certified to this Court is "[w]hether exhaustion precludes Plaintiffs' TVPA claim," the inquiry into this question should end here. R. 211-8.

Appellants ask this Court to go beyond the exhaustion analysis and consider whether the humanitarian aid Plaintiffs have obtained has a preclusive effect. While the TVPA specifically incorporates the exhaustion requirement found in international human rights conventions,[12] the TVPA does not incorporate other provisions in those conventions governing preclusion, some of which include an examination of the adequacy of prior remedies received by the applicant.[13] Nonetheless, even under these preclusion provisions, Plaintiffs' claims would not be precluded based on the humanitarian aid they received.

[12] European Convention art. 35 § 1; American Convention art. 46 § 1(a); African Charter art. 50.

[13] *See*, *e.g.*, European Convention arts. 34, 37 (precluding cases where applicant is not a "victim" or where a "matter has been resolved").

A. An Award of Humanitarian Financial Aid for Claims of Extrajudicial Killing and Torture Is Not Preclusive in International Human Rights Courts.

Plaintiffs have brought claims under the TVPA for extrajudicial killings. In international human rights courts, applicants claiming willful ill-treatment such as extrajudicial killing and torture are entitled to a full and effective remedy, including accountability from the perpetrators, which humanitarian financial aid does not provide.

This point is well illustrated in the jurisprudence under Article 34 of the European Convention. Article 34 requires that an applicant bringing a claim to the ECHR be a "victim" of a violation of the European Convention.[14] International human rights courts have found that a claim may be precluded if the applicant already received a full and effective remedy "because the applicant ceases to have victim status." ECHR Guide, *supra*, ¶ 39.

When applying Article 34 of the Convention to claims of gross human rights abuses like extrajudicial killing and torture, codified respectively in Articles 2 and 3 of the European Convention, the ECHR has held that a state's award of only financial compensation does not provide a full and effective remedy, and thus does

[14] Another example is that under Article 37(b) of the European Convention "[t]he Court may at any stage of the proceedings decide to strike an application . . .[if]the matter has been resolved." It is important to note that the concepts in Article 34 and Article 37(b) have not been incorporated into the TVPA and both are distinct from Article 35 § 1 (exhaustion).

not vitiate an applicant's "victim" status, and in turn does not preclude her claim. Such gross abuses "cannot be remedied exclusively through an award of compensation" because such a remedy does not involve the "prosecution and punishment of those responsible." *Nikolova and Velichkova v. Bulgaria*, Eur. Ct. H.R. Appl. No. 7888/03, filed Feb. 24, 2003, ¶ 55, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84112 (2008 merits judgment discussing Article 2).

The case of *Romanov v. Russia* is typical. Eur. Ct. H.R. Appl. No. 41461/02, filed Oct. 21, 2002, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87836 (2008 merits judgment). In that case, the applicant alleged that prison officials severely beat him while he was an inmate. *Id*. ¶¶ 25–28. He lodged a domestic action seeking compensation for his injuries, and was awarded 30,000 Russian rubles. *Id*. ¶¶ 31–33. When the applicant subsequently brought a claim to the ECHR under Article 3, the court stated that "in cases of wilful ill-treatment the breach of Article 3 cannot be remedied exclusively through an award of compensation to the victim"; the remedy must also include the ability to "prosecute and punish those responsible." *Id*. ¶ 78 (applying Article 34 and finding claim was not precluded). *See also Nikolova and Velichkova* ¶¶ 55, 63–64 (2008) (finding applicants' claim was not precluded under Article 34 because the

state had not effectively prosecuted and punished those responsible, given that the perpetrators received only suspended criminal sentences).

In several other contexts, international human rights courts have found that financial compensation is not a full and effective remedy. *See Garcia Lucero et al. v. Chile*, Letter of Submission to the Court and Merits Report, Case 12.519, Inter-Am. Comm'n H.R, Report No. 23/11, ¶¶ 73–80 (2011), *available at* http://www.cidh.oas.org/demandas/12.519Eng.pdf (collecting cases); *Markin et al. v. Russia*, Eur. Ct. H.R. Appl. No. 30078/06, filed May 21, 2006, ¶¶ 79–92, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109868 (2012 merits judgment rejecting arguments that applicant alleging sex discrimination was no longer a "victim" and that violations were "resolved" after receiving humanitarian aid because the payments did not acknowledge violation or provide sufficient redress of harms suffered).[15]

[15] The ECHR deals with a range of violations ranging from purely economic violations, *see Scordino et al. v. Italy*, Eur. Ct. H.R. Appl. No. 36813/97, filed Jul. 21, 1993, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23731 (2003 admissibility decision regarding dispute of compensation for government takings), to gross human rights violations such as extrajudicial killing and torture. In a few cases not involving gross human rights violations, the ECHR has found that receipt of financial compensation has deprived an applicant of his status as a victim. *See, e.g., Ohlen v. Denmark*, Eur. Ct. H.R. Appl. No. 63214/00, filed Oct. 15, 1998, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68389 (2005 judgment striking out application, holding that an 80% reduction in criminal fine was sufficient redress for violation of speedy trial right).

B. Customary International Law Guarantees Victims of Human Rights Violations a Full and Effective Remedy that Includes Accountability for Perpetrators.

The jurisprudence of international human rights courts regarding victims' right to a remedy for torture and extrajudicial killing is consistent with statements of customary international law in various international declarations and conventions. As articulated in these documents, customary international law guarantees victims of such human rights violations the right to a "full and effective" remedy for the harms suffered.[16] Basic Principles and Guidelines on the Right to Remedy ¶ 19 (2005). A leading international declaration of principles is The Basic Principles and Guidelines on the Right to Remedy, which were adopted by the General Assembly of the United Nations and designed to guide states in implementing proper remedies for victims of gross human rights abuses, such as

[16] *See*, *e.g.*, Basic Principles and Guidelines on the Right to Remedy, ¶ 12 (2005) ("A victim of a gross violation of international human rights law or international humanitarian law shall have equal access to an effective judicial remedy."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."); Africa Charter, Art. 7 ("Every individual shall have the right to have his cause heard"); American Convention, art. 25 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights.").

torture and extrajudicial killing. *Id*. at 1. Under these guidelines, a full and effective remedy provides compensation for damages suffered from the violation, encompassing physical and mental harms, lost opportunities, lost earnings, and moral damages. *Id*. ¶ 20. However, for a remedy to be complete it must also provide satisfaction measures, including judicial and administrative sanctions against the persons liable for the violation, as well as verification and disclosure of the facts of the violation. *Id*. ¶¶ 19, 21–23. *See also Garcia Lucero et al. v. Chile*, Preliminary Objection, Merits, and Reparations, Inter-Am. Ct. H.R. (ser. C) no. 267, ¶ 188 (Aug. 28, 2013) (quoting U.N. Committee Against Torture, General Comment No. 3 (2012)) (torture victims entitled to comprehensive reparations including restitution, compensation, rehabilitation, **satisfaction**, and guarantees of non-repetition) (emphasis added).

C. The Humanitarian Aid Received in This Case Is Not Preclusive Because It Was Not a Full and Effective Remedy.

Under international human rights law, the humanitarian aid plaintiffs received in this case was not a full and effective remedy. The plaintiffs here obtained humanitarian aid from the State through two administrative processes enacted by the Bolivian legislature. Plaintiffs obtained financial humanitarian aid, including emergency and funeral expenses, under a 2003 Humanitarian Assistance Agreement. R. 203-25. Plaintiffs also obtained aid under a 2008 law providing compensation to the heirs of deceased victims. *Id*. Both measures preserved

plaintiffs' ability to seek further redress from individual perpetrators. R. 203-25 nn.17–18. Under international human rights law, this aid was not a full and effective remedy because, in addition to not providing complete compensation for the damages suffered, it did not provide "satisfaction." It did not develop the facts of the violation, and did not impose judicial sanctions against the perpetrators of the extrajudicial killings.

Just as the humanitarian aid plaintiffs received would neither be a full and effective remedy nor preclusive under international law, it would not be a preclusive remedy under the TVPA. The TVPA adopts much of the international law concept of victim satisfaction and legal accountability. Congress recognized the importance of a full and effective remedy, including legal accountability, in enacting the TVPA. They intended that the TVPA "carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," which "obligates state parties to adopt measures to ensure that torturers within their territories are held **legally accountable** for their acts." S. Rep. No. 102-249, at 3 (emphasis added). *See also Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1334–35 (S.D. Fla. 2002) (interpreting TVPA in light of the purpose to prevent torturers from obtaining safe haven in United States). As the district court recognized, the TVPA "creates specific *individual* liability for damages" against perpetrators. R. 203-26 (emphasis in original). Accordingly, the

TVPA's purpose, in concurrence with international law, is designed to provide access to justice for victims and individual liability against the perpetrators. Humanitarian financial aid, because it does not hold individuals perpetrators liable, falls short of a full and effective remedy and thus does not preclude a claim under the TVPA.

CONCLUSION

Congress intended for international human rights law to inform the courts' interpretation and application of the TVPA's exhaustion requirement. International human rights law is consistent with the plain language of the statute and the purpose of the statute. Both treat exhaustion and preclusion as distinct concepts and both call for a full and effective remedy that holds perpetrators accountable.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

This 13th day of March 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on March 13, 2015.

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