07-2579-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RAIED MOHAMAD IBRAHIM MATAR, et al.,

Plaintiff-Appellant,

– v. –

AVRAHAM DICHTER,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE CENTER FOR JUSTICE & ACCOUNTABILITY, HEARTLAND ALLIANCE FOR HUMAN NEEDS AND HUMAN RIGHTS, THE INSTITUTE FOR REDRESS AND RECOVERY, SURVIVORS INTERNATIONAL, AND SURVIVORS OF TORTURE, INTERNATIONAL AS AMICI CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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September 27, 2007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICI

This Brief of *Amici Curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 and Second Circuit Rule 29 in support of the Appellants.[1]

The *amici curiae* are non-profit organizations dedicated to providing social services to survivors of torture and other severe human rights abuses, listed in Appendix A. The *amici curiae* oppose the use of torture under any circumstance and support the efforts of torture survivors to hold their perpetrators accountable. In doing so, the *amici curiae* work to prevent the United States from serving as a safe haven for torturers. *Amicus curiae*, the Center for Justice & Accountability (CJA), is a non-profit legal advocacy center that represents survivors seeking redress for acts of torture and extrajudicial killing. CJA depends on the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000), to hold individual perpetrators who have come to the United States accountable under the law as Congress intended.

An unanticipated result of the district court's far-reaching decision in *Matar v. Dichter*, No. 05 Civ. 10270 (WHP), 2007 U.S. Dist. LEXIS 31946 (S.D.N.Y. 2007), is that it virtually nullifies the TVPA. Unless corrected by this Court, the

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[1] A Motion for Leave to File an Amicus Curiae Brief has been jointly filed with this brief, including a Corporate Disclosure Statement pursuant to Rule 26.1.

holding in *Matar* will deny a large class of victims access to the courts. For example, a case filed by CJA on behalf of five survivors of torture, extrajudicial killing, and other mass atrocities in Somalia has been dismissed by a district court that relied upon the faulty reasoning of the *Matar* decision. *Yousuf v. Samantar*, No. 1:04cv1360, 2007 U.S. Dist. LEXIS 56227 (E.D. Va. Aug. 1, 2007).[2] If allowed to stand, the *Matar* decision will eliminate the sole avenue for many survivors, particularly United States citizens, to seek redress for acts of torture and extrajudicial killing committed overseas.

CJA has filed civil actions in United States courts on behalf of survivors of torture and other abuses against former officials from Bosnia, Chile, El Salvador, Haiti, Honduras, Indonesia, Peru and Somalia. Each of these cases has included claims brought under the TVPA.[3] In these cases, none of the enumerated

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[2] CJA represents the five plaintiffs in *Yousuf*: Mr. Bashe Abdi Yousuf, a young business man detained, tortured, and kept in solitary confinement for over six years; Aziz Mohamed Deria, whose father and brother were abducted by officials and never seen again; John Doe I, whose two brothers were summarily executed by soldiers; Jane Doe, a university student detained by officials, raped 15 times, and put in solitary confinement for over three years; and John Doe II, imprisoned for his clan affiliation, who was shot by a firing squad, but miraculously survived by hiding under other dead bodies. *Yousuf*, 2007 U.S. Dist. LEXIS 56227, at *9-18. The defendant, General Mohamed Ali Samantar, a member of the brutal regime of Siad Barre, resides in Fairfax, Virginia.

[3] CJA also brings claims in United States courts under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2000), for human rights abuses committed abroad.

exceptions to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11 (2000), have applied, but this has not prevented these cases from moving forward—until now. If finding an exception under the FSIA is a prerequisite, as the *Matar* court requires, the legal remedies now available to a large class of victims of torture and extrajudicial killing will be effectively eliminated. Congress could not have intended this result when it enacted the TVPA.

Accordingly, *amici curiae* seek to provide this Court with additional information on the adverse impact of the district court's decision on torture survivors' ability to seek redress against their perpetrators who have come to the United States.

SUMMARY OF ARGUMENT

Congress intended the TVPA to serve as a tool for victims to hold accountable former foreign officials responsible for torture and extrajudicial killing who come to the United States. The TVPA codified this Court's historic decision in *Filartiga v. Pena-Irala*, 630 F.2d 976 (2d Cir. 1980), which held a former foreign official can be found liable for torture and extrajudicial killing in United States courts. Congress could not have intended the FSIA, passed long before the TVPA, to bar actions properly pled under the TVPA against former officials.

The ATS confers subject matter jurisdiction for claims brought by aliens only and is not available to United States citizens.

Instead, the legislative history of the TVPA shows Congress intended that acts of torture and extrajudicial killing, by their nature, are outside the scope of any official's legal authority and therefore do not fall under the protection of the FSIA. Suits brought by torture survivors and families of those extrajudicially killed by former foreign officials fulfill the purpose behind the TVPA of preventing the United States from becoming a safe haven for human rights abusers.

The unintended result in *Matar*, which *amicus* urges this Court to correct, is an overly broad application of the FSIA to the TVPA that is contrary to the intent of Congress. This sweeping decision would bestow immunity upon former state officials responsible for torture or extrajudicial killing where none of the narrow exceptions to the FSIA applies. A large class of survivors to whom Congress intended to give redress would lose access to the courts if, following the district court's opinion, statutory sovereign immunity extends to any former foreign official who operated in an official capacity even though he committed acts that fall outside the scope of his legal authority.

The district court in *Matar* erred by granting immunity under the FSIA to the defendant without considering whether he was acting within the scope of his authority under national and international law. 2007 U.S. Dist. LEXIS 31946, at *21. The FSIA does not apply to former foreign officials accused of torture or extrajudicial killing because these acts fall outside the scope of their legal

authority. Thus, no explicit exception to the FSIA is required in cases of torture and extrajudicial killing because the FSIA does not apply, and has never applied, to individual officials accused of such acts. The district court's faulty reasoning will have the effect of rewarding corrupt and lawless regimes who are more than willing to "ratify" the actions of officials who commit torture, and thereby shield them from liability under the TVPA.

ARGUMENT

I. The District Court's Application of the FSIA Contradicts Congressional Intent to Provide Redress Against Former Foreign Government Officials Responsible for Torture and Extrajudicial Killing Who Come to the United States.

The TVPA provides that:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation--
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing 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.

28 U.S.C. § 1350 note. When it passed the TVPA, Congress intended that victims of torture and extrajudicial killing, including United States citizens, would be able to bring civil claims against their perpetrators. The district court's decision in *Matar* frustrates the clear intent of Congress to provide such relief.

Congress did not intend that the FSIA act as a bar to TVPA claims against former foreign government officials responsible for torture and extrajudicial killings. To the contrary, Congress codified this Court's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights." *Id.* at 878. Congress intended the TVPA to "establish an unambiguous basis for a cause of action that [had] been successfully maintained" in *Filartiga*. S. Rep. No. 102-249 at 4 (1991); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003). Thus, Congress enacted the TVPA specifically with the intent to provide access to the courts for victims of acts that by definition are committed by government officials, individuals acting under governmental authority or color of law. In so doing, Congress recognized that such acts are beyond the power of any government to condone.

Congress intended to deny safe haven in the United States to former foreign government officials who have committed torture or extrajudicial killing and to provide tangible redress for the victims of these human rights abuses. Granting immunity to the perpetrators of these crimes renders the TVPA powerless to achieve its legislative purposes.

A. Congress Intended that the FSIA Would Not Bar Claims Against Former Government Officials Who Commit Torture and Extrajudicial Killing.

When it enacted the TVPA in 1992, Congress was fully aware of the existence and scope of the FSIA. *See* S. Rep. No. 102-249, at 7-8; *see also* H.R. Rep. No. 102-367, at 4-5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87-88. Congress did not intend the TVPA to abrogate the purpose of the FSIA, nor did it intend that the FSIA would immunize former government officials from TVPA suits. "[T]he TVPA is not meant to override the [FSIA] of 1976. . . . [T]he committee does not intend [sovereign, diplomatic, and head of state] immunities to provide former officials with a defense to a lawsuit brought under this legislation." S. Rep. No. 102-249, at 7-8. Congress understood that the FSIA would provide immunity to *governments* for human rights abuses, but it did not intend that immunity would apply to former *individual officials* accused of torture or extrajudicial killing. *See* H.R. Rep. No. 102-367, at 5 ("[S]overeign immunity would not generally be an available defense" to a claim brought under the TVPA).

Congress expressly provided in the statutory language of the TVPA that only those who acted under "the color of law" are liable to their victims. 28 U.S.C. § 1350 note. This requirement shows that Congress intended for individual officials to be sued under the TVPA but wanted to exclude "purely private criminal acts by individuals or nongovernmental organizations" from coverage. S. Rep. No. 102-

249, at 8; *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (holding torture and extrajudicial killing "are proscribed . . . *only when committed by state officials or under color of law*." (emphasis added)).

Congress viewed acts performed under "color of law" as distinct from, and not equivalent to, the sovereign acts that are shielded from United States judicial scrutiny under the FSIA. Congress directed the courts to look to interpretations of 42 U.S.C. § 1983 when construing "color of law." H.R. Rep. No. 102-367, at 5; S. Rep. No. 102-249, at 8. By doing so, Congress adopted the Supreme Court's analysis that certain actions—although they must be committed by government officials—are nonetheless outside the powers granted by any sovereign, and therefore sovereign immunity does not shield an individual from answering for those actions. *See Williams v. United States*, 341 U.S. 97, 99 (1951) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) ("'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'")

In enacting the TVPA, Congress understood that torture and extrajudicial killing cannot be within the scope of a foreign official's authority. As the Senate noted, "no state officially condones torture or extrajudicial killings," and therefore "few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties." S. Rep. No. 102-249, at 8. This is because both

crimes "violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law." S. Rep. No. 102-249, at 3. Therefore, Congress did not "intend these immunities to provide former officials with a defense to a lawsuit brought under this legislation . . . . [T]he FSIA should normally provide no defense to an action under the TVPA against a formal official." S. Rep. No. 102-249, at 8. Accordingly, an interpretation of the FSIA that only allows TVPA actions that fall within the narrow FSIA exceptions to proceed is not consistent with the Congressional understanding of the relationship between these two statutes.

B. Congress Intended the TVPA to Deny Torturers Safe Haven in the United States and Provide Redress for Victims.

Congress enacted the TVPA to prevent former foreign government officials who commit torture and extrajudicial killing from finding refuge in the United States. The TVPA "puts torturers on notice that they will find no safe haven in the United States. Torturers may be sued under the bill if they seek the protection of our shores." 137 Cong. Rec. H11244 (1991) (statement of Rep. Mazzoli). Extending broad immunity that shields these individuals from the reach of the judicial system contravenes this explicit purpose.

Congress also intended that the TVPA provide redress for torture victims who cannot achieve justice in the countries where the abuse occurred. "This bill is designed to provide 'tangible' results—a cause of action for damages for violation

of the law of nations condemning torture and extrajudicial killing." 132 Cong. Rec. 12949 (1986) (statement of Sen. Specter). Congress recognized that victims of these types of crimes often have no other way to seek justice:

> The countries that encourage torture and killing are generally the least likely to be able to adjudicate victims' claims fairly. The torturer who becomes subject to the jurisdiction of our courts must not be shielded by the lack of remedies in the very country that encourages his action.

135 Cong. Rec. 22717 (1989) (statement of Rep. Leach). Congress enacted the TVPA to provide a crucial tool of enforcement and provide victims access to a fair judicial system. The district court's application of immunity undermines Congress's intent by denying most victims access to United States courts, even when the perpetrators of their abuse are in the United States.

II. The District Court's Decision Unjustifiably Narrows the Application of the TVPA and Would Deny Many Survivors of Torture and Other Severe Human Rights Violations Access to the Courts.

The district court in *Matar* erred when it found that United States courts lack jurisdiction to consider TVPA claims if none of the enumerated exceptions to the FSIA apply.[4] 2007 U.S. Dist. LEXIS 31946, at *25-26. This holding ignores a prerequisite inquiry to determine if the FSIA applies at all: whether the defendant

[4] The relevant exceptions are explained in *Belhas v. Ya'alon*, 466 F. Supp. 2d 127, 131 (D.D.C. 2007), cited by the district court in *Matar*: "…waiver, 28 U.S.C. § 1605(a) (1), certain actions by state sponsors of terrorism, 28 U.S.C. § 1605(a) (7), disputes arising from commercial activities of a foreign state, 28 U.S.C. § 1605(a) (2), and disputes arising from certain tortious acts committed within the United States, 28 U.S.C. § 1605(a) (5)."

was acting within the scope of his legal authority. As a result, the decision in *Matar* has the sweeping effect of precluding the majority of claims for torture or extrajudicial killing that Congress intended to go forward.

A. Under the District Court's Decision the Very Type of Victim to Whom Congress Intended to Give Redress Under the TVPA Would Lose Access to the Courts

Below, *amici curiae* provide three examples of torture and extrajudicial claims successfully brought by CJA clients under the TVPA.[5] These claims exemplify the types of cases Congress intended in passing the TVPA and mirror the facts in *Filartiga* where Dolly Filartiga brought a civil action for her brother's torture and killing after learning the perpetrator was living freely in the United States. *Filartiga*, 630 F.2d at 879. If the *Matar* expansion of sovereign immunity under the FSIA had been applied to the defendants in these cases, these claims would likely not have been allowed to proceed to the discovery stage.

The TVPA is the only mechanism for redress that the plaintiffs in the cases below—all of them United States citizens—had available to them for the abuses that they suffered. Their perpetrators had come to live within the jurisdiction of the United States, and the claimants had to demonstrate that they had exhausted all remedies in the countries where the abuses originated as required under the TVPA.

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[5] The cases discussed herein involved claims brought under the ATS as well as the TVPA, however the featured plaintiffs are all United States citizens whose claims were limited to those brought under the TVPA.

28 U.S.C. § 1350 note. However, none of the exceptions enumerated in the FSIA apply in these cases: there is no waiver of immunity by the country where the abuses took place (28 U.S.C. § 1605(a)(1)); these countries have not been designated as state sponsors of terrorism (28 U.S.C. § 1605(a)(7)); the facts do not involve commercial activities of a foreign state (28 U.S.C. § 1605(a)(2)); and the tortious acts were committed outside the United States (28 U.S.C. § 1605(a)(5)). Nonetheless, the holding in *Matar* would have blocked these plaintiffs from proceeding with their claims.

1. The Torture and Extrajudicial Killing of Winston Cabello

After General Augusto Pinochet led a military *coup d'état* that ousted Chilean President Salvador Allende on September 11, 1973, his military *junta* arrested members of the Allende government, including an economist named Winston Cabello, who was taken to the Copiapo military garrison in northern Chile. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1152 (11th Cir. 2005). In early October 1973, General Arellano Stark took his unit on the "Caravan of Death," a bloody tour of northern Chile. *Id*. Joining General Stark was a military officer named Armando Fernandez-Larios (Fernandez). *Id*.

On the morning of October 17, 1973, members of the Caravan of Death, including Fernandez, selected 13 prisoners from Copiapo, Mr. Cabello among them, to be driven out of town and executed. *Cabello*, 402 F.3d at 1152. The

prisoners were ordered out of the truck one by one, then executed by gunfire and stabbing. *Id*. Mr. Cabello refused to leave the truck. *Id*. Fernandez slashed Mr. Cabello with a *corvo*, a short, curved knife designed to kill while causing a prolonged and painful death. *Id*. Mr. Cabello's body was among the bodies of the 13 prisoners finally exhumed in 1990 after the end of General Pinochet's rule. *Id*.

Fernandez resigned from the Chilean military in 1987 with the rank of Major and came to live in the United States. *Cabello*, 402 F.3d at 1153. Fleeing the violence in Chile, surviving members of Mr. Cabello's family also came to the United States, received political asylum, and became naturalized citizens. When they learned of Fernandez's presence in the United States, they filed an action against him in federal court that included claims for extrajudicial killing and torture under the TVPA. *Id.* at 1151. A federal jury held Fernandez liable, representing the first time any of the former members of General Pinochet's regime who fled to the United States faced accountability for their crimes. *Id*.

2. The Torture of Dr. Juan Romagoza Arce

On December 12, 1980, Dr. Juan Romagoza Arce was working at a rural health clinic in El Salvador when two vehicles carrying soldiers from the local army garrison and the National Guard pulled up and opened fire upon the clinic. *See* Second Amended Complaint, ¶¶ 12-13, *Arce v. Garcia*, 434 F.3d 1254 (11th

Cir. 2006) (No. 99-8364) ("2d Amend. Compl.").[6] Dr. Romagoza was shot in the right foot and another bullet grazed his head. *Id.* at ¶ 14. The soldiers and Guardsmen then detained Dr. Romagoza as a "subversive leader" because he possessed medical and surgical instruments. *Id*.

For 22 days, three to four times a day, National Guardsmen subjected Dr. Romagoza to electric shots to his ears, tongue, testicles, anus and the edges of his wounds until he lost consciousness. 2nd Amend. Compl. at ¶¶ 17-18. The Guardsman forced him to regain consciousness by kicking him and burning him with cigarettes. *Id.* at ¶ 17. Additionally, the Guardsmen sodomized Dr. Romagoza with foreign objects and subjected him to additional electric shocks, water torture, and asphyxiation with a hood containing calcium oxide. *Id.* at ¶ 19. After Dr. Romagoza's release, he fled El Salvador and came to the United States in 1983 where he received political asylum and later became a naturalized citizen. *Id.* at ¶¶6, 23-24.

At the time of Dr. Romagoza's torture, General José Garcia served as Minister of Defense of El Salvador and General Vides Cassanova served as the Director General of the Salvadoran National Guard. *Arce v. Garcia*, 434 F.3d

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[6] Since the underlying facts that gave rise to the suit in *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) do not appear in the published decision, citations are from the Second Amended Complaint *available at* http://www.cja.org/cases/Romagoza_Docs/RomagozaComplaint.htm.

1254, 1256 (11th Cir. 2006). Both men eventually left El Salvador and settled in South Florida, where they became permanent residents of the United States in 1989. *Id*. In 1999, Dr. Romagoza brought suit against the two generals under the TVPA and a federal jury found them liable. *Id*. at 1256-1257. The case marked the first time any of the former Salvadoran military who have settled in the United States had been held accountable for the mass atrocities committed against the civilian population of El Salvador. The case inspired several more Salvadoran survivors to seek accountability against their perpetrators.[7]

3. The Torture of Cecilia Santos

On September 25, 1980, university student Cecilia Santos was in the restroom at a shopping mall in San Salvador, El Salvador, when she heard a loud noise that sounded like an explosion. *Chavez v. Carranza*, 413 F. Supp. 2d 891, 895 (D. Tenn. 2005). Two guards entered the restroom and falsely accused Ms. Santos of having planted a bomb. *Id*. Soon after, she was driven to the headquarters of the National Police where she was interrogated and tortured. *Id*. At one point, one of the men raped her with a foreign object. *Id.* at 896. Her interrogators stuck sulphuric acid up her nose and dripped acid on her hand. *Id*.

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[7] CJA has represented torture survivors and families of those extrajudicially killed in two subsequent cases brought against former Salvadoran officials found to be living in the United States. *See Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 895 (D. Tenn. 2005).

They also hooked wires to her fingers that administered electric shocks. *Id*. After her release, Ms. Santos fled El Salvador, sought political asylum in the United States and later became a naturalized citizen.

Vice Minister of Defense Colonel Nicolas Carranza had command over the National Police responsible for Ms. Santos' torture. *Chavez*, 413 F. Supp. 2d at 894. In 1984, Colonel Carranza also moved to the United States and set up residence in Memphis, Tennessee. *Id*.

Ms. Santos sued Colonel Carranza under the TVPA and accused him of having command responsibility for her torture. *Chavez*, 413 F. Supp. 2d at 894. After a federal jury found him liable, Ms. Santos said, "[Carranza] and the others will now get the message that they just cannot go and do anything they want with impunity. They are not above the law." *Action News 5* (WMC-TV Memphis television broadcast, Nov. 18, 2005).

B. Restricting Claims Under the TVPA to an Enumerated Exception Under the FSIA Will Virtually Nullify the TVPA.

The enumerated exceptions under the FSIA are so narrow that if courts analyzing TVPA claims are required to find one, the TVPA is rendered a practical nullity. Such a course would reward corrupt and repressive regimes for their longevity and actually encourage, rather than deter, future abuses. In other words, the district court's ruling would immunize all former officials responsible for the alleged acts abroad under a corrupt and entrenched regime that has not been

designated as a state sponsor of terror, yet continues to control the reigns of power.[8] This result leads to political and foreign relations considerations interfering in the decision about whether immunity applies, contrary to the intent behind the FSIA. *See Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983) (quoting H.R. Rep. No. 94-1487, at 7 (1976)) ("In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'")

If restricted to the enumerated exceptions of the FSIA, justice under the TVPA disappears from the reach of a large class of victims. The enumerated exceptions are extremely narrow, such that the surviving cases would be so few as to render the TVPA completely ineffective.

III. Sovereign Immunity Under the FSIA Does Not Shield Former Foreign Officials Facing Allegations Properly Pled Under the TVPA.

Beginning with this Court's historic decision in *Filartiga*, United States courts have recognized torture as a violation of an established norm of international law and thus actionable in United States courts. 630 F.2d at 890 (cited with approval in

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[8] The United States government currently identifies only five countries as state sponsors of terrorism: Cuba, Iran, North Korea, Sudan and Syria. *See* U.S. Department of State, State Sponsors of Terrorism, http://www.state.gov/s/ct/c14151.htm (last visited Aug. 20, 2007).

Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)). This Court has afforded extrajudicial killing the same recognition. *Kadic*, 70 F.3d at 243 ("*official* torture is prohibited by universally accepted norms of international law, and the Torture Victim Act confirms this holding and extends it to cover summary execution").

In cases that include properly pled allegations of torture or extrajudicial killing under the TVPA, courts have held that the FSIA does not apply. *See Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1472 (9th Cir. 1994) ("[Defendant] may be held liable for acts . . . in violation of existing law. . . . [A]cts of torture, execution, and disappearance were clearly acts outside of [the defendant's] authority as President."); *Doe v. Liu Qi,* 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) ("Where, as here, . . . such violations are in fact prohibited by Chinese law, Defendants cannot claim to have acted under a valid grant of authority for purposes of the FSIA."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (FSIA inapplicable because acts of torture, summary execution, arbitrary detention, disappearance and cruel, inhuman or degrading treatment "exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority.")

When determining whether FSIA applies to an individual, courts have agreed the inquiry must focus on whether an individual acted within the scope of his lawful authority. *See Velasco v. Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir.

2004) ("The FSIA . . . does not immunize an official who acts beyond the scope of his authority."); *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990), *aff'd*, 976 F.2d 561 (9th Cir. 1992) ("Sovereign immunity similarly will not shield an official who acts beyond the scope of his authority.").[9] Before *Matar*, district courts in the Second Circuit held that acts beyond an official's lawful authority do not qualify for FSIA immunity. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (Allegations of torture fall beyond scope of defendant's authority, thus the FSIA does not shield him from claims brought under the TVPA and Alien Tort Statute.); *Anglo-Iberia Underwriting Mgmt. Co. v. PT Jamsostek*, No. 97 Civ. 5116 (HB), 1998 U.S. Dist. LEXIS 8181, at *20 (S.D.N.Y. 1998), *dismissed by* 1999 U.S. Dist. LEXIS 1563 (S.D.N.Y. Feb. 10, 1999), *aff'd*, (2d Cir. 2007) (summary order). The inquiry whether an act falls within an official's lawful authority is two-part, "focus[ing] on the nature of the individual's alleged actions . . . [and] whether the [official] was authorized in his official capacity." *Jungquist*, 115 F.3d at 1028.

[9] *See also Guevara v. Republic of Peru*, 468 F.3d 1289, 1305 (11th Cir. 2006); *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Jungquist v. Al Nahyan* 115 F.3d 1020, 1028 (D.C. Cir. 1997).

A. The Predicate Acts of the TVPA Fall Outside the Scope of an Official's Lawful Authority.

The predicate acts of the TVPA, torture and extrajudicial killing—though committed under the color of law— can never fall within the scope of an official's lawful authority. The scope of an official's authority is limited to the statutory powers granted an official. "If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state'" for FSIA purposes. *Phaneuf v. Republic of Indon.*, 106 F.3d 302, 308 (9th Cir. 1997) (holding actions without actual authority fall outside the FSIA commercial activity exception). *See also Chuidian*, 912 F.2d at 1106 (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("'[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'"); *Cabiri*, 921 F. Supp. at 1197 (citing *Chuidian*, 912 F.2d at 1106). Former foreign officials facing properly pled allegations of torture or extrajudicial killing are thus not entitled to immunity under the FSIA because Congress understood that no state would empower its agents to commit these abuses on its behalf.

The district court in this case failed to examine the nature of the alleged actions or whether the defendant was acting within his lawful authority. Instead, the court erroneously granted immunity based on the determination that the defendant's actions were not "personal and private in nature." 2007 U.S. Dist.

31946, at *17 (citing *Leutwyler v. Al-Abdullah*, 184 F. Supp. 2d 277, 287 (S.D.N.Y. 2001)).[10] This analysis makes no sense in the context of a TVPA claim because proper allegations of torture and extrajudicial killing under the statute *always* require government action and therefore can never be personal or private in nature. *Kadic*, 70 F.3d at 244. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) ("The text of the Torture Victim Protection Act expressly requires the element of state action.") The state action requirement distinguishes torture and extrajudicial killing actionable under the TVPA from assault and murder. The district court's analysis ignores this distinction.

B. The District Court's Holding Risks Rewarding Corrupt Regimes Willing to "Ratify" Actions Such as Torture.

Filartiga observed that virtually no government asserts a right to torture its citizens. 630 F.2d at 884. Unfortunately, the result in *Matar*, if followed to its logical conclusion, may reward corrupt and lawless regimes that are brazen enough to assert a right to commit torture or other gross violations. The district court in *Matar* suggests that immunity is available to any official whose actions have been "expressly ratified" by the foreign government. 2007 U.S. Dist. LEXIS 31946 at *21. Such logic would shield officials of the most openly repressive regimes from suit under the TVPA.

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[10] *Leutwyler* does not include TVPA claims, but rather claims of copyright infringement, breach of contract, and defamation. 184 F. Supp. 2d at 280.

The misguided analysis in *Matar* has already had this effect in *Yousuf*, 2007 U.S. Dist. LEXIS 56227 at *33, where the court, relying on *Matar*, dismissed claims for torture and other abuses committed in Somalia during the Siad Barre dictatorship of the 1980s. The court's decision was based on a letter submitted by a successor regime that "ratified" the actions of the defendant two decades after the fact. *Id*. The plaintiffs in *Yousuf*, all members of Isaaq clan, were targets of human rights abuses based on their clan affiliation, and still today have no democratic representation within the current Somali regime, let alone a remedy for accountability within Somalia. *Id*. at *3 ("The military leadership built upon and exploited the clan system by appointing members of favored clans to top governmental and military positions while also oppressing and targeting other clans, especially the Isaaq clan in the northern regions.") The heinous allegations in *Yousuf* stem from the massive and systematic campaign of torture and other abuses committed by the Siad Barre regime. Granting sovereign immunity to its former officials rewards them for being part of such a boldly repressive regime. Such a result defies Congress' clear intent when they passed the TVPA to condemn and deter torture.

By presuming immunity applies to all acts taken under color of law and failing to consider whether the defendant acted within the scope of his lawful authority, the district court ruled in contravention of case law analyzing the FSIA

in the TVPA context. In so doing, the court disregarded precedent and ignored clear and contrary legislative intent.

IV. CONCLUSION

In order to implement Congress's intent to provide redress to victims of torture and extrajudicial killing whose perpetrators seek safe haven in the United States, and to avoid the virtual nullification of the TVPA, this Court should not grant immunity to a former foreign official acts outside the scope of his authority and in violation of the law of the foreign state and international law norms. No explicit exception to the FSIA is required in those circumstances because the FSIA does not apply at all. To require an exception would deny a large class of victims with valid TVPA claims access to the courts.

APPENDIX A

The Center for Justice & Accountability (CJA), is an international human rights organization dedicated to ending torture and other severe human rights abuses around the world and advancing the rights of survivors to seek truth, justice and redress. Founded in 1998 with support from Amnesty International and the United Nations Voluntary Fund for Victims of Torture, CJA represents survivors of torture and other acts of severe violence in their pursuit of justice. CJA employs a survivor-centered approach that combines legal representation with medical and psycho-social services to both empower and heal torture survivors and their communities.

Heartland Alliance for Human Needs and Human Rights (Heartland) specializes in securing basic human rights, such as housing, quality health care, and economic opportunity for individuals and families confronted by poverty and danger through direct service and advocacy work. Heartland provides direct services to individuals and families in Chicago, Illinois and Benton Harbor, Michigan for whom these rights seem out of reach. Through more than 70 programs, Heartland serves homeless, low-income, and very low income families, immigrants, refugees, and asylum seekers, survivors of domestic violence,

children, youth, and the elderly, people living with HIV/AIDS, people in need of health care, and other unprotected, impoverished, or marginalized individuals.

The Institute for Redress and Recovery (IRR) is an interdisciplinary organization based at Santa Clara University's Schools of Law and Counseling Psychology with assistance from the Markkula Center for Applied Ethics. IRR works to establish collaborations between lawyers representing victims of human rights violations in legal processes and clinicians providing medical and psychological services. Survivors of human rights violations experience a profound need to pursue justice that often motivates them to seek legal redress and accountability, and there is good clinical evidence that the litigation process is beneficial to victims' healing processes. IRR works to ensure that victims achieve such rehabilitation without experiencing retraumatization during the arduous process of eventually confronting one's torturer in court by providing treatment and support for existing and untreated trauma symptoms.

Survivors International (SI), founded in 1986, is dedicated to providing essential medical, mental health, social services to refugees and immigrants living in the San Francisco Bay area who are survivors of torture and gender-based persecution. In accordance with international established guidelines, SI provides the psychological

and medical evaluations to support asylum claims. SI has provided services to more than 2,100 survivors of torture.

Survivors of Torture, International (Survivors) is an independent nonprofit organization dedicated to caring for survivors of politically-motivated torture and their families who live in San Diego County, California. Since its inception in 1997, Survivors has helped more than 650 torture survivors from more than 55 countries to recover from their traumas through a holistic program including medical, dental, psychiatric, psychological, legal and social services. Survivors maintain a coordinated effort at the local, state and national government levels to advocate on behalf of torture survivors and against the use of torture. Through advocacy and education Survivors contributes to the goal of ending the use of torture.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) (7) (B) because this brief contains 6,084 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) (7) (B) (iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a) (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 12 point Times New Roman.

Dated: September 27, 2007

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that on September 27, 2007, I served a true copy of the:

Brief for the Center for Justice & Accountability, Heartland Alliance for Human Needs and Human Rights, the Institute for Redress and Recovery, Survivors International, and Survivors of Torture, International as Amici Curiae in Support of the Plaintiffs-Appellants and Reversal of the District Court's Decision

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