UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

NORA ISABEL LAM GALLEGOS individually and on behalf of the estate of Guillermo Arevalo Pedraza, deceased, and as next friend of P.A.L. and M.A.L., minor children,	)	
Plaintiffs,	)	Civil Action No. 5:14-CV-00136
v.	)	Defendant The United States' Motion to Dismiss
UNITED STATES OF AMERICA, JANET NAPOLITANO, DAVID V. AGUILAR, ALAN BERSIN, MICHAEL J. FISHER, MICHAEL C. KOSTELNIK, ROBERT L. HARRIS, JOHN ESQUIVEL, DANIEL SCHAEFFER, RAMIRO RODRIGUEZ, MATTHEW LAMBRECHT, CHRISTOPHER W. BOATWRIGHT, and DOES 1-3,	)	
Defendants.	)	

DEFENDANT THE UNITED STATES'
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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INTRODUCTION

The crux of this lawsuit is an alleged "Rocking Policy" purportedly adhered to by U.S. Customs and Border Patrol Agents at the southern border of the United States. According to Plaintiff Nora Isabel Lam Gallegos, pursuant to this policy, Border Patrol Agents policing the border between the United States and Mexico have used deadly force to respond to rocks thrown at them from the Mexican side of the border. Amended Complaint ("AC") at 1.[1] Gallegos alleges that deadly force was used regardless of whether the rocks being thrown posed an imminent risk of death or serious injury, or whether other less lethal means of response were available to the agents who were the targets of the rocks being thrown. *Id.* at 1-2. Gallegos claims that the alleged policy caused the death of her husband, Guillermo Arevalo Pedraza ("Arevalo") who was struck and killed by two bullets while he was in Mexico, near the bank of the Rio Grande. *Id.* ¶ 36. Gallegos alleges that the fatal rounds were fired by Border Patrol Agent Christopher Boatwright, who was in an airboat commanded by another border patrol agent on the United States' side of the river. *Id.* ¶¶ 16, 17, 36-37, 43. Gallegos contends that the shooting was unprovoked, but cites a statement issued by the Border Patrol asserting that prior to the incident the agents in question were subjected to rocks thrown from the Mexican side of the border. *Id.* ¶ 45.

[1] Gallegos brings this action on behalf of Arevalo's estate and as the next friend of Arevalo's two minor children. AC ¶¶ 1-3.

Plaintiffs' First Claim for Relief is the sole count of the Amended Complaint remaining in this suit.[2] In that count, Gallegos asserts a claim against Agent Boatwright and the United States under the Alien Tort Statute, 28 U.S.C. § 1350, in which she claims that Arevalo's death was an "extrajudicial killing" prohibited under international law. AC ¶ 131-34. Gallegos alleges that Agent Boatwright, acting pursuant to the unlawful "Rocking Policy," killed Arevalo in violation of the law of nations. *Id.* ¶ 130. Gallegos also contends that the acts and omissions of the United States with respect to the claimed policy violated the law of nations. *Id.* ¶ 132.

The United States has substituted itself under the Westfall Act for Agent Boatwright. *See* United States' Notice of Substitution. As shown below, Gallegos' claim that the United States (including any actions by Agent Boatwright) violated an international law or law of nations prohibition fails as a matter of law for lack of subject matter jurisdiction because the claim is barred by the United States' sovereign immunity. In addition, the allegations of Gallegos' Amended Complaint fail to state a claim for a violation of international law.

FACTUAL BACKGROUND[3]

Gallegos alleges that on September 3, 2012, Arevalo, Gallegos, and their children were in Los Patinaderos Park in Mexico near the bank of the Rio Grande. AC ¶ 36. At some point, an unidentified man swam across the river from Mexico and reached land in Texas. *Id.* at ¶ 39. A

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[2] The Amended Complaint also asserted claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against nine current or former officials of the Department of Homeland Security ("DHS"), each in his or her individual capacity, for the alleged violation of Arevalo's constitutional rights. All of the *Bivens* claims have been dismissed with prejudice. *See* Dkt. No. 69.

[3] While the United States does not concede the truth of Gallegos' factual allegations, a court considering a Rule 12(b)(6) motion to dismiss "is required to accept all well-pleaded facts as true." *Bass v. Stryker Corp.*, 669 F.3d 501, 507 (5th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Border Patrol airboat crewed by Border Patrol Agents Boatwright and Lambrecht arrived, and the man tried to escape by swimming back to Mexico. *Id.* at ¶¶ 40-43. The airboat cut the swimmer off in United States' territory. *Id.* at ¶ 42.

Gallegos alleges that Agent Boatwright subsequently fired two rounds from his weapon into a crowd of people in the park. These rounds struck and killed Arevalo. *Id.* at ¶ 43. The Amended Complaint alleges that, according to a Border Patrol statement, Agent Boatwright fired his weapon because members of the crowd were throwing rocks at the agents. *Id.* at ¶ 45. But Gallegos contends that Agent Boatwright fired "[w]ithout warning or provocation," *id.* at ¶ 43, and that "numerous witnesses" present in the park have claimed that no one threw rocks, *id.* at ¶ 45.[4] Gallegos alleges that Agent Boatwright's use of force was in accordance with a "Rocking Policy," a pattern and practice whereby Border Patrol Agents would use deadly force to respond to rocks being thrown at them by persons on the Mexican side of the border. *Id.* ¶¶ 50-52.

LEGAL FRAMEWORK

A federal district court is a court of limited jurisdiction and possesses only that power which is authorized by the Constitution or statutory law. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction." *Id.* (citing *Turner v. Bank of N. Am.*, 4 U.S. 8, 10 (1799)). Gallegos, as the party seeking to invoke the court's jurisdiction, bears the burden of establishing subject-matter jurisdiction. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). If a district court determines that it lacks subject-matter jurisdiction over the claims raised in a complaint, the complaint must

[4] The Amended Complaint denies that Arevalo "was in the process of throwing a rock" when he was shot, (*id.* at ¶ 48), and states that "none of the witnesses asserts that Arevalo had thrown any rock," (*id.* at ¶ 47). Gallegos maintains that even if Arevalo were throwing rocks, the use of force was excessive because the agents should have shielded themselves, or moved the airboat out of range. (*Id.* at ¶¶ 46-48.)

be dismissed. Fed. R. Civ. P. 12(b)(1); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

To survive a Rule 12(b)(6) motion to dismiss, a complaint must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Well-pled factual allegations are presumed to be true, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but allegations that amount to mere "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or a "'naked assertion[]' devoid of 'further factual enhancement,'" are not entitled to this presumption, *Iqbal*, 556 U.S. at 678; *see also Doe v. Robertson*, 751 F.3d 383, 387 (5th Cir. 2014). A plaintiff must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 at 678. If "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief," and the complaint should be dismissed. *Id.* at 679 (alteration in original, internal quotation marks omitted).

ARGUMENT

I. THE UNITED STATES IS THE SOLE DEFENDANT FOR GALLEGOS'S REMAINING CLAIM UNDER THE ALIEN TORT STATUTE

In the First Claim for Relief, Gallegos invokes the Alien Tort Statute (the "ATS"), 28 U.S.C. § 1350, to assert a tort claim against Agent Boatwright and the United States based upon Arevalo's death. AC ¶¶ 128-44. Gallegos asserts that "[t]he prohibition against extrajudicial killing is a peremptory, *jus cogens* norm – a specific, universal, and obligatory norm from which no nation may lawfully depart." *Id.* ¶ 109. Because Gallegos' claim is based upon the alleged negligent or wrongful conduct of a government employee acting within the scope of his federal employment, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.

L. No. 100-694, 102 Stat. 4563 (codified in part at 28 U.S.C. §§ 2671, 2674, 2679) (the "Westfall Act") bars assertion of that claim against Agent Boatwright individually. The Westfall Act makes clear that the exclusive remedy for such a claim is a suit against the United States under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 2679(b)(1). The Westfall Act expressly precludes any other "civil action or proceeding for money damages" arising out of the same subject matter against the employee. 28 U.S.C. § 2679(b)(1). The exclusivity of the FTCA remedy is applicable even if a plaintiff cannot recover against the United States under the FTCA. *See United States v. Smith*, 499 U.S. 160, 166 (1991) ("Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether.").

Upon certification by the Attorney General or an appropriate designee that the defendant individual employee acted within the scope of his employment, the United States is substituted in the employee's place and becomes the sole defendant by operation of law. 28 U.S.C. § 2679(d)(1); *Osborn v. Haley*, 549 U.S. 225, 241(2007).[5] In this case, an authorized designee of the Attorney General has certified that Agent Boatwright acted within the scope of his employment with respect to the allegations in the Amended Complaint. *See* ECF No. 74, United States' Notice of Substitution, Ex. 1 (certification). The effect of this certification is that Agent Boatwright is absolutely immune from suit for the alleged tort that gave rise to the Amended

[5] Certification of scope of employment under the Westfall Act is not a discretionary action by the Department of Justice. Federal employees who are sued for their actions have a right to receive a scope of employment certification whenever their alleged conduct satisfies the requirements of the Act. If a scope certification is not provided, federal employees may petition the court to compel certification. 28 U.S.C. § 2679(d)(3); *see also Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 431 (1995) (finding that "the Act specifically allows employees whose certification requests have been denied by the Attorney General, to contest the denial in court").

Complaint. *See* 28 U.S.C. § 2679(b)(1) ("civil action[s] or proceeding[s] . . . against the employee or the employee's estate [are] precluded").

While the Attorney General's certification of scope of employment under the Westfall Act is subject to judicial review, *Garcia v. United States*, 62 F.3d 126, 127 (5th Cir. 1995), the burden is on Gallegos to show that Boatwright's conduct was not within the scope of his employment. *Williams v. United States*, 71 F.3d 502, 506 (5th Cir. 1995). And in the Amended Complaint, Gallegos acknowledges that all of the named Defendants, including Boatwright, "were acting under color of law and within the course and scope of their employment." AC ¶ 30; *accord* AC ¶ 17 ("Defendant Boatwright was acting in his capacity as a sworn law enforcement or peace officer, agent, servant, or employee of the United States, and under color of legal authority.").

There are only two exceptions to the exclusive remedy mandated by the Westfall Act: claims brought for 1) "a violation of the Constitution" or 2) "a violation of a statute of the United States." 28 U.S.C. § 2679(b)(2). Neither exception is applicable here. Count I does not allege a constitutional violation. And the ATS itself cannot be "violated" because it is not a statute that creates substantive rights. As the Supreme Court recognized in *Sosa v. Alvarez-Machain*, "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. 692, 724 (2004). *See Alvarez-Machain v. United States*, 331 F.3d 604, 631 (9th Cir. 2003) (finding that the United States was properly substituted for individual DEA officers as the sole defendant on plaintiff's ATS claims under the Westfall Act and noting, "a claim under the AT[S] is based on a violation of international law, not of the AT[S] itself."), *rev'd on other grounds*, 542 U.S. 692 (2004). To the extent that Gallegos relies upon a treaty (or treaties) as the basis for the claim brought in Count I against Agent Boatwright, *see* AC ¶¶ 116, 120, the claim is similarly barred by the

Westfall Act because treaties are neither federal statutes nor part of the Constitution. *See Sobitan v. Glud*, 589 F.3d 379, 386 (7th Cir. 2009) ("[W]e note that every court to consider the issue has determined that the Westfall Act's exemption for statutory claims does not include claims brought pursuant to a treaty."); *Saleh v. Bush*, 848 F.3d 880, 892 (9th Cir. 2017) ("In short, the treaties and charters cited by Plaintiff do not alter our conclusion that the Westfall Act, by its plain terms, immunizes Defendants from suit.").

II. NEITHER THE ALIEN TORT STATUTE NOR THE FEDERAL TORT CLAIMS ACT WAIVE SOVEREIGN IMMUNITY OR PROVIDE SUBJECT-MATTER JURISDICTION FOR GALLEGOS'S "EXTRAJUDICIAL KILLING" CLAIM

The United States, "as sovereign, is immune from suit save as it consents to be sued." *La. Dep't of Envtl. Quality v. U.S. E.P.A.*, 730 F.3d 446, 448-49 (5th Cir. 2013) (alteration in original and quotation marks omitted). In order to establish that the Court has subject-matter jurisdiction for the international law claim she asserts, Gallegos must show that there has been a valid waiver of the United States' sovereign immunity for that claim. *Lewis v. Hunt*, 492 F.3d 565, 570 (5th Cir. 2007); *Bodin v. Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Any waiver "will be strictly construed . . . in favor of the sovereign" and cannot be enlarged by a court "beyond the purview of the statutory language." *Lewis*, 492 F.3d at 570-71 (quotation marks omitted).

A. The Alien Tort Statute Does Not Provide Jurisdiction

Gallegos specifically invokes the ATS as the jurisdictional basis for the First Claim for Relief against the United States. AC ¶¶ 31-34, 128-44. The ATS provides that "[federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350; *Beanal v.*

Freeport-McMoran, Inc., 197 F.3d 161, 164-65 (5th Cir. 1999). The ATS, however, is not a general waiver of the United States' sovereign immunity. In *Sosa*, the Supreme Court held that the ATS is "strictly jurisdictional [in] nature" and does not create a cause of action for any and all torts alleged to be in violation of international law. 542 U.S. at 713-14. Moreover, the Fifth Circuit has specifically held that the ATS does not imply a waiver of sovereign immunity for an alleged "extrajudicial killing" legally indistinguishable from that pled here. *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014), *reh'g and reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014), *adhered to in relevant part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015). Like Gallegos, the plaintiffs in *Hernandez* invoked the ATS to sue the United States for the death of a Mexican national who was shot in Mexico by a Border Patrol Agent who fired his gun at the decedent from the United States side of the border with Mexico. 757 F.3d at 255. Like Gallegos, the *Hernandez* plaintiffs asserted a claim against the United States for the alleged violation of the "international prohibition against 'extrajudicial killings.'" *Id.* at 259. The Fifth Circuit concluded that even if the alleged conduct amounted to an extrajudicial killing under international law, the claim had to be dismissed for lack of subject-matter jurisdiction. *Id.* The court observed that "[n]othing in the ATS indicates that Congress intended to waive the United States' sovereign immunity" for that claim because the language of Section 1350 "contains no explicit waiver of sovereign immunity and does nothing more than establish that district courts have original jurisdiction to consider a discrete set of cases." *Id.* at 259. Since the ATS does not imply a waiver of sovereign immunity and the *Hernandez* plaintiffs could not "establish, independent of the ATS, that the United States ha[d] consented to suit" for an alleged extrajudicial killing which

violated the law of nations, their ATS claim was properly dismissed for lack of subject-matter jurisdiction. *Id.*

In a filing which states her position on the effect the Supreme Court's subsequent decision in *Hernandez* had on her claims in this suit, Gallegos asserts that when the *Hernandez* panel opinion was reviewed *en banc*, the Fifth Circuit "badly fractured" on the issue of whether the United States is immune to a *jus cogens* claim asserted under the ATS." *See* Dkt. No.64 at 3-4. This is an incorrect reading of the *en banc* opinion. Eleven of the fifteen Fifth Circuit judges who considered *Hernandez en banc* joined in the per curiam opinion, which: 1) specifically concluded that "the panel opinion rightly affirm[ed] the dismissal of Hernandez's claims against the United States;" and 2) reinstated the portion of the panel opinion dismissing those claims. *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (per curiam) (citing *Hernandez*, 757 F.3d at 257–59). The purported "fracture" on the question of ATS jurisdiction amounted to a small minority (four of the fifteen judges) of the *en banc* court, and in any event, the affirmance on that issue remains controlling.

The Fifth Circuit's ruling in *Hernandez* prevents Gallegos' from relying upon the ATS to provide subject-matter jurisdiction for her cross border shooting claim.[6] The panel's holding that

[6] Notwithstanding Gallegos' allegation that "U.S. courts have recognized that extrajudicial killing is among the gravest violations of the law of nations," AC ¶ 111, none of the cases cited in the Amended Complaint recognize the validity of an ATS claim asserted against the United States. *See Chavez v. Carranza*, 559 F.3d 486, 490 (6th Cir. 2009) (addressing ATS and Torture Victim Protection Act (TVPA) claims against a former Salvadoran military officer); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1074 (9th Cir. 2006), *modified on rehearing en banc*, 550 F.3d 822 (9th Cir. 2008) (addressing ATS claims against an international mining corporation); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005) (per curiam) (addressing ATS and TVPA claims against a Chilean military officer); *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995) (asserting ATS and TVPA claims against the president of a Bosnian Serb entity); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1469 (9th Cir. 1994) (addressing ATS claims against the former President of the Philippines).

the ATS does not waive the United States' sovereign immunity for claims asserting violations of international law is still binding precedent in this Circuit. In fact, every federal court of appeal that has addressed the issue has held that the ATS does not waive sovereign immunity. *See, e.g.*, *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011); *Goldstar (Pan.) S.A. v. United States*, 967 F.2d 965, 967-69 (4th Cir. 1992); *Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 858 (D.C. Cir. 2010) (Kavanaugh, J., concurring). As Judge Jones recognized in her concurring opinion in the *en banc Hernandez* decision,

> [T]he [] theory [that the United States is amenable to ATS suits] has yet to be adopted by *any* circuit court of appeals and has been repeatedly rejected, and that is because it has no valid foundation in the American constitutional structure, in the ATS, or in Supreme Court precedent. To effectuate the[ ] theory would create a breathtaking expansion of federal court authority, would abrogate federal sovereign immunity contrary to clearly established law, and would have severely adverse consequences for the conduct of American foreign affairs. . .

785 F.3d at 128-29 (Jones, J., concurring) (emphasis added).

Finally, Gallegos' claim is not saved by the assertion that an alleged "peremptory international norm against extrajudicial killing by police use of excessive, lethal force" is "consistent with the letter and spirit of the United States Constitution and Law." AC ¶ 115. First, even if it is assumed that there is a peremptory international norm against "extrajudicial killing," that does not control the question of whether the ATS contains an express indication that Congress created a cause of action against the United States for alleged violation of the norm. The Supreme Court has recognized that federal courts, through their common law-making authority, and with great caution, might recognize causes of action under the ATS based on a narrow set of "norm[s] of international character accepted by the civilized world and defined with . . . specificity." *Sosa*, 542 U.S. at 720, 724-25. Federal courts, however, cannot waive the

sovereign immunity of the United States through common-law-making power, and the Supreme Court has never suggested that any "norm of international character" could authorize suit against the United States under the ATS.

Second, "consistency," as Plaintiffs' ascribe, between these separate legal frameworks does not mean that every purported violation of the Fourth Amendment is tantamount to an extrajudicial killing conducted in violation of international law, nor does it mean that every purported violation of the Fourth Amendment gives rise to a private right of action under international law against the United States. *Cf. Lopez v. Richardson*, 647 F. Supp. 2d 1356, 1364-65 (N.D. Ga. 2009) ("If courts were to recognize the applicability of § 1350 to domestic situations, then every encounter of an alien with a police officer will become not just a 'federal case,' but an 'international case.' This would require federal courts to not only determine whether a plaintiff's cause of action against police officers, to take one example, states a federal constitutional claim -- a complicated exercise in itself -- but also whether the actions state a claim under international law. The Supreme Court, in part, recognized this danger in *Sosa*."). Gallegos cites no support for the remarkable proposition that the United States has implicitly, as opposed to by an express waiver of sovereign immunity, consented to a legal realm in which either the United States or its law enforcement officers are subject to potential liability under the ATS for Fourth Amendment excessive force claims brought by aliens. *Cf. F.D.I.C. v. Meyer*, 510

U.S. 471, 483 (1994) (finding that federal agency waived sovereign immunity for constitutional tort claim because consent for agency to "sue and be sued" was given by Congress.).[7]

B. The Federal Tort Claims Act Does Not Provide Jurisdiction

As shown above, Count One asserted against Agent Boatwright must be construed as a claim against the United States under the FTCA. Through the FTCA, as amended by the Westfall Act, the United States has waived its immunity for tort claims arising from the negligent or wrongful acts or omissions of federal employees that occurred within the scope of their employment. *See* 28 U.S.C. § 1346(b)(1). However, under the FTCA's "foreign country" exception, the limited waiver of sovereign immunity provided by the FTCA does not apply to "[any] claim[] based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa*, 124 S. Ct. at 2739; *see* 28 U.S.C. § 2680(k). It is undisputed, and affirmatively pled, that Arevalo was on Mexican soil when he was shot. AC ¶¶ 36-38. Therefore, Gallegos's claim is necessarily based on an injury suffered in a foreign country and,

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[7] Gallegos also cannot establish, independent of the ATS, that the United States has consented to suit for an extrajudicial killing claim. The United States has not expressed its consent to suit pursuant to the Treaty of Guadalupe Hidalgo or any other bilateral agreement between the United States and Mexico referenced in the Amended Complaint. *See* AC ¶¶ 116, 120. "In the absence of specific language in [a] treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom." *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). As the Supreme Court observed in *Edye v. Robertson*,

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress.

112 U.S. 580, 598 (1884). No consent to suit is expressed in any of the "International and Domestic Strictures on Excessive, Lethal Force" cited by Gallegos. *See* AC ¶¶ 109-10, 112-15.

accordingly, is barred under the FTCA. *Hernandez*, 757 F.3d at 258.

Moreover, the FTCA's waiver of sovereign immunity is limited to circumstances where the United States, if a private person, would be liable "in accordance with the law of the place" where the act or omission occurred. *Id.* The Supreme Court has consistently held that the "law of the place" means the "law of the (relevant) State—the source of substantive liability under the FTCA." *Meyer*, 510 U.S. at 478 (citations omitted). Because the FTCA's waiver of immunity extends only to violations of *state tort law*, claims based on alleged violations of international law (including treaty law and customary international law of which *jus cogens* norms are a part) are not cognizable under the FTCA. *See Ameur v. Gates*, 950 F. Supp. 2d 905, 907 (E.D. Va. 2013) ("[T]he Federal Tort Claims Act [ ], while a partial waiver of sovereign immunity, does not act as a waiver where claims arise from a source other than state law, such as customary international law. . . Plaintiffs' [ ] claims, predicated on customary international law and Geneva Convention violations, do not invoke the FTCA's sovereign immunity waiver."); *Al Janko v. Gates*, 831 F.Supp.2d 272, 283 (D.D.C. 2011) (holding that violations of customary international law "are not covered under the FTCA's limited waiver"); *Sobitan*, 589 F.3d at 389 (rejecting FTCA's waiver of sovereign immunity as "the source of [plaintiff's] claims is not state tort law, but international treaty"); *Goldstar*, 967 F.2d at 969 (breach of "duty arising under the Hague Convention, which, as an international treaty, is equivalent to federal law" is not cognizable under the FTCA because it was not a breach of "duty imposed by the law of the forum state"); *Schneider v. Kissinger*, 310 F.Supp.2d 251, 268 (D.D.C. 2004) (United States has not waived sovereign immunity for "violations of peremptory norms of international law").

Thus, the FTCA does not provide subject-matter jurisdiction for Count One against Boatwright or the United States.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR AN "EXTRAJUDICIAL KILLING" IN VIOLATION OF INTERNATIONAL LAW

Given that the United States has not waived its sovereign immunity for Plaintiffs' claim under the ATS and such a claim cannot be brought under the FTCA, Gallegos's Amended Complaint should be dismissed for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). However, even in the absence of this clear ground for dismissal, the Amended Complaint would still be dismissed because Gallegos has not alleged a plausible claim that Arevalo's death was an "extrajudicial killing" that is actionable under the ATS, and thus dismissal of Count One under Rule 12(b)(6) is also warranted.

"The ATS is no license for judicial innovation." *Mamani v. Berzain*, 654 F.3d 1148, 1152 (11th Cir. 2011). "Just the opposite, the federal courts must act as vigilant doorkeepers and exercise great caution when deciding either to recognize new causes of action under the ATS or to broaden existing causes of action." *Id.* (citing *Sosa*, 542 U.S. at 692). Courts are only authorized under the ATS to "recognize private causes of action for *certain* torts in violation of the law of nations" – specifically, claims based on norms of international law which are "accepted by the civilized world and defined with a specificity comparable to the features of" the "modest number" of international law violations for which there was a potential for personal liability at the time the ATS was enacted. *Id.* at 724 (emphasis added).

While Gallegos alleges that the conduct underlying her claim amounts to an "extrajudicial killing" in violation of the law of nations, this assertion is a legal conclusion rather than a well-pleaded statement of fact and should not be entitled to any presumption of truth. To the contrary, the allegations of the Amended Complaint do not establish an "extrajudicial killing" actionable under the ATS—*i.e.*, do not define an offense that is currently accepted or defined by the international community with a specificity akin to that of the international law offenses and

recognized as actionable under common law at the time the ATS was enacted. *See Sosa*, 542 U.S. at 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

In *Sosa*, the Supreme Court recognized that in order to obtain relief under the ATS for a violation of an international law norm, the norm must be "sufficiently definite" to support a cause of action. 542 U.S. at 732-33; *id.* n.21 (noting the "requirement of clear definition" for seeking relief from a violation of customary international law). The Court cautioned that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. *Id.* at 727 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). In this regard, the Court observed

> We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.

Id. at 728. The Supreme Court's caution is fully applicable to Plaintiff's claim here.

Had Congress intended to authorize claims for "extrajudicial killings" against U.S. officials under the ATS, it could, and likely would have done so when it created a cause of action for such claims against foreign officials. In the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, Congress authorized a civil cause of action against an individual who, under actual or apparent authority, or color of law, *of a foreign nation*, *id.* sec. 2(a), subjects an individual to "extrajudicial killing," as that concept is defined in the statute as a matter of domestic U.S. law. Specifically, the TVPA defines "extrajudicial killing" as "a *deliberated* killing not authorized by a previous judgment

pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* (emphasis added). Congress' failure to authorize such a claim against a U.S. official acting under color of U.S. law counsels strongly against the court recognizing such a claim against the United States by way of the ATS.

To the extent there is any argument that Gallegos's particular claim against the United States is otherwise a violation of the ATS, there is no indication that established international law has already defined the conduct as wrongful in this context. *Mamani*, 654 F.3d at 1152 (citing *Sosa*, 542 U.S. at 736 n.27). The United States has not located any federal case in which an ATS claim involving conduct remotely similar to that presented in the Amended Complaint was determined to constitute an "extrajudicial killing." The Fifth Circuit has never recognized an "extrajudicial killing" claim under the ATS.[8] Moreover, the few circuit courts that have recognized such claims under the ATS have done so in the face of allegations of planned and targeted killings. *See, e.g., Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1341-42 (11th Cir. 2011) (assassination of trade union representatives by hired Columbian paramilitaries); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005) (executions by Chilean military officers following *coup d'etat*); *Chavez v. Carranza*, 559 F.3d 486, 490 (6th Cir. 2009) (deliberate murders of opposition leaders by El Salvadoran security forces during civil war). In *Mamani*, for instance, the Eleventh Circuit recognized that the "minimal

[8] In *Hernandez*, the panel majority opinion assumed without deciding that such a claim had been stated against the United States and found that the claim was barred by sovereign immunity. 757 F.3d at 249. The *en banc* Fifth Circuit affirmed the panel's the dismissal of the claims against the United States. *See Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015).

requirement" for "extrajudicial killing" under the ATS is deaths that were "'deliberate' in the sense of being undertaken with studied consideration and purpose." 654 F.3d at 1155; *accord* 28 U.S.C. § 1350 note § 3(a) (TVPA defining an "extrajudicial killing" as "a *deliberated* killing") (emphasis added).

The allegations here describe a scenario the exact opposite of "studied consideration and purpose" with respect to Arevalos' death. Even as described in the Amended Complaint, the identified Border Patrol Agents did not have some advance plan or intent to kill the decedent. The Amended Complaint gives no indication that they knew who the decedent was, or targeted him in any way. Rather, as pled, they were in the midst of a tense and evolving border interdiction of an individual in the water, attempting to enter the United States not at a port of entry, but by swimming across the Rio Grande. To the extent Gallegos attempts to invoke some unidentified "Rocking Policy," the premise of her claim is that the response of Border Patrol Agents to the threat posed by rock throwers was *indiscriminate*, not undertaken with "studied consideration and purpose."[9] While Gallegos may disagree with determinations made by Border Patrol Agents that deadly force was necessary to protect themselves from rock throwers, she does not allege the planned, targeted killing of actual or suspected rock throwers. As the Eleventh Circuit found in *Mamani*, "deaths [ ] compatible with accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others)," do not

[9] Gallegos' vague claims of a "Rocking Policy"—which is not alleged to have been a written or formally-adopted official policy, but rather an informal "pattern and practice"—is itself wanting. "Any credible invocation of a principle against [extrajudicial killing] that the civilized world accepts as binding customary international law requires a factual basis beyond" mere conclusional pleadings. *Hernandez*, 785 F.3d at 132 (Jones, J., concurring) (quoting *Sosa*, 542 U.S. at 737).

constitute "extrajudicial killings" for purposes of the ATS. 654 F.3d at 1155. No court has ever recognized a claim under the ATS for an "extrajudicial killing" based on *any* alleged conduct by United States' officials, let alone the specific type of conduct alleged here, and Plaintiff's claim should likewise be dismissed.

CONCLUSION

For the reasons stated above, Plaintiffs' sole remaining claim should be dismissed with prejudice.

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Respectfully submitted,

UNITED STATES DEPARTMENT OF JUSTICE

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