

* On October 2, 2008, the Court denied amici's motions to participate in these proceedings.

NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the
District of Columbia Circuit

No. 08-7008 Consolidated with 08-7009

H Aidar Muhsin Saleh et al.,
Plaintiffs-Appellants,

v.

Titan Corporation. et al.,
Defendants-Appellees,

Ilham Nassir Ibrahim, et al.,
Plaintiffs-Appellants,

v.

Titan Corporation, et al.,
Defendants-Appellees

*On Appeal from the United States District Court for the District of Columbia in
Case Nos. 04-cv-1248 and 05-cv-1165 (Hon. James Robertson, Judge)*

**BRIEF OF AMICUS CURIAE INTERNATIONAL LAW AND HUMAN RIGHTS
EXPERTS, ALIEN TORT STATUTE PRACTITIONERS, AND TORTURE VICTIM
ADVOCACY ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS**

RICHARD J. WILSON, *Counsel of Record*
MEETALI JAIN
AMERICAN UNIVERSITY,
WASHINGTON COLLEGE OF LAW
4801 Massachusetts Avenue, N.W.
Washington D.C. 20016
202-274-4246

DEENA R. HURWITZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road,
Charlottesville VA 22936
434-924-4776

Attorneys for Amici Curiae
September 11, 2008

On the brief:

Anna Cabot (AU, WCL '09)
Aaron Esty (UVA Law School '09)
Sarah Melikian (AU, WCL '10)

Shaunik Panse (UVA Law School '09)
Alyssa Petroff (UVA Law School '09)
Meredith Van Tine (UVA Law School '10)

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STATEMENT OF AMICI

Amici curiae, including law professors, human rights organizations and torture survivor support organizations, are experts in international law, the Alien Tort Statute, and specifically the prohibition against torture. *Amici* urge this Court to reverse Judge Robertson's decision in light of the strong consensus in U.S. and international law that exists today establishing non-state actor liability for torture committed in the course of a war crime or crime against humanity. *Amici* also wish to highlight the obligation imposed on the United States in U.S. and international law to ensure that torture victims and survivors have access to effective remedies for violations of international law.

SUMMARY OF ARGUMENT

The international law governing the liability of non-state actors has changed considerably over the past twenty-five years. Traditionally, international law focused primarily (although not exclusively) on the duty of states to promote, respect and protect the rights of individuals and therefore required that state action be established to hold individuals liable for most international law violations. This requirement, which remains in effect today for many international law violations, is met not only where a state official committed the alleged abuse, but also where the perpetrator acted under color of state law. However, individuals who act independent of the state's authority or direction may also be held accountable for some international law violations. As Judge Edwards acknowledged in *Tel-Oren* that "the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984). That there are certain international law rules that "bind[] individuals for the benefit of other individuals" was recently affirmed by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

Against this backdrop of liability under international law rests two kinds of claims under the Alien Tort Statute, 8 U.S.C. § 1350 ("ATS"): ones that require state action (such as official torture), and others that do not (such as war crimes and crimes against humanity, including torture, when committed as a war crime or

as part of a crime against humanity). While the judges in *Tel-Oren* declined to hold that torture, like piracy, could be excepted from the general rule of state action for violations of the law of nations,¹ in part because of the insufficient consensus within international law at the time, subsequent ATS precedent has identified torture committed by individuals in the course of a war crime or crime against humanity as not requiring state action. In short, developments in international law and ATS jurisprudence since *Tel-Oren* have resulted in a more robust consensus today within international law on individual liability for non-official torture.

For the purposes of the ATS, international law *as it exists today* governs both the content of actionable international law norms and the identity of the actors who can be held liable for a violation of that norm. *Sosa*, 542 U.S. at 725 (discussing ATS claims based on the “present-day law of nations”); 729 (“today’s law of nations”). *Amici* therefore make their arguments in the context of the legal developments of the quarter century since *Tel-Oren*, particularly the recognition

¹ *Amici* use the “law of nations” and international law interchangeably throughout this brief. Blackstone’s *Commentaries* describe the “law of nations” not as a law solely among nation-states, but as “a system of rules . . . established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in the intercourse which must frequently occur between two or more independent states, *and the individuals belonging to each*.” 4 William Blackstone, *Commentaries* *66 (emphasis added).

that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” *Kadić v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995), *cited with approval in Sosa v. Alvarez-Machain*, 542 U.S. 692 at n.20 (2004) (indicating sufficient consensus in 1995 that genocide by private actors violates international law). Inasmuch as private enterprises are treated as juridical entities or individuals with a distinct legal identity under U.S. and international law, they may fall within the category of non-state actors capable of committing violations of the law of nations.²

Furthermore, once liability for a violation of the law of nations attaches, notwithstanding the identity of the perpetrator, U.S. and international law clearly establish the right to an effective remedy. States carry an obligation to ensure that victims have access to effective remedies. Accordingly, U.S. courts have consistently recognized the significance of providing a forum for victims of violations of the law of nations. *Amici* urge this Court to similarly recognize the importance of providing an effective remedy to the plaintiffs in this case by

² “There is no authoritative definition of the term ‘non-state actors’ under international law. The broadest possible definition encompasses all private actors distinct from the state, including private individuals, civil society organisations, private companies, armed groups, *de facto* regimes etc.” Redress, *Not Only the State, Torture by Non-State Actors, Towards Enhanced Protection, Accountability and Effective Remedies* (May 2006), at 14. For the purposes of this Brief, *amici* use individuals, private persons, and non-state actors interchangeably.

reversing Judge Robertson’s decision and remanding the case for a full hearing on the merits.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT NON-STATE ACTORS CANNOT BE HELD LIABLE FOR VIOLATIONS OF INTERNATIONAL LAW UNDER THE ALIEN TORT STATUTE.

A. The District Court Erred In Its Summary Reliance on *Tel-Oren* and *Sanchez-Espinoza*.

The District Court erred in finding that international law does not apply to non-state actors, and therefore that defendants could not be held liable under the ATS. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15 (D.D.C. 2005); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006). As support for its holding, the District Court relied on this Court’s earlier pronouncements in *Tel-Oren*, 726 F.2d 774, and *Sanchez-Espinoza v. Reagan*, 770 F. 2d 202 (D.C. Cir. 1985).

In its summary reliance on *Tel-Oren* and *Sanchez-Espinoza*, however, the District Court failed to consider that none of the judges in *Tel-Oren* went so far as to categorically preclude non-state actor liability under the ATS.³ Indeed, Judge

³ The Court in *Sanchez-Espinoza* merely relied upon Judge Edward’s concurrence in *Tel-Oren* in finding that the law of nations did not reach “private, non-state conduct of this sort.” *Sanchez-Espinoza*, 770 F.2d at 206-207. The Court’s holding therefore did not extend to all private acts; indeed, it was limited to the facts alleged there. The Court did not characterize the facts there as a war crime and

Edwards undertook a nuanced analysis, acknowledging “the fringe areas” of non-state actor liability that were “gradually emerging” at the time. *Tel-Oren*, 726 F.2d at 792, 806-07. He looked not only to the “truly private arena” from which the early ATS cases emerged, which supported the concept of individual responsibility, but he also surveyed the analyses set forth by jurists and commentators in favor of individual liability. *Id.* at 792-94. Judge Edwards then proceeded to inquire into “whether torture today is among the handful of crimes to which the law of nations attributes individual responsibility,” ultimately concluding that a clear consensus had not yet emerged on that issue. *Id.* at 795, 806-07.

1. United States and International Law Recognized Non-State Actors’ Liability for Violations of the Law of Nations.

However, as early as the eighteenth century, U.S. courts established liability for non-state actors. *See, e.g., Respublica v. De Longchamps*, 1 U.S. 111 (1 Dall.) (1784) (holding private individual liable for violating the law of nations in assault upon French consul-general); *Bolchos v. Darrel*, 3 Fed. Cas. 810 (D.S.C. 1795) (holding private individual liable in title dispute in violation of a treaty); 1 Op. Att’y Gen. 57, 59 (1795) (recognizing liability of private persons for certain

there was no mention of an internal armed conflict that would trigger the application of Common Article 3 to the Geneva Conventions.

violations of customary international law where American citizens aided French fleet to plunder British property off the coast of Sierra Leone); *United States v. Smith*, 18 U.S. 153 (5 Wheat.) (1820) (holding private individual liable for piracy as violation of the law of nations).

Non-state actor liability for certain violations of the law of nations has been recognized since at least World War I, and was confirmed at Nuremberg after World War II. *Kadić*, 70 F.3d at 243, citing Telford Taylor *Nuremberg Trials: War Crimes and International Law*, 450 Int'l Conciliation 304 (1949).

That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Commentaries to the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, para. 99, 5 U.N. GAOR Supp (No. 12) at 11-14, U.N Doc A/1316 (1950), reprinted in [1950] Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1.⁴

The Geneva Conventions of August 12, 1949, which are considered part of customary international law, do not limit the class of persons who can be found

⁴ See also, e.g., *In re Tesch (Zyklon B Case)* 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946); *United States v. Krauch*, CCL No. 10, 1081, 1169-72 (1952); *United States v. Krupp (The Krupp Case)* CCL No. 10 (July 31, 1948).

liable for the commission of grave breaches. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (“Geneva Convention I”), *adopted on* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (*entered into force* for U.S. Feb. 2, 1956); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (“Geneva Convention II”), *adopted on* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (*entered into force* for U.S. Feb. 2, 1956); Geneva Convention Relative to the Treatment of Prisoners of War (“Geneva Convention III”), 6 U.S.T. 3316, 75 U.N.T.S. 135 (*entered into force* for U.S. Feb. 2, 1956); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Geneva Convention IV”), *adopted on* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* for U.S. Feb. 2, 1956). *See also* U.S. Dep’t of the Army Field Manual 27-10, The Law of Land Warfare (1956), para. 498 (“[a]ny person, whether a member of the armed forces or a civilian”), para. 499 (“by any person or persons, military or civilian; every violation of the laws of war is a war crime”). Further, State parties are obligated to provide “effective penal sanctions for persons committing, or ordering to be committed,” grave breaches of any of the four Conventions or the Additional Protocols. Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

Common Article 3 to the Geneva Conventions “imposes obligations not only upon the Contracting Parties [i.e., states] but also upon ‘each party to the conflict.’ To that extent, the Convention, *in keeping with other developments in modern International Law, treats persons and entities other than States as subjects of international rights and duties.*” See 2 Oppenheim, *International Law: A Treatise*, 211 n.3 (H. Lauterpacht ed., 7th ed. 1952) (emphasis added); *see also Military & Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04 (Merits Judgment of June 27) (indicating that Common Article 3 applies to Nicaraguan “contras” as private non-state actors); *In re Matter of Medina*, 19 I. & N. Dec. 734, 737-38, Interim Decision BIA 3078, (BIA 1988) (Common Article 3 applies to government and guerrilla forces in El Salvador).

Courts have recognized that even non-self-executing treaties may be relied upon as evidence of customary international law. *Sosa*, 542 U.S. at 735, *reaffirming Filartiga*, 630 F.2d at 881-82; *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d at 284 (Katzman, J., concurring), *citing Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003); *see also* Restatement (Third) of Foreign Relations Law § 102(2) (1987). A significant body of treaty law provides further evidence of the recognition of individual responsibility for certain international law violations. In addition to the treaties on human rights and anti-hijacking and other

forms of terrorism that pre-date *Tel-Oren*,⁵ many since then also hold non-state actors responsible or criminally liable for violations of the provisions contained therein. The International Convention for the Suppression of Terrorist Bombings; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts; and the International Convention for the Suppression of the Financing of Terrorism all make non-state actor liability a central principle.⁶ *See* Int’l Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. Doc. A/52/164 (Dec. 15, 1997); Optional Protocol to the

⁵ *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *approved* Dec. 8, 1948, 1249 U.N.T.S. 277; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Int’l Covenant on Civil and Political Rights (“ICCPR”), Dec. 16, 1966, S. Exec. Rep. No. 23, 102d Cong., 2d Sess., 999 U.N.T.S. 171 (*ratified* by U.S. on Sept. 8, 1992); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Int’l Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; Int’l Convention Against the Taking of Hostages (Hostages Convention), Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

⁶ In *Tel-Oren*, Judge Edwards commented on the “divisive[] split on the legitimacy of [terrorist] aggression” and again concluded that the lack of international harmony or consensus under current international law prevented him from being able to find that terrorist attacks “amount to law of nations violations.” *Tel-Oren*, 726 F.2d at 795. *Amici* do not argue that terrorism today definitively constitutes a violation of the law of nations, but merely suggest that in light of these international law developments subsequent to *Tel-Oren*, the issue may be analyzed differently. At a minimum, these developments in international law further underscore the constant evolution of the law of nations.

Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, U.N. Doc. A/54/59 (May 25, 2000); Int'l Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106-49, 39 I.L.M. 270.

2. *Tel-Oren* Is Not Controlling Precedent on The Development of Alien Tort Statute Non-State Actor Liability For Torture.

Though at the time of *Tel-Oren*, both the concept of non-state actor liability and the prohibition against official torture were developing in international law, U.S. courts had not yet had occasion to comment on the legal implications of torture committed by a non-state actor under the ATS. Indeed, the first U.S. case to hold that official torture violated universally accepted international law, *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980),⁷ was issued just four years before *Tel-Oren*. It is no wonder that Judge Edwards refused to extend the concept of non-state actor liability to torture because “[t]he degree of ‘codification or consensus’ [was] simply too slight.” *Tel-Oren*, 726 F.2d at 792.

The law of nations has developed significantly since the 1980’s. In summarily relying on “controlling Circuit precedent,” *Saleh*, 436 F. Supp. 2d at 57, the District Court therefore not only misconstrued *Tel-Oren*, but failed to recognize

⁷ *Filartiga* was credited as giving “birth [to] the modern line of [ATS] cases,” *Sosa*, 542 U.S. at 724-25.

the law of nations as an ever-changing body of law that must be continually re-evaluated.

B. The District Court Erred In Failing To Consider Domestic and International Law Developments Of Nearly a Quarter Century Since *Tel-Oren* And *Sanchez-Espinoza* Establishing Non-State Actor Liability Under the Alien Tort Statute For Violations of the Law Of Nations, Particularly for War Crimes and Crimes Against Humanity.

Since *Tel-Oren* and *Sanchez-Espinoza*, the law of nations has evolved, and legislators and judges alike have repeatedly and unequivocally reaffirmed the principle of non-state actor liability, particularly for war crimes and crimes against humanity, found in international and domestic law. The District Court failed to acknowledge these legal developments of the past two and a half decades. This Court therefore must consider Plaintiffs-Appellants' claims against this changing legal landscape, for as Judge Edwards himself observed in *Tel-Oren*, the law of nations "is not stagnant and should be construed as it exists today among the nations of the world." 726 F.2d at 777, 816 (Bork, J., concurring, and stating, "the substantive rules of international law may evolve").

1. The Principle of Non-State Actor Liability, Particularly For War Crimes and Crimes Against Humanity, Has Further Crystallized Through the Jurisprudence of International Criminal Tribunals.

The trend of liability for non-state actors, particularly in the context of war crimes and crimes against humanity, has built upon the legacy of Nuremberg and has been affirmed by the establishment of international criminal tribunals.

Article 7(1) of the 1993 Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY) explicitly provides that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” Statute of the Int’l Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 7(1), S.C. Res. 827, U.N. Doc S/RES/827 (May 25, 1993). Following on the model of the ICTY, the statutes of the 1994 International Criminal Tribunal for Rwanda (ICTR), the 1998 International Criminal Court (ICC), the 2001 Extraordinary Chamber in the Courts of Cambodia (ECCC), and the 2002 Special Court for Sierra Leone (SCSL), among others, all contain similar provisions for non-state actor liability, specifically, for genocide, crimes against humanity and war crimes. *See* Statute of the Int’l Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring

States, between 1 January 1994 and 31 December 1994, art. 6, S.C. Res. 995, U.N. Doc S/RES/955 (Nov. 8, 1994); Rome Statute of the Int'l Criminal Court ("Rome Statute"), arts. 25, 27, July 17, 1998, 2187 U.N.T.S. 90; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, art. 29, NS/RKM/1004/006, *available at* <<http://www.eccc.gov.kh>>; Statute of the Special Court for Sierra Leone, art. 6, Jan. 16, 2002, 2178 U.N.T.S. 138.

That non-state actors are criminally liable for international law violations has not remained a hollow promise. Prosecutors at the ICTY, ICTR, SCSL and ICC have all instituted proceedings against private actors for war crimes and crimes against humanity. In *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeal on Jurisdiction, ¶ 34 (Oct. 2, 1995), the ICTY held that customary international law imposes criminal liability for serious violations of Common Article 3 of the Geneva Conventions upon all who commit such violations, regardless of the nature of the conflict. *See also Prosecutor v. Limaj*, Case No. IT-03-66-PT (Apr. 20, 2006); *Prosecutor v. Musema*, Case No. ICTR-96-13-I (July 15, 1996); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T (July 7, 2004); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-3 (Mar. 20, 2006).

Recent decisions from these tribunals have also confirmed that the prohibition against torture specifically does not require the participation of public officials, but also extends to private individuals. *See Tadic*, IT-94-1, Trial Chamber ¶¶ 654-55 (May 7, 1997); *Prosecutor v. Kunarac*, Case No. IT-96-23, Appeals Chamber Judgment ¶ 148 (June 12, 2002); *Prosecutor v. Kvočka*, Case No. IT-98-30, Appeals Chamber Judgment ¶ 284 (February 28, 2005).

C. International Consensus Exists That Violations Of The Prohibition Against Torture As A War Crime Or Crime Against Humanity Are Included Within A Handful Of Offenses For Which Individual Responsibility Attaches, Even Absent State Action.

Almost thirty years ago, the Second Circuit held that official torture violates the law of nations “in light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world.” *Filartiga*, 630 F.2d at 880. On the basis of both treaty law and state practice, the prohibition of torture has attained the status of a peremptory, or *jus cogens*, norm of customary international law from which no derogation is permitted.

Indeed, the universality of the prohibition against official torture has been thoroughly incorporated into U.S. law. The universal prohibition against any form of official torture, and under any circumstances, has been restated many times by U.S. courts, including this Court. *See e.g., Sosa*, 542 U.S. at 781; *Khulumani v.*

Barclay Nat. Bank, Ltd., 504 F.3d 254 (2d Cir. 2007) (private individual who acts with significant state aid is liable); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (private security force liable for violence against trade unionists when public official participated in actions); *Kadić*, 70 F.3d at 243; *Tel-Oren*, 726 F.2d at 777 (Edwards, J.); *Doe v. Islamic Salvation Front*, 993 F. Supp. 2d 3, 8 (D.D.C. 1998).⁸

It is against this background of an international consensus against official torture requiring state action that the landmark case of *Kadić* extended liability to non-state actors when torture was committed as a war crime. Numerous courts have followed the *Kadić* precedent. *See Sosa*, 542 U.S. at 733 n.20; *Khulumani*, 504 F.3d at 282 (Katzman, J., concurring) (noting that “[w]e have repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be.”); *Doe v. Unocal Corp.*, 395 F.3d 932, 945-46 (9th Cir. 2002) (allowing suit against an American multinational to proceed under the ATCA for crimes of forced labor, murder, and rape that occurred during the construction of a pipeline in Myanmar), *vacated and reh’g granted en banc*, 395 F.3d 978 (9th Cir. 2003); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000); *Islamic Salvation Front*, 993 F.

⁸ *See*, Brief of *Amici Curiae* International Human Rights Organizations and Experts In Support of Plaintiffs-Appellants filed with this Court in this case.

Supp. 3d at 8 (citing *Kadić*, found violations including crimes against humanity, war crimes, murder and rape, “are proscribed by international law against both state and private actors, as evinced by Common Article 3 [of the 1949 Geneva Conventions]”); *Jama v. I.N.S.*, 343 F. Supp. 2d 338, 361 (D.N.J. 2004) (ATS jurisdiction over private contractor for customary international human rights violations including inhuman and degrading treatment); *Estate of Rodriguez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1260-62 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 310-11 (S.D.N.Y. 2003); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 22, n.5 (D.D.C. 2000) (accepting that private parties can be held liable under the ATS for “egregious acts of misconduct”); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (concluding that “[n]o logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law”).

Congress has also incorporated into U.S. legislation the principle of individual responsibility for a handful of offenses that violate the law of nations. Through the War Crimes Act of 1996, 18 U.S.C. § 2441, as amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (“MCA”), Congress specifically criminalized conduct that violates Common Article 3 (grave breaches) of the Geneva Conventions, whether inside or outside the United States.

In 1984, Congress also passed the Hostage Taking Act, 18 U.S.C. § 1203, to execute the International Convention Against the Taking of Hostages.⁹ The Hostage Taking Act, in accordance with the Hostage Convention, provides criminal liability for non-state actors. In enacting the MCA in 2006, Congress defined “torture” and “cruel or inhuman treatment” as war crimes without regard to the status of the perpetrator. MCA §§ 950v(b)(11), (12).

II. INTERNATIONAL LAW ESTABLISHES THE RIGHT TO AN EFFECTIVE REMEDY FOR VIOLATIONS OF THE LAW OF NATIONS, INCLUDING THOSE PERPETRATED BY NON-STATE ACTORS.

The right to an effective remedy is a firmly established principle of international law. In 1927, the Permanent Court of International Justice articulated the principle that a state must provide for remedies for violations of the law of nations. The Court declared not only that a remedy must exist, but that the remedy must be adequate: “The essential principle . . . is that reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” *Chorzów Factory Case (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

⁹ See *U.S. v. Yunis*, 924 F.2d 1086, 1090 (C.A.D.C. 1991).

Arising in the context of a state's obligation to provide redress for the expropriation of property, the *Chorzów Factory* rule did not stand as a solitary or anomalous proposition. At the time, international humanitarian law provided that “[a] belligerent party . . . shall be responsible for all acts committed by persons forming part of its armed forces.” Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 3, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The four Geneva Conventions reaffirmed the individual right to a remedy for violations of humanitarian law. *See* Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-Int'l Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. The right to an effective remedy for violations of “fundamental rights” found further acceptance as a universal obligatory norm in the Universal Declaration of Human Rights, art. 8, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

The right to an effective remedy is one of the rights which allows no derogation. The U.N. Human Rights Committee clarified this point.

Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its

procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

U.N. Human Rights Committee, Gen. Cmt. 29, *States of Emergency*, Article 4, para. 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

Numerous international and regional law instruments have provided that remedies must be available generally for rights violations.¹⁰ Regional courts have consistently affirmed the right to remedy, and have elaborated on the substance of the right. The Inter-American Court has called the right to remedy “one of the fundamental pillars . . . of the very rule of law in a democratic society in terms of the Convention.” *Castillo Páez v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 34, at para. 82 (1997). Relying on Article 25 of the American Convention, the Inter-American Court has stated that “[i]t is a legal duty of the States” to provide a

¹⁰ See, e.g., Int’l Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Dec. 21, 1955, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, art. 2(c), Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. See also Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of Int’l Human Rights Law and Serious Violations of Int’l Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); Rome Statute, art. 75. Regional conventions include: Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; Organization of African Unity, African Charter on Human Rights and Peoples’ Rights, art. 7, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 1520 U.N.T.S. 217.

remedy for fundamental rights violations. *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct. H.R. (ser. C) No. 4, at para. 62 (1988). Indeed, the Court has found that “[t]he absence of an effective remedy for violations of rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking.” *Velasquez Rodriguez Case*, Advisory Opinion OC-9/87, at para. 24 (1988). The European Court of Human Rights (“ECHR”) recognizes the obligation to provide an effective remedy in rights violations cases, and has stated that a remedy must “restore as far as possible the situation existing before the breach.” *Salah v. Netherlands*, App. No. 8196/02, Eur. Ct. H.R., at para. 72 (2006).¹¹

As it has been adopted in numerous conventions, the general principle that an international law violation necessarily implicates the right to a remedy has become more specific over time, both with regard to the types of violations calling for redress and the nature of a state’s obligations to provide redress. The ICCPR reiterated the general right to an effective remedy and then went further to address this right in the particular contexts of unlawful arrest, detention, and conviction. *See* ICCPR, arts. 2(3), 9(5), 14(6).

¹¹ *See also Cordova v. Italy (No. 1)* App. No. 40877/98, Eur. Ct. H.R. at paras. 54, 70-71 (2003) (indicating that the right to remedy cannot be limited “in such a way or to such an extent that the very essence of the right is impaired.”); *Waite and Kennedy v. Germany*, App. No. 26083/94, Eur. Ct. H.R., at para. 59 (1999).

Nowhere has an individual's right to an effective remedy been more forcefully and specifically articulated than with respect to redress for torture. In 1984, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") mandated that each state party must "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." CAT, art. 14, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See id.* at art. 12 (also calling for a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction).

The U.N. Human Rights Committee has further elucidated the international norm that an effective remedy necessarily includes access to states' judiciaries. Commenting on the nature of states' obligations under Article 2 of the ICCPR, the Committee asserted that states "must ensure that individuals also have accessible and effective remedies," and must "give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies." Human Rights Committee, Gen. Cmt. 31 ("Gen. Cmt. 31"), para. 15, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 24, 2004).

U.S. courts must accord proper weight to the significance of providing a forum for victims of violations of the law of nations. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d. Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d. Cir 1998). Indeed, the U.S. has an interest in vindicating such violations in its courts. *Talisman Energy*, 244 F.Supp.2d at 340. Congress recognized the importance of redressing international wrongs in U.S. Courts in enacting the Torture Victims Protection Act, 8 U.S.C. § 1350 note (“TVPA”), which was designed to provide a remedy to torture victims.

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. H6423 (daily ed. Oct. 2. 1989) at 6426 (statement of Rep. Leach). Thus, in emphasizing the importance of providing a forum to victims of rights violations, the U.S. has made significant headway in providing an effective remedy for violations occurring abroad.

Providing for an effective remedy is not merely good policy, nor is it simply a means to punish internationally proscribed conduct. It is an obligation under international law. When an individual has no recourse but to the courts, and the courts fail to hear the claim, he is doubly victimized. The court both denies him

means for redress and manifests a failure to adhere to the internationally recognized norm obliging States to provide an effective remedy.

III. STATES HAVE AN OBLIGATION TO ENFORCE THE RIGHT TO A REMEDY AGAINST NON-STATE ACTORS, INCLUDING AND ESPECIALLY, CORPORATIONS.

As non-state actors, corporate enterprises are recognized under the law as being capable of committing violations of the law of nations. International law and U.S. law both treat private enterprises as juridical entities in the context of determining responsibility for conduct that may be illegal or unauthorized.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the Int'l Military Tribunal, Aug. 8, 1845, 82 U.N.T.S. 279; *Talisman Energy*, 244 F. Supp. 2d at 309, 316; *Santa Clara County v. So. Pac. R.R. Co.*, 118 U.S. 394 (1886).¹² Once non-state actor liability attaches to a corporate enterprise for its violation of the law of nations, it is imperative that the victim of that violation be provided a remedy for the wrongs inflicted. One of the most authoritative treatises in the field notes that “[c]orporations can commit

¹² See also, *United States v. Krauch*, CCL No. 10 (1952); *Talisman Energy*, 244 F. Supp. 2d at 316 n.28 (“[A] corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.” *Citing New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493 (1909) (citation omitted).

almost any kind of tort that individuals can commit, and are liable for the acts of their agents and servants in the same degree as natural persons are liable for the acts of their servants and agents.” 10 W. Fletcher, *Cyclopedia on the Law of Private Corporations*, § 4877, 337-38 (rev. ed. 1993).

The obligations of corporations extend to the law of nations, including and especially human rights norms. In a 2007 report to the Human Rights Council, the U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, noted that

corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes - imposed through national courts.

U.N. Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and human rights: mapping international standards of responsibility and accountability for corporate acts* (“Ruggie Standards”), para. 22, UN Doc. A/HRC/4/35 (Feb. 19, 2007).

Based on a number of studies undertaken by his Office, the Special Representative proposed a policy framework organized around three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access to effective remedies. U.N. Human Rights Council, *Protect, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Respect and Remedy: a Framework for Business and Human Rights* (“Ruggie Framework”), paras. 4, 16, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008)

Each principle is an essential component of the framework: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness.

Id. at para. 9.¹³ The corporate responsibility to respect human rights includes avoiding complicity, which has been most clearly elucidated “in the area of aiding and abetting international crimes, i.e. knowingly providing practical assistance or

¹³ In June 2008, the UN Human Rights Council adopted a resolution by acclamation welcoming his policy framework for business and human rights. U.N. Human Rights Council Res. 8/7, U.N. Doc. A/HRC.RES/8/7 (June 18, 2008).

encouragement that has a substantial effect on the commission of a crime, as discussed in the 2007 report of the Special Representative.” *Id.* at para. 74.

States have a duty to actively regulate and adjudicate abuse by business enterprises or risk breaching their international obligations.¹⁴ The U.N. Special Representative recommends that “[s]tates . . . strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs - especially where alleged abuses reach the level of widespread and systematic human rights violations.” Ruggie Framework, para. 91.

¹⁴ See Ruggie Standards, para. 18; *U.N. Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum 1: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries* (“Ruggie Overview”), p. 9, n.11, U.N. Doc. A/HRC/4/25/Add.1 (Feb. 13, 2007). See also Ruggie Framework, para. 83 (internal citations omitted):

Expectations for States to take concrete steps to adjudicate corporate-related human rights harm are expanding. Treaty bodies increasingly recommend that States investigate and punish human rights abuse by corporations and provide access to redress for such abuse when it affects persons within their jurisdiction. Redress could include compensation, restitution, guarantees of non-repetition, changes in relevant law and public apologies. As discussed earlier, regulators are also using new tools to hold corporations accountable under both civil and criminal law . . .

The Human Rights Committee’s General Comment 31 warns that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities.” Gen. Cmt. 31, para. 8. Thus, failure on the part of the State “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities” constitutes itself a violation of international law. *Id.* Simply put, under international law, States must ensure that national courts provide an effective remedy for a corporation’s violations of the law of nations.¹⁵

CONCLUSION

For these reasons, the District Court below erred in finding that non-state actors, including corporate enterprises, cannot be held liable for violations of the law of nations, specifically torture committed as a war crime and a crime against humanity. Amici respectfully urge this Court to reverse the decision of Judge Robertson and remand this matter for a full hearing on the merits.

¹⁵ *See also* Ruggie Overview, para. 26 (noting also that General Comments of other treaty bodies implicitly refer to corporations by confirming the State’s duty to protect against private actions and abuses by “private agencies”, “legal persons” and “private bodies”).

ADDENDUM: LIST OF AMICI CURIAE

M. Cherif Bassiouni, Distinguished Research Professor of Law, President, International Human Rights Law Institute, DePaul University

Christopher L. Blakesley, Cobeaga Professor of Law, William S. Boyd School of Law
University of Nevada Las Vegas

Roger S. Clark, Board of Governors Professor, Rutgers the State University School of Law,
Camden

Benjamin G. Davis, University of Toledo College of Law

Stephanie Farrior, Professor of Law, and Director of International and Comparative Law
Programs, Vermont Law School

Doug Ford, Lecturer & Director, Immigrant Rights Clinic, University of Virginia School of Law

Berta Esperanza Hernandez-Truyol, Levin, Mabie & Levin Professor of Law, University of
Florida Fredric G. Levin College of Law, Spessard L. Holland Law Center

Bert Lockwood, Distinguished Service Professor, Director, Urban Morgan Institute for Human
Rights, University of Cincinnati College of Law

Linda A. Malone, Director, Human Rights and National Security Law Program, Marshall-
Wythe Foundation Professor of Law, William and Mary Law School

Francisco Forrest Martin, President, Rights International, The Center for International Human
Rights Law, Inc.

Sarah Paoletti, Clinical Supervisor and Lecturer, Transnational Legal Clinic, University of
Pennsylvania Law School

Jordan Paust, Mike and Teresa Baker Law Center Professor, University of Houston Law Center

Henry J. Richardson III, Professor of Law, Temple Law School

Naomi Roht-Arriaza, Professor of Law, University of California, Hastings College of the Law

Sheri P. Rosenberg, Visiting Professor of Clinical Law, Director, Human Rights and Genocide
Clinic, Benjamin N. Cardozo of Law

Leila Nadya Sadat, Henry H. Oberschelp Professor of Law, Director, Whitney R. Harris
Institute for Global Legal Studies, Washington University School of Law

Dinah Shelton, Manatt/Ahn Professor of International Law, The George Washington University Law School

Barbara Stark, Visiting John T. Copenhaver Chair of Law, West Virginia College of Law, Morgantown

Ralph G. Steinhardt, Arthur Selwyn Miller Research Professor of Law and Director, Oxford Program in International Human Rights Law, The George Washington University Law School

Johan D. van der Vyver, I.T. Cohen Professor of International Law and Human Rights, Emory University School of Law

Penny M. Venetis, Clinical Prof. of Law, Clinical Scholar, Co-Director of the Rutgers Constitutional Litigation Clinic, Rutgers School of Law-Newark

Stephen I. Vladeck, Associate Professor, American University Washington College of Law

Deborah Weissman, Reef C. Ivey II Distinguished Professor of Law, Director of Clinical Programs, School of Law, University of North Carolina at Chapel Hill

Burns H Weston, Bessie Dutton Murray Distinguished Professor of Law Emeritus, Senior Scholar, UI Center for Human Rights, Director, Climate Legacy Initiative, The University of Iowa, and Visiting Distinguished Professor of International Law and Policy, Director, Climate Legacy Initiative, Vermont Law School

Jeanne M. Woods, Henry F. Bonura, Jr. Distinguished Professor of Law, Loyola University New Orleans

Allard K. Lowenstein International Human Rights Clinic is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations, as well as U.S. federal and other national courts. The Clinic has a longstanding commitment to efforts to protect people from torture and cruel, inhuman or degrading treatment, including work on cases involving the definition of torture under the Torture Victim Protection Act. It has also acted as counsel for plaintiffs in many lawsuits under the Alien Tort Statute.

EarthRights International (ERI) is a non-profit human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. ERI is or has been counsel in several lawsuits dealing with claims involving liability of non-state actors under the Alien Tort Statute (ATS), including *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.), and *Wiwa v.*

Royal Dutch Petroleum Corp., No. 96 Civ. 8386 (S.D.N.Y.). Most relevant to this appeal is *Doe v. Chiquita Brands International, Inc.*, No. 07-CV-03406 (D.N.J.), in which ERI represents plaintiffs alleging corporate complicity in war crimes committed by paramilitary groups in Colombia.

International Federation for Human Rights (FIDH) Established in 1922, FIDH is a federation of 155 non-profit human rights organizations in more than 100 countries. FIDH coordinates and supports affiliates' activities at the local, regional and international level, to obtain effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. With activities ranging from judicial enquiry, trial observation, research, advocacy, and litigation, FIDH seeks to ensure that all international human rights and humanitarian law instruments are respected by State parties.

International League for Human Rights Established in 1941, the League is the oldest of the United States-based international human rights organizations. With the Universal Declaration of Human Rights as its platform, the League raises human rights issues and cases before the UN and other intergovernmental regional organizations in partnership with our colleagues abroad, helping to amplify their voices and coordinate strategies for effective human rights protection.

International Rights Advocates (IRAdvocates) builds and supports the capacity of women, human rights, and legal organizations to develop and promote innovative legal strategies to hold multinational corporations and global institutions accountable for labor, human rights, and environmental violations. We do so by supporting direct legal advocacy both in the U.S. and abroad, and by working with partner organizations to develop and undertake precedent-setting legal actions in the global South. We believe that only when multinational corporate and institutional actors are subject to meaningful and enforceable legal mechanisms both in their home country and abroad can individual human rights be fully realized.

North Carolina Stop Torture Now is a grassroots coalition of faith, human rights, peace, veteran, and student groups across the state of North Carolina, as well as many concerned individuals. We have worked since 2005 to expose and end North Carolina's central role in the rendition and torture programs of the Bush Administration. Our special focus has been on the "torture taxis" of Aero Contractors, Ltd., of Smithfield, and Centurion Aviation of Fayetteville – aircraft operated by private contractors in collaboration with U.S. government agents to transport detainees to places where they are tortured. Our mission is to seek an end to the torture carried out directly by U.S. government agents or by those with whom they contract. We are interested in prohibiting private corporations from participating in torture with the collusion, acquiescence or ratification through inaction of government.

Rocky Mountain Survivors Center assists survivors of torture and war trauma, and their families, through legal assistance, therapeutic counseling, medical referrals and social services.

San Jose Peace and Justice Center was founded in 1957 by individuals profoundly concerned about peace and justice issues, especially the growth of nuclear arsenals and atmospheric nuclear testing. More than fifty years later, the Peace and Justice Center, along with our affiliated organizations, continues to educate and engage the South Bay community around critical issues

of peace and justice, with a current focus on ending the war in Iraq and preventing an attack on Iran. The Peace and Justice Center has a major campaign against the CIA's policy of extraordinary rendition and torture that focuses on the role of Jeppesen Dataplan, a local company that is contracted by the CIA to handle flight logistics for the torture flights.

Torture Abolition and Survivors' Support Coalition International (TASSC) is an organization each of whose members is a survivor of torture. TASSC's mission is to serve the needs of survivors, whatever they may be; to provide a vehicle for them to speak publicly about torture, this crime against humanity, which they know from the inside out; and to oppose the practice of torture wherever it may occur.

World Organization for Human Rights USA ("Human Rights USA") is a non-profit, public interest human rights organization dedicated to ending torture, gender-based violence, and other major human rights abuses, using litigation in the United States as the primary tool for accomplishing these goals. Human Rights USA's staff has extensive experience litigating issues regarding U.S. adherence to international human rights standards, as well as human rights norms incorporated into U.S. domestic law, particularly the Convention Against Torture and its implementing legislation. This litigation has included a number of civil actions under the ATS and the TVPA dealing with corporate accountability, FSIA, and act of state issues. We also were named amicus curiae in the first criminal prosecution under the Convention Against Torture, the case against Chuckie Taylor of Liberia. Human Rights USA is an affiliate of the World Organization Against Torture (Organisation Mondiale Contre La Torture, or "OMCT") network, composed of over 200 similarly situated human rights organizations around the world, each focusing on their own nation's human rights compliance issues and needs.