

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Presbyterian Church of Sudan, et al.,

Plaintiffs,

-against-

Talisman Energy, Inc., Republic of the Sudan,

Defendants.

Appellate Docket No.:
Not Assigned

Civil Action No. 01 CV 9882
(DLC)

**MEMORANDUM OF LAW OF AMICI CURIAE IN
SUPPORT OF PLAINTIFFS' PETITION FOR LEAVE TO APPEAL**

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IDENTITY AND INTEREST OF AMICI

Amici are human rights organizations, professors of law teaching international human rights and civil procedure, and human rights activists. All have an interest in ensuring that cases alleging the commission of mass crimes—such as genocide, crimes against humanity and war crimes against civilian populations—can proceed in United States courts as class actions pursuant to Federal Rule of Civil Procedure 23.

Organizational Amici

The **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 Lowenstein Clinic undertakes numerous litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. Its work is based on the human rights standards contained in international law. The Lowenstein Clinic has conducted research and provided briefs for international tribunals and many courts in the United States and has acted as counsel for plaintiffs in numerous lawsuits under the Alien Tort Statute.

The **Center for Constitutional Rights (CCR)** is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of

Human Rights. CCR has successfully litigated many important international human rights cases since 1980, including *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Statute grants federal courts jurisdiction to hear cases seeking compensation and other relief for violations of international law. CCR has litigated the following cases, among others: *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir. 1995); *Doe v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Doe v. Unocal*, 963 F.Supp. 880 (C.D.Cal 1997); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987) and 694 F. Supp. 707 (N.D. Cal. 1988). CCR currently represents the plaintiffs in, among others, *Wiwa v. Royal Dutch Petroleum* and *Saleh v. Titan*. The Court's disposition in this case is therefore of great interest to CCR and its clients.

The Center for Justice and Accountability (CJA) is a nonprofit organization dedicated to the protection and promotion of human rights through law. CJA works to deter torture and other severe human rights abuses around the world by helping survivors hold their persecutors accountable. CJA is the leading center in the United States that represents survivors in civil suits against persecutors who live in or visit the United States. CJA is pioneering an integrated approach to the quest for justice that combines legal representation with referrals for needed medical and psychosocial services, and outreach to schools, community

organizations and the general public. CJA currently represents more than 40 survivors from countries such as Bosnia, Chile, China, East Timor, El Salvador, Guyana, Haiti, Honduras, Somalia, and Spain.

EarthRights International (ERI) is a nongovernmental organization dedicated to protecting human rights and the environment. ERI represents plaintiffs in several international human rights cases, at least five of which were pled as class actions. ERI also works directly with communities suffering human rights and environmental abuses in Southeast Asia and the Amazon region, especially with respect to abuses in connection with the oil and gas industry. ERI's interest in this case is to ensure that victims of gross human rights abuses have the ability to seek redress, and in particular to see that the class action is not improperly made unavailable to victims of large-scale human rights abuses who would otherwise have no means to seek justice.

Human Rights Advocates (HRA) is a California non-profit corporation, founded in 1978 with national and international membership that endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. HRA has Special Consultative Status in the United Nations and participates in meetings of UN human rights bodies. HRA has submitted *amicus curiae* briefs in cases in the United States involving individual and group rights where international standards offer assistance in interpreting both

state and federal law. Examples of *amicus* briefs that HRA has participated in include those in the following cases: *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (one of several *amici* in the brief filed by the Bar of England and Wales cited twice in the majority opinion); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

Individual Amici

William Aceves is Professor of Law at California Western School of Law and the Director of the Law School's International Legal Studies Program. He teaches Civil Procedure, Comparative Law, Foreign Affairs and the Constitution, Human Rights Law, and Law & International Relations. Professor Aceves studies human rights and international law and writes extensively in these fields. He frequently works with Amnesty International, the Center for Justice & Accountability, the Center for Constitutional Rights and the American Civil Liberties Union on projects involving the domestic application of international law. He has also represented several human rights and civil liberties organizations as *amicus curiae* counsel in cases before the federal courts. He is the principal author of the 2002 Amnesty International USA report on torture and impunity in the United States. He has served on the Board of Directors of Amnesty International

USA and is presently the Ombudsperson for AIUSA. He is also a member of the National Board of the American Civil Liberties Union and serves on the Board of the Center for Justice & Accountability. Professor Aceves has appeared before the Inter-American Commission On Human Rights, the U.N. Special Rapporteur on Migrants, and the U.S. Commission on Civil Rights.

Constance de la Vega, Professor of Law, teaches International Human Rights Law and directs the International Human Rights Clinic at University of San Francisco School of Law, where she supervises students who participate in meetings of U.N. bodies addressing human rights issues. She has written extensively on the application of international human rights law in the United States and has authored *amicus curiae* briefs urging the application of those standards in courts in the U.S.

Deena Hurwitz is Associate Clinical Professor and the Director of the Human Rights Program at the University of Virginia School of Law.

Deborah LaBelle is a Senior Soros Justice Fellow.

Jules Lobel is Professor of law at the University of Pittsburgh School of Law where he teaches Constitutional Law, International Law, Human Rights, and Foreign Relations Law. Through the U.S. Center for Constitutional Rights, Jules Lobel has litigated important issues regarding the application of international law in the U.S. courts. In the late 1980's, he advised the Nicaraguan government

on the development of its first democratic constitution, and has also advised the Burundi government on constitutional law issues. Professor Lobel is editor of a text on civil rights litigation and of a collection of essays on the U.S. Constitution, *A Less Than Perfect Union* (Monthly Review Press, 1988). He is author of numerous articles on international law, foreign affairs, and the U.S. Constitution in publications including Yale Law Journal, Harvard International Law Journal, Cornell Law Review, and Virginia Law Review. He is a member of the American Society of International Law.

Cynthia Soohoo is the director of the Bringing Human Rights Home Project (BHRH) with the Human Rights Institute (HRI) of Columbia Law School and has worked as an instructor and supervising attorney for the law school's Human Rights Clinic. BHRH encourages U.S. compliance with international human rights law, including through the use of the U.N. and Inter-American Human Rights systems and the development of strategies to use human rights and comparative foreign law in U.S. courts. Prior to coming to HRI, Ms. Soohoo spent several years in private practice as a civil litigator and was co-counsel in the landmark Alien Tort Statute case *Doe v. Karadzic*. She convenes the Bringing Human Rights Home Lawyers Network and is a Coordinating Committee Member for the U.S. Human Rights Network. She is currently editing a book on human rights and the United States.

Eric Tars is an independent human rights consultant, presently working with Global Rights: Partners for Justice on their government accountability, domestic workers rights, and right to education projects; with Columbia Law School's Human Rights Institute on projects relating to the Inter-American and international human rights bodies; and with the US Human Rights Network, coordinating the training program for their bi-annual conference. He has written and conducted numerous training sessions on the use of the international human rights framework in the United States.

AUTHORITY TO FILE BRIEF

FRAP 29(a)-(b) authorizes *amici* to file this memorandum of law with leave of the Court.

SUMMARY OF ARGUMENT

Amici as international law professors and human rights organizations urge this Court to grant plaintiffs' Rule 23(f) petition for review and to reverse the district court's denial of class certification. Review now is appropriate, because the denial of class certification will extinguish the international human rights claims of thousands of Sudanese individuals who allege that they have been the victims of a campaign of genocide, crimes against humanity, and war crimes carried out jointly by the Government of Sudan and defendant Talisman. If not permitted to participate in this case as members of a class, thousands of victims of

this campaign will be unable to pursue their claims at all, because they are poor, illiterate, and powerless, and because they are without access to functioning and fair courts or lawyers other than class counsel. As a result, defendant Talisman will escape liability for the full scope of its inhumane activities.

Amici urge this Court to recognize that proceeding as a class will often be the only way that many victims of mass crimes—such as crimes against humanity, genocide, and war crimes committed against civilian populations—can have their day in court given the nature of human rights abuses and the nation states in which they occur. Victims of such mass crimes often find themselves in fora in which no justice is possible, either because the local judicial system is inaccessible or because they face retaliation by a government alleged to be involved in the challenged violations. The dire predicaments of claimants such as the plaintiff class in this case render suits alleging mass crimes particularly suited to class treatment.

The unique nature of the international delicts at issue—crimes against humanity, genocide, and certain collective war crimes directed at civilian populations—often compel class treatment. These delicts exist in international law precisely to address collective harms and acts targeted at protected groups or communities. Participation in a plan or campaign to commit such abuses will result in liability for a defendant toward the entire class where the relevant

standards of complicity, joint venture, or conspiracy are met. Because these mass crimes are defined under international law in terms of abuses directed against groups *qua* groups, the substantive elements of these offenses and theories of liability will be subject to collective proof with respect to the entire plaintiff class. Where large swaths of a class's case are amenable to generalized proof, common issues will inevitably predominate and class treatment is warranted.

It is imperative that United States courts utilize their equitable powers to certify class actions where victims allege collective harms subject to common proof. Otherwise, to interpret Rule 23 restrictively in this context as the district court did would frustrate the congressional purpose behind the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) to provide a civil remedy for international law violations and undermine the substantive policies underlying the international prohibitions against genocide, crimes against humanity, and war crimes. It would also amount to a denial of relief in many cases to the victims of the international law violations most worthy of effective redress whose only access to court may be as a member of a plaintiff class. Because the district court fundamentally erred in its approach to the class certification issue presented by this case, review and reversal by this Court are warranted.

ARGUMENT

I. Without The Ability To Engage In Collective Action, Many Victims Of Mass Crimes Will Be Denied Relief

Where large-scale and systemic human rights abuses are committed, the class action mechanism has the potential to provide comprehensive redress for victims of human rights violations and full accountability to human rights violators where the alternative may be no justice at all. These grave international law violations often occur in states experiencing political upheaval or governed by authorities who are themselves responsible for, or complicit in, such violations. As such, domestic courts in these states may be unable or unwilling to proceed effectively against perpetrators or to provide victims with redress. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (noting that plaintiff's Paraguayan attorney was arrested, threatened with death and subsequently disbarred); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 8, 1996) (finding the Rwandan judicial system to be virtually inoperative and thus unable to process civil claims). As this Court has recognized, "One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000). This observation was central to the passage of the TVPA, whose legislative history noted that

“judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent.” *See* H.R. REP. NO. 249, pt. 1, 3 (1991).

Indeed, in the context of this case in particular, the district court has already concluded that Sudan does not provide a viable forum for plaintiffs’ claims. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 335-6 (S.D.N.Y. 2003) (quoting plaintiff’s expert for the proposition that “the trial of this case in Sudan will result in a total failure of justice” in part because the Government of Sudan is implicated in the abuses, but also because plaintiffs have no legal personality under Sudanese law). In such situations of mass violence, redress would be impossible in the jurisdiction in which the harms occurred, so collective action in the United States may be the only justice possible. *See In re Tetracycline Cases*, 107 F.R.D. 719, 732 (W.D. Mo. 1985) (finding adjudication through a class action to be superior to no adjudication of the matter at all).

Other substantial barriers exist for human rights plaintiffs pursuing justice independently. Human rights plaintiffs may lack a basic knowledge of their legal rights under international law. *See Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 310 (N.D. Ill. 1995) (a class action protects the rights of consumers who may be unaware of statutory protection). Even if they are aware of

their rights, victims often lack the resources necessary to pursue a claim or lack access to lawyers or to courts able to hear their claims. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 616 (1997) (class treatment appropriate where class members have no ability to take care of themselves). Class actions allow individuals who may fear violent retaliation (against themselves or their loved ones) to participate in the legal process without having to assume a public or prominent role in the litigation. *See Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (finding joinder impracticable where plaintiffs still employed by defendant feared workplace retaliation).

Because the majority of potential class members in cases involving crimes against humanity, genocide, and war crimes will be unable to bring individual actions, the difficulties of obtaining justice in the human rights context favor a finding of the superiority of class treatment. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) (ruling that a class action is superior if no other alternative exists); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808-809 (1985) (observing that class action is an “invention of equity,” properly used when “plaintiffs would have no realistic day in court if a class action were not available”); *In re Prudential Securities Inc. Ltd. Partnerships Litigation*, 163 F.R.D. 200, 208-09 (S.D.N.Y. 1995) (considering access to justice factors in connection with superiority requirement); *Korn v. Franchard Corp.*, 456 F.2d

1206, 1214 (2d Cir. 1972) (finding class action treatment superior where there were no other suits pending).

Likewise, genocide, crimes against humanity, and war crimes claims are more amenable to class treatment than the claims typically advanced in domestic mass tort cases that are based on underlying substantive rights that are strongly individual in character. Considerations of individual control and alternative forums may thus be less salient in cases involving mass crimes than in other personal injury contexts. In particular, in other tort contexts where “high value” claims are at issue, there may be significant interests in individually controlling the litigation process. In contrast, in the mass crimes context, divergent interests are less prevalent where individual relief is elusive and classes exhibit high degrees of cohesion because of a shared experience with group-based persecution. *See In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983) (noting that courts must give great weight to the pragmatic interests of the class members). Furthermore, because class actions involving mass crimes are rare in our domestic courts, and involve conduct that occurred in different political and cultural milieu, there are benefits to concentrating litigation in a single jurisdiction in terms of educating the court and consolidating the presentation of proof. For these reasons, cases involving mass crimes are uniquely suited to class treatment.

II. Allowing Class Treatment In The Mass Crime Context Furtheres The Substantive Policies Behind The Alien Tort Statute And The Torture Victims Protection Act

In enacting the ATS and TVPA, Congress expressed a policy favoring U.S. courts hearing cases involving violations of international law committed abroad and in enforcing international law norms in the civil context. *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). As the district court noted in its recent opinion denying dismissal on the basis of statements of interest filed by the United States and Canada, the United States has a “compelling interest in the application of the international law proscribing atrocities such as genocide and crimes against humanity.” *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 at *7 (S.D.N.Y. Aug. 30, 2005). Protecting victims against a denial of justice was central to this policy. The legislative history of the TVPA notes that:

[a] state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact The Torture Victim Protection Act . . . would respond to this situation.

H.R. Rep. 102-367, pt. 1, at 3 (1991). In certain contexts, such as is presented here where involvement in a class is the only realistic justice possible for victims of

mass crimes, class treatment may best effectuate the goals underlying the ATS and TVPA.¹

This clear policy in favor of accountability and against impunity is relevant to interpreting procedural doctrines as they arise in human rights litigation. *See Wiwa*, 226 F.3d at 108 (directing district courts to consider “the policy favoring our court’s retention of such suits brought by plaintiffs who are residents of the United States, and []the policy expressed in the TVPA favoring adjudication of claims of violations of international prohibitions on torture” in ruling on *forum non conveniens* motions). Accordingly, Rule 23 must be applied to advance, rather than frustrate, the policies underlying the ATS and the TVPA. *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (“In the absence of a direct expression by Congress of its intent to depart from the usual course of trying ‘all suits of a civil nature’ under the Rules established for that purpose, class relief is appropriate.”). Otherwise, a restrictive reading of Rule 23 may paradoxically

¹ In this regard, it is important to note that no international institutions exist to enable plaintiffs to seek collective relief. Institutions based on the U.N. Charter, international multilateral treaties, and regional agreements typically address state responsibility and norm compliance but do not assign liability to individual defendants, generate enforceable remedies, or provide victims with a judicial forum in which to bear witness and confront their abusers. Moreover, the various international human rights institutions do not entertain collective action by victims of human rights abuses. *See William J. Aceves, Actio Popularis? The Class Action in International Law*, 2003 U. Chi. Legal F. 253 (2003).

result in impunity for the most serious international crimes—genocide, crimes against humanity, and war crimes—in situations in which justice is most pressing.

Where Congress has declined to provide guidance as to how human rights class actions should be managed, federal courts are invited to create “federal common law to provide justice for any injury contemplated” by those statutes. *See Alvarez-Machain v. United States*, 331 F.3d 604, 635 (9th Cir. 2003) (“Because the ATCA invokes international law principles of universal concern, it holds a unique place among federal statutory tort causes of action, and application of federal common law is therefore appropriate.”); *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1469 (D. Hawaii 1995) (“Because Congress in the TVPA offered no methodology as to how damages should be determined, federal courts are free to and should create federal common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treaties dealing with the protection of human rights.”); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (“The Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.”); *Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 267 (S.D.N.Y. 2002). Thus, courts have broad equitable powers to devise novel remedial approaches to ensure the manageability of complex class actions where

allegations of crimes against humanity, genocide, and war crimes against civilian populations are at issue.

III. Class Treatment Is Vital To Protect Interests Underlying The International Prohibitions Against Crimes Against Humanity, Genocide, and War Crimes Against Civilian Populations

The class action mechanism has the potential to give force to grievances about government or corporate practices and policies that violate human rights on a mass and collective scale. Certifying classes involving allegations of crimes against humanity, genocide, and war crimes against civilian populations ensures that any remedy reflects the collective nature of the harm suffered. Accordingly, individuals or organizations responsible for large-scale human rights abuses will face accountability for the full scope of the harm that they have caused to a targeted community. Indeed, given the collective nature of these international law norms and forms of responsibility, proceeding as a class action allows class plaintiffs to seek the discovery and introduction of a broader range of evidence that may more accurately reflect the nature of the repression suffered under a particular regime or at the hands of a particular defendant.

Such broad discovery, in turn, aids in creating a more accurate and complete judicial record. *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice By Collective Means*, 62 Ind. L. J. 561, 587 (1987) (noting that the class action mechanism encourages courts to look to systemic

nature of the challenged conduct, which may be overlooked where independent claimants proceed in separate actions). Thus, adopting an expansive perspective of the causes of the harm alleged by members of the class facilitates the discovery and disclosure of a pattern of wrongdoing, perhaps not readily apparent from singular or scattered cases. *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 800 (5th Cir. 1986) (Goldberg, J., dissenting), *cert. granted in part*, 483 U.S. 1004 (1987), *vacated*, 487 U.S. 977 (1988) (noting that without the class mechanism, “injuries of thousands would have remained both undiscovered and unredressed.”). This approach allows for a more accurate assessment of the systemic harm done to a group and can potentially generate more effective remedies to address class-wide injuries, thus ensuring symmetry between substantive rights under international law and available remedies.

Further, the class action device can hold entities responsible for mass crimes accountable for a fuller range of the harm caused than an individual action might. As a result, proceeding as a class action may generate a more effective deterrent effect. Particularly with respect to cases against multinational corporations, class treatment may be necessary to create “optimum incentives” for corporations to take due care in arranging for project security, providing weapons and other matériel to host governments, and designing and implementing offshore personnel policies—all issues that have served as the basis for class actions against

corporate entities. *See Doe v. The Gap, Inc.*, 2002 WL 1000073 (D. N. Mar. I. May 10, 2002) (granting class certification). Without the threat of aggregative liability and unless defendants are forced to bear the full costs of the harm caused, unlawful conduct may remain “profitable.” *See* David Rosenberg, *The Causal Connection In Mass Exposure Cases: A “Public Law” Vision Of The Tort System*, 97 Harv. L. Rev. 851, 906-07 (1984) (noting that critical mass of victims must prosecute claims in order for responsible institutions to be confronted with threat of liability powerful enough to invoke deterrence). In this way, collective action in response to systemic harms may result in a fuller realization of the substantive policies underlying applicable international norms. For all these reasons, class treatment may best effectuate the values underlying international law norms that have been purposefully defined to prescribe collective harms.

IV. Conclusion

Mass crime class actions have the potential to play an important role in the worldwide effort to enforce international norms concerned with the protection of international human rights. Class actions can contribute to the redress and rehabilitation of victims, the deterrence of future abuses, the creation of an accurate judicial record of mass violence, and the enunciation of international law norms in ways that individual actions may not. These suits also provide victims with a form of redress that is unattainable in the jurisdictions in which the

harm occurred or in international and regional fora that do not allow collective action. And, class action suits in domestic courts contribute to the fulfillment of states' obligations under international law to provide victims of human rights violations with an opportunity to seek civil reparations.

Given the important goals satisfied by class action suits in the mass crimes context, it is vital that United States courts exercise their equitable powers to certify victim classes where class members allege collective harms and theories of liability that are subject to common proof. In such circumstances, common issues will predominate over individual issues and certification is warranted. If the narrow reading of Rule 23 advanced by the district court is allowed to take hold, it would render class treatment unavailable in the mass crimes context and thousands of victims will be effectively denied any opportunity to pursue legal redress for acts of genocide, crimes against humanity, and war crimes. This result contravenes the policies behind Rule 23 to enable collective actions, the ATS and TVPA to provide an effective remedy for international law violations, and international law to prescribe mass crimes. To avoid this result, review and reversal of the district court's order are appropriate.

Date: 10/3/05



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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the amici curiae that are non-governmental corporate entities state that they have no parent corporations and that no publicly held corporation owns 10% or more of any of them.