

07-1893

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ASHE ABDI YOUSUF, AZIZ MOHAMED DERIA (IN HIS CAPACITY AS
PERSONAL REPRESENTATIVE OF THE ESTATES OF MOHAMED DERIA
ALI, MUSTAFA MOHAMED DERIA, JAMES DOE I AND JAMES DOE II),
JOHN DOE I, JANE DOE, AND JOHN DOE II,
Plaintiffs-Appellants,

– v. –

MOHAMED ALI SAMANTAR,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

**BRIEF OF TORTURE SURVIVORS SUPPORT ORGANIZATIONS,
HUMAN RIGHTS ORGANIZATIONS, RELIGIOUS ORGANIZATIONS,
AND TORTURE SURVIVORS AND THEIR FAMILY MEMBERS AS
AMICI CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND
REVERSAL OF THE DISTRICT COURT'S DECISION**

TYLER GIANNINI
International Human Rights Clinic
Human Rights Program, Harvard Law School
Pound Hall 401
1563 Massachusetts Avenue, Cambridge, MA 02138
(617) 496-7368
Counsel for Amici Curiae

December 7, 2007

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil or bankruptcy case, corporate defendants in a criminal case, and corporate amici curiae. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 07-1893

Caption: Yousuf et al. v. Samantar

Pursuant to FRAP 26.1 and Local Rule 26.1,

All amici (see attached form) who is amici curiae,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
 YES NO
2. Does party/amicus have any parent corporations?
 YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
 YES NO
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
 YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)
 YES NO
If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:
6. Does this case arise out of a bankruptcy proceeding?
 YES NO
If yes, identify any trustee and the members of any creditors' committee:



(signature)

December 7, 2007

(date)

ADDENDUM:
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

The responses provided on the preceding statement of disclosure of corporate affiliations and other interests apply equally to all organizational *amici curiae* supporting this brief, including:

American Friends Service Committee
Boston Center for Refugee Health and Human Rights
Consistent Life
EarthRights International
Florida Center for Survivors of Torture
Global Lawyers and Physicians
Harvard Law School International Human Rights Clinic
Human Rights First
Human Rights Watch
International Rights Advocates
Lowenstein Human Rights Clinic
Maryknoll Office for Global Concerns
Muslim Public Affairs Council
Program for Survivors of Torture and Severe Trauma
Program for Torture Victims
Rocky Mountain Survivors Center
The Shalom Center
Survivors of Torture, International
Torture Abolition and Survivors Support Coalition International
World Organization for Human Rights USA

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. IN PROVIDING TORTURE SURVIVORS WITH A CAUSE OF ACTION AGAINST INDIVIDUALS, CONGRESS UNDERSTOOD THAT FORMER OFFICIALS OF FOREIGN GOVERNMENTS WOULD NOT BE IMMUNE FROM SUIT.....	3
A. The FSIA does not explicitly apply to individual foreign officials.	3
B. The FSIA protects neither former officials nor officials operating outside the scope of their lawful authority.....	4
C. Endorsing landmark ATS cases— <i>Filártiga v. Peña-Irala</i> and <i>Forti v. Suarez-Mason</i> —Congress codified relief for victims of torture, explicitly extending such relief to U.S. citizens.	6
II. A LONG LINE OF CASES HAS PERMITTED TORTURE SURVIVORS TO SEEK JUSTICE AND HOLD FORMER OFFICIALS TO ACCOUNT IN U.S. COURTS, JUST AS CONGRESS EXPECTED WHEN IT PASSED THE TVPA.....	9
III. THE DISTRICT COURT’S APPROACH CONTRADICTS THE UNDERSTANDING OF CONGRESS AND OF THE SUPREME COURT, AND IS OUT OF STEP WITH A LONG LINE OF ATS AND TVPA CASES AGAINST FORMER OFFICIALS.	11

A. The District Court erred in placing “great weight” on letters from the current Somali government, thus undermining the purpose of both the FSIA and the TVPA. 11

B. The District Court decision is out of step with a long line of cases against former officials going back to *Filártiga*, and would endanger the very class of victims Congress expected the TVPA would protect..... 13

CONCLUSION 16

APPENDIX A 18

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

<i>Abebe-Jira v. Negewo</i> , 72 F.3d 844 (11th Cir. 1996)	10
<i>Arce v. Garcia</i> , 434 F.3d 1254 (11th Cir. 2006)	10
<i>Argentine Republic v. Amerada Hess</i> , 488 U.S. 428 (1989)	4
<i>Cabello v. Fernandez-Larios</i> , 402 F.3d 1148 (11th Cir. 2005)	10
<i>Chavez v. Carranza</i> , 413 F. Supp. 2d 891 (D. Tenn. 2005)	10
<i>Chuidian v. Philippine Nat'l Bank</i> , 912 F.2d 1095 (9th Cir. 1990)	5
<i>Dole Food Co. v. Patrickson</i> , 538 U.S. 468 (2003)	4, 5
<i>Enahoro v. Abubakar</i> , 408 F.3d 877 (7th Cir. 2005)	4
<i>Filártiga v. Peña-Irala</i> , 630 F.2d 876 (1980)	4
<i>Forti v. Suarez-Mason</i> , 672 F.Supp. 1531 (N.D. Cal., 1987)	7
<i>Jean v. Dorelien</i> , 431 F.3d 776 (11th Cir. 2005)	10
<i>Kadic v. Karadzic</i> , 74 F.3d 377 (2d Cir. 1996)	7
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004)	7
<i>Tachiona v. United States</i> , 386 F.3d 205 (2d Cir. 2004)	4
<i>Velasco v. Republic of Indonesia</i> , 370 F.3d 392 (4th Cir. 2004)	5
<i>Verlinden B.V. v. Cent. Bank of Nigeria</i> , 461 U.S. 480 (1983)	11
<i>Xuncax v. Gramajo</i> , 886 F.Supp. 162 (D. Mass. 1995)	9, 10, 15
<i>Yousuf v. Samantar</i> , 2007 U.S. Dist. LEXIS 56227	13

STATUTES

28 U.S.C. § 1350 (2000).....	1, 2, 7
28 U.S.C. § 1350 note (2000).....	1, 2, 6
28 U.S.C. § 1602-1611 (2000).....	2
28 U.S.C. § 1603 (2000).....	3
28 U.S.C. § 1603(b).....	5

OTHER AUTHORITIES

H.R. Rep. No. 102-367 (1991).....	6, 8
H.R. Rep. No. 94-1487 (1976).....	11
S. Rep. No. 102-249 (1991)	passim
Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, to Senator Claiborne Pell, Chairman of the Senate Committee on Foreign Relations (Dec. 11, 1989).....	6
Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 66 (1990).....	16
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, <i>entered into force</i> June 26, 1987	6
Abdikarim Ali Omar, Letter to the Editor, Wash. Post, Mar. 21, 1990.....	13
Dolly Filártiga, <i>American Courts, Global Justice</i> , N.Y. TIMES, Mar. 30, 2004, at A21	14

Donna Minkowitz, *"The Blindfold's Eyes"* by Dianna Ortiz, SALON.COM, Nov. 19, 2002 (book review) 15

Jennifer Schirmer, *The Guatemalan Military Project: a Violence Called Democracy* (1998)..... 15

INTEREST OF THE *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of the Plaintiffs-Appellants.

The *amici curiae* (listed individually in Appendix A to this brief) are:

- (a) two former plaintiffs who, thanks to suits against former foreign government officials under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350 (2000), and the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note (2000), have secured some measure of justice for their own torture and that of their family members;
- (b) non-profit organizations dedicated to providing health and social services to survivors of torture and other severe human rights abuses;
- (c) human rights organizations committed to abolishing torture through legal and policy advocacy, including but not limited to litigation under the ATS and the TVPA; and
- (d) religious organizations both opposed to torture on moral grounds and committed to ensuring that the TVPA continues to protect their practitioners serving communities overseas.

Amici curiae oppose the use of torture under any circumstance and support the efforts of torture survivors to hold their perpetrators accountable. Thus, the *amici curiae* work to prevent the United States from serving as a safe haven for torturers.

SUMMARY OF ARGUMENT

When Congress passed the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note (2000), it intended to allow survivors of torture to sue former officials of foreign governments in U.S. courts, on the understanding that the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1602-1611 (2000), would not bar such suits. In a substantial line of cases, survivors of torture have invoked the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350 (2000), and the TVPA to seek justice and hold their abusers to account—including perpetrators who were former government officials.

The District Court’s decision to apply FSIA immunity to a former official contradicts the understanding of Congress when it passed the TVPA and is out of step with a long line of cases against former officials. The District Court’s logic would extend FSIA immunity to former officials and place undue weight on letters of authorization from foreign governments. Such an approach would effectively eviscerate the TVPA. Indeed, it would permit an abusive regime to immunize the most heinous acts of its former officials and thus deny justice to the very types of victims Congress passed the TVPA to protect, including U.S. missionaries, relief workers, and federal agents.

ARGUMENT

I. **IN PROVIDING TORTURE SURVIVORS WITH A CAUSE OF ACTION AGAINST INDIVIDUALS, CONGRESS UNDERSTOOD THAT FORMER OFFICIALS OF FOREIGN GOVERNMENTS WOULD NOT BE IMMUNE FROM SUIT.**

Congress passed the TVPA on the understanding that immunity under the FSIA would not apply to former officials sued under the TVPA.¹ The District Court's decision contradicts that understanding, as well as Supreme Court authorities which suggest that the FSIA does not necessarily apply in suits against individual officials and, even if it does, would not extend immunity to former officials.

In addition to its recognition that the FSIA does not apply to former officials, Congress acknowledged that torture is never within the scope of a government official's authority, and that a foreign state may not provide immunity by authorizing an act that violates peremptory norms of international law. *See* S. Rep. No. 102-249, at *6-7.

A. The FSIA does not explicitly apply to individual foreign officials.

When Congress passed the FSIA in 1976, it did not state that immunity would extend to individual officials of foreign governments. 28 U.S.C. § 1603 (2000) (referring only to foreign states and their "agenc[ies] and

¹ The present case does not require the court to determine whether current officials are covered by FSIA immunity; accordingly, *amici curiae* do not address this issue in this brief.

instrumentalit[ies]”). A plain reading of the FSIA would not have the statute apply to individuals. *See Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004) (noting with respect to 28 U.S.C. § 1603 (b) that “‘agencies [and] instrumentalities’ . . . are defined in terms not usually used to describe natural persons”); *see also Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (“If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.”).

In *Amerada Hess*, the Supreme Court noted a distinction between suits against individual foreign officials and those against foreign states. *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 436 n. 4 (1989). The court cited *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980), a suit “against a Paraguayan police official for torture” in which “the Paraguayan Government was not joined as a defendant” to demonstrate that jurisdiction could be exercised against an individual official under the ATS without implicating the FSIA. 488 U.S. at 436 n. 4.

B. The FSIA protects neither former officials nor officials operating outside the scope of their lawful authority.

The Supreme Court in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003), endorsed “the longstanding principle that the jurisdiction of the Court depends on the state of things at the time . . . the action [was] brought.” *Id.* at 478 (internal quotation marks and citations omitted). The Supreme Court held that in a suit against a defendant that is potentially an agency or instrumentality, such

status—and thus the applicability of FSIA immunity—is determined “at the time suit is filed,” not “at the time of the conduct giving rise to the suit.” *Id.* at 478-80.

Some circuits, including this Circuit, have interpreted the FSIA to apply to individual officials acting within their scope of authority, reasoning that individuals can be considered agencies or instrumentalities under 28 U.S.C. § 1603(b). *See, e.g., Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990); *Velasco v. Republic of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004). However, even if individual officials acting within the scope of their authority are considered agencies or instrumentalities, *Dole* mandates that FSIA immunity would not extend to former officials.

Furthermore, the scope of lawful authority is defined by domestic and international law. *See* S. Rep. No. 102-249 at *6-7; *see also* Brief of Appellants at Part II.D. In passing the TVPA, Congress recognized that torture is never within the scope of a government official’s authority, and that a foreign state may not provide immunity by authorizing acts that violate peremptory norms of international law. S. Rep. No. 102-249, at *6-7. The Senate Report made this clear by quoting a letter sent by the State Department during the ratification process for the Convention Against Torture, which affirmed that the U.S. Government “does not regard authorized sanctions that unquestionably violate international law as ‘lawful sanctions’ exempt from the prohibition on torture.” *Id.*

at *7 (quoting Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, to Senator Claiborne Pell, Chairman of the Senate Committee on Foreign Relations (Dec. 11, 1989)).²

C. Endorsing landmark ATS cases—*Filártiga v. Peña-Irala* and *Forti v. Suarez-Mason*—Congress codified relief for victims of torture, explicitly extending such relief to U.S. citizens.

In passing the TVPA, Congress codified the principle established in *Filártiga* that torture victims can seek justice in U.S. courts against individuals.³ In *Filártiga*, *Amica* Dolly Filártiga and her father successfully sued a former Paraguayan Inspector General of Police for kidnapping and torturing to death her younger brother. 630 F.2d at 878. *Filártiga* labeled torturers such as this former official the “enemy of all mankind.” S. Rep. No. 102-249, at *3-4 (quoting *Filártiga*, 630 F.2d at 890); *see also* H.R. Rep. No. 102-367, at *3-4. The Senate Report cited *Filártiga* as evidence of a “universal consensus” that “official torture . . . violate[s] standards accepted by virtually every nation.” S. Rep. No. 102-249 at

² *See also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2), GA res. 39/46, *entered into force* June 26, 1987 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

³ The TVPA provides a cause of action against “individuals” who commit torture or extrajudicial killing “under actual or apparent authority or under color of law of any foreign nation.” 28 U.S.C. § 1350 note; *see also* S. Rep. No. 102-249 at *7 (“only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976.”); Brief of *Amici Curiae* International Law Professors at Part I.B.

*3. The Report also noted that the TVPA would “establish an unambiguous basis” for the cause of action in *Filártiga* and “extend a civil remedy also to U.S. citizens who may have been tortured abroad.” *Id.* at *4-5. *See also Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (“Congress has made clear that its enactment of the Torture Victim Protection Act of 1991 was intended to codify the cause of action recognized by this Circuit in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens.”).

The Supreme Court has likewise understood the TVPA to indicate Congressional support for the result in *Filártiga*. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 751 (2004) (describing the TVPA as a “supplement” to *Filártiga* that showed that Congress actively approved of the result). The Court also expressed its own approval of that result, treating *Filártiga* as a model for the type of case in which relief for human rights violations should be available. *See id.* at 732 (citing *Filártiga* as evidence that the rule announced by the Court in *Sosa* was “generally consistent with the reasoning of many of the courts and judges” who have entertained human rights litigation).

The Senate Report also endorsed *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987), a case in which torture victims and their survivors successfully used the ATS to sue a former Argentine general who was responsible for ordering torture and summary execution by military and police forces under his control. S.

Rep. No. 102-249 at *4. Congress understood that liability under the ATS and TVPA extended to high-ranking former officials with command responsibility for the acts of those below them. *Id.* at *9 (1991) (“[R]esponsibility . . . extends beyond the person or persons who actually committed those acts [to] anyone with higher authority who authorized, tolerated or knowingly ignored those acts.”).

Congress appreciated that the TVPA could raise immunity issues, and concluded that the FSIA would not normally bar suits alleging torture by former officials. *Id.* at *7-9 (“[T]he committee does not intend these immunities to provide former officials with a defense to a lawsuit brought under this legislation. . . . Because all states are officially opposed to torture and extrajudicial killing . . . the FSIA should normally provide no defense.”); H.R. Rep. No. 102-367, at *5.⁴ That Congress explicitly endorsed existing ATS cases in which torture survivors and their next of kin held former foreign officials to account under the ATS demonstrates its understanding that former officials, including high officials, would be subject to suit under the TVPA.

⁴ The Senate Report further stated that the TVPA’s statute of limitations would be tolled “during the period when a defendant has immunity from suit.” S. Rep. No. 102-249, at *11. To apply FSIA immunity to former officials in perpetuity would render such a tolling “period” utterly senseless.

II. A LONG LINE OF CASES HAS PERMITTED TORTURE SURVIVORS TO SEEK JUSTICE AND HOLD FORMER OFFICIALS TO ACCOUNT IN U.S. COURTS, JUST AS CONGRESS EXPECTED WHEN IT PASSED THE TVPA.

Consistent with the understanding of Congress when it passed the TVPA, many torture survivors have used the Act to hold accountable former officials and to receive some measure of relief. For example, *Amica* Sister Dianna Ortiz, an American nun, was abducted, raped, and tortured in 1989 by Guatemalan soldiers under the direction of the Minister of Defense, Hector Gramajo. *Xuncax v. Gramajo*, 886 F. Supp. 162, 173-74 (D. Mass. 1995). After traveling from a Kentucky convent to the rural province in Guatemala where she was to conduct missionary work, she began to receive threats. *Id.* at 173. In response to those threats, she left the country temporarily, but returned two months later to continue her missionary work. *Id.* at 174.

Not long after her return, Sister Ortiz was kidnapped from the garden of a religious center and taken to an unlit room where her captors burned cigarettes into her skin, punched her in the face, and raped her repeatedly. *Id.* at 174 & n.7. Following her escape, Gramajo publicly attacked her reputation, claiming in the U.S. and Guatemalan press that her injuries had been inflicted by an angry lover. *Id.* at 174. Sister Ortiz filed claims under the ATS and the TVPA against Gramajo. The court held that Ortiz had “properly” used the TVPA against this former official

because the “statute unambiguously provides victims of torture with a private cause of action against the perpetrators of such abuse.” *Id.* at 176.

Many other torture survivors have used the TVPA to hold abusive former officials to account. In *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006), a rural health worker who had been abducted and tortured by members of the El Salvador National Guard—including being subjected to electric shocks, sodomizing and asphyxiation—obtained justice in a TVPA suit against the former Minister of Defense and the former Director General of the National Guard. In *Chavez v. Carranza*, 413 F. Supp. 2d 891 (D. Tenn. 2005), a naturalized U.S. citizen received relief in a suit against a former official responsible for her torture and rape when she was a student at the National University of El Salvador. In *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), a suit against a former Chilean military official residing in Miami, the TVPA provided access to justice for survivors of a Chilean economist who had been subjected to torture and extrajudicial execution. In *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005), a federal jury found a former Haitian colonel liable for extrajudicial killing and torture. And in *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), a former high-ranking Ethiopian official living in Atlanta was found liable for the torture of three women during Ethiopia’s military dictatorship of the 1970s.

Each of these cases, which followed directly from the precedent set by *Filártiga*, gave victims who were brutally abused by former foreign government officials access to justice in U.S. courts—exactly as Congress had understood was happening under the ATS and would happen under the TVPA. Yet under the District Court’s approach, each of these victims could have been denied the relief Congress understood it was providing by codifying *Filártiga* in the TVPA.

III. THE DISTRICT COURT’S APPROACH CONTRADICTS THE UNDERSTANDING OF CONGRESS AND OF THE SUPREME COURT, AND IS OUT OF STEP WITH A LONG LINE OF ATS AND TVPA CASES AGAINST FORMER OFFICIALS.

The implications of the District Court’s decision are far-reaching. The TVPA was never meant to give license to abusive regimes and their officials to carry out torture, only to later send a letter to a U.S. court to prevent the exercise of jurisdiction. To the contrary, Congress understood that under the Convention Against Torture, authorized sanctions that contravene international law could not exempt former officials from the prohibition against torture. *See supra* Part I.B.

A. The District Court erred in placing “great weight” on letters from the current Somali government, thus undermining the purpose of both the FSIA and the TVPA.

The purpose of the FSIA was to ensure that courts would make immunity decisions “on purely legal grounds” and without regard to “pressures from foreign governments.” H.R. Rep. No. 94-1487, at 7 (1976); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). In this case, the District Court

disregarded this purpose and relied heavily on two letters from the Transitional Federal Government of Somalia as a basis for concluding that Samantar was acting within the scope of his authority when he presided over the torture and summary executions that gave rise to this suit. In relying on the letters, the District Court succumbed to the political pressures that the FSIA was intended to prevent.

Placing great weight on letters from foreign governments also contradicts Congress' understanding that the ATS and the TVPA would provide access to justice for survivors who were denied relief in the countries where they were tortured. Under the District Court's approach to TVPA suits, any foreign government, no matter how abusive, could send a letter like those in this case to secure immunity for its former officials.⁵ This would invite foreign governments to immunize torture by former officials, allowing them to deny survivors access to justice and subvert the very purpose of the TVPA.⁶ See Brief of Appellants at Part II.B.

⁵ The approach would equally apply to suits brought under the ATS, a consequence the District Court apparently failed to consider.

⁶ Assuming, *arguendo*, that it would ever be proper for a court to consider a letter from a foreign government, such consideration should come in the context of an independent, fact-based determination of whether FSIA immunity would apply to a particular defendant, and letters of authorization that merely state legal conclusions should hold no evidentiary value.

Assuming further that a current government could authorize the acts carried out by a former official of a previous regime, and assuming that an act of torture could ever be lawfully sanctioned, *cf. supra* Part I.B, to be effective a letter would have to include an admission by a state of "knowledge or authorization of relevant

B. The District Court decision is out of step with a long line of cases against former officials going back to *Filártiga*, and would endanger the very class of victims Congress expected the TVPA would protect.

The District Court's drastic departure from precedent could unravel the protections and opportunities for relief that Congress understood the ATS to provide, and deliberately extended to U.S. citizens in the TVPA.

Amica Dolly Filártiga and her father, Joel Filártiga, filed their landmark case against a former Paraguayan Inspector General of Police in 1978, well before the Paraguayan dictator Alfredo Stroessner fell from power.⁷ After her brother's killing was publicized in the news media, Ms. Filártiga and her mother were

acts"—the sort of admission Congress rightly expected that a state would rarely, if ever, make. S. Rep. No. 102-249 at *8 (quoting 28 U.S.C. § 1603(b)).

The letters in this case do not sanction the specific conduct in question, but instead merely state in vague terms that “the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 *would have been* taken by Mr. Samantar in his official capacities.” *Yousuf v. Samantar*, 2007 U.S. Dist. LEXIS 56227, at *35 (emphasis added). This is not a genuine admission of relevant acts, but instead merely a legal conclusion meant to serve as a basis for another legal conclusion—that the defendant has an “entitlement to sovereign immunity from prosecution.” *Id.* These conclusory statements are proffered by an entity that may not qualify as a foreign state. *See* Brief of Appellants at Part I.A.

Finally, even if such language could constitute an admission by a state of “knowledge or authorization” of specific acts of torture, such a post-hoc authorization is contradicted in this case by the former government's contemporaneous denials that it engaged in or approved of such acts. *See, e.g.*, Abdikarim Ali Omar, Letter to the Editor, Wash. Post, Mar. 21, 1990, at A20 (letter to editor by Somali Ambassador to the United States claiming that “Somalia upholds the human rights of its citizens.”).

⁷ Stroessner seized power in a 1954 coup d'état. He ruled for thirty-five years, only falling from power in a 1989 coup d'état.

arrested on false charges. See Dolly Filártiga, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21. When the Filártigas tried to bring a case against Joelito's murderer in Paraguay, their lawyer was arrested, threatened and shackled to a wall, then had his law license taken away. *Id.* For the Filártigas, the ATS case was risky, but as *Amica* Filártiga has written, it also gave them protection: "the Paraguayan government threatened us but wouldn't risk retaliating once we had the American legal system on our side." *Id.* In 2004, Ms. Filártiga wrote about the importance of the case and the ATS:

[S]urvivors or victims' relatives have used this law to obtain a measure of justice. . . . [Without the law] torturers like Americo Peña-Irala would be able to travel freely in the United States. Deposed dictators like Ferdinand Marcos and brutal generals like Carlos Vides Casanova, who presided over human rights abuses in El Salvador in the 1980's, could come here and enjoy safe haven.

Id. Ms. Filártiga also reported that in Paraguay the case had become "a symbol of the injustice of the Stroessner dictatorship." *Id.* Yet if the rule announced by the District Court in this case had been followed in *Filártiga*, Stroessner's regime could have obtained dismissal simply by sending a letter in support of the defendant. Not only would *Amica* Filártiga and her father thus have been denied any justice for the kidnapping, torture and murder of their family member, but the cases that followed could never have come to pass.

Likewise, *Amica* Sister Ortiz, who brought her suit against the former Guatemalan Minister of Defense, Hector Gramajo, would have faced potential dismissal under the District Court's reasoning. *Xuncax v. Gramajo*, 886 F.Supp. 162. At the time of Sister Ortiz's lawsuit, Gramajo, like many military officers involved in human rights violations in Guatemala, still had the support of the country's ruling parties. Jennifer Schirmer, *The Guatemalan Military Project: a Violence Called Democracy* 265-66 (1998). The District Court's approach would have allowed Gramajo to have his allies still in power send a letter entitling him to immunity. Sister Ortiz would thus have been denied the opportunity not only to receive redress for her own rape and torture, but also to help deter future government officials from harming future American missionaries or others.⁸ Such a result would have blocked the avenue to justice that Congress opened to U.S. citizens such as Sister Ortiz when it passed the TVPA.

Indeed, the District Court's approach would allow foreign governments to compel the dismissal of cases brought by a broad range of potential victims, including U.S. students abused while on overseas service projects, relief workers targeted while on vital aid missions, and even U.S. government agents tortured

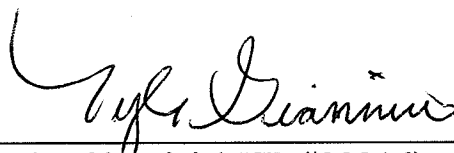
⁸ Ortiz felt she had been targeted "not because she was any kind of radical but simply because she was a garden-variety Catholic missionary working with the poor at a time when the military wanted to seriously scare the church." Donna Minkowitz, "*The Blindfold's Eyes*" by Dianna Ortiz, SALON.COM, Nov. 19, 2002 (book review) at <http://dir.salon.com/story/books/review/2002/11/19/ortiz/>.

while on foreign assignments. In so doing, its approach would undercut one important role that legislators explicitly envisioned for the TVPA: to protect U.S. officials working abroad. *See* Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 66 (1990) (statement of Sen. Specter) (“We have to protect our drug agents, wherever they are. . . . [I]f you have torture by officials of another government . . . and it is something that is of core value of a country like the United States . . . what do you do about it, short of going to war? And these are heinous and horrendous acts and wherever we can move against them, we should. [The TVPA] is just a very small step, but I think an important one.”). In sum, the District Court’s approach to immunity would make it exceedingly easy for uncooperative foreign regimes to deny relief to U.S. citizens subjected to torture.

CONCLUSION

To ensure that survivors of torture continue to have access to justice in U.S. courts, the decision of the District Court should be reversed.

By:



Tyler Giannini (VSB #39316)
International Human Rights Clinic
Human Rights Program, Harvard Law School
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-7368

on the brief:

Nathan Ela (Mass. bar registration pending)
Thomas Davies (Harvard Law School, '09)
Fernando Delgado (Harvard Law School, '08)
Matthew Perault (Harvard Law School, '08)
Deborah Popowski (Harvard Law School, '08)
Sarah Sorscher (Harvard Law School, '10)
Claret Marcia Vargas (Harvard Law School, '10)
Joy Wang (Harvard Law School, '10)

APPENDIX A *AMICI CURIAE*

I. TORTURE SURVIVORS AND THEIR FAMILY MEMBERS

Dolly Filártiga and her younger brother Joelito lived in Asuncion, Paraguay, in 1976, with her mother and father, a long-time opponent of Paraguay's dictator, General Alfredo Stroessner. That year, her brother was abducted and later tortured to death by Americo Norberto Peña-Irala, the Inspector General of Police of Asuncion. Dolly Filártiga was forced out of her house in the middle of the night to view her brother's mutilated body. After her arrival in the United States, she sued Peña-Irala under the Alien Tort Statute ("ATS") in New York, becoming the first plaintiff to successfully use the statute to seek justice for human rights violations. In 1984, she and her father were awarded over \$10 million dollars in damages.

Sister Dianna Ortiz, a native of New Mexico, is a U.S. Roman Catholic nun of the Ursuline order. In 1982, while serving as a missionary teaching literacy and religion to indigenous peoples in Guatemala, she was kidnapped, tortured and raped by government forces under the command of Guatemalan Minister of Defense, Hector Gramajo. In 1995, Ortiz won a judgment against Gramajo, who was by then a retired officer, in a case filed under the Torture Victim Protection Act ("TVPA"). She subsequently founded *Amicus* Torture Abolition and Survivors Support Coalition International, of which she is currently the director; Ortiz thus has both a personal and a professional interest in ensuring that survivors of torture continue to have access to justice under the TVPA in suits against former foreign officials.

II. HUMAN RIGHTS ORGANIZATIONS

Consistent Life ("CL") joins this brief of *amici curiae* because of its commitment to the protection of all human life. In addition to the threat to life from summary or extrajudicial executions related to torture, CL is especially concerned about the need for protection of vulnerable activists who, for example, advocate for the poor, for the rights of women or racial minorities or people with disabilities or unborn children, or who are active in preventing executions, abortions, or war.

EarthRights International ("ERI") is a 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 under the ATS and the TVPA in which the acts of foreign government agents are at issue, and therefore has an interest in ensuring the correct interpretation of the Foreign Sovereign Immunities Act ("FSIA") in cases involving international offenses.

Human Rights First ("HRF") is a non-profit, nonpartisan organization that has worked since 1978 to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. HRF supports human rights activists around the world, protects refugees in flight from persecution and repression, and helps build an international system of justice and accountability for human rights crimes. HRF acts to halt catastrophic violations of human rights currently in progress and to support international efforts to ensure that states fulfill their responsibility to protect their people from gross violations of human rights.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. Human Rights Watch has filed amicus briefs before various bodies, such as U.S. courts of appeal and the Inter-American Commission.

The **International Human Rights Clinic** at the Human Rights Program of Harvard Law School has served as counsel for *amici curiae* in several cases involving the ATS and the TVPA, and is currently co-counsel in *Mamani et al. v. Sánchez de Lozada*, CA 07 CV 2507 (AW) (D. Md), a case filed under the ATS currently pending in the U.S. District Court for the District of Maryland.

International Rights Advocates ("IRAdvocates") protects and empowers individuals victimized by multinational corporations and other powerful entities that traditionally enjoy impunity or immunity. Designed to foster global operations that, at a minimum, conform to human rights principles, IRAdvocates has litigated numerous suits involving claims brought under the ATS and the TVPA, and has an interest in ensuring the correct application of immunities under the FSIA.

The **Allard K. Lowenstein International Human Rights Clinic** (“Lowenstein 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 many 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, has done work on cases involving the definition of torture under the TVPA, and has acted as counsel for plaintiffs in many lawsuits under the ATS.

The **World Organization for Human Rights USA** (“Human Rights USA”) is a non-profit, public interest human rights organization dedicated to ending torture, slavery, and gender-based violence, 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 civil actions under the ATS and the TVPA dealing with FSIA and act of state issues. 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.

III. TORTURE SURVIVOR SUPPORT AND RECOVERY ORGANIZATIONS

The **Boston Center for Refugee Health and Human Rights**, located at the Boston Medical Center, provides comprehensive health care for refugees and survivors of torture and related trauma, coordinated with legal aid and social services. The Center also educates and trains agencies and professionals who serve this patient population, to advocate for the promotion of health and human rights, and to conduct clinical, epidemiological, and legal research for the better understanding and promotion of health and quality of life for survivors of torture and related trauma. The Center has an interest generally in promoting justice and holding perpetrators of torture to account, and specifically in ensuring the proper interpretation of the TVPA in cases such as this.

The **Florida Center for Survivors of Torture**, a program of Gulf Coast Jewish Family Services, Inc., has during the past seven years served over 600 torture survivors who have come from countries around the world to seek refuge in Florida. The Center is deeply aware of the need for these survivors to seek justice and reparations once they have reached the shores of the United States, and thus has an interest in protecting the well-established role of the TVPA as an important avenue to justice and accountability.

Global Lawyers and Physicians (“GLP”) is a non-profit non-governmental organization formed in 1996 to reinvigorate collaboration between the legal and medical/public health professions, in order to better protect the human rights and dignity of all persons. GLP provides support and assistance in developing, implementing, and advocating public policies and legal remedies which protect and enhance human rights, and as such has an interest in seeing that remedies created by Congress in the TVPA remain available to survivors of torture.

The **Program for Survivors of Torture and Severe Trauma** (“PSTT”) was established in 1998 at the Center for Multicultural Human Services in Falls Church, Virginia, to address the consequences of human rights abuses. PSTT’s mission is to assist survivors of politically-motivated torture by providing a comprehensive range of services to address the complex results of their torture. Serving over 200 survivors each year, PSTT holds a holistic view of survivors’ needs and offers a team approach that encompasses a full range of services and interventions, including mental health, referrals for medical care, legal, language and social services; as such, it has an interest in protecting the TVPA as a viable avenue for survivors to seek justice and accountability in cases against former foreign officials.

The **Program for Torture Victims** (“PTV”) is a non-profit organization based in Los Angeles, California, whose mission is to alleviate the suffering and health consequences of torture through psychological, medical, and social services to victims of state-sponsored violence. PTV also works with asylum attorneys on behalf of clients seeking political asylum in the United States, trains primary health providers, advocates for anti-torture legislation and enforcement of laws, as well as adequate and appropriate resources for the treatment of torture survivors. PTV has an interest in guaranteeing the continued availability of legal relief for its clients in cases brought under the TVPA.

Survivors of Torture, International believes in the abolition of torture and the healing of torture survivors. A successful appeal of *Yousuf v. Samantar* is

significant because holding torturers accountable is an essential part of the healing process for torture survivors. Additionally, cases like *Yousuf v. Samantar* prevent future abuse by confirming that torture is a human rights violation which incurs consequences.

Torture Abolition and Survivors Support Coalition International (“TASSC”) is the only organization founded by and for torture survivors. The mission of TASSC is to end the practice of torture wherever it occurs and to empower survivors, their families and communities wherever they are. TASSC demands an end to impunity for the architects of torture—those who order, justify and practice it—and thus has an interest in ensuring that U.S. courts properly construe the FSIA and the TVPA in cases involving former high officials.

IV. RELIGIOUS ORGANIZATIONS

The **American Friends Service Committee** is a Quaker organization that includes people of various faiths who are committed to social justice, peace and humanitarian service. Its work is based on the Quaker belief in the worth of every person, and faith in the power of love to overcome violence and injustice. In keeping with our beliefs and our experience working in war torn areas and places of conflict in the United States and around the world, we hold that torture, whether physical, mental, or emotional, violates the human spirit and innate goodness within the torturer and the tortured.

The **Maryknoll Global Concerns Office** represents Maryknoll, the U.S.-based Catholic missionary movement, in advocating before governments and international bodies for human rights protections in national and international law and practice and for an end to impunity for human rights abusers. Maryknoll includes: the Maryknoll Fathers and Brothers, the Maryknoll Sisters, the Maryknoll Lay Missioners and the Maryknoll Affiliates. Maryknoll missioners work in about forty countries around the world and have on many occasions accompanied victims of human rights abuse and survivors of torture, including a number of our own members.

The **Muslim Public Affairs Council** (“MPAC”) is a public service agency working for the civil rights of American Muslims, for the integration of Islam into American pluralism, and for a positive, constructive relationship between American Muslim and their elected representatives. MPAC was created in 1988 to promote a vibrant American Muslim community and enrich American society through exemplifying the Islamic values of Mercy, Justice, Peace, Human Dignity,

Freedom, and Equality for all. MPAC has an interest in ensuring that in cases such as this, which offers the opportunity to realize justice and to safeguard human dignity, U.S. courts protect and promote these most basic values.

The Shalom Center was founded in 1983 to bring a prophetic voice to Jewish, multireligious, and American life. From the earliest memories of Pharaoh's cruelty, the Jewish experience is that high officials of oppressive regimes have been responsible for ordering the use of torture; Judaism itself has long striven to construct a legal system in which torture would be impossible and in which high officials would be accountable to the public. Based on this collective experience, the Shalom Center has an interest in ensuring that in cases such as this laws governing relations with other countries are applied in such a way as to make domestic and international laws against torture enforceable.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style
Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) (7) (B) because this brief contains 4,110 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) (7) (B) (iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a) (6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2004 for Mac in 14 point Times New Roman.

Dated: December 7, 2007



Tyler Giannini
International Human Rights Clinic
Human Rights Program
Harvard Law School
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-7368

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that on December 7, 2007, I served a true copy of the:

**BRIEF OF TORTURE SURVIVORS SUPPORT ORGANZIATIONS,
HUMAN RIGHTS ORGANIZATIONS, RELIGIOUS ORGANIZATIONS,
AND TORTURE SURVIVORS AND THEIR FAMILY MEMBERS AS
AMICI CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLANTS
AND REVERSAL OF THE DISTRICT COURT'S DECISION**

by first class mail or equivalent upon the following persons:

Clerk of the Court (twenty-five copies)
U.S. Court of Appeals, Fourth Circuit
Office of the Clerk
Lewis F. Powell, Jr. United States Courthouse
1100 East Main Street
Richmond, VA 23219

Attorneys for Plaintiffs:

Robert R. Vieth (two copies)
Tara M. Lee
Sherron N. Thomas
Cooley Godward Kronish LLP
One Freedom Square
11951 Freedom Drive
Reston, Virginia 20190-5656
(703) 456-8000

Maureen P. Alger (two copies)
Cooley Godward Kronish LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, California 94306-2155
(650) 843-5000

Pamela Merchant
Moirra Feeney
Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, California 94102
(415) 544-0444

(two copies)

Attorneys for Defendant:

Harvey J. Volzer, Esq.
216 South Patrick Street
Alexandria, VA 22314

(two copies)

Julian Henry Spirer
Fred B. Goldberg, Esq.
Spirer & Goldberg, P.C.
7101 Wisconsin Avenue, Suite 1201
Bethesda, MD 20814

(two copies)

Executed in Cambridge, MA on December 7, 2007.



Tyler Gianni
International Human Rights Clinic
Human Rights Program, Harvard Law School
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-7368