

**No. 16-15179**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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JOAN JARA, IN HER INDIVIDUAL CAPACITY, AND IN HER CAPACITY AS  
THE PERSONAL REPRESENTATIVE OF THE ESTATE OF VICTOR JARA,  
AMANDA JARA TURNER, IN HER INDIVIDUAL CAPACITY, MANUELA  
BUNSTER, IN HER INDIVIDUAL CAPACITY,

Plaintiffs—Appellants,

v.

PEDRO PABLO BARRIENTOS NUNEZ,  
Defendant—Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
HON. ROY B. DALTON JR., PRESIDING, CASE NO. 6:13-CV-01426-RBD-GJK

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***BRIEF OF AMICI CURIAE AMBASSADORS STEPHEN J. RAPP AND  
DAVID J. SCHEFFER IN SUPPORT OF REVERSAL OF DISMISSAL OF  
ALIEN TORT STATUTE CLAIMS***

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*Docket No.: 16-15179  
Jara v. Barrientos Nunez*

**CORPORATE DISCLOSURE STATEMENT OF AMICI CURIAE  
AND CERTIFICATE OF INTERESTED PERSONS**

Pursuant to the Federal Rule of Appellate Procedure 26.1, amici curiae state that they are all natural persons.

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that the following persons and entities have an interest in the outcome of this matter. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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*Docket No.: 16-15179  
Jara v. Barrientos Nunez*

**CORPORATE DISCLOSURE STATEMENT OF AMICI CURIAE  
AND CERTIFICATE OF INTERESTED PERSONS (CONT'D)**

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Dated: November 30, 2016

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**STATEMENT OF IDENTITY AND INTERESTS OF AMICI**

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997–2001) and senior adviser and counsel to the U.S. Permanent Representative to the United Nations (1993–1997). He also is the U.N. Secretary-General’s Special Expert on United Nations Assistance to the Khmer Rouge Trials. The views expressed herein are Ambassador Scheffer’s own and are not attributable to the United Nations.

Stephen J. Rapp served as U.S. Ambassador-at-Large for Global Criminal Justice (2009–2015), as prosecutor for the Special Court of Sierra Leone (2007–2009), as senior trial attorney and chief of prosecutions at the International Criminal Tribunal for Rwanda (2001–2007), and as the Sonia and Harry Blumenthal Distinguished Fellow for the Prevention of Genocide at the U.S. Holocaust Memorial Museum (2015–2016).

Ambassadors Scheffer and Rapp submit this brief to highlight the unique nature and significance of crimes against humanity and the importance of justice and accountability in American courts for mass atrocities.

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Pursuant to Federal Rule of Appellate Procedure 29(a), this brief is filed with the consent of Plaintiffs/Appellants, and having spoken with Defendant via a non-certified Spanish translator, the understanding of having received Defendant/Appellee's consent. No party or party's counsel authored this brief in whole or in part, or financially supported this brief, and no one, other than *amici curiae* or their counsel, contributed money intended to fund the preparation or submission of this brief.

**STATEMENT OF THE ISSUE ON APPEAL**

Plaintiffs/Appellants raise on appeal whether the District Court erred in dismissing their Alien Tort Statute (28 U.S.C. § 1350) claims. *Amici curiae* write in support of reversal of the dismissal of those claims.

**SUMMARY OF ARGUMENT**

Crimes against humanity are among the few crimes recognized as a violation of the law of nations. Crimes against humanity encompass a constellation of acts made criminal under international law when they are committed within a certain context. They are distinct from their predicate criminal acts and do unique harm to their victims and beyond. A crime against humanity exists where a predicate act of sufficient severity, such as murder, extermination, or torture, is committed as part of a widespread or systematic attack directed against a civilian population. *See* Rome Statute of the International Criminal Court (“Rome Statute”), 2187 U.N.T.S. 90, Art. 7; *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005).

This second element of a “widespread or systematic attack” on civilians distinguishes crimes against humanity from the predicate acts of torture and extrajudicial killing in both scope and gravity. Because of the broader context in which they are committed, crimes against humanity affect victims differently and have a distinct symbolic significance. The potential for liability for torture or

extrajudicial killing therefore cannot, and should not, foreclose a claim for crimes against humanity under the Alien Tort Statute. The availability of a Torture Victim Protection Act claim for the death of Victor Jara, contrary to the ruling of the District Court below, should not foreclose the Plaintiffs from also pursuing Alien Tort Statute claims for crimes against humanity.



## INTRODUCTION

In 1973, Pedro Barrientos Núñez arbitrarily detained, tortured, and murdered Víctor Jara, a Chilean folk singer and democratic activist. Third Amended Complaint at ¶ 1, *Jara v. Barrientos Nunez*, No. 6:13-cv-1426-RBD-GJK (M.D. Fla. Sept. 21, 2015), ECF No. 111. Barrientos Núñez was an officer in the Chilean Army, and his actions were part of a widespread and systematic attack against civilians in support of General Augusto Pinochet’s rise to power and in an effort to extinguish any civilian opposition. *Id.* ¶¶ 9, 21–37. The Second Amended Complaint therefore included claims both under the Torture Victim Protection Act (“TVPA”), *codified at* 28 U.S.C. § 1350, note, for torture and extrajudicial killing and under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, for crimes against humanity. Second Amended Complaint at ¶¶ 68–100, *Jara*, No. 6:13-cv-1426-RBD-GJK (M.D. Fla. July 30, 2014), ECF No. 63.

The lower court dismissed Plaintiffs’ ATS claims, noting that “foreclosing Plaintiffs’ ATS claims does not leave them without remedy; torture and extrajudicial killing are cognizable under the TVPA, which was enacted in part to provide a remedy where the ATS cannot.” Order at 9, *Jara*, No. 13-cv-1426-RBD-GJK (M.D. Fla. Apr. 14, 2015), ECF No. 93. This equation of a claim of crimes against humanity with claims of torture and extrajudicial killing fails to recognize

the distinct nature of crimes against humanity. The ATS can, and must be allowed to, provide a remedy that the TVPA alone does not.

“[C]rimes against humanity are as old as humanity.” Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat’l L. 787, 789 (1999). Far more than just crimes against other humans, these crimes are so deliberate and occur on such a scale as to be deemed attacks on humanity itself. The crimes committed during the Holocaust, in Cambodia under the Khmer Rouge, in Chile during the Pinochet regime, in the former Yugoslavia during its dissolution, and in Rwanda during its genocide are examples of atrocities of a magnitude that transcends national borders and demands the condemnation of the international community as a whole.

## **ARGUMENT**

### **I. CRIMES AGAINST HUMANITY HAVE A UNIQUE HISTORY AND NATURE**

#### *A. Crimes Against Humanity Have a Long History of Universal International Condemnation*

The underpinnings of the concept of crimes against humanity trace at least as far back as 1868, when an international military commission gathered at St. Petersburg to ban the use of explosive bullets, which all agreed would “uselessly aggravate the sufferings of disabled men, or render their death inevitable . . . [and]

would, therefore be contrary to the laws of humanity.”<sup>1</sup> Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, Nov. 29/Dec. 11, 1868, 1 AJIL 95. These “laws of humanity” were universally understood to serve “the interests of humanity and the ever increasing requirements of civilization.” Convention with Respect to the Laws and Customs of War on Land (Hague II), pmbl., July 29, 1899, 32 Stat. 1803, 1 Bevans 247, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429; Laws and Customs of War on Land (Hague IV), 18 October 1907, 187 CTS 227, pmbl. Such protection from inhuman treatment is “still applicable today,” because while “[w]eaponry and modes of warfare change; human nature does not.” *Al Bahlul v. United States*, 767 F.3d 1, 57–58 (D.C. Cir. 2014).

Crimes against humanity were first codified in the Charter of the International Military Tribunal (hereinafter, “IMT Charter”). The IMT Charter defined crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the [Second World W]ar; or persecutions on political, racial or religious grounds[.]” Charter of the International Military Tribunal, Aug. 8, 1945,

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<sup>1</sup> Though 1868 may be one of the earliest dates at which the concept and modern language were joined, the understanding of a universal “natural law” as something outside of and greater than the law of any state can be traced to Aristotle (384–322 BCE). Robert Dubler, *What’s in a Name? A Theory of Crimes Against Humanity*, 15 Austl. Int’l L. J. 85, 87 (2008).

art. 6(c), 59 Stat. 1546, 1547, E.A.S. No. 472, 82 U.N.T.S. 284; *see also* David Luban, *A Theory of Crimes Against Humanity*, 29 Yale J. Int'l L. 85, 86 (2004); Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 5 UN GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950); 1950 ILC Yb 374, vol. II; 44 AJIL 126 (1950). Though this was the first appearance of the crime in positive international law, the validity of the prosecutions at Nuremberg rested on the proposition that the IMT Charter did not establish new laws; it merely gave name to the most rhetorically obvious of crimes. “It was clear . . . [the conduct] was wrong before a law could be contrived to condemn it.” Richard Vernon, *What is a Crime against Humanity?*, 10 J. Pol. Phil. 231, 232 (2002).<sup>2</sup>

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<sup>2</sup> The IMT Charter, which first codified crimes against humanity, limited its jurisdiction to crimes against humanity committed “before or during the war.” IMT Charter, Art. 6(c). This war nexus requirement evaporated as the definition of crimes against humanity was developed in jurisprudence in favor of an understanding that “once the abuse of civilians surpasses a particular threshold”—shown by satisfaction of the mens rea and systematic or widespread attack elements—“the prescriptions of international law are activated.” Van Schaack at 791–95; *see also* *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 141 (App. Chamber, Int'l Crim. Trib. for the former Yugoslavia, Oct. 2, 1995) (“It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.”); *accord* *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352–53 (N.D. Ga. 2002) (“[T]he definition of crimes against humanity no longer requires any connection to an international or internal armed conflict.”), *overruled on other grounds by* *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005).

Since Nuremberg, crimes against humanity have been codified in, *inter alia*, the Rome Statute of the International Criminal Court;<sup>3</sup> the Security Council resolutions establishing the International Criminal Tribunals for the former Yugoslavia<sup>4</sup> and Rwanda,<sup>5</sup> the Special Court for Sierra Leone,<sup>6</sup> and the Extraordinary Chambers in the Courts of Cambodia<sup>7</sup> (collectively, the “international tribunals”); and the laws of 51 nations and the European Union.<sup>8</sup>

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<sup>3</sup> Rome Statute Art. 7.

<sup>4</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia Since 1991, art. 5, U.N. GAOR, May 19, 1993, U.N. Doc S/25704.

<sup>5</sup> International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, art. 3, U.N. Doc. S/res/955 (1994), 33 I.L.M. 1598, 1603.

<sup>6</sup> Agreement between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone (with Statute), Sierra Leone-U.N., art. 2, Jan. 16, 2002, 2178 U.N.T.S. 137.

<sup>7</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), art. 5, as amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation).

<sup>8</sup> Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Brazil, Bulgaria, Cambodia, Canada, Colombia, the Democratic Republic of Congo, the Republic of Congo, Costa Rica, Croatia, Denmark, Ecuador, Estonia, the European Union, Finland, France, Georgia, Germany, Ireland, Italy, Ivory Coast, Japan, South Korea, Kyrgyzstan, Latvia, Liechtenstein, Luxembourg, Mali, Malta, Mexico, Netherlands, New Zealand, Nigeria, Norway, Peru, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, and Uruguay. Law Library of Congress, *Multinational report: Crimes Against Humanity Statutes and Criminal Code Provisions*, April 2010. As of 2012, 92 states had included one or more crime against humanity as a crime under national law and 80 provided for

The Eleventh Circuit has recognized this history and noted that crimes against humanity were “part of United States and international law long before” the 1970s.<sup>9</sup> *Cabello*, 402 F.3d at 1154.

By the 1970s, crimes against humanity were well entrenched. They have been extensively litigated both domestically and in the international tribunals since 1945, and their jurisprudence has been repeatedly affirmed and refined, forming the core of prosecutions for international crimes. Since World War II, crimes against humanity have been prosecuted in the courts of Argentina, Canada, Estonia, France, Germany, Hungary, Israel, Indonesia, Iraq, Italy, Latvia, and Peru.<sup>10</sup> M. Cherif Bassiouni, *Crimes Against Humanity: the Case for a Specialized Convention*, 9 Wash. U. Global Stud. L. Rev. 575, 577 (2010) (citation omitted).

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universal jurisdiction over them. Amnesty International Publications, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* 13, 16–21 (2012 Update).

<sup>9</sup> Although the elements, history, and much of the precedent regarding crimes against humanity arise in a criminal context, the potential for liability outside of criminal courts and tribunals—as in domestic civil actions—is a significant avenue for achieving the goals of international criminal law. See generally, Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 Am. J. of Int’l L. 1 (2013) (addressing non-criminal adjudication of international criminal law before the Inter-American Court of Human Rights, the Council of Europe’s Committee of Ministers, and the United Nations’ Human Rights Committee.).

<sup>10</sup> And the state where the events took place, Chile, has found it important to characterize similar crimes not simply as killing or torture, but as crimes against humanity. Naomi Roht-Arriaza, *Foreword*, in *Digest of Latin American Jurisprudence: On International Crimes*, ix, xxviii (2010) (summarizing decision of Chilean Supreme Court in *Case of Molvo of Choshuenco (Paulino Flores Rivas, et al.)* characterizing facts as crimes against humanity).

Since 1993, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda has prosecuted over 200 cases involving crimes against humanity. *See Home*, United Nations International Tribunal for the former Yugoslavia (last visited Nov. 29, 2016), <http://www.icty.org/> (follow “Cases” hyperlink); *ICTR Basic Documents and Case Law*, International Criminal Tribunal for Rwanda (last visited Nov. 29, 2016), <http://www.ictrcaselaw.org/> (follow “Advanced Browse” hyperlink; then follow “Keywords: Show All” hyperlink; then follow “crimes against humanity” hyperlink). To date, in the twelve<sup>11</sup> cases charged and confirmed in the International Criminal Court, nine have alleged crimes against humanity. *See ICC—Welcome to the International Criminal Court*, International Criminal Court (last visited Nov. 29, 2016), <https://www.icc-cpi.int/> (follow “Investigations and cases” hyperlink; then follow “Trial,” “Appeals,” “Reparations,” and “Closed” hyperlinks). Meanwhile, academics have produced a prodigious volume of scholarship on the import, impacts, distinct nature, and evolving jurisprudence of crimes against humanity. *See e.g.*, M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2d ed. 1999) (providing overview of history of

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<sup>11</sup> This number includes the individual cases against Laurent Gbagbo and Charles Blé Goudé, which were joined subsequent to confirmation of the individual charges on March 11, 2015. *See Gbagbo and Blé Goudé Case*, International Criminal Court (last visited Nov. 29, 2016), <https://www.icc-cpi.int/cdi/gbagbo-goude>.

crimes against humanity and early jurisprudence); *Encyclopedia of Genocide and Crimes Against Humanity* (Dinah L. Shelton ed., 2005) (encyclopedia and bibliography of topics relating to crimes against humanity); *Forging a Convention for Crimes Against Humanity* (Leila Nadya Sadat ed., 2011) (proposing and compiling history, practice, and context for a convention on crimes against humanity); William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (2012) (examining political and policy implications of international criminal justice). Crimes against humanity are accordingly well established, well defined, widely accepted, and extensively catalogued, and have been prosecuted repeatedly in the modern era.

B. *Crimes Against Humanity Are Legally Distinct Crimes With Unique Elements*

Crimes against humanity exist where a predicate crime of sufficient gravity, such as torture, is committed as part of a widespread or systematic attack against a civilian population. *See Rome Statute Art. 7; Cabello*, 402 F.3d at 1161.

The IMT Charter governing the Nuremberg prosecutions limited the eligible set of predicate crimes to “murder, extermination, enslavement, deportation, or other inhumane acts” of similar nature and gravity. IMT Charter. “Since the Nuremberg trials . . . the scope of enumerated offenses has been expanded to



include, *inter alia*, imprisonment, rape, and torture.”<sup>12</sup> *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352–53 (N.D. Ga. 2002) (citations omitted). This limited group of crimes that can serve as a predicate for crimes against humanity underscores that only the grossest of violations are eligible for such liability designation.

1. Crimes Against Humanity Must Be Committed As Part of a Widespread or Systematic Attack Against a Civilian Population

“For persecution to reach the level of a crime against humanity, it typically must involve more than the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity,” rather, it must also be part of a widespread or systematic campaign of such deprivations. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 317 (D. Mass. 2013) (internal quotations and citations omitted).<sup>13</sup> Courts have used

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<sup>12</sup> In the Statute for the International Criminal Court, the enumerated list of predicate crimes includes imprisonment, torture, severe sexual crimes (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence), persecution, enforced disappearance, and apartheid. Rome Statute Art. 7(1)(e)-(j).

<sup>13</sup> Though some states and defendants have attempted to frame “widespread or systematic” as a conjunctive test requiring that an attack be both “widespread” and “systematic,” the argument has been rejected in case law, customary international law, and the drafting of the Rome Statute. *See e.g., Prosecutor v. Kupreskic*, No. IT-95-16-T, ¶ 544 (Jan. 14, 2000) (noting “the requirement that the occurrence of crimes be widespread or systematic being a disjunctive one”); *Prosecutor v. Akayesu*, No. ICTR-96-4-T, ¶ 579 (Sept. 2, 1998) (“The act can be part of a widespread or systematic attack and need not be a part of both.”), ¶ 579 n.144 (noting customary international law “requires only that the attack be either

different formulations to define what constitutes “widespread” or “systematic” action. Widespread-ness captures scope, while systematicity captures nature. *Prosecutor v. Semanza*, No. ICTR-97-20, ¶ 329 (May 15, 2003). The “existence of a policy or plan,” “the means, methods, resources and result of the attack upon the population . . . [t]he consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes” are all relevant in determining whether an attack was widespread or systematic. *Prosecutor v. Limaj*, No. IT-03-66-t, ¶¶ 183–84 (Nov. 30, 2005) (quoting *Prosecutor v. Kunarac*, Nos. IT-96-23, IT-96-23/1-A, ¶ 95 (June 12, 2002)).

“The concept of widespread may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” *Prosecutor v. Akayesu*, No. ICTR-96-4-T, ¶ 580 (Sept. 2, 1998); accord *Doe v. Drummond Co.*, No. 2:09-CV-01041-RDP, 2010 WL 9450019, at \*9 (N.D. Ala. Apr. 30, 2010). Widespread-ness is result-oriented, requiring an attack of great breadth against a large number of victims. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 670 (S.D.N.Y. 2006), judgment entered sub nom. *Presbyterian Church of Sudan v.*

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widespread or systematic”); *Prosecutor v. Tadic*, No. IT-94-1-T, ¶ 646 (May 7, 1997) (noting “it is now well established” that either widespread-ness or systematicity is sufficient); Rome Statute Art. 7.

*Talisman Energy, Inc.*, No. 01 CIV.9882(DLC), 2006 WL 3469542 (S.D.N.Y. Dec. 1, 2006), *and aff'd*, 582 F.3d 244 (2d Cir. 2009) (“A widespread attack is one conducted on a large scale against many people” (citation omitted)); *see also* Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 Am. J. Int’l L. 43, 47–48 (1999). For example, courts have defined the widespread element to exclude “single or isolated acts,” *Doe*, 2010 WL 9450019, at \*9 (citing *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349343, at \*3 (N.D. Cal. Aug. 14, 2007)), while including attacks spanning several years, two provinces, and involving hundreds to thousands of victims, *id.*

“The concept of systematic may be defined as thoroughly organised [sic] and following a regular pattern on the basis of a common policy involving substantial public or private resources.” *Akayesu*, No. ICTR-96-4-T, ¶ 580 (Sept. 2, 1998). Systematicity therefore captures acts for which a preconceived plan, policy, or pattern provides the context to the act. *See id.*; *accord Prosecutor v. Tadic*, No. IT-94-1-T, ¶¶ 648-49 (May 7, 1997). It is conduct-oriented, established by a showing of “a high degree of organization or orchestration,” regardless of the outcome and form of the attack itself. *See Presbyterian Church of Sudan*, 453 F. Supp. 2d at 670 (“[A] systematic attack is an organized effort to engage in the violence.” (citation omitted)); *accord Prosecutor v. Blaskic*, No. IT-95-14-A, ¶ 101 (July 29, 2004); Robinson, 93 Am. J. Int’l L. at 50. It “refers to the organized

nature of the acts of violence and the improbability of their natural occurrence.” *Blaskic*, ¶ 101. For example, “patterns of crimes, namely the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.” *Limaj*, ¶ 184 (quoting *Kunarac*, ¶¶ 98, 101).

2. The “Widespread or Systematic” Element of Crimes Against Humanity Sets Them Apart from Other Crimes and Torts

The element requiring that crimes against humanity be part of a widespread or systematic attack on civilians is the gravamen of the crime. “[T]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population.” *Tadic*, No. IT-94-1-T, ¶ 653 (May 7, 1997). As one commentator noted, crimes against humanity can be “set apart from ordinary inhumanities by [their] grossness.” Robert Dubler, *What’s in a Name? A Theory of Crimes Against Humanity*, 15 *Austl. Int’l L. J.* 85, 99 (2008).

The widespread or systematic element distinguishes crimes against humanity from their predicate crimes. *See* Vernon, 10 *J. Pol. Phil.* at 245 (“The kind of evil in question is also distinguished . . . from violations of human rights. Human rights violations are individuated.”). Thus, while conduct constituting torture and extrajudicial killing is actionable under the TVPA, that conduct satisfies only the first element of a crime against humanity. *See* 28 U.S.C. § 1350,

note (codifying the TVPA). Torture and extrajudicial killing rise to the level of crimes against humanity only when they are part of a widespread or systematic attack on civilians. Accordingly, the Eleventh Circuit has emphasized that textual analysis of the statutes, applicable precedent, and the canons of statutory construction all require a finding that claims under the TVPA and for crimes against humanity under the Alien Tort Statute are distinct. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005) (“decid[ing] that Plaintiffs can raise separate claims for state-sponsored torture under the Alien Tort [Statute] and also under the Torture Victim Protection Act”). Neither replicates or may substitute for the other, *see id.*, nor should the applicability of one preclude pursuit of the other where both apply, particularly where the effect would be to remove the predicate crime from its broader context.

C. *Crimes Against Humanity Are Among the Few Crimes Recognized as “Violations of the Law of Nations” for Purposes of the ATS*

Crimes against humanity are among the few violations of international law actionable under the ATS. The ATS confers jurisdiction on federal courts for civil claims “by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. In 1980, the Second Circuit recognized that the ATS provides jurisdiction over tort actions brought by aliens for violations of customary international law, including war crimes and crimes against humanity. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). In

*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court clarified the scope of actionable torts under the ATS. Taking into account the meaning of the ATS at the time of its adoption, the Supreme Court held that actionable torts under the ATS were restricted to a “very limited category defined by the law of nations and recognized at common law,” historically only “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 712, 715 (citations omitted).

However, the *Sosa* Court did not limit the jurisdiction of the federal courts under the ATS to those three enumerated offenses. The *Sosa* Court instead permitted federal courts to recognize claims “based on the present-day law of nations” if those claims rest on “norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.” *Id.* at 725.

Justice Breyer noted in concurrence that crimes against humanity are analogous to the three offenses not only in that they substantively constitute “universally condemned behavior,” but also in that “universal jurisdiction exists to prosecute” them. *Id.* at 762 (Breyer, J., concurring). These *jus cogens* crimes—offenses that includes war crimes, genocide, and torture—are of a unique significance, and it is this significance that gives every nation the right to hold perpetrators accountable. *See United States v. Bellaizac-Hurtado*, 700 F.3d 1245,

1260–61 (11th Cir. 2012) (citing “gravity of the crime” as one premise of international jurisdiction and declining to acknowledge drug trafficking as subject to universal jurisdiction (citation omitted)); *see also Sosa*, 542 U.S. at 762 (acknowledging universal jurisdiction applies to *jus cogens* crimes). Their defining attribute is that they cut both more broadly than ordinary crimes—that is, affecting all humanity—and more deeply, “violating the core humanity that we all share and that distinguishes us from other natural beings.” Luban, 29 Yale J. Int’l L. at 86. The availability of universal jurisdiction in nations that accept the concept demonstrates that crimes against humanity are by nature different from, and far more heinous than, ordinary violations of law.

Since *Sosa*, “persecution that rises to the level of a crime against humanity has repeatedly been held to be actionable under the ATS.” *Sexual Minorities Uganda*, 960 F. Supp. 2d at 316–17 (citing *Presbyterian Church of Sudan*, 582 F.3d at 256); *see also Cabello*, 402 F.3d at 1154; *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 244 n. 18 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *In re Chiquita Brands Int’l, Inc.*, 792 F. Supp. 2d 1301, 1344 (S.D. Fla. 2011); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1156–57 (E.D. Cal. 2004); *Mehinovic*, 198 F. Supp. 2d at 1352. Crimes against humanity rise to the level of violations of the law of nations precisely because there is universal agreement that they are barred by customary international law. *Flores*, 414 F.3d at 244 n.18

(“Customary international law rules proscribing crimes against humanity . . . have been enforceable against individuals since World War II.”); *accord Mehinovic*, 198 F. Supp. 2d at 1352 (“Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and therefore are actionable under the [ATS].”); *Cabello*, 157 F. Supp. 2d at 1360 (collecting citations and holding “the Nuremberg Tribunal memorialized the recognition of ‘crimes against humanity’ as customary international law”).

## II. **CRIMES AGAINST HUMANITY ARE OF UNIQUE SIGNIFICANCE, MEANING, AND HARM**

### A. *The Legal Significance of Crimes Against Humanity Transcends That of Other Crimes*

“[C]rimes against humanity . . . are among the most serious crimes of concern to the international community as a whole[.]” International Criminal Court, *Elements of Crimes*, Art. 7, ¶ 1 (2011). “An attack of sufficient ferocity, seriousness and scale” to constitute a crime against humanity “means . . . it is the international community as a whole which is being threatened.” Dubler, 15 *Austl. Int’l L. J.* at 99. David Luban, a human rights scholar at Georgetown University Law Center, notes that a key aspect of crimes against humanity when it was first defined in the IMT Charter was that “[c]rimes against humanity consist of the most severe and abominable acts of violence and persecution.” Luban, 29 *Yale J. Int’l*



L. at 98. Crimes against humanity are so severe that they simply have no analogue in domestic or international law.

B. *Naming Crimes Against Humanity Has Important Expressive Functions*

To victims of crimes against humanity, there is a value to naming and proving in a court of law that a particular tort was in fact a crime against humanity. When a single predicate act is proven to be part of a widespread or systematic attack on civilians, it is more abhorrent than any individual instance of the act. As history cautions, the interest in deterring grave crimes committed on the basis of group affiliation is based on recognition that it is “not a merely hypothetical threat[.] . . . [A]ll human beings have an interest in ensuring that people are not killed by their neighbors solely because of their group affiliation; for all of us have neighbors whose group is not our own.” Luban, 29 Yale J. Int’l L. at 138–39. In short, putting a single instance of a violation in its political and social setting and labeling a sufficiently widespread, systematic, and intentional attack a “crime against humanity” is crucial to fully redressing the harm done.

Research with victims and family members of these crimes has shown that to make sense of what happened to them or to their loved ones, the individual crime needs to be understood within larger political and cultural contexts. The harm is not simply to the individual, but to the social fabric or collectivity to which they belong. Any healing must be similarly situated within a narrative of

collective harm. *See, e.g.*, M. Brinton Lykes and Marcie Mersky, *Reparations and Mental Health: Psychosocial Interventions Towards Healing, Human Agency and Rethreading Social Realities*, 589-622 (Pablo de Greif ed., 2006). This additional harm that results from a crime against humanity is not redressed by acknowledgment of the predicate act alone while the larger context is ignored.

Further, the effect of such contextualization goes beyond the individual defendant, his predicate criminal act, and his victim, and contributes to a goal of even greater magnitude than that of preventing torture, extrajudicial killing, or any other predicate act alone. Quite apart from adjudicating liability, prosecuting and imposing liability for crimes against humanity establishes standards for behavior, particularly for those in positions of power. Essential to achieving this laudable goal is not just addressing the predicate act, *e.g.*, torture, but engaging in an open and explicit analysis of whether a crime against humanity has occurred. Saira Mohamed, *Reconciling Mass Atrocity and the Criminal Law*, 124 Yale L. J. 1628, 1677 (2015) (explaining “straightforwardness in the courts’ reasoning is essential” to achieving progress toward aspirational standards). “The narrative function of international criminal law has been understood as a service to victims and to formerly warring communities.” *Id.* at 1679 (citation omitted). This function is not served when a court declines to analyze whether a crime of international significance and against an entire civilian population has occurred.

Going forward with plaintiffs' crime against humanity claims (as opposed to merely the predicate acts) serves an important expressive function condemning more than just the actor before the court, while still recognizing his personal responsibility. *See* Mohamed, 124 Yale L. J. at 1665–87. It establishes standards of aspirational behavior, “giving voice to the better angels of our nature and setting out a model for behavior in the most demanding of times.” *Id.* at 1666. Similarly, as the International Criminal Tribunal for the former Yugoslavia has held, “the emphasis is not on the individual victim but rather on the collective.” *Tadic*, No. IT-94-1-T, ¶ 644 (May 7, 1997). Goals of reconciliation and healing, setting of aspirational standards, and documenting the harm done to both the collective group of victims and the international community cannot be achieved if only the predicate act against the individual is recognized. Identifying a crime against a victim or group of victims instead as a crime against the world writ large advances these broader global goals.

**CONCLUSION**

For the foregoing reasons, Ambassadors Rapp and Scheffer, as *amici curiae*, respectfully request that the Court consider the unique nature of crimes against humanity in reviewing the district court's decision.

Respectfully submitted,

Dated: November 30, 2016

s/ Jonathan D. Schmidt  

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I HEREBY CERTIFY that on November 30, 2016, a true copy of the foregoing brief has been delivered to a third-party carrier for express delivery to the Court, to Defendant/Appellee at the address below, and has been filed electronically using the Court's CM/ECF system. All parties for whom appearances have been filed or registered with the appellate CM/ECF system will be served by the appellate CM/ECF system.

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