

# 09-2778-CV

09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv;  
09-2792-cv; 09-2801-cv; 09-3037-cv

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In The  
United States Court of Appeals  
For the Second Circuit

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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF OF AMICUS CURIAE**  
**INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE**  
**IN SUPPORT OF PLAINTIFFS-APPELLEES**  
**SEEKING AFFIRMANCE OF DISTRICT'S COURT DECISION**

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*Plaintiffs-Appellees,*

*(caption continued on inside cover)*

v.

DAIMLER AG, FORD MOTOR COMPANY, INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

*Defendants-Appellants.*

GENERAL MOTORS CORPORATION, RHEINMETALL AG

*Defendants.*

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## **INTEREST OF AMICUS CURIAE**

*Amicus Curiae*, the International Center for Transitional Justice (“ICTJ”), submits its views on the amended complaints now before the District Court and in light of the letter submitted to that Court by the South African Government on September 1, 2009. ICTJ is a global non-government organization with more than 100 staff members, including experts on truth commissions, the prosecution of massive and systematic human rights violations and the implementation of reparations for victims of those violations. ICTJ is headquartered in New York City, with offices in 14 locations in Asia, Latin America, the Middle East, Europe and Africa, including Cape Town, South Africa.

ICTJ assists States, international organizations, including the United Nations, as well as survivors of human rights violations and their families or communities. ICTJ is fully in support of the South African government’s position on this litigation in light of the amended complaints.

*Amicus* submits this brief pursuant to F.R.A.P. 29(a) in support of Appellees. All parties have consented to its filing.

## **PRELIMINARY STATEMENT**

The field of transitional justice has been significantly influenced by the work of the South African Truth and Reconciliation Commission (TRC). In the aftermath of their own periods of authoritarian rule or armed conflict, more than

thirty countries have established truth commissions since 1974, including South Africa. But the South African experience remains important, and to some even iconic, because it dealt with an egregious system of segregation and oppression. While it had its flaws, the truth-seeking process in South Africa not only started a longer process of reflection on the impact of apartheid on its victims and survivors, but also led to the pursuit of accountability for those responsible for and complicit in the worst violations of human rights under that system.

ICTJ thus concurs with the opinion expressed by the South African government in its September 1, 2009 letter to the District Court and submits that the South African position is consistent with one of the fundamental goals of establishing a truth commission – to determine accountability, including responsibility for reparations. At the same time, the September 1, 2009 letter is consistent with emerging international standards on the right of victims of systematic and massive human rights violations to a remedy and to reparations, articulated in the *Basic Principles and Guidelines On the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.<sup>1</sup>

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<sup>1</sup> *United Nations Basic Principles and Guidelines On the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious*

## DISCUSSION

### I. Accountability and reparations should follow from truth-seeking

The Defendants in this case have stated that this litigation offends South Africa's attempts at reconciliation because it conflicts with the TRC process. That argument erroneously conflates reconciliation with justice. The TRC was a truth *and* reconciliation commission. Reconciliation in this context is a complex process. It does not happen by judicial decree or even as a result of truth commission recommendations. It is, above all, a process that is premised on an acknowledgment by those who may be complicit in human rights violations of their roles and corresponding responsibility to survivors and victims. Defendants cannot invoke the reconciliatory goal of the TRC process in South Africa and at the same time deny any accountability. Truth-seeking, on the other hand, can lay the basis for justice. The TRC process in South Africa did not put an end to the pursuit of accountability for human rights violations committed under apartheid. The TRC process in fact started it.

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*Violations of International Humanitarian Law*, G.A. Res. 60/147 (Dec. 16, 2005) available at <http://www2.ohchr.org/english/law/remedy.htm>

## **II. The Defendants were not given amnesty in the TRC process nor made exempt from responsibility for compensation**

The TRC made it clear that “(t)o the extent that business played a central role in helping to design and implement apartheid policies, it must be held accountable.”<sup>2</sup> This contradicts any claim that the TRC process removed the basis for corporate accountability and exempts the Defendants from any responsibility for compensation. Neither did the Defendants apply for amnesty itself in the first place.

Under part IX of the *Basic Principles and Guidelines On the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, “(r)eparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.” (Underscoring supplied.)



It is not unprecedented for corporations to be held responsible for aiding and abetting human rights violations, and to then be required to compensate survivors and victims. United States courts have approved, in a number of important cases involving claims of massive human rights violations committed abroad in the past, settlements between corporate defendants and victims. Some of the more prominent cases include those involving banks and other corporations that profited from the assets of victims of persecution under the Nazi regime,<sup>3</sup> which in turn led to the settlement of claims made by victims of slave and forced labor under the same regime.<sup>4</sup> More recently, a U.S. court allowed a claim to proceed against a corporation for its complicity in the commission of gross human rights violations, involving the detention and execution of the Nigerian author Ken Saro-Wiwa and nine other persons.<sup>5</sup> A settlement was reached that allowed not just the plaintiffs, but an entire community of indigenous people, to attain justice and receive compensation to help rebuild their lives.

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<sup>2</sup> Truth and Reconciliation of South Africa Report, Vol. 4, Ch. 2, p. 24 (1998).

<sup>3</sup> In re Holocaust Victims Assets Litigation, 105 F.Supp.2d 139 (E.D.N.Y. 2000).

<sup>4</sup> See *Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future"*, Berlin, Germany, July 17, 2000, available at [http://www.state.gov/www/regions/eur/holocaust/000717\\_agreement.html](http://www.state.gov/www/regions/eur/holocaust/000717_agreement.html); See also *The Foundation Remembrance, Responsibility and Future* at <http://www.stiftung-evz.de/eng/about-us/>

<sup>5</sup> *Ken Wiwa vs. Royal Dutch Petroleum Company*, 226 F.3d 88 (2d Cir. 2000).

**III. The South African position and the narrowed scope of litigation can encourage a just outcome**

We share the South African government's September 1, 2009 view that the United States District Court for the Southern District of New York "is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law." The narrowed scope of the litigation will also encourage a detailed examination of the role of Defendant corporations in the specific human rights violations that the Plaintiffs suffered. As an organization of transitional justice advocates, we believe that in accounting for gross human rights violations, the law should make no artificial distinction between individuals who directly perpetrate gross human rights violations and corporations and those entities that are complicit in – and benefit from – those violations.

Respectfully Submitted,



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November 30, 2009

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1209 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 2003 in Times New Roman 14-point font.

Dated: November 30, 2009



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## CERTIFICATE OF SERVICE

I, Piper Hendricks, hereby certify that on November 30, 2009, the attached Brief was served upon the following by electronic mail and by first-class U.S. Postal Service mail:

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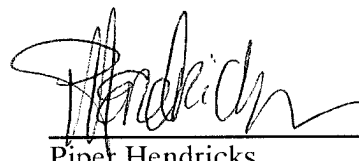
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