No. 05-36210

IN UNITED STATES COURTS OF APPEALS

FOR THE NINTH CIRCUIT

CYNTHIA CORRIE and CRAIG CORRIE, *et al.*,

Plaintiffs/Appellants,

v.

CATERPILLAR INC., a Foreign Corporation,

Defendant/Appellee

On Appeal from a Judgment of the United States District Court
For the Western District of Washington, Tacoma Division,

Case No. CV-05192-FDB
The Honorable Frank D. Burgess

BRIEF OF *AMICI CURIAE* PROFESSORS ROGER CLARK, DEENA HURWITZ, DEREK JINKS, NAOMI ROHT-ARRIAZA, AND BETH STEPHENS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL (FILED WITH THE CONSENT OF ALL PARTIES)

Tyler R. Giannini
Associate Clinical Director, Human Rights Program
Harvard Law School
Pound Hall 401
Cambridge, MA 02138
Tel: 617-495-9362

Counsel for Amicus Curiae

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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this Brief pursuant to Federal Rule of Appellate Procedure 29(a).

INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this Brief as faculty and professors of law whose areas of expertise include international humanitarian law, international human rights law, and litigation under the Alien Tort Statue ("ATS"). We have an interest in providing this Court with a detailed doctrinal analysis of the customary international law surrounding the war crime of destruction of civilian property unjustified by military necessity. *Amici* are listed in the Appendix: *Amici Curiae*.

STATEMENT OF THE ISSUES ADDRESSED BY *AMICI CURIAE*

The narrow questions *amici* address are (I) whether the war crime of destruction of civilian property unjustified by military necessity meets the standard for establishing a claim under the ATS, 28 U.S.C. § 1350,[1] and (II) whether courts can adjudicate such a norm despite the question of military necessity, which involves a partially subjective determination. The District Court's order granting

[1] The issues discussed in this Brief apply generally to destruction of civilian property by occupying powers and particularly to certain civilian home demolitions by the occupying Israel Defense Forces ("IDF") in the Occupied Palestinian Territory. At particular issue are plaintiffs' allegations that certain civilian home demolitions have not been militarily necessary.

defendants' motion to dismiss found the above norm did not give rise to an ATS claim, in part because the norm included a subjective element; this decision is inconsistent with U.S. and international law and should be reversed.

SUMMARY OF ARGUMENT

U.S. courts have found that war crimes are violations of customary international law, giving rise to claims under the ATS. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995). More specifically in this case, the war crime of destruction of civilian property unjustified by military necessity clearly meets the standard for establishing an ATS claim as articulated by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Articles 53 and 147 of Geneva Convention (IV) enshrine the modern articulation of this widely established and long-standing norm. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV) art. 53 and 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter "Geneva Convention (IV)"].

Sosa held that norms actionable under the ATS must reach a level of "specificity comparable to the features of the 18th century paradigms" of customary international law. *Sosa*, 542 U.S. at 724-25, 732. The norm must be "specific, universal, and obligatory." *Id*. at 732 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)). Having been ratified by every

country except Nauru, the Geneva Convention (IV) is a universal codification of norms. Similarly, criminalization of this particular norm in over sixty countries, along with national and international case law, reinforces the clear and specific nature of the prohibition on the destruction of civilian property unjustified by military necessity. As a well-defined war crime with universal acceptance, the norm meets the *Sosa* test as clearly as torture or piracy do.

U.S. courts have long adjudicated cases involving military necessity.[2] Indeed, the Ninth Circuit itself stated in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), that "the claim of military necessity will not, without more, shield governmental operations from judicial review." *Id.* at 1331 (discussing claims against the U.S. and its defense contractors brought by families of deceased civilian passengers of a plane shot down by a U.S. warship). The *Koohi* Court's reliance on *The Paquete Habana*, 175 U.S. 677, 712-13 (1900), illustrates the long-

[2] Plaintiffs also allege war crimes for which defendants cannot invoke military necessity; for example, attacks against civilians are absolutely prohibited under international humanitarian law. *See, e.g.*, Common Article 3 to the Geneva Conventions; Protocols I, art. 51 and II, art. 13 ("acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."). The International Committee of the Red Cross ("ICRC") Commentary to Protocol II emphasizes that the "general protection" referred to the in the above passage implies "an absolute prohibition of direct attack against the civilian population." Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977* ¶¶ 4771-4772 (1987). The United States has also codified customary international law prohibition against attacks directed against civilian populations in 18 U.S.C. § 2441 (c).

standing tradition of adjudicating cases involving military necessity. Thus the District Court erred when it found that a norm that includes military necessity could not be reviewed by a court. Order at 5. The District Court's reasoning that the subjectivity of military necessity causes it to fail the *Sosa* test is flawed. The inclusion of a subjective element within a norm does not prevent it from meeting the *Sosa* standard for specificity. Clearly articulated norms often involve elements of subjectivity.[3] Finally, with a norm meeting the *Sosa* standard, dismissal at this stage would be inappropriate, and any factual issues involving subjective analysis should be resolved later in the proceedings.

[3] For example, U.S. courts have recognized torture as clearly prohibited under customary international law. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). Torture is defined by "*severe* pain and suffering," which requires a subjective determination. *Id.* at 882-83 (emphasis added).

ARGUMENT

I. The Prohibition on the Destruction of Civilian Property Unjustified by Military Necessity Meets the *Sosa* Standard for an Actionable ATS Claim.

The U.S. Supreme Court established a test in *Sosa* that ATS claims must have "[no] less definite content and acceptance" among nations than the "historical paradigms" at the time the ATS was adopted. *Sosa*, 542 U.S. at 732. The *Sosa* test is "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached the Supreme Court." *Id.* (citing *Filartiga*, 630 F.2d at 890; *Tel-Oren*, 726 F.2d at 781 (ATS reaches "definable, universal and obligatory norms"); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d at 1475 ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory."). The Supreme Court urged caution when recognizing such norms, *Sosa*, 542 U.S. at 734, stating they should be in line with the "custom and usages" of nations. *Id.* (citing *The Paquete Habana*, 175 U.S. at 700). The norm at issue in this Brief easily meets the *Sosa* standard. A plethora of sources[4]

[4] *Amici* examine U.S. jurisprudence; international treaty law; national legislation and implementation; military manuals and directives; United Nations resolutions and regulations; and international, regional, and comparative jurisprudence. The Ninth Circuit has recognized these sources as evidence of customary international law. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992) (determining "customary international law 'by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law'" (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820))); *Martinez v. City*

demonstrates that the prohibition on the destruction of civilian property unjustified by military necessity is part of the historical "custom and usages" of nations and is universal, specific and obligatory. *Sosa*, 542 U.S. at 732.

This norm falls within the larger body of jurisprudence prohibiting war crimes, which have been found actionable under the ATS. *See infra* Part I.A. Furthermore, this specific norm is historically well-established, which satisfies the *Sosa* Court's call for judicial restraint in recognizing ATS claims.[5] *See infra* Part I.B. The Geneva Convention (IV), which is overwhelmingly recognized as customary international law, codifies the modern form of the norm in Articles 53 and 147. *See infra* Part I.C. Article 53, for example, prohibits "any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons . . . except where such destruction is rendered absolutely necessary by military operations." Geneva Convention (IV), art. 53.

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of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998) (discussing, with respect to arbitrary detention, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, U.S. appellate cases, Restatement (3d) of Foreign Relations, and Professor Bassiouni's analysis of international treaties); *see also Sosa*, 542 U.S. at 734 (recognizing treaties, legislative and judicial decisions, and the commentary of respected jurists as constituting "trustworthy evidence of what the law really is" (quoting *The Paquete Habana*, 175 U.S. at 700)).

[5] The *Sosa* Court favorably relies on historical analysis in the tradition of *The Paquete Habana* decision, which traces development of custom from "ancient usage." *See Sosa*, 542 U.S. at 715; *see also The Paquete Habana*, 175 U.S. at 686 ("It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our country and generally throughout the . . . world.").

The shared definition of the prohibition in treaties and national implementation legislation, reflecting Articles 53 and 147 of the Geneva Convention (IV), demonstrates that the norm is specific.[6] That virtually all countries have ratified this convention, as well as the high number of countries recognizing the prohibition through implementing legislation and support at the United Nations, demonstrates that the norm is universal.[7] The criminalization of excessive violations of the prohibition, along with the prosecution of those who commit this war crime, demonstrates that the norm is obligatory.

A. U.S. Courts Have Found War Crimes Actionable Under the ATS.

U.S. federal courts have previously held that war crimes are actionable under the ATS. *See Kadic*, 70 F.3d at 242 (looking to the Geneva Conventions as a codification of the customary laws of war); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1181 (C.D. Cal. 2005) (recognizing war crimes as customary international law that meets the *Sosa* ATS test); *accord Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1352-53 (S.D. Fla. 2003) (holding that

[6] To satisfy the specificity requirement, the norm need not be defined precisely the same in all sources of international law, but the core of the norm must be agreed upon. *See Smith*, 18 U.S. at 161 (noting variations among jurists as to the definition of piracy, but finding a shared core definition).

[7] The universality requirement does not require every state to ratify a treaty expressing a norm of customary international law, but the greater the number of states ratifying a treaty and acting in accordance with its principles, the more compelling the evidence in favor of the customary nature of the norm. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 162-63 (2d Cir. 2003).

claims of war crimes establishes subject matter jurisdiction under the ATS); *Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1261-62 (N.D. Ala. 2003) (recognizing war crimes as actionable under the ATS); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (concluding that the Geneva Conventions represent international law actionable under the ATS). The Second Circuit also found that war crimes are, along with piracy and crimes against humanity, crimes which "now have fairly precise definitions and [have] achieved universal condemnation" so as to give rise to universal jurisdiction. *U.S. v. Yousef*, 327 F.3d, 56, 106 (2d Cir. 2003) (distinguishing terrorism from war crimes, crimes against humanity, and piracy).

At least one court has also specifically recognized the destruction of civilian property as a war crime that can be pled under the ATS. *See Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1142 (C.D. Cal. 2002) (concluding that because the burning of houses and villages alleged by plaintiffs is prohibited under the Geneva Conventions, plaintiffs had stated an actionable claim under the ATS).

B. The Prohibition on Destruction of Civilian Property Unjustified by Military Necessity Is Historically Well-Established in "Custom and Usages" in Line with the *Sosa* Standard.

Historical development is important to the *Sosa* analysis. *Sosa*, 542 U.S. at 715, 734. The prohibition on the destruction of civilian property unjustified by military necessity is a customary international legal norm that by "an ancient usage

. . . gradually ripen[ed] into a rule of international law." *Id*. at 715 (citing *The Paquete Habana*, 175 U.S. at 686).[8] Even before the Geneva Conventions, the norm was established in early articulations of custom, including the Lieber Code, the Brussels Conference of 1874, and the Hague Conventions. These early codification efforts demonstrate the strengthening consensus surrounding the prohibition. By the end of World War II, there was no doubt that the norm had ripened into a binding tenet of customary international law.[9]

1. The Lieber Code, 1863

The United States' Lieber Code, an early attempt to codify the laws of war for use by an army, recognized that, "as civilization has advanced during the last centuries," the "principle has been more and more acknowledged that the unarmed

[8] Some early U.S. treaty law explicitly recognized the need to protect civilian property during war. For example, in *The Paquete Habana*, the Supreme Court stated that the 1785 treaty between the United States and Prussia created a clear "exemption from hostile molestation or seizure of … houses" in "unfortified places." *The Paquete Habana*, 175 U.S at 690-91. The treaty, proposed and drafted by John Adams, Benjamin Franklin, and Thomas Jefferson, protects "unfortified towns, villages, or places" occupied by civilians, who "shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed." *Id.* at 690-91, 698-99 *(*stating this article was repeated in subsequent similar U.S. treaties with Prussia and Mexico). *See generally* L.C. Green, *The Contemporary Law of Armed Conflict* 20-25 (2d ed. 2000) (discussing the development of the laws of war up through the middle ages); Stephen C. Neff, *War and the Law of Nations* 23-25 (2005) (same).

[9] "[T]he period of a hundred years . . . is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of . . . nations, into a settled rule of international law." *The Paquete Habana*, 175 U.S. at 694.

citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." General Orders No. 100 art. 22, *reprinted in* Richard Shelly Hartigan, *Lieber's Code and the Law of War* (1983). Under Lieber's understanding of the customary laws of war, limited destruction of property was permitted by military necessity, but excessive destruction was always prohibited. *See id.* at art. 15-16.

The Lieber Code was merely a restatement of the existing custom: it was a "concise and careful rendering of international legal theory and practice." Hartigan at 5, 15; *see also* Green at 29 (noting the Code was based on "the generally accepted law of [Lieber's] day"). The Code so successfully summarized custom that Prussia, the Netherlands, France, Russia, Serbia, Argentina, Great Britain, and Spain used it as a basis for their military codes. Green at 29-30.

2. The Brussels Conference, 1874

The Brussels Conference, an effort by fifteen European countries to summarize the existing laws of war, concluded that "[a]ny destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war" is "forbidden" during war. Project of an International Declaration Concerning the Laws and Customs of War art. 13(g), *reprinted in Laws of War and International Law* 53 (Rene van der Wolf & Willem-Jan van der Wolf eds., 2002). The

participants agreed unanimously that this principle represented the customary law of the time. *See id.* at preface.

3. The Hague Conventions, 1899 and 1907

Dozens of countries gathered in the Hague in 1899 and 1907 to regulate formally, through binding conventions, the conduct of war. The 1907 Convention (IV) relative to the Laws and Customs of War on Land (which replaced the nearly identical 1899 Convention), in its annexed set of detailed regulations, "especially prohibited" belligerents from "destroy[ing] or "seiz[ing] the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Convention Respecting the Laws and Customs of War on Land art. 23(g), Oct. 18, 1907, 36 Stat. 2277 [Hereinafter "Hague Conventions"]. Further, in occupied territory, "[f]amily honours and rights, individual lives and private property . . . must be respected." *Id.* at art. 46. The Hague Conventions were accepted as binding custom at least by World War II. *See* I *Trial Of the Major War Criminals Before the International Military Tribunal* 254 [Hein 1995] 254 ("[B]y 1939 these rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.") [hereinafter "*Nuremberg*"]; *see also Prosecutor v. Strugar*, Case No. IT-01-42, Case Trial Judgment, ¶ 223 (Jan. 31, 2005) (appeal pending) (stating that

the Hague Conventions, and specifically Article 23, have become part of customary international law).

4. International Military Tribunal (Nuremberg), 1945

After World War II, the Allied powers agreed that the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity" constituted a war crime. Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; *see also Yousef*, 327 F.3d at 105, note 39 and accompanying text (accepting Article 6(b) as a definition of war crimes, which the U.S. and other nations understood as among "crimes for which international law permits universal jurisdiction"). The tribunal at Nuremberg viewed the Charter as "the expression of international law existing at the time of its creation." *Nuremberg* at 218. In sum, by the time of the adoption of the Geneva Conventions, the prohibition against the unnecessary destruction of civilian property had been undoubtedly established as a binding and universal norm of customary international law.

C. The Modern Codification of the Prohibition on the Destruction of Civilian Property Unjustified by Military Necessity Easily Meets the *Sosa* Standard.

Codified in its modern form by the Geneva Convention (IV), the prohibition on the destruction of civilian property unjustified by military necessity is recognized and accepted as part of customary international law. The prohibition

has been expressed in (1) international treaties, (2) national legislation and implementation, (3) United Nations resolutions and regulations, and (4) commentary by jurists. Together with U.S. and foreign jurisprudence adjudicating militarily unnecessary destruction of civilian property, *see infra* Part II.A, these sources[10] establish the shared international definition of the prohibition. The high number of states ratifying the clearly articulated prohibition in the Geneva Convention (IV), along with its inclusion in numerous domestic criminal codes, demonstrates that the prohibition meets the specific, universal, and obligatory standard of *Sosa*.

1. International Treaties

Building upon the Hague Conventions, Geneva Convention (IV), its Additional Protocol I, and treaties creating international war crimes tribunals have all included this prohibition and criminalized excessive destruction.

i. Geneva Convention (IV) of 1949

The Geneva Convention (IV) codified the modern prohibition on the destruction of civilian property unjustified by military necessity. The Geneva Convention (IV) has been universally ratified, binding 192 States Parties, a total that represents every country except Nauru. Int'l Comm. of the Red Cross, *States Party to the Geneva Conventions and their Additional Protocols*, Dec. 4, 2005, *at*

[10] The Ninth Circuit has recognized these legal sources as evidence of customary international law. *See supra* note 4.

http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc. (last visited Mar. 23, 2006) [hereinafter "ICRC, *States Party*"].

a. Article 53

Article 53 prohibits "any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons . . . except where such destruction is rendered absolutely necessary by military operations." Geneva Convention (IV) at art. 53.

b. Article 147

Article 147 criminalizes "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" by making it a grave breach of the Convention. *Id*. at art. 147. Articles 53 and 147 are complementary aspects of the same norm: Article 53 establishes the baseline protection of civilian property, while Article 147 imposes criminal sanctions on especially egregious violations of the norm.

c. Additional Protocol I of 1977

The Additional Protocol I specifies that in international armed conflicts, "civilian objects shall not be the object of attack or reprisals"; if there is uncertainty about whether "a house or other dwelling" is a legitimate military target, "it shall be presumed not to be so." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

International Armed Conflicts (Protocol I) art. 52, June 8, 1977, 1125 U.N.T.S. 3. "Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" is a grave breach of the Protocol and considered a war crime. *Id*. at art. 85(3). 163 countries are party to the Additional Protocol I. *See* ICRC, *States Party*.

ii. Treaties Creating International Criminal Tribunals

The Charter of the International Military Tribunal at Nuremberg in 1945, *see supra* Part I.B., the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Rome Statute for the International Criminal Court (ICC) all include the prohibition. The latter two, which post-date Geneva Convention (IV), specifically incorporate violations of Article 147 as war crimes. Statute of the ICTY art. 2, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Rome Statute of the ICC art. 8(2), July 17, 1998, 2187 U.N.T.S. 3.[11] 100 countries are parties to the Rome Statute. International Criminal Court, *Assembly of States Parties*, http://www.icc-cpi.int/asp/statesparties.html (last visited March 14, 2006).

[11] The Rome Statute criminalizes unjustified property destruction in international and non-international conflicts. *Id.* at arts. 8(2)(b)(xiii), 8(2)(e)(xii). These provisions were copied by the ad-hoc court for East Timor. *See infra* Part I.C.3.

2. National Legislation and Implementation

Further demonstrating that the prohibition is custom, over 60 countries have criminalized the destruction of civilian property unjustified by military necessity through their national law. *See* Appendix: Implementing Legislation.[12]

In implementing the Geneva Convention (IV), states have also issued manuals for their military personnel that include the prohibition on the destruction of civilian property unjustified by military necessity, making it obligatory for the armed forces of many countries, including the United States.[13] For example, the

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[12] *See*, *e.g.*, War Crimes Act of 1996, 18 U.S.C. §2441(c) (2000) ("'[W]ar crime' means any conduct … defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party."). If a war crime is committed by a member of the U.S. armed forces or a U.S. national, the perpetrator "shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." *Id.* at §2441(a).

[13] *See*, *e.g.*, **U.S. Army**, FM 27-10, *The Law of Land Warfare* §§ 58, 393 (1956, 1976 ed.) (stating "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war"); **U.S. Navy**, NWP 1-14M, *The Commander's Handbook on the Law of Naval Operations* §6.2.5 (1995) (forbidding "wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations"); **U.S. Dep't of Defense**, *Report to Congress on the Conduct of the Persian Gulf War* (Apr. 10, 1992) in 31(3) I.L.M. 612-644 (1992) (explaining how the Department sought to fulfill this obligation during the Persian Gulf War, e.g., by accurate targeting); *see also* Int'l Comm. of the Red Cross, 1 *Customary International Humanitarian Law* 1002-10 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (citing military manuals of many other states that similarly incorporate the prohibition, including **Argentina**, **Australia**, **Belgium**, **Benin**, **Cameroon**, **Canada**, **Colombia**, **Dominican Republic**, **Ecuador**, **France**, **Germany**, **Israel**, **Italy**, **Kenya**, **Nigeria**, **Philippines**, **South Korea**, **Lebanon**,

United States Air Force includes the prohibition in its manuals for Judge Advocates General, recognizing the prohibition as binding through both conventional and customary international law, including the 1907 Hague Conventions and the Geneva Convention (IV).[14]

3. United Nations Resolutions and Regulations

The United Nations has emphasized the specific, universal, and obligatory nature of the prohibition as expressed in the Geneva Convention (IV), and the General Assembly requested and accepted the adjudication of the prohibition by the International Court of Justice ("ICJ").

The General Assembly appreciated "the virtually universal acceptance of the Geneva Conventions of 1949, and notes the trend towards a similarly wide acceptance of the two Additional Protocols of 1977." G.A. Res. 55/148, ¶ 1, U.N. Doc. A/RES/55/148 (Dec. 12, 2000)*; see also* G.A. Res. 59/36, ¶ 1, U.N. Doc. A/RES/59/36 (Dec. 2, 2004); G.A. Res. 47/30, ¶ 1, U.N. Doc. A/RES/47/30 (Nov. 25, 1992). The Secretary-General stated that the law embodied in the Geneva Conventions, the Hague Conventions, and the Charter of the International Military Tribunal has "beyond doubt become part of international customary law." The

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Madagascar, **Netherlands**, **New Zealand**, **Peru**, **Romania**, **Russia**, **Senegal**, **South Africa**, **Spain**, **Sweden**, **Switzerland**, **Togo**, and **the United Kingdom**).

[14] *See* U.S. Air Force, AFP 110-31, *International Law—The Conduct of Armed Conflict and Air Operations* §14-6(b) (1976); U.S. Air Force, AFP 110-1-3, *Treaties Governing Land Warfare* i (1958).

Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 35, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993); *see also* S.C. Res. 827, ¶ 1, U.N. Doc. S/RES/827 (May 25, 1993)).

The U.N. has noted the prohibition on destruction of civilian property unjustified by military necessity in the context of Yugoslavia, East Timor, and the Palestinian Territories. The Security Council condemned property destruction in the former Yugoslavia. S.C. Res. 1034, ¶ 15, U.N. Doc. S/RES/1034 (Dec. 21, 1995). In administering the newly formed state of East Timor, the U.N. incorporated the prohibition into the criminal code, specifying that "destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict" is a war crime. UNTAET Reg. 2000/15, §§ 6(1)(e)(xii-iii), UNTAET/REG/2000/15 (June 6, 2000). The Security Council has also condemned Israel's practice of the "demolition of homes" in the Palestinian Territories as contrary to international humanitarian law. S.C. Res. 1544, ¶ 1, U.N. Doc. S/RES/1544 (May 19, 2004). Similarly, the General Assembly has declared "that Israel's grave breaches of that [Fourth Geneva] Convention are war crimes and an affront to humanity" and "strongly condemn[ed]" the "destruction and demolition of Arab houses." G.A. Res. 39/95D, ¶¶ 6-7, U.N. Doc. A/RES/39/95D (Dec. 14, 1984)*; see also* G.A. Res. 45/74A, ¶¶

6, 8, U.N. Doc. A/RES/45/74A (Dec. 11, 1990); G.A. Res. 42/160D, ¶¶ 6, 8, U.N. Doc. A/RES/42/160D (Dec. 8, 1987).

Not only has the U.N. strongly condemned the destruction of civilian property unjustified by military necessity, but the General Assembly has also requested a court to adjudicate the issue of the Israeli barrier wall using that prohibition as part of its legal analysis. G.A. Res. ES-10/14, ¶ 1, U.N. Doc. A/RES/ES-10/14 (Dec. 8, 2003). When the ICJ issued its advisory opinion adjudicating the issue of the destruction of civilian property, *see supra* Part III.D, the General Assembly adopted the Court's ruling. G.A. Res. ES-10/15, ¶ 2, U.N. Doc. A/RES/ES-10/15 (July 20, 2004).

4. Commentary by Jurists

Jurists agree that the norms codified in the Geneva Conventions, including the prohibition on the destruction of civilian property unjustified by military necessity, reflect the custom and usages of nations. The prohibition has been expressed as custom by the ICRC and numerous legal scholars. For example, Professor M. Cherif Bassiouni writes that the Geneva Conventions and parts of Additional Protocol I are "deemed to have risen to the level of a general custom. They are therefore binding on all states irrespective of whether a given state has or has not ratified one of them." M. Cherif Bassiouni, *The Normative Framework of*

International Humanitarian Law: Overlaps, Gaps, and Ambiguities, 8 Transnat'l L. & Contemp. Probs. 199, 220 (1998).[15]

Moreover, the ICRC, the guardian organization of international humanitarian law, has concluded that the prohibition on the destruction of civilian property unjustified by military necessity is part of established custom. Int'l Comm. of the Red Cross, 2 *Customary International Humanitarian Law* 1000-1029 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). In its role as guardian, the ICRC "has delegates around the world teaching armed and security forces that destruction and seizure of property 'without military necessity' is prohibited." *Id.* at 1028. Its representatives "also teach that 'when not justified by military necessity and carried out unlawfully and wantonly, . . . extensive

[15] *See also*, *e.g.*, Green at 260-61 (noting the customary obligation of an occupying power to avoid property destruction unless absolutely required by military necessity); George H. Aldrich, *Symposium: The Hague Peace Conferences*, 94 Am. J. Int'l L. 42, 53 (2000) (identifying the portions of the Additional Protocol I dealing with protection of civilian objects to be part of customary international law); Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 Mil. L. Rev. 184, 223 (2003) (stating that many of the norms in the Geneva Conventions are part of customary international law); First Lieutenant Melissa J. Epstein, U.S. Army (retired), *The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 Mil. L. Rev. 68, 80-83 (2004) (stating that the principles of the Geneva Conventions have attained the status of customary international law and indicating that the U.S. government recognizes this status); Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 Denv. J. Int'l L. & Pol'y 265, 307-08 (2000) (recognizing the 1907 Hague Conventions and the Charter of the International Military Tribunal as customary law).

destruction of property …' constitute[s] grave breaches of the law of war." *Id.* (quoting Frederic de Mulinen, *Handbook on the Law of War for Armed Forces* §§ 206-07, 777 (1987)). The International Law Commission also includes the prohibition in its draft code of war crimes. *See* Draft Code of Crimes against the Peace and Security of Mankind art. 20(a)(iv), *reprinted in* 1 Y.B. Int'l L. Comm'n 32, 33, U.N. Doc. A/CN.4/L.522 (June 6, 1996).

In sum, there is overwhelming evidence that the prohibition on destruction of civilian property unjustified by military necessity is an established norm with definite and accepted content that meets the *Sosa* requirements.

II. The Subjectivity Involved in Weighing Military Necessity Does Not Render the Prohibition Against Civilian Destruction of Property Non-Actionable Under the ATS; Indeed, Courts Have Long Adjudicated Cases Involving Military Necessity.

The District Court erred in concluding that a rule incorporating military necessity "does not set a clear, specific norm" actionable under *Sosa* because it would require a "subjective," "case-by-case review." Order at 5. The fact that courts, including U.S. courts, have long adjudicated cases involving military necessity indicates that the judiciary is equipped to handle such issues and determinations. U.S. and foreign courts at least since *The Paquete Habana*, 175 U.S. at 712-13, have dealt with such matters. Furthermore, nothing in *Sosa* suggests that a norm that includes a subjective determination is inherently

indefinite and thus would fail the *Sosa* test. Indeed, norms that are specific often include subjective determinations that courts and triers of fact must evaluate at later stages of the proceedings.[16]

In addition, courts have adjudicated the specific norm at issue in this case. Military necessity would similarly be a measurable concept here as it has been in other cases. The remaining question, whether the systematic destruction of civilian property was "absolutely necessary" in this particular case, is a question of fact not appropriate to be resolved at this stage of proceedings.

A. U.S. Courts Have Considered Military Necessity Subject To Judicial Review.

The District Court erred in concluding the inclusion of military necessity in Geneva Convention (IV) Article 53 rendered the norm too subjective to be evaluated by the courts. The controlling case in the Ninth Circuit is *Koohi v. United States*, 976 F.2d at 1331-32:

> Nor is the lawsuit rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation. The Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians. The controlling case is *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900). That case involved the seizure of two Spanish fishing vessels by United States naval forces engaged in a military blockade during the Spanish-American War. The Supreme Court found that the question whether the seizure of the vessels was militarily justified could be

[16] *See supra* note 3 (discussing torture).

> reviewed by the Court. *See id.* at 686-713, 20 S.Ct. at 294-304. The Court then held that the decision to seize the vessels was not justified by military necessity and that the vessels must be returned. *See id.* at 713-14, 20 S.Ct. at 304-05. More recently, in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), the Court allowed a civil action alleging the unlawful operation of the national guard during the incident at Kent State, *see id.* at 247-49, 94 S.Ct. at 1692-93. These cases make clear that the claim of military necessity will not, without more, shield governmental operations from judicial review. Instead, as the Court has stated, "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." *Laird v. Tatum*, 408 U.S. 1, 15-16, 92 S.Ct. 2318, 2327, 33 L.Ed.2d 154 (1972). As *The Paquete Habana* demonstrates, this is true in time of war as well as in time of peace, and with respect to claims by enemy civilians as well as by Americans.

In reviewing military necessity in the context of property destruction, courts are not "second guessing" military decisions, but rather exercising a traditional function of the courts in checking excessive actions. "[T]he allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

B. International and Foreign Tribunals Have Considered Military Necessity Subject To Judicial Review, Including in the Contexts of Articles 53 and 147.

In the context of militarily unjustified property destruction, cases dating back to at least the Nuremberg Tribunal demonstrate the norm is subject to judicial review. Contemporary tribunals have continued this practice, and the ICJ has explicitly applied Geneva Convention (IV) Article 53 as a customary law of war.

1. Nuremberg and World War II National Jurisprudence

Destruction of civilian property by occupying powers constituted a significant part of World War II war crimes adjudication. Courts consistently employed the concept of military necessity in such cases. In a case against German military officers who set inhabited civilian buildings on fire in occupied Dijon, the Permanent Military Tribunal at Dijon applied Article 23 of Hague Convention (IV), *see supra* Part I.B.3, to conclude that the alleged German aim of rooting out members of the French Resistance did not show the burning of civilian homes was demanded by "imperative military necessity"; as such, the destruction went beyond the "limits of international law." Permanent Military Tribunal at Dijon, *Holstein case*, Judgment, Feb. 3, 1947, *reprinted in* United Nations War Crimes Comm'n, VII *Law Reports of Trials of War Criminals* 30 (1949), *available at* http://www.ess.uwe.ac.uk/WCC/Holstein2.htm (last visited Mar. 23, 2006).

Similarly, the Special Court of Cassation of the Netherlands found that the German Security Police's burning of houses near Amsterdam as reprisal for sabotage committed by unknown persons was a war crime *qua* "devastation not justified by military necessity," *Annual Digest and Reports of Public International Law Cases Year 1949* 484-85 (Lauterpacht ed., 1955) (quoting *In re Wingten case*, Judgment, July 6, 1949); *see also id*. at 509-13 (excerpting *In re von Lewinski*, Judgment, Dec. 19, 1949, in which the British Military Court at Hamburg

(Germany) held that although a German officer's destruction of public and private buildings while retreating from the Ukraine may have afforded military *advantage*, it was not justified by military *necessity* inasmuch as there was no imperative need for the destruction).[17]

2. Contemporary International and Regional Jurisprudence

Contemporary jurisprudence has continued the practice of World War II tribunals. The ICTY has adjudicated the norm, and has found it to generate criminal liability, both as a matter of treaty and of customary international law. *See Strugar*, Case No. IT-01-42; *Prosecutor v. Natelic & Martmovic*, Case No. IT-98-34-T, Trial Judgment (Mar. 31, 2003) (appeal pending); *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2, Appeal Judgment, ¶ 76 (Feb. 26, 2001) ("[T]here is no doubt that the crime envisaged by Article 3(b) of the [ICTY] Statute [incorporating Geneva Convention (IV), Art. 53] was part of international customary law at the time it was allegedly committed.").

Consistent with ICTY jurisprudence, district courts in Croatia have imposed liability for destruction of civilian property during the Balkan conflicts. For

[17] Even in acquitting defendants, World War II tribunals made clear that their decisions were results of *adjudicating* the norm against militarily unjustified destruction of civilian property. *See United States v. List (The Hostage Case)*, *reprinted in* XI *The Trials of War Criminals Before the Nuremberg Military Tribunals* 1253 (1949) (convicting one individual and acquitting another while affirming that "[t]he destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law.").

example, one court held that nineteen members of the Yugoslav Army violated international law by attacking "civilians and settlements [and] destroy[ing] material property, in the manner that can not be explained as the military necessity." *Zadar District Court*, Apr. 24, 1997, K. 74/96, ¶ g, *available at* http://www.icrc.org/ihl-nat.nsf/WebALL?openview (last visited Mar. 23, 2006); *see also Prosecutor v. Rajko Radulovic and Others*, K. 15/95, Split District Court (May 26, 1997).

The Eritrea-Ethiopia Claims Commission ("EEC"), created under the auspices of the Permanent Court of Arbitration, also has adjudicated Geneva Convention (IV) Article 53. Applying the Article as part of customary law even though Eritrea had yet to ratify the Convention at the time of the conflict, the EEC awarded damages to Ethiopia and Eritrea for property destroyed during their 1998-2000 war. *Partial Award Regarding Ethiopia's Central Front Claim 2*, 43 I.L.M. 1275, 1296 (EEC 2004). The EEC examined the evidence provided by each side and weighed whether the property destruction could be justified by military necessity. It reasoned:

> [S]ome destruction of structures within [the town of] Zalambessa must be ascribed to lawful combat damage. However, the Commission's inspection of the extensive evidence before it, particularly the photographic evidence showing a recurring pattern of collapse of the front walls of buildings, convinces it that the bulk of that destruction is ascribable to deliberate actions by Eritrea, including widespread use of bulldozers. Such destruction was unlawful, except as 'rendered absolutely necessary by military operations' [citing

> Geneva Convention (IV) Article 53]. Eritrea has neither alleged nor proved such necessity. *Id.* at 1290.

Although the EEC was uncertain "of the precise percentage of the total property destruction resulting from deliberate actions by Eritrea . . . based upon its study of the evidence, including photographs, the Commission concludes that Eritrea's actions were the predominant cause of damage, and assigns it responsibility for seventy-five percent." *Id.* Thus, not only was the norm considered universal enough to be considered part of international customary law, it was also sufficiently specific and obligatory to serve as a basis to award damages.

Finally, in a standard-setting Advisory Opinion, the ICJ specifically reached the customary international norm codified in Geneva Convention (IV) Article 53. Considering the question whether the construction of a wall in the occupied Palestinian territory violated Article 53, the ICJ concluded that "the construction of the wall has led to the destruction or requisition of properties under conditions which contravene" Article 53 and specifically that the destruction was not justified by absolute military necessity. "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," Advisory Opinion, July 9, 2004, General List No. 131, ¶ 132; *see also id.* at ¶ 135.

C. The Determination of Military Necessity Is a Question of Fact Inappropriate for This Stage of the Proceeding

As these cases demonstrate, military necessity is a specific enough standard to allow for adjudication. The remaining question, whether or not military necessity required the destruction of the particular homes at issue in this case, is a question of fact that would be inappropriate to resolve in favor of the defendant at this stage of the proceedings. "A ruling on a motion to dismiss . . . is a ruling on a question of law. . . . [It] should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proven." *Alonzo v. ACF Prop. Mgmt., Inc.*, 643 F.2d 578, 579 (9th Cir. 1981). It is sufficient at this stage that the prohibition against destruction of civilian property unjustified by military necessity is a specific, universal, and obligatory norm of customary international law that meets the *Sosa* standard for justiciability under the ATS, and that plaintiffs have pled facts that would allow them to argue that these demolitions were not required by military necessity.

CONCLUSION

For the reasons set forth above, plaintiffs' Complaint should not be dismissed on grounds that the norm of customary international law against destruction of civilian property unjustified by military necessity is not actionable under the ATS.

DATED: March 29, 2006

Respectfully Submitted,

Tyler R. Giannini
Associate Clinical Director
Human Rights Program
Harvard Law School
Counsel for Amici Curiae

APPENDIX: IMPLEMENTING LEGISLATION

National Legislation Implementing the Prohibition on the Destruction of Civilian Property Unjustified by Military Necessity*

Country	Language	Code
Armenia	Criminalizing "[t]he committal of the following acts seriously violating international norms with respect to persons and facilities" including "illegal, willful destruction or realization of property not caused by military necessity…"	Criminal Code of the Republic of Armenia, 2003, c. XXXIII, art. 390, §2.
Australia	"(1) A person (the perpetrator) commits an offence if: (a) the perpetrator destroys or appropriates property; and (b) the destruction or appropriation is not justified by military necessity; and (c) the destruction or appropriation is extensive and carried out unlawfully and wantonly; and (d) the property is protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and (e) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the property is so protected; and (f) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict."	International Criminal Court (Consequential Amendments) Act, 2002, No. 42, §268.29.
Azerbaijan	Declaring that "destroying property unless such destruction is imperatively demanded by war necessity" is a violation of the norms of international humanitarian law.	Criminal Code of the Republic of Azerbaijan, 1999, Section VII, art. 116, §6.
Barbados	Criminalizing the "grave breach of any	Geneva Conventions Act,

	of the Geneva Conventions of 1949" including those "in article 147 of the Convention set out in the Fourth Schedule."	1980, §§1-4.
Botswana	"Any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions" including "article 147 of the convention set out in the Fourth Schedule to this Act shall be guilty of an offence…."	Geneva Conventions Act, 1970, §3.
Canada	"Every person who, whether within or outside Canada, commits a grave breach referred to in … Article 147 of Schedule IV … is guilty of an indictable offence."	Geneva Conventions Act, R.S.C., ch. G 3 §3 (1985).
Cook Islands	"Any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of the First Protocol is guilty of an offence … A grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention."	Geneva Conventions and Additional Protocols Act, 2002, pt. 1, §5.
Croatia	Criminalizing the "unlawful and arbitrary destruction or usurpation of property that cannot be justified by the military necessity."	Penal Code, 1997, art. 158, §1.
Cyprus	"Any person who, in spite of nationality, commits in the Republic or outside the Republic, any serious violation or takes part, or assists or incites another person in the commission of serious violations of	Geneva Conventions Ratification Law, 1966, No. 40, §4.

	the Geneva Conventions, from those mentioned in the following Articles of the relative Conventions" including "Article 147 of the Convention set out in Part IV of the Schedule; shall be guilty of an offence."	
Ethiopia	Declaring the following to be a war crime: "the confiscation of estates, the destruction or appropriation of property, the imposition of unlawful or arbitrary taxes or levies, or of taxes or levies disproportionate to the requirements of strict military necessity."	Penal Code, 1957, bk. III, tit. II, c. I, art. 282(h).
Georgia	Declaring the following to be a willful breach of norms of international humanitarian law committed in armed conflict: "extensive destruction or appropriation of property, not justified by military necessity and carried out wantonly."	Georgian Criminal Code, 1999, Special Pt., Section XIV, c. XLVII, art. 411, §2(h).
Germany	"Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years."	Act to Introduce the Code of Crimes against International Law of 26 June 2002, 2002, c. 2, §9(1).
India	"If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions he shall be punished. [A] grave breach of the	Geneva Conventions Act, 1960, c. II, §3.

	Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention."	
Ireland	"Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the Scheduled Conventions or Protocol I shall be guilty of an offence and on conviction on indictment." A grave breach includes Article 147 of Geneva Convention (IV).	Geneva Conventions Act, (Act No. 11/1962) (Ir.) §3(1), (as amended).
Kenya	"Any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions such as is referred to in the following articles respectively of those Conventions" … including "article 147 of the Convention set out in the Fourth Schedule to this Act, is guilty of an offence."	The Geneva Conventions Act, (1968) Cap. 198 §1. (Kenya).
Malaysia	"Any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions: … article 147 of the convention set out in the Fourth Schedule, shall be guilty of an offence."	Geneva Conventions Act, 1962, No. 5, pt. II, §3(1).
Mauritius	"Any person who in Mauritius or elsewhere commits, or is an	Geneva Conventions Act, 1970, RL 3/37, §3.

	accomplice in the commission by another person of, a grave breach of any of the Conventions or of Protocol I shall commit an offence. … For the purposes of this section … a grave breach of the Fourth Convention is a breach of that convention involving an act referred to in article 147 of that Convention committed against persons or property protected by that Convention."	
Moldova	"Banditry, violence, illegal destruction of property, as well as illegal appropriation of property under the pretext of military necessity performed with respect to the population in the area of military operations shall be punishable with imprisonment for a term from 16 to 25 years or with life imprisonment."	Criminal Code of the Republic of Moldova, Special Pt., c. XVIII, art. 390.
Netherlands	"Anyone who, in the case of an international armed conflict, commits one of the following acts: … destroying or seizing property of the adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict."	International Crimes Act, 2003, §5.
New Zealand	"Any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of the First Protocol is guilty of an indictable offence. … A grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention."	Geneva Conventions Act, 1958, No. 19, §3 (1)-(2).
Nigeria	"If, whether in or outside the Federal	Laws of the Federation of

	Republic of Nigeria, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the Conventions as is referred to in the articles of the Conventions set out in the First Schedule to this Act," including "article 147 of the Fourth Geneva Convention, 1949; he shall, on conviction thereof – (i) in the case of such a grave breach as aforesaid involving the willful killing of a person protected by the Convention in question, be sentenced to death, and (ii) in the case of any other such grave breach, be liable to imprisonment for a term not exceeding fourteen years."	Nigeria. Revised Edition. 1990. §3(1). also at http://www.nigeria-law.org/LFNMainPage.htm.
Norway	"Anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in (a) the Geneva Conventions of 12 August 1949 concerning the amelioration of the conditions of the wounded and sick in armed forces in the field, the amelioration of the conditions of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war, (b) the two additional protocols to these conventions of 10 June 1977, is liable to imprisonment for up to four years."	Military Penal Code, 1981, §108.
Slovenia	"Whoever, in time of war, armed conflict or occupation and in violation of international law, orders or commits against the civil population the following criminal offences shall be	Penal Code, 1994, c. 35, art. 374.

	sentenced to imprisonment for not less than ten years or to twenty years: … confiscation of property, pillage, unlawful and arbitrary destruction or large-scale appropriation of property not justified by military needs …"	
Sweden	"A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law to imprisonment for at most four years. Serious violations shall be understood to include: … initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property."	Brottsbalken [BrB] [Criminal Code] 22:6 (Swed.).
Tajikistan	"Willful breaches of norms of international humanitarian law committed in an international or internal armed conflict against persons hors de combat or having no means of defense, as well as against wounded, sick, and also against medical and religious personnel, medical units or medical transports, against prisoners of war, civilians, civilian population in the occupied territory or in the combat zone, against refugees and stateless persons, and also against other persons enjoying protection in time of hostilities, consisting of … extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly, – shall be punished by deprivation of liberty for a term of fifteen to twenty	Criminal Code of Tajikstan, 1998, c. 34, art. 403, §2.

	years, or by death penalty."	
Ukraine	"Violence, unlawful destruction of property, and also unlawful expropriation of property under the reason of military necessity, committed against the civil population in an area of war action … shall be punishable with deprivation of liberty for a term of three to eight years."	Criminal Code of Ukraine, 2001, No. 2341-14, art. 433, §1.
United Kingdom	"Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence– (a) in the case of a grave breach involving the willful killing of a person protected by the convention or protocol in question, shall be sentenced to imprisonment for life; (b) in the case of any other grave breach shall be liable to imprisonment for a term not exceeding fourteen years." A grave breach includes Article 147 of Geneva Convention (IV).	Geneva Conventions Act, 1957, 5 Eliz. 2, §1 (as amended).
United States	"As used in this section the term 'war crime' means any conduct … defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party."	War Crimes Act of 1996, 18 U.S.C. §2441(c) (2000).
Zimbabwe	"Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of a scheduled Convention or of the First Protocol as is referred to in … article 147 of the Convention set out in the Fourth Schedule; shall be guilty of an	Geneva Conventions Act, 1981, No. 36, §3(1) (as amended).

	offence.”	

*Appendix data taken from Int’l Comm. of the Red Cross, 2 *Customary International Humanitarian Law* 1010-1021 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., Cambridge U. Press 2005) and Int’l Comm. of the Red Cross, *International Humanitarian Law: National Implementation Database*, http://www.icrc.org/ihl-nat.nsf/WebALL?OpenView (last visited March 27, 2006).

APPENDIX: *AMICI CURIAE*

Roger Clark

Roger Clark is the Board of Governors Professor at Rutgers School of Law—Camden. He has served as a member of the United Nations Committee on Crime Prevention and Control. He has also represented the Government of Samoa in arguing the illegality of nuclear weapons before the International Court of Justice in The Hague, and has represented Samoa in negotiations at the United Nations to create a permanent International Criminal Court. His publications include *International Criminal Law* (LexisNexis, 2d ed., 2004) (with Edward M. Wise and Ellen S. Podgor) and *The Prosecution of International Crimes* (Transaction, 1996) (with Madeline Sann).

Deena Hurwitz

Deena Hurwitz is Director of the Human Rights Program and International Human Rights Law Clinic at University of Virginia School of Law. She has worked as a legal counselor with the United Nations High Commissioner for Refugees, and as director of Global Rights' (formerly the International Human Rights Law Group) program in Bosnia and Herzegovina. She was also a liaison officer for the Organization for Security and Co-operation in Europe (OSCE)'s mission in Bosnia and Herzegovina. She has worked in the Middle East with the Centre for International Human Rights Enforcement, and served as a consultant to the Women's Division of Human Rights Watch, as well as to Global Rights and the Center for Justice and Accountability. Prior to her appointment at Virginia, she taught at Yale College and served as a the Robert M. Cover/Allard K. Lowenstein Fellow in International Human Rights with the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School. She is the editor of *Walking the Red Line: Israelis in Search of Justice for Palestine* (New Society Publishers, 1992).

Derek Jinks

Derek Jinks is an Assistant Professor of Law at the University of Texas School of Law. He has worked in the Prosecutor's Office of the International Criminal Tribunal for the Former Yugoslavia. He has also worked as Senior Legal Advisor

and United Nations Representative for the South Asia Human Rights Documentation Centre in India; and served in the delegation of the International Service for Human Rights at the Rome conference for the establishment of a permanent International Criminal Court. Prior to his appointment at Texas, he also taught at Arizona State University College of Law and the University of Chicago Law School. He is the author of *The Rules of War: The Geneva Conventions in the Age of Terror* (Oxford University Press 2006) and *International Humanitarian Law* (forthcoming Oxford University Press 2007) (with Ryan Goodman).

Naomi Roht-Arriaza

Naomi Roht-Arriaza is a Professor of Law at the University of California Hastings College of the Law, and international humanitarian law is one of her areas of expertise. Prior to her appointment at Hastings, she was a Riesenfeld Fellow in International Law and Organizations at Boalt Hall School of Law and a European Community Fulbright Scholar in Spain. She has received research grants from the MacArthur Foundation and the United States Institute of Peace. Her publications include *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, 2005) and *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995). She is also an associate editor of the *Yearbook on International Environmental Law*.

Beth Stephens

Beth Stephens is a Professor of Law at Rutgers School of Law—Camden. She has published extensively on the relationship between international and domestic law, focusing on the enforcement of international human rights norms through domestic courts and the Alien Tort Statute. She co-authored a book analyzing U.S. enforcement of human rights norms, *International Human Rights Litigation in U.S. Courts* (Transnational Publishers, Inc. 1996) (second edition forthcoming 2006). Recent publications include *Sosa v. Alvarez-Machain: "The Door Is Still Ajar" For Human Rights Litigation in U.S. Courts*, 70 Brooklyn Law J. 533 (2004-2005); *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 Harv. Human Rts. J. 169 (2004); *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for Human Rights Violations*, 27 Yale J. Int'l L. 1 (2002); and *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DePaul L. Rev. 433 (2002).

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (a)(7)(C) AND CIRCUIT RULE 32-1

Case No. 05-36210

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

DATED: March 29, 2006

Respectfully submitted,

Tyler R. Giannini
Associate Clinical Director
Human Rights Program
Harvard Law School
Counsel for Amicus Curiae

PROOF OF SERVICE

I, the undersigned, say: I am employed by the Harvard Law School's Human Rights Program, whose address is Pound Hall 401, 1563 Massachusetts Avenue, Cambridge, MA 02138; I am over the age of eighteen, and I am not a party to this action.

I further declare that on March 29, 2006, I served a copy of the **Brief of *Amicus Curiae* Professors Roger Clark, Deena Hurwitz, Derek Jinks, Naomi Roht-Arriaza, and Beth Stephens** on the interested parties in this action by placing true and correct copies thereof in envelopes addressed as follows:

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Howrey Simon Arnold & White LLP
1299 Pennsylvania Avenue N.W.
Washington, D.C. 20004-2402

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 29, 2006 at Cambridge, Massachusetts.

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Tyler R. Giannini
Declarant