# 06-4876

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

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**ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA individually and on behalf of his late father, CLEMENT TUSIMA,**

**Plaintiffs-Appellants-Cross-Appellees,**

**v.**

**ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,**

**Defendants-Appellees-Cross-Appellants,**

**and**

**SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,**
**Defendant.**

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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 *AMICI CURIAE***
**INTERNATIONAL LAW SCHOLARS CHERIF BASSIOUNI, ET AL**
**IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES**
**AND IN SUPPORT OF AFFIRMANCE**

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## I. STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

*Amici* are professors of international law and international human rights and humanitarian law; some are also former prosecutors with international criminal tribunals. Additional information about the qualifications of *amici* are provided in Appendix A. *Amici* address the definition, nature, and scope of the Plaintiffs' claim for crimes against humanity and demonstrate that this claim constitutes a viable cause of action under the Alien Tort Statute, 28 U.S.C. §1350 (hereinafter "ATS"). The issues discussed are of general interest to the legal academic community, which has sought to further understanding and analysis of international legal norms that are binding upon all nations and peoples. Therefore, pursuant to Federal Rule of Appellate Procedure 29, *Amici* respectfully submit this brief in support of Plaintiffs-Appellants/Cross-Appellees and in support of affirmance.

## II. SUMMARY OF ARGUMENT

The District Court properly found the prohibition against crimes against humanity to be justiciable as a violation of customary international law. *Amici* first provide the definition of crimes against humanity, and demonstrate that this norm is actionable under the ATS in conformity with *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). *Amici* next discuss the development of the prohibition of crimes against humanity as a specific, universal and obligatory norm, and outline the elements of crimes against humanity. Finally, *Amici* discuss the widespread acceptance in U.S. courts of the justiciability of crimes against humanity claims under the ATS.

## III. ARGUMENT

### A. INTRODUCTION

For a claim to be actionable under the ATS, *Sosa* requires that the alleged actions be recognized as violating well-established norms of customary international law that are "defined with a specificity" comparable to the paradigm norms recognized in the 18th-century. *Sosa*, 542 U.S. at 725. It is not required that every contour of the norm be universally accepted, but that there exists certain core aspects that are agreed upon. *See United States v. Smith*, 18 U.S. 153, 160-62 (1820) (Court expressly acknowledged the diversity of definitions of piracy, but held that despite that diversity, there existed certain core aspects of piracy that everyone could agree upon, for instance, that robbery or forcible depredation comprises the crime of piracy by the law of nations). Crimes against humanity are actionable under the ATS because they qualify as a "norm that is specific, universal, and obligatory." *Sosa*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). Thus, courts considering the issue after *Sosa,* like courts prior to *Sosa*, have found that crimes against humanity continue to be actionable under the ATS.

The District Court's ruling that the Kiobel plaintiffs' claims for crimes against humanity are justiciable should be upheld.

### B. THE CORE DEFINITION OF CRIMES AGAINST HUMANITY

The prohibition on crimes against humanity is well-established and well-defined in international law. The District Court accurately described the customary international law prohibition against crimes against humanity in its September 29, 2006 decision as well as its prior 2002 decision:

> This Court has defined crimes against humanity as any of a certain number of acts, including rape, torture, and arbitrary detention,

> "committed as part of a widespread or systematic attack directed against any civilian population." [citing *Wiwa v. Royal Dutch Petroleum*, 2002 U.S. Dist. LEXIS 3293, at *28 (S.D.N.Y. Feb. 22, 2002) (citing Rome Statute of the International Criminal Court)].

*Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006).

Although the outer contours of crimes against humanity have varied among some international instruments, the core definition has not: the customary international law norm proscribing crimes against humanity condemns certain heinous crimes as part of a widespread or systematic attack upon a civilian population. Among the heinous crimes are murder, torture, deportation, and other comparably inhumane acts which cause great suffering or serious physical or mental injury. The requisite mental state for a defendant to be culpable is that of knowledge of the attack, which consists of two elements: the commission of an act which, by its nature or consequences, is objectively part of that attack, and knowledge on the part of the accused that there is an attack on the civilian population and that his or her act is part thereof. The defendant need not have knowledge of the details nor share the motives or purpose underlying the attack. A few incidents may meet the requirement that the attack be part of a widespread or systematic attack. The attack need not target the entire civilian population, and can be separated in time and space. A state or organizational policy is useful evidence of the existence of a widespread or systematic attack, but is not an element of the crime.

The sources of this core definition are described more fully below: from a general prohibition originating at least at the beginning of the twentieth century, to codification in the Nuremberg Charter, Control Council Law 10, United Nations resolutions, the Statutes and jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda [hereinafter "ICTY" and "ICTR",

respectively], and the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 at Article 7(1) [hereinafter "Rome Statute"].

### C. THE DEVELOPMENT OF THE CUSTOMARY INTERNATIONAL LAW PROHIBITION AGAINST CRIMES AGAINST HUMANITY

"Crimes against humanity" originated as an extension of war crimes but has subsequently emerged to become a "separate and distinct category of international crimes applicable in time of peace as well as in time of war irrespective of any connection to the regulation of armed conflicts."[1]

The seeds of what today are known as "crimes against humanity" were planted in the Preambles of the 1899 Hague Convention II and the 1907 Hague Convention IV, and in their annexed Regulations Respecting the Laws and Customs of War on Land.[2] In addition to specifying specific conduct deemed violative of the

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[1] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 49, 53 (2d rev. ed., Kluwer Law Int'l 1999). Defendants quote Professor Bassiouni in a misleading fashion (Appellees' Brief [hereinafter "AB"] at 44). Rather than being a comment on the lack of definition of crimes against humanity, the quotation Defendants' cite is from a passage of the book criticizing the lack of enforcement of this basic norm:

> The term, "crimes against humanity" is almost as much a part of worldwide popular usage as murder. Yet, unlike murder, "crimes against humanity" is far from having the benefit of international and national legislation which provides it with the necessary legal specificity and particularity which exists in common crimes. In fact, only a handful of countries have embodied "crimes against humanity" in their national legislation -- and that in itself is a tragic neglect. But, worse yet, enforcement of the international proscriptive norm has been significantly lacking.

Bassiouni at xvii. In the second passage by Bassiouni cited (AB 44), Defendants omit from their selection the first part of the sentence that "crimes against humanity remain part of customary international law." *Id*.

[2] Bassiouni at 61.

laws and customs of war, Hague Conventions II and IV were also "intended to provide an overarching concept to protect against unspecified violations whose identification in positive international law was left to future normative development."[3]

Accordingly, Hague Convention II stated that in cases not covered by specific regulations: "Populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, *from the law of humanity*, and the requirements of public conscience" (emphasis added). [4]

The protection was reinforced in the Preamble to Hague Convention IV:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, *from the laws of humanity*, and the dictates of the public conscience (emphasis added).

Bassiouni at 61, 62 (*quoting* 1907 Hague Convention ¶ 8 of the Preamble.).

"The origin of the term 'crimes against humanity' as the label for a category of international crimes goes back to 1915 when the governments of France, Great Britain, and Russia issued a joint declaration on May 28, 1915 denouncing the Ottoman government's massacre of the Armenian population in Turkey as 'constituting crimes against civilization and humanity' for which all members of the

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3 *Id.*

4 *Id*. (*quoting* 1899 Hague Convention ¶ 9 of the Preamble.).

Turkish government would be held responsible together with its agents implicated in the massacres."[5]

The first appearance of crimes against humanity in positive international law dates back to the Nuremberg Charter, appended to the London Agreement ratified by the Allied forces on August 8, 1945. Section 6(c) of the Nuremberg Charter defined crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Charter for the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6 (c), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 [hereinafter "Nuremberg Charter"].

Control Council Law No. 10, adopted by the Allies to provide for additional prosecutions in Europe following the end of WWII, again defined and provided for the prosecution of crimes against humanity. While the core definition remained essentially the same as in the Nurenberg Charter, Control Council Law No. 10 removed the requirement that there be a nexus between a crime against humanity and either a war crime or a crime against peace. Under Control Council Law No. 10, crimes against humanity were defined as:

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[5] *Id.* at 62; France, Great Britain, and Russia, Joint Declaration, May 29, 1915, *available at* http://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160. *See also* Darryl Robinson, *Developments in International Law: Defining "Crimes Against Humanity" at the Rome Conference*, 93 A.J.I.L. 43, n.8 (1999).

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.[6]

Since the adoption of the Nuremberg Charter, the prohibition against crimes against humanity has been firmly recognized in several international instruments. In 1946, the United States was the principal mover behind the establishment of the Nuremberg Tribunal, officially known as the International Military Tribunal at Nuremberg (IMT). It was established pursuant to the treaty signed by the United States, the United Kingdom, France, and the USSR. That treaty, binding upon the United States, was subsequently acceded to by 19 other states. Subsequently, on January 19, 1946, the United States through its Supreme Allied Military Commander in the Far East, Gen. Douglas MacArthur, promulgated the statute of the International Military Tribunal for the Far East (IMTFE).[7] The IMTFE reflected almost identically the IMT. Thus, the United States accepted "crimes against humanity" as defined in Article 6(c) of the IMT and Article 5(c) of the IMTFE as part of the customary international law which it recognized.

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[6] Allied Control Council Law No. 10, art. II, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946 [hereinafter "Control Council Law 10"].

[7] Charter for the International Military Tribunal for the Far East, art. 5 (c), Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

It is also important to note that subsequently the United States reconfirmed its position recognizing that "crimes against humanity" are part of customary international law. It did so by voting in favor of a Security Council Resolution establishing the International Criminal Tribunal for Yugoslavia (ICTY) (S.C. Res. 808, U.N. Doc. S/RES/808 (February 22, 1993), as well as a Security Council Resolution establishing the International Criminal Tribunal for Rwanda (ICTR) (u.n. Doc. S/RES/955 November 8, 1944). Both Resolutions included a statute which respectively embodied a definition of "crimes against humanity", namely Article 5 (ICTY) and Article 3 (ICTR). In connection with Article 5 of the ICTY, the definition of "crimes against humanity" was deemed to embody customary international law as reflected in the Secretary General's report to the Security Council. The Secretary-General, *Report of the Secretary General on the Former Yugoslavia, delivered to the Security Council and the General Assembly*, U.N. Doc. S/25704 (1993).

Moreover, it is important to consider the jurisprudential evolution of the definition of crimes against humanity, starting with the judgment of the IMT and including the jurisprudence of the ICTY and ICTR discussed below, as well as the latest development in the definition of crimes against humanity as embodied in

Article 7 of the statute of the International Criminal Court (ICC).[8] The United States actively participated in the process leading to the ICC and voted in favor of it on July 17, 1998 at the Rome Diplomatic Conference, and subsequently signed it, though it never ratified it. The United States also subsequently recognized the customary international law nature of "crimes against humanity" and embodied it in the statute of the Iraq Special Tribunal, promulgated by Ambassador Paul Bremer as the head of the Coalition Provisional Authority in Iraq.[9] The definition of "crimes against humanity" was identical to that of Article 7 of the ICC Statute.[10]

There is no doubt that crimes against humanity are part of customary international law as recognized by the United States. The core definition of "crimes against humanity" may have slightly changed between its original version in Article 6c of the IMT in 1946, and Article 7 of the ICC statute; however, the specificity which has been added to the original definition does not alter the core characteristics of that category of international crimes.[11]

The United Nations General Assembly affirmed the principles set forth in the Nuremberg Charter and the subsequent decisions of the International Military

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[8] A/Conf.183/9, July 17, 1998; *see also* M. Cherif Bassiouni, The Legislative History of the International Criminal Court (3 vols. 2005).

[9] Coalition Provisional Authority Order 48, "Delegation of Authority Regarding an Iraqi Special Tribunal," issued December 10, 2003.

[10] M. Cherif Bassiouni, Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, 38 Cornell Int'l L. J. 327 (2005).

[11] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, 2d ed. 1999.

Tribunal. *See* G.A. Res. 95(I), at 188, U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (Dec. 11, 1946). These principles were reaffirmed in 1968 with the adoption of a treaty to prevent the application of statutory limits to crimes against humanity. *See* Convention on the Non-Applicability of Statutory Limits to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 660 U.N.T.S. 195, reprinted in 8 I.L.M. 68 (1969). *See also* Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, G.A. Res. 3074 (XXVIII), 28 GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030/Add.1 (1973). These subsequent instruments did not require a nexus to armed conflict, and there is broad consensus among commentators that such a nexus is not part of the customary law definition of the offense.

In 1993 and 1994, the statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda defined crimes against humanity in a manner that, despite some variations on elements related to the jurisdiction of each particular tribunal, maintained the same essential core definition of crimes against humanity.[12]

Article 5 of the ICTY Statute on crimes against humanity, provided as follows: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i)

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[12] Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press (2001) at 58 ("[T]he trend of decision since Nuremberg reflects a general acceptance by states of an end to the link between crimes against humanity and war crimes or crimes against the peace, and thus the position that acts may be deemed crimes against humanity without any link to armed conflict, international or internal.")

other inhumane acts."[13] While this requirement of a nexus to an armed conflict may have been applicable to the factual and historical situation inside the former Yugoslavia, numerous commentators, as well as the ICTY itself, have acknowledged that this nexus requirement did not reflect customary international law and was intended to set the jurisdictional limits of the Court's action.[14] What did reflect customary international law was the core concept that the non-isolated commission of certain grievous crimes "directed against any civilian population" constitutes a crime against humanity.[15] Defendants' statement that the ICTY Statute lacks a "requirement" that an enumerated act be committed as part of a widespread or systematic attack against any civilian population," AB 46, simply ignores ICTY jurisprudence noting from the time of the Tribunal's first appellate judgment that the words of the ICTY Statute incorporate this element:

> The Appeals Chamber agrees that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of

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13 ICTY Statute, art. 5.

14 *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 249 (Appeals Chamber, July 15, 1999). In *Tadic*, the Appeals Chamber found that under customary law there is no requirement that crimes against humanity have a connection to an international armed conflict, or indeed to any conflict at all. Article 5 of the ICTY Statute "requires the existence of an armed conflict at the relevant time and place for the International Tribunal to have jurisdiction." *Prosecutor v. Kordic/Cerkez*, No. IT-95-14/2-T, ¶ 23 (Trial Chamber, Feb. 26, 2001). *See also Prosecutor v. Krnojelac*, IT-97-25, ¶ 53 (Trial Chamber, Mar. 15, 2002) (in addition to elements of crime, "the Statute of the ICTY imposes a jurisdictional requirement that the crimes be 'committed in armed conflict.'"); *Prosecutor v. Krajisnik*, No. IT-00-39-T, ¶ 704 (Trial Chamber, Sept. 27, 2006) ("Committed in armed conflict. This is a jurisdictional limitation on the Tribunal which is not part of the customary law definition of crimes against humanity.").

15 ICTY Statute, art. 5.

> widespread or systematic crimes directed against a civilian population ….[16]

Thus the "civilian population" element of the Nuremberg Charter, which was incorporated into the ICTY Statute, is found to be synonymous with the "widespread or systematic" element used in later jurisprudence.

The 1994 Statute of the ICTR defined crimes against humanity as the same grievous crimes itemized in the ICTY Statute, "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds …."[17] Reflecting customary international law, this Statute has no armed conflict requirement. It does, however, add the requirement of a discriminatory intent. While this requirement of discriminatory intent was easily established in the Rwandan context of violence between Hutus and Tutsis, the ICTR itself has found that "this additional 'discriminatory intent element' under ICTR jurisdiction d[id] not reflect the state of customary international law" at the time of the statute's drafting.[18] Thus, like the

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[16] *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 248 (Appeals Chamber, July 15, 1999).

[17] Statute of the International Criminal Tribunal for Rwanda, art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter "ICTR Statute"].

[18] *Prosecutor v. Kayishema/Ruzindana*, No. ICTR-95-1-T, ¶ 138 (Trial Chamber, May, 21 1999) ("This is evident by the inclusion of the need for an armed conflict in the ICTY Statute and the inclusion of the requirement that the crimes be committed with discriminatory intent in the ICTR Statute.") The Tribunal is limited in its capacity to prosecute a narrow set of crimes, and "not intended to alter the definition of Crimes Against Humanity in International Law." *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T, ¶ 671 (Trial Chamber, Jan. 22, 2004).

ICTY did with respect to the ICTY Statute's nexus to armed conflict requirement, the ICTR itself recognized its Statute's divergence from customary international law and the jurisdictional nature of the added requirements.[19]

The ICTR has reiterated that the "discriminatory intent" requirement in international law applies only to the subsection of crimes against humanity involving "persecutions based on political, racial and religious grounds," and not to crimes against humanity as a whole. *See Prosecutor v. Bagilishema*, No. ICTR-95-1-T, ¶ 81 (Trial Chamber, June 7, 2001). "The ICTY and the ICTR have both held that the perpetrator must be motivated by discriminatory animus only where the specific CAH charged is persecution." In the *Kordic/Cerkez*, *Simic*, *Sikirica*, and *Simic/Tadic/Zaric* cases, the ICTY rejected the view that to constitute a crime against humanity, the relevant acts must be undertaken by the perpetrator on discriminatory grounds. In these cases, the Tribunal made clear that discriminatory intent is necessary to commit persecution, one of the predicate acts for a charge of crimes against humanity, but not for other such acts, including murder and inhumane treatment.[20] "Persecutions on political [] grounds," are widely recognized as one of the offenses underlying a violation of crimes against

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19 *Prosecutor v. Kayishema/Ruzindana*, No. ICTR-95-1-T, ¶ 138.

20 *Prosecutor v. Simic/Tadic/Zaric*, No. IT-95-9-T, ¶ 1063 (Trial Chamber, Oct. 17, 2003); *Prosecutor v. Simic*, No. IT-95-9/2-S, ¶ 77 (Trial Chamber Oct. 17, 2002); *Tadic*, No. IT-94-1-A ¶ 305; *Prosecutor v. Sikirica*, No. IT-95-8-S, ¶ 232 (Trial Chamber, Nov. 13, 2001); *Kordic/Cerkez*, No. IT-95-14/2-T ¶ 186 (Trial Chamber, Feb. 26, 2001).

humanity.[21] Persecution based on political grounds presupposes that an individual holds opinions or has had opinions attributed to him or her, which are critical of the policies or methods of the authorities.[22]

Thus, Defendants' attempt to show inconsistency in the definition of crimes against humanity by pointing to differences in whether there is a link to armed conflict or whether acts were committed with discriminatory intent, AB 45-46, fails to acknowledge that the commission of crimes against humanity during armed conflict or with "discriminatory intent" were merely jurisdictional requirements unique to the ICTY and ICTR. They are not indications of a lack of consensus on the core definition of a crime against humanity. On the contrary, the jurisprudence of both Tribunals confirms that customary international law is uniform with respect to the lack of an armed conflict or discriminatory intent requirement, thereby refuting defendants' argument. More generally, both the ICTY and ICTR have affirmed the status of crimes against humanity under international law. In *Prosecutor v. Tadic*, for example, the ICTY noted that "the customary status of the prohibition against crimes against humanity and the attribution of individual

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[21] Control Council Law No. 10, art. II (1) (c); Nuremberg Charter, art. 6 (c); ICTY Statute, art. 5; Rome Statue, art. 7 (1).

[22] *See* United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for the Determination of Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 80 (1967).

criminal responsibility for their commission have not been seriously questioned."[23] No court that has addressed the issue has found that crimes against humanity do not constitute cognizable crimes.

The 1998 Rome Statute of the International Criminal Court contains the most recent international codification of crimes against humanity. Article 7 of the Rome Statute defines, "for the purpose of this Statute," crimes against humanity as:

> any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[24]

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[23] *Prosecutor v. Tadic*, No. IT-94-1, ¶ 623 (Trial Chamber, May 7, 1997) (confirming that the Tribunal has the power to prosecute individuals responsible for crimes against humanity); *see also Prosecutor v. Akayesu*, No. ICTR-96-4-T, ¶ 4 (Trial Chamber, Sept. 2, 1998).

[24] Rome Statute, art. 7. The ICTY has also found the "forcible displacement of persons" and "deportation" to constitute crimes against humanity. *See Prosecutor v. Stakic*, No. IT 97-24-A, ¶ 278 (Appeals Chamber, March 22, 2006) ("deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present" across a border "without grounds

As with the ICTY and the ICTR, the Rome Statue contains a core definition of crimes against humanity – "part of a widespread or systematic attack directed against any civilian population" – that is consistent with customary international law. This definition is set out in Article 7(1). The definition of crimes against humanity in the Rome Statute does not include those aspects of the ICTY and ICTR definitions that were not, as explained above, in conformity with customary international law. Hence, the Rome Statute definition requires neither a nexus with armed conflict nor a discriminatory motive. What it does require are the core elements of crimes against humanity: the commission of a heinous crime as part of a widespread or systematic attack on a civilian population.

## D. ELEMENTS OF CRIMES AGAINST HUMANITY

To be a crime against humanity under customary international law, five elements must be satisfied:

> (i) There must be an attack. (ii) The acts of the perpetrator must be part of the attack. (iii) The attack must be directed against any civilian population. (iv) The attack must be widespread or systematic. (v) The perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[25]

These elements are interconnected.[26]

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permitted under international law"); *see also Prosecutor v. Simic*, IT 95-9-T, ¶ 122 (Trial Chamber, Oct 17, 2003) (same).

[25] *Prosecutor v. Kunarac/Kovac/Vukovic*, No. IT-96-23-A, ¶ 85 (Appeals Chamber, June 12, 2002).

[26] Defendants mis-cite several sources in support of their argument that the definition of crimes against humanity is unclear. In citing Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former*

### 1. There must be an attack and the perpetrator's acts must be part of the attack.

To establish a crime against humanity, a perpetrator's act must be committed "as part of a widespread or systematic attack directed against any civilian population."[27] In order to demonstrate that the perpetrator's act formed part of an attack, "the relevant conduct need not amount to military assault or forceful takeover; the evidence need only demonstrate a 'course of conduct' directed against a civilian population that indicates a widespread or systematic reach."[28] The ICTR designates an attack as an "unlawful act" such as those enumerated in the ICTR statute (e.g., murder, torture, etc.) or an unlawful act, event or series of events.[29]

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*Yugoslavia*, Brook. J. Int'l L. No. 2, 1995, an early treatment of the crimes in the ICTY Statute written without the benefit of that court's subsequent jurisprudence, the Defendants fail to note that the author unquestionably finds that the core of the definition is clear enough to be applied to the crime of rape in the Former Yugoslavia. AB 46.

[27] Rome Statute, art. 7.

[28] *Prosecutor v. Limaj, et al.*, No. IT-03-66-T, ¶ 194 (Trial Chamber, Nov. 30, 2005); *see also Prosecutor v. Blagojevic/Jokic*, No. IT-02-60-T, ¶ 543 (Trial Chamber, Jan. 17, 2005 ) ("'Attack' in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence."). This has been construed broadly to "encompass *any mistreatment* of the civilian population. . . ." *Prosecutor v. Brdjanin*, No. IT-99-36-T, ¶ 131 (Trial Chamber, Sept. 1, 2004) (same); *Kunarac*, No. IT-96-23-A ¶ 86 (same); *Prosecutor v. Simic/Tadic/Zaric*, No. IT-95-9-T, ¶ 39 (Trial Chamber, Oct. 17, 2003) (emphasis added). *See Prosecutor v. Vasiljevi*c, No. IT-98-32-T, ¶ 29 (Trial Chamber, Nov. 29, 2002) (same).

[29] *Akayesu*, No. ICTR-96-4-T ¶ 581; *Kamuhanda*, No. ICTR-95-54A-T ¶¶ 660-61.

### 2. The attack must be against a civilian population.

The purpose of requiring that the attack be committed against a civilian population is to ensure the attack is not a limited and random occurrence. Further, the civilian population must be the primary object of the attack. Members of a resistance movement as well as former combatants may be considered part of a civilian population, so long as they are not taking active part in armed hostilities.[30]

### 3. The attack must be widespread or systematic.

The requirement that the acts in question must be part of an attack that is widespread or systematic is disjunctive. A crime may be widespread or committed on a large scale by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.[31] The phrase systematic refers to the "organized nature of the acts of violence and the improbability of their random occurrence."[32] Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence. Thus, an accumulation of "smaller" crimes can be sufficient to constitute a widespread or systematic attack. Moreover, the case law of the ICTY makes clear that a single act may qualify as a crime against humanity as long as it is linked to a widespread and systematic attack:

> Crimes against humanity…must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual

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30 *See Kordic/Cerkez*, No. ICTY-95-14/2-T ¶ 97 (citing Kunarac, No. IT-96-23-A ¶ 90) (the manner in which the population was targeted is an indication that a "population," and not simply a limited, random selected number of individuals was the target of the attack).

31 *Kunarac*, No. IT-96-23-A ¶¶ 94-96.

32 *Kordic*, No. IT-95-14/2-A ¶ 94.

> committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above.[33]

Thus, only the attack, not the individual acts of the accused, must be widespread or systematic. International tribunals have found the existence of a crime against humanity in cases involving a single rape, finding that the rape was consistent with the pattern of an attack and formed part of the attack.[34] In *Akayesu*, the defendant was found guilty of crimes against humanity for the murder of three brothers and six acts of torture against six individuals.[35] U.S. courts agree, finding that a crime against humanity took place with the assassination of El Salvador's Monseñor Romero.[36]

The attack need not be narrowly circumscribed in time or place. In *Krajisnik*, crimes were committed in different municipalities.[37] In *Stakic*, the crimes were carried out against non-Serbs as well as others not loyal to the Serb authorities in a variety of towns as well as in predominantly non-Serb areas.[38] In *Krnojelac*, the Trial Chamber held that a crime committed several months after, or several

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[33] *Tadic*, No. IT-94-1-T ¶ 248 n.311 (quoting "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence," *Prosecutor v. Mrksic*, No. IT-95-13-R61, ¶ 30 (Apr. 3, 1996).

[34] *Prosecutor v. Musema*, No. ICTR-96-13-A, ¶¶ 966-67 (Trial Chamber, Jan. 27, 2000). *See generally Kunarac*, No. IT-96-23-A (accused found guilty of crimes against humanity for helping imprison four Muslim women and periodically raping them).

[35] *Prosecutor v. Akayesu*, No. ICTR-96-4-T ¶¶ 653, 683 (Trial Chamber, Sept. 2 1998).

[36] *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004).

[37] *Krajisnik*, No. IT-00-39-T ¶ 5.

[38] *Prosecutor v. Stakic*, No. IT-97-24-T, ¶ 248 (Trial Chamber, July 31, 2003).

kilometers away from the main attack could still, if sufficiently connected, be part of an attack.[39]

An attack that targets a significant number of people could clearly satisfy the requirement of being "widespread." In addition, individual acts that are committed pursuant to an established plan, or with several actors working in concert to accomplish the same goal, would meet the systematic requirement.

### 4. A person does not need knowledge of specific incidents or acts to have the requisite knowledge of an attack on a civilian population.

The mental state associated with commission of a crime against humanity is that of "knowledge of the attack." This consists of two elements: "the commission of an act which, by its nature or consequences, is objectively part of that attack; and knowledge on the part of the accused that there is an attack on the civilian population and that his or her act is part thereof."[40] The Tribunal in *Limaj* states that

> ... the accused need not know the details of the attack or approve of the context in which his or her acts occur. The accused merely needs to understand the overall context in which his or her acts took place. The motives for the accused's participation in the attack are irrelevant as well as whether the accused intended his or her acts to be directed against the targeted population or merely against his or her victim, as it is the attack, not the acts of the accused, which must be directed against the targeted population, and the accused need only know that his or her acts are parts thereof.

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[39] *Krnojelac*, No.IT-97-25-T, ¶ 55 (Trial Chamber, Mar. 15, 2002).

[40] *Limaj*, No. IT-03-66-T ¶ 188. *See Prosecutor v. Kupreskic*, IT-95-16, ¶ 556 (Trial Chamber, Jan. 14, 2000) ("the requisite *mens rea* for crimes against humanity appears to be comprised by (1) the *intent* to commit the underlying offence, combined with (2) *knowledge* of the broader context in which that offence occurs").

*Limaj*, No. IT-03-66-T ¶ 190. *See also Brdjanin*, IT-99-36-T ¶ 138 ("This requirement does not imply knowledge of the details of the attack. In addition, the accused need not share the ultimate purpose or goal underlying the attack: the motives for his or her participation in the attack are irrelevant, and a crime against humanity may even be committed exclusively for personal reasons.").

Knowledge of the attack may be inferred from circumstantial evidence. The knowledge of the attack may be actual or constructive. "It may be inferred from a concurrence of concrete facts, such as the historical and political circumstances in which the acts occurred, the scope and gravity of the acts perpetrated, or the nature of the crimes committed and the degree to which they were common knowledge."[41]

A defendant therefore need not have known about any specific shootings, or intent to shoot in any particular case, in order to commit a crime against humanity. They would merely need to know about the general context of a widespread or systematic attack and that the underlying actions objectively formed part of this attack. Such knowledge does not require any intent to violate laws, shared or otherwise, and may be inferred from circumstantial evidence.

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[41] *Kordic/Cerkez*, No. IT-95-14/2-T ¶ 183. *See also Simic/Tadic/Zaric*, No. IT-95-9-T ¶ 1063 (circumstantial evidence allowed on knowledge of attack); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1354, n.50 (N.D. Ga. 2002) ("Plaintiffs have shown that the 'ethnic cleansing' campaign necessarily was widespread and common knowledge to all persons in areas affected by it, such that [the defendant] should have been aware that his actions would contribute to a widespread or systematic campaign or attack against a civilian population.").

## E. U.S. COURTS HAVE RECOGNIZED THE CUSTOMARY INTERNATIONAL PROHIBITION AGAINST CRIMES AGAINST HUMANITY.

U.S. courts, including this Court, have recognized the prohibition of crimes against humanity as a well-defined and widely accepted norm. Courts around the country have repeatedly found the prohibition against humanity to be justiciable under the ATS, and have used the same definition as the *Kiobel* District Court. In *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005), the Eleventh Circuit stated that "crimes against humanity . . . have been a part of the United States and international law long before [the defendant's] alleged actions." The court referred to the norm's definition: "To prove the claim of crimes against humanity, the Cabello survivors had to prove a widespread or systematic attack directed against any civilian population." *Id.* at 1161; *Saravia*, 348 F. Supp. 2d at 1154 (court provided extensive analysis of sources of law and found that "[t]he prohibition against crimes against humanity constitutes . . . a specific, universal, and obligatory norm."); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005) ("'widespread and systematic' violence intended to result in the 'forced displacement of civilians'" constituted crimes against humanity); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 338 (S.D.N.Y. 2005) (finding that crimes against humanity is a *jus cogens* violation of international law actionable under the ATS and that, moreover, the decisions of the ICTY and ICTR on the definitions of these crimes "occupy a special role in enunciating the current content of customary international law norms."); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005) ("a systematic attack on certain segments of a population is a crime against humanity."); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003) (widespread or systematic attack against the civilian

population constitute crimes against humanity, which "have been recognized as violation of customary international law since the Nuremberg Trials in 1944."); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344, 1352-54 (N.D. Ga. 2002) (after extensive analysis of international law sources, the district court held that crimes against humanity were a "specific, universal and obligatory" norm which were actionable under the ATS, citing to "widespread or systematic attack against civilians."); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999) (acknowledging crimes against humanity as a violation of international law, citing Nuremberg Charter and Rome Statute); *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986) ("crimes against humanity, such as genocide, violate international law"). *See also Sosa*, 542 U.S. 692, 762 (Breyer, J., concurring) (recognizing that international law views crimes against humanity as universally condemned behavior that is subject to prosecution).[42]

This Court has not yet had an opportunity to conduct a detailed, post-*Sosa* analysis of the definition of crimes against humanity. However, in its previous rulings, this Court has recognized that the prohibition against crimes against humanity is a universally condemned violation of customary international law. In *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 150 n.18 (2d Cir. 2003), this Court analyzed the sources of international law prohibiting crimes against humanity, including the Nuremberg Charter, Control Council Law No. 10, and the works of international law scholars Oppenheim and Theodor Meron and held: "Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World

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[42] Defendants' reference to the lack of reference by the Restatement (Third) of Foreign Relations Law (1987) to crimes against humanity is unavailing, as it fails to cite the specific Comment a to Section 702 of the Restatement that the list is not incomplete or closed.

War II." Additionally, in *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), a case fundamentally concerned with treaty based crimes, the court recognized the long-standing prohibition against crimes against humanity, and cited to the Nuremberg Charter as evidence of the prohibition going back to the World War II and analogized crimes against humanity to piracy for purposes of establishing universal jurisdiction. The Court indicated that crimes against humanity are among the crimes that "now have fairly precise definitions" and "have achieved universal condemnation," and are "uniformly recognized by the 'civilized world' as an offense against the 'Law of Nations.'" *Id.* at 106, 103. *See also Kadic v. Karadzic*, 70 F.3d 232, 236, 239 (2d Cir. 1995) (recognizing crimes against humanity as violations of customary international law).

The lower court correctly applied the accepted definition of crimes against humanity, both in the decision now before this court and in its prior ruling in *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at *27-*32 (the court held that the prohibition of crimes against humanity was "a norm that is customary, obligatory, and well-defined in international jurisprudence.").

## IV. CONCLUSION

The preceding establishes that there exists in customary international law a specific, universal and obligatory norm prohibiting crimes against humanity. Based on these and other authorities and on the overwhelming weight of scholarly opinion and national and international courts, we have no doubt in affirming that the customary international law norm prohibiting crimes against humanity is as well-defined and as widely accepted as were the 18th century norms against piracy, affronts to ambassadors, and violations of safe passage. *Amici* respectfully urge this Court to uphold the ruling of the District Court.

Dated: July 17, 2007

Respectfully submitted,

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# Addendum

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# Addendum A

## Signatories to the Brief Amici Curiae

1. **M. Cherif Bassiouni**

M. Cherif Bassiouni is a Distinguished Research Professor of Law at DePaul University College of Law, President of its International Human Rights Law Institute, President of the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, and the Honorary President of the International Association of Penal Law, based in Paris, France. He received his J.D. from Indiana University, LL.M. in International and Maritime Law from The John Marshall Lawyers Institute, S.J.D. in International Criminal Law from George Washington University, Doctor of Law, Honoris Causa, University of Torino, Italy, University of Pau (France), Niagara University (U.S.A.) and National University of Ireland, Galway (Ireland). He has served the United Nations in a number of capacities, including Chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court. In 2004, he was appointed by the United Nations High Commissioner for Human Rights as the Independent Expert on Human Rights in Afghanistan. In 1999, Professor Bassiouni was nominated for the Nobel Peace Prize for his work in the field of international criminal justice and for his contribution to the creation of the International Criminal Court. He has received medals from Austria, Egypt, France, Germany, Italy, and the United States.

2. **David M. Crane**

David M. Crane is a distinguished professor of practice at the Syracuse University College of Law. He is a former undersecretary general of the United Nations and Chief Prosecutor of the international war crimes tribunal in Sierra Leone, called the Special Court for Sierra Leone.

3. **Dermot Groome**

Dermot Groome is a visiting professor in international criminal law at Pennsylvania State Dickinson School of Law. Professor Groome was an Assistant District Attorney in the New York County District Attorney's Office and a senior prosecutor in the International Criminal Tribunal for the former Yugoslavia. In the war crimes tribunal he was the senior trial attorney responsible for the Milosevic case (Bosnia Indictment) and the Vasiljevic case.

He is the author of Handbook of Human Rights Investigation (2000, Human Rights Press).

**4. Sharon A. Healey**

Sharon A. Healey practices immigration and nationality law. Before starting her own firm, she spent four years as the Director of the Asylum Project at the University of Denver. She is a member of the California state Bar and the American Immigration Lawyers Association. She received her B.A. from St. Mary's College (1983) her J.D. from Pepperdine University School of Law (1988) and her LL.M. in international law with an emphasis in international human rights from the Washington College of Law, American University (1995). She is in the process of completing a Ph.D. in International Relations from the Graduate School of International Studies at the University of Denver. She authored the article, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 Brook. J. Int'l L. 327 (1995).

**5. Jennifer Martinez**

Jennifer Martinez is an Associate Professor of Law at Stanford Law School. An expert in international law, she was previously an associate legal officer at the U.N. International Criminal Tribunal for the Former Yugoslavia, where she worked on trials involving crimes against humanity, war crimes, and genocide.

**6. Naomi Roht-Arriaza**

Naomi Roht-Arriaza is Member of the Legal Advisory Council of the Center of Justice and Accountability (CJA) and Professor of Law at University of California, Hastings College of the Law. She received her J.D. from Boalt Hall and a Masters at the Graduate School of Public Policy. She is a world-renowned expert on the issues of impunity of human rights abusers, accountability for past abuses in transitional societies, universal jurisdiction, international human rights law and international environmental law. She is the author of *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005) and *Impunity and Human Rights in International Law and Practice* (1995). A third book, on post-2000 transitional justice initiatives, will be published in 2006.

**7. Michael Scharf**

Michael Scharf is Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law. In 2004-05, he served as a member of an international team of experts that provided training to the judges and prosecutors of the Iraqi Special Tribunal, and in 2006 he led the first training session for the Prosecutors and Judges of the U.N. Cambodia Genocide Tribunal. In February 2005, he and the Public International Law and Policy Group, a Non-Governmental Organization he co-founded, were nominated for the Nobel Peace Prize by six governments and the Prosecutor of an International Criminal Tribunal for the work they have done to help in the prosecution of major war criminals, such as Slobodan Milosevic, Charles Taylor, and Saddam Hussein. In 1993, he was awarded the State Department's Meritorious Honor Award "in recognition of superb performance and exemplary leadership" in relation to his role in the establishment of the International Criminal Tribunal for the former Yugoslavia.

**8. Darryl Robinson**

Darryl Robinson LL.B (UWO) 1994, LL.M (International Legal Studies) (NYU) 2002, was called to the bar of Ontario in 1996. He has numerous publications in international criminal law and he is currently an Adjunct Professor and Fellow at the University of Toronto Faculty of Law. From 1997-2003, he served as Legal Officer at Foreign Affairs Canada, working on international criminal, human rights and humanitarian law as well as public international law. He received a Minister’s Citation and a Minister’s Award for Foreign Policy Excellence. From 2004-06, he was a legal adviser at the International Criminal Court Office of the Prosecutor.

**9. Ronald C. Slye**

Ronald C. Slye is Associate Professor of Law and Director of International and Comparative Law Programs at the Seattle University School of Law. He gained a BA from Columbia University in 1984, a Masters in Philosophy at the University of Cambridge in 1985, and a JD from Yale Law School in 1989. From 1993-96, he was associate director of the Orville H. Schell, Jr., Center for International Human Rights at Yale Law School and co-taught Yale's international human rights law clinic. He is the co-author of International Criminal Law & Its Enforcement (Foundation Press, 2007). From 2006-2007 he was the Bram Fisher Visiting Professor of Human Rights at the University of the Witwatersrand in South Africa.

## 10. Beth Van Schaack

Beth Van Schaak is Assistant Professor of Law at the Santa Clara School of Law. She gained a BA from Stanford in 1991 and graduated from Yale Law School in 1997 when she became a Law Clerk for the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia in the Hague. She was the acting Executive Director and Staff Attorney at the Center for Justice and Accountability in San Francisco from 1998-1999 and was a practicing attorney at Morrison and Foerster in Palo Alto from 1999 -2002. Professor Van Schaack specializes in, among other areas, International Law including International Human Rights, Transitional Justice and International Criminal Law & Humanitarian Law. She has been a Legal Advisor at the Documentation Centre of Cambodia since 1996. She is the co-author of International Criminal Law & Its Enforcement (Foundation Press, 2007).

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