THE HONORABLE FRANKLIN D. BURGESS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CYNTHIA CORRIE AND CRAIG CORRIE, ON THEIR OWN BEHALF AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF RACHEL CORRIE AND HER NEXT OF KIN, INCLUDING HER SIBLINGS; MAHMOUD OMAR AL SHO'BI, ON HIS OWN BEHALF, ON BEHALF OF HIS SURVIVING SIBLINGS MUHAMMAD AL SHO'BI AND SAMIRA AL SHO'BI, AND ON BEHALF OF HIS DECEASED FAMILY MEMBERS, UMAR AL SHO'BI, FATIMA AL SHO'BI, ABIR AL SHO'BI, SAMIR AL SHO'BI, ANAS AL SHO'BI, AZZAM AL SHO'BI AND ABDALLAH AL SHO'BI; FATHIYA MUHAMMAD SULAYMAN FAYED, ON HER OWN BEHALF AND ON BEHALF OF HER DECEASED SON, JAMAL FAYED AND HIS NEXT OF KIN; FAYEZ ALI MOHAMMED ABU HUSSEIN ON HIS OWN BEHALF AND ON BEHALF OF HIS SONS, BAHJAT FAYEZ ABU HUSSEIN, AHMED FAYEZ ABU HUSSEIN, NOUR FAYEZ ABU HUSSEIN AND SABAH FAYEZ ABU HUSSEIN; MAJEDA RADWAN ABU HUSSEIN ON HER OWN BEHALF AND ON BEHALF OF HER DAUGHTERS, HANAN FAYEZ ABU HUSSEIN, MANAL FAYEZ ABU HUSSEIN, INSHERAH FAYEZ ABU HUSSEIN, AND FADWA FAYEZ ABU HUSSEIN; EIDA IBRAHIM SULEIMAN KHALAFALLAH ON HER OWN BEHALF AND ON BEHALF OF HER DECEASED

Civil Action No. C05-5192-FDB

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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HUSBAND, IBRAHIM MAHMOUD MOHAMMED KHALAFALLAH AND NEXT OF KIN,

Plaintiffs,

v.

CATERPILLAR INC., a Foreign Corporation,

Defendant.

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STATUTES, LEGISLATIVE HISTORY, CONSTITUTIONS

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RESTATEMENTS

TREATIES

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I. INTRODUCTION

Plaintiffs, the families of U.S. citizen Rachel Corrie and Palestinians living in the Occupied Palestinian Territory ("OPT") have suffered death, injury, and the loss of home and business as a result of the unlawful demolitions by Caterpillar bulldozers used by the Israeli Defense Forces ("IDF"). Plaintiffs have sufficiently stated claims against Caterpillar for its complicity in violations of international humanitarian and human rights law, for liability under the Racketeering and Influenced Corruption Organizations Act ("RICO"), and for wrongful death, public nuisance, and negligent entrustment/sale/distribution. As Plaintiffs allege, Defendant knew or should have known that the bulldozers it provided had been and were being used to demolish homes in the OPT in violation of the Geneva Conventions and customary international law ("CIL"), and despite this knowledge, continued to provide such bulldozers and technical assistance, knowing that such would be used to commit further violations of international law. Despite Defendant's argument to the contrary, Defendant's liability as an aider and abettor in international law violations is recognized in prior case law and is fully consistent with such.

All Plaintiffs should be able to proceed in their claims for extrajudicial killing and war crimes under the Alien Tort Statute ("ATS")[1] 28 U.S.C. §1350, and under 28 U.S.C. §1331. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed. 718 (2004) established that federal common law includes private rights of action for certain torts in violation of the law of nations, which undoubtedly include extrajudicial killing.[2] Moreover, as *Sosa* holds, private rights of action based on the law of nations *do* exist as part of our federal common law, and thus the Corries also have the ability to bring claims for the same set of violations of the law of

[1] The ATS is also referred to as the Alien Tort Claim Act ("ATCA").

[2] The majority of courts have found that the Torture Victim Protection Act ("TVPA") (published as a historical and statutory note to the ATS, codified at 28 U.S.C. § 1350 (1991)) is *not* the exclusive avenue for bringing claims for extrajudicial killing, and that claims for extrajudicial killing can also be brought under the ATS.

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nations under 28 U.S.C. § 1331. Furthermore, there is no exhaustion requirement for claims in violation of the law of nations brought under ATS.

With regard to Plaintiffs' claims under the TVPA, case law supports the conclusion that corporations can be held liable for their complicity in violation of the TVPA because Congress did not intend to exclude corporations. The liability of corporations for complicity in violations of international law is consistent with international law principles, which are incorporated into the TVPA. Moreover, Plaintiffs sufficiently allege facts to meet the requisite level of cooperation between Caterpillar and the IDF to meet the "color of law" requirement of the TVPA.

Although the TVPA contains an exhaustion requirement, the law does not require that Plaintiffs pursue a remedy where none exists. While Defendant argues that Plaintiffs are required to exhaust, Defendant presents no evidence that adequate and available remedies exist in the OPT. Even assuming that Plaintiffs are required to exhaust through Israel's legal system, Defendant's own expert cannot say whether the courts of Israel would acknowledge such a claim. Plaintiffs attach an expert opinion which sufficiently describe that Israeli courts would not be amenable to a tort claim for violation of international law like that provided for in the TVPA and ATS, nor to a claim against a corporation for complicity in such violations. Plaintiffs' expert also describes why such claims, even if they could be brought, would be futile.

Plaintiffs have also sufficiently stated claims for wrongful death, public nuisance, and negligence under the theory of negligent entrustment/sale/distribution. The First Amended Complaint ("FAC") alleges that Defendant had knowledge that its bulldozers were being used to commit violations of international law, and although the deaths and injuries suffered by Plaintiffs were foreseeable, Defendant continued to supply bulldozers, equipment, and technical assistance to the IDF.

If the Court finds that the law of Gaza and the West Bank should apply to these claims, then Defendant has utterly failed to meet its burden because it does not even analyze the claims

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under those laws; thus, Plaintiffs' claims should move forward. If this Court finds that Illinois or Washington law applies to these claims, Plaintiff has alleged sufficient facts to support each and every of these state torts. In the unlikely event that the Court would apply Israeli law, Plaintiffs have alleged sufficient facts to survive such claims under that law as well.

Finally, the act of state doctrine and political question doctrines should not prohibit this lawsuit. The factors courts review to determine whether these doctrines should lead to the dismissal of a lawsuit militate in favor of finding that these doctrines should not preclude Plaintiffs' claims. Most importantly, there is near universal consensus that the demolitions at issue in this case are violations of international law—a factor that strongly weighs against preclusion. Indeed, "it is a rare case that would be precluded by the Act of State doctrine." *Kadic v. Karadzic,* 70 F.3d 232, 250 (2d Cir. 1995). This is not such a case.

II. STATEMENT OF RELEVANT FACTUAL ALLEGATIONS

In the FAC, Plaintiffs allege that Caterpillar, by supplying bulldozers (and parts, training, etc.) to the IDF when it knew or should have known that such were being used to commit violations of international humanitarian and international human rights law, has aided and abetted or otherwise been complicit with the IDF in such violations. FAC at ¶¶ 7, 32–36, 52. Moreover, Plaintiffs have alleged that death and injury were foreseeable results of Defendant's complicity in these violations. *Id.* at ¶¶ 12–13, 44–53. The world community, including the United States, has consistently condemned these repeated violations of international law. *Id.* at ¶ 37.

Plaintiffs specifically describe Defendant's role in aiding and abetting these violations of international law. *Id.* at ¶¶ 41–43, 54. For example, since 1967, Defendant has provided bulldozers and/or significant parts or has made repairs to the bulldozers and provided training, manuals, specialized knowledge and/or instructions regarding the bulldozers used to commit illegal acts. *Id.* ¶¶ 42, 54. Defendant has been on *actual* notice since at least 2001 that the bulldozers and/or parts or other assistance related to the bulldozers it was supplying the IDF

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were and are being used to commit demolitions of violations of international law in the OPT. *Id.* at ¶¶ 12–13, 44–53. Moreover, Defendant has also been on constructive notice that the bulldozers it was supplying were being used to commit crimes in violation of international law since at least 1967 when it first began supplying bulldozers and the United Nations began to condemn home demolitions as illegal under international law. *Id.* at ¶¶ 42, 44. Even with this knowledge, Defendant continued to supply the bulldozers and/or parts or other technical assistance related to the bulldozers knowing that such would be used by the IDF to commit torts in violation of state law and international human rights and humanitarian law that could lead to deaths and injuries. *Id.* at ¶ 52.

Plaintiffs also specifically describe the circumstances surrounding each human rights violation giving rise to the allegations in the FAC. *Id.* at ¶¶ 56–80. The April 5, 2002 demolition that led to the death of the family of Mahmoud Al Sho'bi, including three children ages 4, 7 and 9, occurred in Nablus (West Bank) during an attack by the IDF on the city of Nablus, in violation of international humanitarian law. *Id.* at ¶¶ 30, 36, 56, and 57. The April 9, 2002 demolition that led to the death of paralyzed and disabled Jamal Fayed in the Jenin Refugee Camp (West Bank) was committed during an offensive by the IDF to clear paths for IDF tanks and other heavy weaponry, during which 140 buildings, mostly family dwellings, were destroyed leaving approximately 4,000 people homeless. *Id.* at ¶¶ 29, 59. The September 3, 2002 demolition that injured the Abu Hussein family home and left the family homeless took place in the refugee camp of Rafah (Gaza) in order to create a "buffer zone" along the border. *Id.* at ¶¶ 26, 61. The March 2003 demolition that led to Rachel Corrie's death in Rafah (Gaza) was committed to create the same "buffer zone." *Id.* at ¶ 18. Finally, the July 12, 2004 demolition that destroyed the Khalafallah home in the Khan Yunis Refugee Camp (Gaza), which led to the death of Ibrahim Mahmoud Mohammed Khalafallah, who was elderly and could not walk or hear occurred during a large–scale Israeli military incursion in the camp. *Id.* at ¶ 80.

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Moreover, Plaintiffs allege that Defendant and IDF formed an enterprise and conspired with the IDF to engage in a pattern of illegal acts. *Id.* at ¶¶ 117, 119. Defendant significantly collaborated and shared technology with the IDF relating to the bulldozers that Defendant knew would be used to commit violations of international law; Defendant transported the bulldozers, parts, and related technology to the IDF; Defendant worked with the IDF in arranging financing for the purchase of bulldozers; Defendant provided the IDF with after-sales support and other technical support; and that Defendant provided training of the IDF regarding the operation and maintenance of the bulldozers used to commit violations of international law. *Id.* ¶ 122. Plaintiffs further allege that the abuses committed against Plaintiffs and Decedents described herein were acts against a civilian population, in violation of the Fourth Geneva Convention, including but not limited to, Articles 27, 32, 33, and 53. *Id.* at ¶ 83. Intentional acts on the civilian population are strictly prohibited. *Id.* Plaintiffs also allege that the home demolition and attack on Plaintiffs and Decedents also constitute grave breaches of the Fourth Geneva Convention, found at Article 147, which includes as grave breaches: willful killing, torture or inhumane treatment, including willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property carried out unlawfully and wantonly. *Id.* at ¶ 84. These deaths and injuries, all of which resulted from Defendant's complicity, were foreseeable by Defendant. *Id.* at ¶¶ 13, 85, 96, 106, 124, 128, 137, 143.

III. PLAINTIFFS HAVE STATED A CLAIM UNDER THE ATS

A. Plaintiffs' FAC Asserts the Precise Type of Alien Tort Claims Upheld By the United States Supreme Court.

In asserting that Plaintiffs do not have ATS claims, Defendant resurrects a series of ATS arguments that had been extensively litigated and then rejected in *Sosa*. None of the arguments persuaded the Supreme Court; none should persuade this Court. And of course, even if persuaded, this Court is not free to ignore *Sosa*, a controlling precedent. In ignoring the standards endorsed by *Sosa*, Defendant tried to create the illusion that Plaintiffs "propose a

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previously unrecognized federal claim for doing business with a foreign government that violates international law." MTD at p. 11. This is not the case. Plaintiffs have brought claims for summary execution, cruel, inhuman or degrading treatment and war crimes, all of which have been recognized in cases specifically commended by the *Sosa* court.

1. *Sosa* Reaffirmed that United States Federal District Courts Have Jurisdiction Over Civil Claims For Certain Human Rights Violations.

The Supreme Court's decision in *Sosa* upholds the line of rulings that gave aliens access to the federal district courts under the ATS to sue those who committed gross human rights violations against them, such as extrajudicial killing. The Supreme Court held that courts are permitted to recognize causes of action for claims for which the ATS affords jurisdiction, so long as claimants seek to recover for violations of international norms that are "specific, universal, and obligatory." *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). The *Sosa* Court squarely upheld and endorsed this reasoning. *Sosa*, 124 S. Ct. at 2765-66.

The Defendant would have this Court interpret the reasonable caution suggested by the *Sosa* court as a prohibition, a position clearly in conflict with the holding in *Sosa*, which noted that courts have always had a fundamental obligation to interpret international law.[3] Defendant argues that *Sosa* "directed that federal courts exercise 'great caution' (MTD at p. 11) and that caution was justified because of "possible collateral consequences." However, after considering these cautions, *id.* at 2762-63, the *Sosa* court unambiguously held that the courts should recognize under the ATS international law claims that have "definite content and acceptance

[3] The *Sosa* court's "cautions" were actually the reasons offered by Petitioner Sosa for denying federal courts the power to create *any* causes of action for ATS claims – arguments which the *Sosa* court obviously rejected when it held that federal courts *did* have the power to create causes action for certain ATS claims. *See* Brief of Petitioner Jose Francisco Sosa, No. 03-339, *Sosa v. Alvarez-Machain* (filed Jan. 23, 2004) at 34-44, *available at,* http://www.sdshh.com/Alvarez/SosaMeritsBr.pdf. For Defendant and others interested in immunity from international law, the *Sosa* decision was a devastating loss. Thus, it is not surprising that Defendant is trying to resuscitate Sosa's arguments by transforming them from "cautions" into a full-blown legal standard to be applied on a case-by-case basis, one flexible enough to encompass all of their arguments about political questions and other immunities.

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among civilized nations," and that meet the rigorous but simple standard of being "specific, universal, and obligatory." *Id.* at 2766 (citing *Marcos*, 25 F.3d at 1475).

Defendant in effect argues that this Court should abdicate its judicial responsibility by deferring to the political branches in this case, a position rejected by the Supreme Court in *Sosa*. By establishing the clear and rigorous test that a norm of international law must be "specific, universal, and obligatory" to be recognized under the ATS, the Supreme Court reiterated that questions raised by such cases are legal questions, not political ones. This judicial pronouncement is consistent with Congressional action in the area. As the *Sosa* court noted, "Congress . . . has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation [the Torture Victim Protection Act] supplementing the judicial determination in some detail." *Sosa*, 124 S. Ct. at 2765. As explained *infra*, the principle of separation of powers is not impinged simply because Defendant in this case is a corporation doing business with a U.S. ally.

B. Plaintiffs' FAC Pleads Historically Recognized Torts Under CIL.

Plaintiffs allege causes of action under the ATS for violations of three historically recognized "specific, universal, and obligatory" international norms: summary execution, cruel, inhuman, or degrading treatment or punishment, and war crimes. Defendant makes no substantive challenge to summary execution and presents no challenge whatsoever to cruel inhuman and degrading treatment or punishment as a violation of customary international law. All three of these international norms have been recognized by other federal courts applying the same standard articulated in *Sosa*. Those sources of international law, the Court explained, are the "customs and usages of civilized nations, and as evidence of these … the works of jurists and commentators . . ." *Sosa*, 124 S. Ct. at 2766-67 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). *Filartiga*, cited with approval by the Supreme Court (*Sosa*, 124 S.Ct at 2765-66), established that the "law of nations" must be understood as an evolving standard that now encompasses more than it did at the time of the statute's enactment. *See Filartiga v. Pena-Irala*,

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630 F.2d 876, 881 (2nd Cir. 1980); *Marcos*, 25 F.3d at 1475. Plaintiffs' allegations fall comfortably within the core of a small set of well-established human rights violations.

1. Summary Execution: The TVPA is Not the Exclusive Remedy for Plaintiffs' Claims of Extrajudicial Killing.

Plaintiffs' claims for summary execution are not precluded by the TVPA. As discussed below, the legislative history of the TVPA makes clear that the TVPA was not intended to restrict ATS claims in any way. Defendant argues that the TVPA preempts Plaintiffs' ATS claims for extrajudicial killing because the TVPA is the exclusive remedy for that claim under international law, relying exclusively on *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005). MTD at p. 13. Plaintiffs respectfully submit that *Enahoro* is wrongly decided and is against the weight of authority reflected in the decisions of all other courts that have addressed the issue. Moreover, it is inconsistent with *Sosa*.

In relying on *Enaharo*, Defendant fails to cite all the other cases that hold to the contrary. In fact, most courts that have considered the issue have found that TVPA is *not* the exclusive remedy for extrajudicial killing, and that claims for extrajudicial killing and torture can also be brought under the ATS.[4]

Nothing in *Sosa* supports the limitation on the ATS found in *Enahoro*. In *Sosa* the Court specifically noted that the TVPA *supplemented* the ATS and extended the holding of *Filartiga*. *Sosa* at 2765. As the dissent by Judge Cudahy in *Enahoro* makes clear, "The majority, in claiming *Sosa* as authority for the preclusive effect of the TVPA, stands *Sosa* on its head. That case in fact relies on the TVPA as evidence of Congressional acceptance of torture as a norm *enforceable via the ATCA*." *Enahoro*, 408 F.3d at 889.

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[4] *See Wiwa v. Royal Dutch Petroleum Company*, No. 96 CIV. 8386, 2002 WL 319887, at *4 (S.D.N.Y. 2002); *Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 380 (E.D. La. 1997); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied* 519 U.S. 830, 117 S.Ct. 96, 136 L.Ed.2d 51 (1996); *Flores v. Southern Peru Copper Corporation*, 343 F.3d 140, 153 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232, 241, 246 (2d Cir. 1995), *cert. denied* 518 U.S. 1005, 116 S.Ct. 2524, 135 L.Ed.2d 1048 (1996); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

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In holding that the TVPA does not preempt the ATS, most courts look to the TVPA's legislative history, finding that the TVPA was passed primarily for two reasons. First, it was passed to give U.S. citizens the same rights to bring claims for torture and extrajudicial killing as enjoyed by aliens under ATS. *Kadic v. Karadzic,* 70 F.3d 232, 241 (2d Cir. 1995); *Flores,* 343 F.3d at 153*; Wiwa,* 2002 WL 319887, at * 4; *Doe v. Rafael Saravia,* 348 F. Supp. 2d 1142, 1145 (E.D. Cal. 2004); *Beanal,* 969 F. Supp. at 380; *Cabello v. Fernandez Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005). Second, the TVPA set forth an *unambiguous* basis for actions in federal court relating to extrajudicial killing and torture in response to Judge Bork's concurring opinion in *Tel Oren v. Libyan Arab Republic*, 727 F.2d 774 (D.C. Cir. 1984) (Bork, J. concurring) questioning whether a cause of action existed without a specific grant by Congress. *See Flores,* 343 F.3d at 153*; Kadic,* 70 F.3d at 241; *Rafael Saravia,* 348 F. Supp. 2d at 1145; S. Rep. No. 102-249, at 5 (1991). As the court in *Flores* noted, the Senate Report on the TVPA states that the statue was intended to "establish an unambiguous basis for a cause of action that has been successfully maintained under [the ATS]." *Flores*, 343 F.3d 140, 153 (2d Cir. 2003). The *Flores* court also noted that [r]ecognizing that "[a]t least one Federal judge . . . has questioned whether [the ATS] can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress" (citing *Tel-Oren*, 726 F.2d at 774). *Id.* The Senate Report concluded that "[t]he TVPA would provide such a grant." *Flores*, 343 F.3d at 153 (citing S. Rep. No. 102-249 at 5); *see also, Rafael Saravia*, 348 F. Supp. 2d at 1145. Similarly, the courts in both *Rafael Saravia* and *Kadic* cite to the House Report on the TVPA for the proposition that the TVPA was passed to create an unambiguous cause of action. *Rafael Saravia*, 348 F. Supp. 2d at 1145; *Kadic*, 70 F.3d at 241, (citing H.R.Rep. No. 367 (1991) which explained that codification of *Filartiga* was necessary in light of the skepticism expressed by Judge Bork's concurring opinion on *Tel-Oren*).

When the TVPA was passed, it was not completely clear whether ATS or §1331 provided jurisdiction for a private tort claim for violations of the law of nations. Many

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proponents of bringing such claims in the United States sought to ensure such a cause of action existed in case the courts, including the Supreme Court, accepted Judge Bork's reasoning (which ultimately it did not). Because it is now clear from *Sosa* that federal common law *does* provide such causes of action in violation of the law of nations through the ATS (and arguably § 1331) —including torture and extrajudicial killing—there is no basis to conclude that the TVPA is the exclusive cause of action for torture and extrajudicial killing.

Furthermore, in *Beanal* the court explained that the TVPA did not supersede or impliedly repeal the causes of action under the ATS because, *inter alia*, the text of the TVPA does not indicate that the statute provides the exclusive set of remedies for torture and extrajudicial killings and that there was an absence of legislative intent to repeal or limit claims of torture and extra-judicial killing under ATS. *Beanal,* 969 F. Supp. at 380-81. The intent to replace another statute or principle of law has to be clear. *Id.* There is nothing in the statutory language or legislative history of the TVPA that provides any evidence, much less a clear case, that Congress meant to preclude any claims under the ATS or § 1331.

This Court should follow the vast majority of courts and find that TVPA is not the exclusive remedy for extrajudicial killing and torture. Both the Palestinian Plaintiffs and the Corries should be allowed to bring their claims for extrajudicial killing under ATS and § 1331, respectively, as well as the TVPA.[5]

2. Cruel, Inhuman or Degrading Treatment

Defendants have not challenged Plaintiffs' claim for cruel, inhuman or degrading treatment is actionable, nor can they. While the Ninth Circuit has yet to rule on this standard,[6] courts around the country have found the norm to be actionable, using the same rigorous test set

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[5] Defendant does not argue there is an exhaustion requirement under ATS, so Plaintiffs will not brief this issue.

[6] In analyzing a jury instruction, the *Hilao* court found that it "need not decide whether the proscription against 'cruel, inhuman or degrading' treatment is sufficiently specific" because torture and arbitrary detention comprised all the conduct alleged by the plaintiffs. *Hilao*, 103 F.3d at 795.

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forth in *Sosa*.[7] In a recent case in this Circuit, the arguments found in *Xuncax* were presented to Judge Charles A. Legge who ruled from the bench that plaintiffs could proceed with their claims alleging cruel, inhuman or degrading treatment.[8] In *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998) (motion to dismiss denied in part and granted in part), the court included in its analysis that the United States has recognized this customary international human rights norm. In fact, as early as 1980, the United States argued that even though at that time neither the United States nor Iran had ratified treaties proscribing such conduct, they were nevertheless bound by the norm against cruel inhuman or degrading treatment. *United States v. Iran*, 1980 I.C.J. 3. In *Jama,* the court said that the "entirety of the conduct" constitutes cruel, inhuman or degrading treatment. 22 F. Supp. 2d at 363, and Plaintiffs have met this standard as well.

3. War Crimes Claims

Defendant attempts to cast Plaintiffs' claims as concerning only the destruction of "civilian property." MTD at p. 14. However, Plaintiffs' claims are in fact centered on the deaths and injuries of civilians. In addition, Plaintiffs have stated clear claims of wanton destruction and the disproportional use of force. U.S. courts and international jurisprudence since the Nuremberg Tribunals have made clear that war crimes as defined by customary international law do not require state action. See, *infra*, p. 16.

(a) Attacks against civilians are war crimes justiciable in U.S. courts.

U.S. Courts have repeatedly recognized attacks against civilians as war crimes actionable under ATS. The *Kadic* case, which was endorsed by *Sosa* as having applied the appropriate legal standards, recognized war crimes as a violation of customary international law actionable in

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[7] *See Wiwa*, 2002 WL 319887, at *8 (concluding that cruel, inhuman or degrading treatment is an actionable claim under ATS); *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002) (Awarding damages under ATS for "cruel, inhuman, or degrading treatment . . . including being bound and gagged and forced to ride in a vehicle for hours, being dragged down the street in front of neighbors and loved ones, and being placed in fear of impending death"); *Najarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985).

[8] Transcript of Oral Argument on Chevron's Motion for Dismissal Based on Forum Non Conveniens, *Bowoto v. Chevron*, No. C 99-2506 CAL (N.D. Cal. Apr. 7, 2000), *available at*, http://www.earthrights.org/chevron/0407transcript.rtf.

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U.S. courts. *Sosa*, 124 S. Ct. at 2783; *Kadic*, 70 F.3d at 236. *See also, Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003). The executive branch has also recognized attacks against civilians as a violation of customary international law.[9]

One of the most readily recognized sources of the customary "laws of war" protections to civilians is the Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, U.N.T.S. 287 ("Fourth Geneva Convention"). As of April 2005, a total of 192 countries have ratified the Geneva Conventions—surpassing the 191 countries that have ratified the UN Charter—demonstrating the universal nature of the standards enunciated in their texts.[10] Article 147 specifically states that grave breaches of the Convention include "wilful killing . . . or inhuman treatment" or "wilfully causing great suffering or serious injury to body or health" if committed against persons or property protected by the Convention, *i.e.*, civilians in occupied territory such as Plaintiffs.

Article 3 common to all four of the Geneva Conventions states that, "violence to life and person, in particular murder of all kinds" is "prohibited at any time and in any place whatsoever with respect to [civilians]." Fourth Geneva Convention, Art. 3. As recently as October 2004, the U.S. government affirmed its view that Common Article 3 reflects CIL.[11] Additional Protocol I of 1977 ("the Protocol") further elaborates on the principles stated in the Geneva Conventions

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[9] *See, e.g., United States Air Force Intelligence Targeting Guide*, Order of the Secretary of the Air Force Air Force Pamphlet 14-120, February 1, 1998, Federation of American Scientist, *USAF Intelligence Targeting Guide*, Attachment A4.2.1 (Feb. 1, 1998), http://www.fas.org/irp/doddir/usaf/afpam14-210/part17.htm#page147 Attachment A4.2.1 states that the "civilian population as such, as well as individual civilians, may not be made the object of attack...") (referenced in: New York Human Rights Watch, Needless Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War, 1991, *available at*, http://www.hrw.org/reports/1991/gulfwar/index.htm#TopOfPage) ("the U.S. government has expressly recognized Article 51 [of Additional Protocol I] as customary international law, and the Air Force Pamphlet enjoins attacks against civilians in terms virtually identical to Article 51"); GlobalSecurity.org, *The Law of Land Warfare*, Dep't of the Army Field Manual, No. 27-10, Chap.2 §1 40(a) (July 18, 1956), http://www.globalsecurity.org/military/library/policy/army/fm/27-10/Ch2.htm.

[10] International Committee of the Red Cross, *State Party to the Geneva Conventions and Their Additional Protocols* (Dec. 04, 2005), *available at*, http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc; *See also,* United Nations, *List of Member States*, *available at*, http://www.un.org/Overview/unmember.html.

[11] *See* Prosecution Response to Motion to Dismiss, *United States v. Hamdan*, (Oct. 15, 2004), *available at*, http://defenselink.mil/news/Oct2004/d20041026article.pdf.

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protecting civilian populations during an armed conflict.[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391. The U.S. government has stated that provisions of the Protocol protecting civilians are part of CIL.[13] The Protocol, Article 51(2) specifically states that "the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." The U.S. government has also confirmed that Article 51(2) of the Protocol constitutes customary international law.[14] Finally, The Protocol, Article 85 affirms that "making the civilian population or individual civilians the object of attack" or "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" and when "committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health" constitute a grave breach of the Protocol.

(b) The disproportionate use of force against Plaintiffs and their homes cannot be justified by military necessity, and is justiciable in U.S courts.

Defendant incorrectly argues that no standards exist to determine what constitutes military necessity justifying the destruction of civilian property. MTD at p. 14. To the contrary,

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[12] "One hundred thirty five states have ratified the Protocol (making it, already, one of the most widely ratified international treaties), including two permanent members of the Security Council (China and Russia)." Theodor Meron, *Comment: The Time has Come for the United States to Ratify Geneva Protocol I*, 88 Am. J. Int'l L. 678, 680-81 (1994).

[13] In April 1992, the U.S. Department of Defense reported to Congress on a number of legal issues related to the U.S.-led military operations in Kuwait. In this report, the DOD clarified the U.S. position on the customary status of Articles 48 and 49 of Protocol I, which establish the basic rule prohibiting attacks against civilians, stating they were "generally regarded as a customary codification of the practice of nations, and therefore binding on all." Melissa J. Epstein, Richard Butler, *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, 87 (2004).

[14] According to the recent military law review article discussed *supra* n. 13, an internal DOD memorandum dated 9 May 1986, signed by several high-ranking DOD officials including W. Hays Parks and then-Lieutenant Commander Michael F. Lohr, "affirm[ed] the view of the United States that Articles 51(2) and 52(1), (2) (except for the reference to reprisals), and (4), of Protocol I; constitute customary international law." *Id.* at 68, 85.

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courts and international tribunals have long adjudicated whether military necessity justifies violations of fundamental rights.[15] Furthermore, military necessity does not render obsolete the rules of international humanitarian law. Actions taken under the rubric of military necessity must in all circumstances be conducted in accordance with principles of proportionality, including the prohibitions against intentional killing of civilians and wanton destruction of civilian property.[16] According to leading international humanitarian law texts, there are three recognized constraints upon the free exercise of military necessity:

> First, any attack must be intended and tend toward the military defeat of the enemy; attacks not so intended cannot be justified by military necessity because they would have no military purpose. Second, even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated. Third, military necessity cannot justify violation of the other rules of IHL.[17]

Attacks in the name of military necessity must also be conducted in accordance with the precautionary measures enunciated in Article 57 of The Protocol, which states that "an attack shall be *cancelled* or *suspended* if it becomes apparent that...the attack may be expected to cause *incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof*, which would be excessive in relation to the concrete and direct military advantage anticipated." (emphasis added). The Protocol, Article 57 also mandates that "*effective advance* warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[18] Advance warning was undeniably feasible under the circumstances in which

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[15] The Supreme Court has rejected military necessity or war powers as justification for violations of fundamental rights. *See Rasul v. Bush*, 124 S.C. 2686, 2698-2699 (2004); *Greer v. Spock*, 424 U.S. 828, 852 (1976); *U.S. v. Robel*, 389 U.S. 258, 264 (1967); *Middendorf v. Henry*, 425 U.S. 25, 67 (1976) (Marshall's dissent). *See also, Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1189 (C.D. Cal. 2002).

[16] *See, e.g.*, Fourth Geneva Convention, Article 147 (stating that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Convention); Additional Protocol I, Article 35 ("In any conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. It is prohibited to employ . . . methods of warfare of a nature to cause superfluous or unnecessary suffering.").

[17] Francoise Hampson, *Military Necessity, Crimes of War: What the Public Should Know*, 251 (Roy Gutman & David Rieff eds., W.W. Norton & Co., 1999), *available at* http://www.crimesofwar.org/thebook/military-necessity.html.

[18] A report from the International Committee for the Red Cross ("ICRC") affirms this treaty language affirms this treaty language and identifies that these fundamental principles of due process have reached the level of

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Plaintiffs were killed or injured, as sufficient warnings had been given on prior occasions when house demolitions were committed in comparable situations. Clearly, no direct military advantage could have been gained from demolishing a home without even attempting to evacuate its unarmed sleeping or disabled inhabitants. FAC at ¶¶ 5, 59, 61, 78-79.

Moreover, establishing a "military necessity" justification for its destruction of civilian property would require Defendant to prove that its actions served an urgent military purpose compliant with the laws of war and international humanitarian law.[19] In this case, Defendant knew its products and services were being used by Israel to destroy the homes and property of Palestinian civilians, resulting in severe injury or death of Plaintiffs. *See* FAC at ¶¶ 44-53. Defendant continuously chose to supply its products and services to Israel despite this knowledge; a choice clearly made in the absence of military necessity.

(c) Defendant may be held directly liable for war crimes.

Lack of state action has never defeated ATCA jurisdiction when the underlying international tort did not require state action.[20] U.S. courts and international jurisprudence are

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customary international law, stating that the civilian population must be give "effective advance warning of attacks...unless circumstances do not permit." Jean-Marie Henckaerts, *Rule 20, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, International Rev. of the Red Cross, Vol. 87 No. 857 (Mar. 2005), *available at*, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf.

[19] UN Reports have already indicated that demolitions of Palestinian civilian homes in the OPT were not justified by military necessity. *Statement by Peter Hansen, Commissioner-General of UNRWA to the Special Political and Decolonization Committee* (Nov. 1, 2004); Security Council Resolution adopted by the U.N. SCOR, 4972nd mtg. at 1544, S/RES/1544 (2004).

[20] *Kadic*, 70 F.3d at 236 (Radovan Karadzic may be found liable for war crimes in his private capacity); *Bolchos v. Darrel*, 3 Fed. Cas. 810 (D.S.C. 1795) (ATCA provides jurisdiction over a suit between private parties to settle the ownership of slaves captured on the high seas); *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (ATCA afforded jurisdiction over a child custody dispute between two private citizens); *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *U.S. v. Arjona*, 120 U.S. 479 (1887) (individual who counterfeited foreign currency liable for violation of law of nations); Liability extends to corporations as well as individuals. "Private corporation entities also may be sued under the Alien Tort Statute." K. Randall, *Further Inquiries Into the Alien Tort Statute & a Recommendation*, 18 Int'l L. & Pol. 473, 501 (1986) (citing *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975) (liability of adoption agencies as joint tortfeasors for abduction of children); Mexican Boundary -- Diversion of the Rio Grande, 26 Op. Att'y Gen. 250 (1907) (U.S. corporation liable under ATCA for tortious interference with the channel marking the boundary between Mexico and the United States). Both corporations and unincorporated associations can be held liable for torts committed by their members in order to pay both compensatory and punitive damages, under both U.S. and international law. *See, e.g., Berhanu v. Metzger*, 119 Ore. App. 175, 850 P.2d 373 (1993), *cert.*

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clear that war crimes are one of the violations that do not require state action; private parties may also be held directly liable for war crimes. *See Sarei v. Rio Tinto Plc,* 221 F. Supp. 2d 1116, 1144, n. 122 (C.D. Cal. 2002) (citing *Kadic v. Karadzic*, 70 F. 3d at 243 and *Bigio v. Coca-Cola,* 239 F.3d at 448 (C.D. Cal 2002)). In *Kadic,* the court concluded that war crimes "are actionable under the [ATCA] without regard to state action . . .." *Kadic*, 70 F. 3d at 244; *See also,* Restatement (Third) 404 (war crimes included on list of international crimes that do not require state action); Harv. L. Rev. Assoc., *Corporate Liability for Violations of International Human Rights Law*, 114 Harv. L. Rev. 2025, 2037 (2001).

The principle that individuals and corporations may be held directly liable for their war crimes formally originated in the founding documents for the Nuremberg trials. The scope of the Nuremberg Tribunal encompassed the many banks, economic organizations, chemical manufacturers, and machinery manufacturers that were eventually held liable for their indirect support, approval or direct complicity.[21]

The United States and its allies convicted 43 private German citizens for committing war crimes, specifically holding that their actions were independent of those of their governments and thus did not involve state action. The Nuremberg military tribunals explicitly rejected defendants' argument that as private individuals they could not be indicted for war crimes or crimes against humanity.[22]

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denied, 114 S. Ct. 2100 (1994); *Donald v. United Klans of America*, No. 84-725 (S.D. Ala.1987). "For negligent or tortious conduct liability is the rule. . . . Corporations, trustees, executors, administrators, receivers, as well as individual human beings and partnerships or their members, are responsible for negligence. Respondeat superior makes each liable for the tortious conduct of representatives acting in the course of the enterprise. . . ." *President & Dirs. of Georgetown College v. Hughes*, 130 F.2d 810, 812 (D.C. Cir. 1942).

[21] *See Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,* Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Article II, para.2.

[22] "International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. . . . The

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C. Plaintiffs May Also Bring Claims Under the Geneva Convention Protecting Civilians in Armed Conflict.

In addition to claims for violations of the customary international law prohibitions against war crimes, Plaintiffs have claims directly under the Fourth Geneva Convention as a treaty of the United States.

1. The Geneva Conventions Are Directly Enforceable in U.S. Courts.

As a matter of international obligation, treaties ratified by the United States are binding on all levels of government (federal, state and local) and all branches of government (executive, legislative and judicial). The Supremacy Clause of Article VI of the United States Constitution incorporates these international treaty obligations into United States law by making treaties the supreme law of the land: "*[A]ll Treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land[.]" U.S. CONST. art. VI., cl. 2 (emphasis added); *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884), ("Head Money Cases") (a ratified treaty "is a law of the land as an act of Congress is"). Furthermore, whenever a treaty's provisions "prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.*

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application of international law to individuals is no novelty." *Flick and others*, VI Trials of War Criminals Before the Nuremberg Military Tribunals 1192 (1952) (as cited in Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int'l L. 91, 121 n.119 (2002)). *See also, U.S. v. Krupp and Others*, 10 War Crimes Reports 69, 150 *cited in* Ole Spiermann, *The Other Side Of The Story: An Unpopular Essay On The Making Of The European Community Legal Order*, 10 European Journal of International Law 763, 767 (1999), available at, http://www.ejil.org/journal/Vol10/No4/100763.pdf ("The laws and customs of war are binding no less upon private individuals than upon government and military personnel"); *In re Krauch and Others*, 15 Ann. Dig. 668 (U.S. Mil. Trib. 1948) (cited in Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 St. Louis-Warsaw Trans'l 167, 176 n.49 (1997)) ("It can no longer be questioned that the criminal sanctions of international law are applicable to private individuals.").

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In *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002), the court declared that the GPW under the Supremacy Clause has the force of domestic law. *See also, United States v. Lindh*, 212 F. Supp. 2d 541, 553-554 (E.D. Va. 2002) ("[T]he GPW provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause.") (footnotes omitted); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POW in a court of law").[23] In addition, the text and history of the Convention clearly establish the drafters' intent to confer individual rights enforceable in domestic courts. The language of the Conventions explicitly refers to the protections afforded as "rights." The Conventions provide that the "protected person may in no circumstances renounce in part or in entirety *the rights secured to them by the Present Convention.*" Fourth Geneva Convention, Article 8. Article 7 of that Convention states that nations cannot "*restrict the rights* which [the Conventions] confer upon [protected persons]." (Emphasis added). The 1949 Conventions adopted the unanimous recommendation of the Red Cross Societies "to confer upon the rights recognized by the Conventions 'a personal and intangible character' allowing the beneficiaries to claim them irrespective of the attitude adopted by their home country." International Committees of the Red Cross, *Commentaries, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Chapter I: General*

[23] While some courts have held to the contrary, these decisions either did not fully analyze the Conventions or are not precedent. *See Hamdan v. Rumsfeld*, 2005 U.S. App Lexis 14315 (D.C. Cir. 2005); *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2633 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (opinion of Bork, J.); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (holding that Geneva Conventions are not self-executing).

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provisions, p. 58, *available at*,

http://www.icrc.org/ihl.nsf/0/cc58ae8cb5768d16c12563cd00420135.

The Conventions sought to ensure that protected persons could use whatever means available, including domestic judicial remedies, to protect their rights. Thus, the drafters explicitly contemplated proceedings in domestic courts:

> [i]t should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered the violation.
> *Id.*, at 84.

"From the practical standpoint . . . to assert that a person has a right is to say that he possesses ways and means of having that right respected." *Id.* at 83. Protected persons can claim the protections of the Convention "not as a favor but as a right," and "in case of violations, [Article 8 of the Convention] allows them, to employ any procedure available . . .." *Id.* at 84. Further, the Commentary contemplates that protected persons may bring legal actions "in those countries at least in which individual rights may be maintained before the courts." International Committees of the Red Cross, *Commentaries, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. Chapter I: General Provisions, 12 August 1949. Chapter I: General Provisions*, p. 59, *available at*, http://www.icrc.org/ihl.nsf/0/0b21c9764207c31cc12563cd004230c6.

In general, treaty provisions such as Common Article 3, that can readily be given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self executing. Restatement on Foreign Relations (Third), & 111, reporter's note 5, at 53; *Rainbow Navigation Inc. v. Dep't of Navy*, 686 F. Supp. 354, 357 (D.D.C. 1988); *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 557 (5th Cir. 1946); Yuji Inasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 27 *Va. J. Int'l L.* 627, 656 (1986); *Cook v. United States*, 288 U.S. 102, 119 (1933) (finding a treaty self-executing in that no legislation was

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necessary); *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886) (holding that a treaty providing "that certain acts shall not be done" is self-executing).

The drafters of the Geneva Conventions were well aware that diplomatic measures contained in the 1929 Conventions had failed badly during wartime. *See, e.g.,* A. Hammarskjold, *Revision of Article 30 of the Geneva Convention*, International Comte. of the Red Cross, *Report on Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929* at 83, 91 (1938). The very failure of these measures highlighted the need for rules directly enforceable by individuals.

The Convention's clear language and intent to create individual, enforceable rights is not negated by the provision—not involved in this case—mandating each country to enact legislation criminalizing certain grave breaches. Treaties that contain provisions enforceable by the states parties may also include provisions that confer rights upon individuals "which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U.S. 580, 598 (1884) (analyzing provisions of a treaty separately to determine whether they are self-executing); *see also, Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001); Restatement (Third) of Foreign Relations, § 111, cmt. H ("Some provisions of an international agreement may be self-executing and others non-self-executing.")

In sum, the weight of authority permits Plaintiffs to pursue in federal courts their rights under the Geneva Conventions. That outcome best serves the federal interest in stopping and redressing war crimes, and is the most practical way to ensure that the Conventions' terms are respected by private companies with the motive and opportunity to commit such violations.

2. The Geneva Conventions are Enforceable Through the Alien Tort Statute.

Even if this Court were to determine that the Geneva Conventions do not provide a direct cause of action, the Alien Tort Statute provides that an alien may bring a claim in tort for a violation of "a law or treaty of the United States." 28 U.S.C. § 1350. Thus, the black letter

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language of the ATS provides that a plaintiff may bring a claim for a self-executing treaty such as GCIV through the ATS. Moreover, as the *Sosa* court instructs, courts must look to the Congress that enacted the ATS in order to determine their intention for the use of treaties as substantive law under the ATS. *Sosa,* 124 S. Ct. at 2765–66. The analysis of the *Sosa* court, as well as contemporaneous cases, such as *Bolchos v. Darrel*, 1795 U.S. Dist. LEXIS 4, 3 F. Cas. 810 (1795), suggests that, Congress expected the federal courts to use their discretionary common law powers (with care) to recognize a private cause of action for some violations of some treaties.

Historically, the ATS has provided U.S. courts jurisdiction to hear private causes of action that arise in tort in violation of the law of nations or violation of a treaty to which the U.S. was a party. The District Court of South Carolina in *Bolchos v. Darrel* found on the basis of §1350 that it had jurisdiction "where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States." *Id.*[24] In *Bolchos,* the court heard a suit by a French citizen requesting the return of his property (a "cargo" of slaves) allegedly seized at sea in violation of article 14 of a U.S.-French treaty. The court held that the U.S.-French treaty "alter[ed]" the "law of nations" leading to a different outcome given the circumstances. *See also, Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816) (treaty routinely applied as domestic law). After a much criticized ruling in the Supreme Court in *Foster & Elam v. Neilson,* 27 U.S. (2 Pet.) 253 (1829), courts held that treaties must be "self-executing" in order to be enforceable in U.S. courts. However, as described above, GCIV is clearly one of those treaties and thus, even if this Court

[24] *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 866-67 n. 65 (1987) (*Foster's* language has probably been misconstrued); Harold H. Koh, *Transnational Public Law Litigation,* 100 Yale L.J. 2347, 2360-61 (1991) (notes that Foster was reversed on its facts four years later and was largely ignored until the 19th century).

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were to determine that Plaintiffs have no direct rights under GCIV, their substantive treaty claims could be brought under the ATS.

D. The Text, History, and Case Law of the Alien Tort Statute Support An Aiding and Abetting Theory of Liability.

Federal courts and international tribunals have repeatedly confronted the question of whether the ATS encompasses the liability of private actors, including private corporations, for violations of international law. Both federal and international courts, including those of this jurisdiction, have consistently answered the question in the affirmative.

The liability of private actors as aiders and abettors for violations of international law has been understood since the ATS was enacted. In 1795, Attorney General Bradford issued an opinion, which specifically stated that individuals would be liable under the ATS for committing, aiding, or abetting violations of the laws of war.[25] *Breach of Neutrality*, 1 Op. Atty Gen. 57, 59 (1795) (incident involving private actors, acting in concert with, but not controlling the French naval vessels). Six years after the passage of the ATS, the Supreme Court in *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 156 (1795), found that Talbot, a French citizen, who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention of the law of nations and was liable for the value of the captured assets. Justice Patterson wrote that Talbot's liability sprang from his actions in aiding Ballard to arm and outfit, in cooperating with him on the high seas, and using him as the instrument and means of capturing vessels. *Id.* at 157.

U.S. courts have repeatedly, and recently, affirmed that the ATS encompasses aiding and abetting liability in a variety of different circumstance,[26] including those involving corporate defendants. In *Bowoto v. ChevronTexaco,* 312 F. Supp.2d 1229, 1247 (N.D. Cal. 2004), a case

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[25] The Bradford opinion was cited as authority in the recent opinion in *Sosa* for the proposition that the ATS was intended to provide jurisdiction over what must have amounted to common law causes of action. *Sosa*, 124 S. Ct. at 2759. In *Kadic*, the Court specifically relied of the Bradford Opinion in reaching the conclusion that the private actors could be held liable under the ATS. *Kadic*, 70 F.3d at 239.

[26] In *Hilao v. Estate of Marcos,* 103 F.3d 767, 776 (9th Cir. 1996), for example, the Ninth Circuit affirmed a jury instruction allowing a foreign leader to be held liable upon finding that he directed, ordered, conspired with, or aided the military in torture, summary execution, and disappearance.

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closely analogous to the instant case, the court held that plaintiffs could proceed on their claims against an oil company for aiding and abetting military killings in Nigeria. Likewise, *Burnett v. Al Baraka Investment*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003), held that allegations by victims of the September 11 attacks that various entities aided and abetted the perpetrators stated a claim. Similarly, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000), held that claims that defendant banks aided and abetted the Vichy and Nazi regimes in plundering plaintiffs assets were actionable under the ATS. There is simply no question that the ATS provides for aiding and abetting liability, even for private non-state actors, including corporations.[27]

The only two post-*Sosa* appellate decisions on this issue hold that aiding and abetting liability exists under the ATS. In *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), after consulting international and regional instruments, the Eleventh Circuit concluded that the ATS permitted recovery "based on [both] direct and indirect theories of liability." *Cabello*, 402 F.3d at 1158. The *Cabello* court engaged in a common-law type inquiry—it sought evidence of the international rule in the context of other relevant domestic norms, determined that it created aiding and abetting liability for torture claims, and adopted it in the ATS context. The Eleventh Circuit reaffirmed *Cabello* in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 2005 WL 1587302, at * 4 (11th Cir. 2005) ("claim for state-sponsored torture under the Alien Tort Act or the Torture Victim Protection Act may be based on indirect liability as well as direct liability").

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[27] In March 2005, Judge Jack Weinstein reached the same conclusion, adopting extensive portions of an amicus brief in support of its decision that "even under an aiding and abetting theory, civil liability may be established under international law." *In re Agent Orange Product Liability Litigation*, 373 F. Supp.2d 7, 52 (E.D.N.Y. 2005); *see also, Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. 2002); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 312 (S.D.N.Y. 2001); *Bodner v. Banque Paribas*, 114 F. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 340-341 (S.D.N.Y. 2005); *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-1356 (N.D. GA 2002); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999); *Sinaltrainal*, 256 F. Supp. 2d 1345, 1358 (S.D. Fla. 2003) (citing *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D. Ca. 1997); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845-48 (11th Cir. 1996); *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1332 (S.D. Fla. 2002); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091-92 (S.D. Fla.1997).

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In re: Apartheid is the only decision, before or after *Sosa*, in which aiding and abetting liability was denied. As Judge Schwartz noted in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp 2d 289 (S.D.N.Y. 2003), federal courts "have almost unanimously permitted actions premised on a theory of aiding and abetting" under the ATCA. *Presbyterian Church*, 244 F. Supp at 321.

The *In re: Apartheid* District Court declined to follow the *Talisman* decision, noting that *Talisman* had been decided before *Sosa*. However, in May 2005, the District Court, in response to a motion for reconsideration based on *Sosa*, again found that aiding and abetting liability exists under the ATS. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 U.S. Dist. LEXIS 11368, *24-26 (D.N.Y. 2005). A second judge, Judge Cote, agreed with Judge Schwartz' prior analysis that the weight of international authority demonstrates that aiding and abetting liability for human rights violations such as these is part of customary international law.

International jurisprudence dating back to the Second World War recognized aiding and abetting as a basis for liability for non-state actors. For example, in *U.S. v. Friedrich Flick*, a civilian industrialist was convicted because he knew of the criminal activities of the SS and nevertheless contributed money that was vital to its financial existence even though he did not condone SS atrocities. 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 1216-1223) (1949). Similarly, in *In re Tesch* (*Zyklon B Case*), 13 Intl L. Rep. 250 (Br. Mil. Ct. 1946), industrialists were convicted for sending poison gas to a concentration camp, knowing it would be used to kill.

Furthermore, the Convention Against Torture establishes liability for those who aid and abet violations of its provisions.[28] Congress also codified this principle in the TVPA in 1992.

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[28] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, 39 148 U.N.T.S. 85, 23 I.L.M. 1027. *See also*, Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 6, 266 U.N.T.S. 3, 43 (establishing liability for abetting an accessory to another's enslavement); Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *adopted* Dec. 19, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 493 (1989), art. 3 (establishing aiding and abetting liability); Convention on the Suppression of Terrorist Bombings, Jan. 9, 1998, G.A. Res. 52/164, 37 I.L.M. 249 (mandating that states criminalize the aiding and abetting of terrorist bombing); Convention on the Suppression of the Financing of Terrorism, Dec. 9, 1999, G.A. Res. 54/109, 39

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Pub. L. No. 102-256, 2, 106 Stat. 73 (1992). The Senate Report accompanying the TVPA noted that the legislation covers lawsuits against persons who ordered, abetted, or assisted in the torture. S. Rep. No 102-249 (1991). Similarly, Article 3 of the Genocide Convention provides that complicity in genocide is a punishable offense. *Id.* Numerous other international treaties establish aiding and abetting liability. [29]

International law clearly and specifically defines aiding and abetting liability. United States courts applying such liability under the ATS have correctly held that under international law the *actus reas* of aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime, and that the *mens rea* required is the knowledge that these acts assist the commission of the offence; the accomplice need not share the principal's wrongful intent.[30] Aiding and abetting is recognized generally under federal common law.[31] *See Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (Aiding-and abetting focuses on whether a defendant knowingly gave substantial assistance to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.). United States tort law, like international law, requires only that one

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I.L.M. 270 (requiring states to criminalize aiding and abetting the willful provision or collection of funds with the knowledge that they will be used to carry out terrorist acts).

[29] Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948 (entered into force on Jan. 12, 1951, G.A. Res. 260 A (III), art. 3). *See, also*, Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 6, 266 U.N.T.S. 3, 43 (establishing liability for abetting an accessory to another's enslavement); Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *adopted* Dec. 19, 1988, 28 I.L.M. 493 (1989), art. 3 (establishing aiding and abetting liability); Convention on the Suppression of Terrorist Bombings, *adopted* Jan. 9, 1998, G.A. Res. 52/164 (mandating that states criminalize the aiding and abetting of terrorist bombing); Convention on the Suppression of the Financing of Terrorism, *adopted* Dec. 9, 1999, G.A. Res. 54/109 (requiring states to criminalize aiding and abetting the willful provision or collection of funds with the knowledge that they will be used to carry out terrorist acts).

[30] *Mehinovic*, 198 F. Supp. 2d at 1356 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1/T, judgment, && 192-249 (ICTY Trial Chamber, Dec. 10, 1998), *reprinted at* 38 I.L.M. 317 (1999)); *accord Presbyterian Church of the Sudan*, 244 F. Supp. at 323-24. Critically, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, upon which the *Mehinovic* and *Talisman* courts relied, was based on an exhaustive analysis of the jurisprudence of the post-World War II tribunals. *See, e.g., Furundzija* IT-95-17/1, 195-97, 200-25, 236-49.

[31] Beth Stephens, *Corporate Liability: Enforcing Human Rights through Domestic Litigation*, 24 Hastings Intl & Comp. L. Rev. 401, 408-9 (2001); *see also,* Stephens and Ratner, *International Human Rights Litigation in U.S. Courts*, Transnational Publishers, Inc. 120--122 (1996).

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knowingly provide substantial assistance to a person committing a tort. Restatement (Second) of Torts 876 (b) (1977). Thus, whether the court looks to federal common law, tort principles, or international law, aiding and abetting is actionable.[32]

Defendant erroneously argues that *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994) precludes recognition of aiding-and-abetting liability in the ATS context. MTD at p. 25. The thrust of *Central Bank* involved determining Congressional intent to create aiding and abetting liability when it creates a cause of action. *Central Bank* rejected aiding and abetting liability in the specific context of Section 10(b) of the Securities Exchange Act reasoning that the statute's lack of express inclusion of aiding and abetting liability indicated Congressional intent not to cover it. 511 U.S. at 179.

To extend the *Central Bank* holding to the ATS fundamentally contravenes *Sosa*. *Sosa* made it clear that the ATS did not create new causes of action but instead was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 2760. That the ATS merely created jurisdiction over what the Framers conceived as preexisting common-law causes of action means that a court that encounters the ATS does not determine the standards of liability through statutory interpretation, but instead, does so by the centuries-old process of federal common lawmaking, albeit a process that is derived directly from international law. *See Sosa*, 124 S. Ct. at 2761. While it was entirely reasonable for the Court in *Central Bank* to expect that Congress would have included aiding and abetting liability in section 10b—a detailed liability statute within an even more detailed statutory scheme—it would have been unreasonable

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[32] Defendant also misstates the standard for aiding and abetting liability. The cases defendant raises in fact support Plaintiffs. In *United States v. Blankenship*, 970 F.2d 283, 285-87 (7th Cir. 1992), the court distinguished between a single instance, as opposed to a pattern, which is what plaintiffs allege here. In *United States v. Falcone*, 311 U.S. 205, 210-211 (1940), a bootlegging case, the court concluded, "Those having no knowledge of the conspiracy are not conspirators." This case is clearly inapplicable to the instant case, in which plaintiffs' have clearly alleged that defendant did have knowledge of the use of its products. FAC at ¶ 44–53. Alternatively, Defendant argues that any universally-accepted international norm of aiding and abetting is valid as customary law only if consistent with United States criminal law. *United States v. Yousef*, 327 F.3d 56, 92 n..25 (2d Cir. 2003). This contradicts U.S. legal standards, described more fully above.

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to expect that Congress would have included any particular liability standard at all in a statute which had the purpose solely of recognizing the federal courts' common-law powers. Courts have correctly rejected the argument that *Central Bank* precluded aiding and abetting liability in the context of ATS claims based on the text of the ATS and the existence of other ATS cases specifically upholding such liability. *See, e.g., Presbyterian Church,* 244 F. Supp. 2d at 320-21.[33]

Finally, prudential concerns also favor aiding-and-abetting liability here. While *Central Bank* expressed concern that imposing aiding-and-abetting liability in the securities context might lead to excessive deterrence and therefore inefficient markets, 511 U.S. at 188, *Boim* found such arguments inapplicable to Acutting off the flow of money to terrorists, 291 F.3d at 1019. Economic efficiency concerns are similarly inapplicable to aiding-and-abetting liability for war crimes.

IV. 28 U.S.C. § 1331 PROVIDES JURISDICTION FOR AMERICAN CITIZENS' CLAIMS IN VIOLATION OF THE LAW OF NATIONS.

In addition to their claims under the TVPA, the Corries also bring claims for extrajudicial killing, war crimes, and cruel, inhuman and degrading treatment (CIDT) in violation of the laws of nations under federal common law. FAC at ¶ 95, 83-87; 103-104. The Corries cite §1331 as the jurisdiction basis for their claims, just as the Palestinians bring such claims under §1350 as their jurisdictional basis. FAC at ¶¶ 23, 95.

Defendant argues that because the Corries are not aliens (and thus ATS is not available to them), "they have no basis to assert federal claims derived from international law." MTD at p.

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[33] Courts interpreting statutes more closely analogous to the ATS than the Securities Exchange Act and in factual contexts more pertinent to these actions, have found that *Central Bank* did not eliminate aiding and abetting liability. For example, the Seventh Circuit found that *Central Bank* had no application to whether "aiding and abetting" liability could be found under the Antiterrorism Act of 1990. *Boim v. Quaranic Literacy Inst.*, 291 F.3d 1000, 1019-20 (7th Cir. 2002). The United States took the view in *Boim* that international principles of aiding and abetting liability should be employed under the Antiterrorism Act as a matter of federal common law, even though the Act did not explicitly provide for such liability. Brief of Appellant, *Boim v. Quranic Literacy Institute*, Nos. 01-1969 and 01-1970 (7th Cir. Nov. 28, 2001), 2001 WL 34108082 at *3. The Seventh Circuit agreed, reasoning that any other view would undermine the policies underlying that Act. The same is true here. As in *Boim*, the remedial purposes of the ATS are advanced by the availability of aiding and abetting liability.

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19. In so arguing, Defendant inaccurately relies on a footnote in the *Sosa* case, where the Court raised the issue, but did not decide whether §1331 provided such jurisdiction.

This Court should recognize that because our federal common law incorporates international law, § 1331 provides jurisdiction for such claims because: 1) it is well-settled that § 1331 provides jurisdiction for claims arising under federal common law; 2) like 28 U.S.C. § 1350, 28 U.S.C. § 1331 was passed with Congressional understanding that our federal common law incorporated CIL, including a small number of torts in violation of the law of nations; 3) in *Sosa*, the Supreme Court recognized that our federal courts were *not* precluded from recognizing and applying common law related to international law by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); and 4) fairness and justice, as well as logic, dictate such a ruling, otherwise aliens would be left with more rights than U.S. citizens in adjudicating claims for torts in violation of the law of nations. The Court's dictum in *Sosa* does not preclude this finding.

A. *Sosa* Did Not Preclude 28 U.S.C. § 1331 as a Jurisdictional Basis Over Torts in Violation of the Law of Nations.

The Supreme Court raised the issue in a footnote in *Sosa* without deciding whether jurisdiction for claims of torts in violation of the law of nations arising under federal common law would exist under federal question jurisdiction, § 1331, like that provided by ATS. *Sosa*, 124 S.Ct. at 2764, n. 19. In raising the issue, the Court noted that § 1350 was "enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations;" and the Court questioned whether federal-question jurisdiction was extended subject to any comparable congressional assumption. *Id.* The Court also raised the question, without deciding, of whether finding comparative common law power under § 1331 would be consistent with the division of responsibilities between federal and state courts after *Erie*. 304 U.S. 64; *Sosa*, 124 S.Ct. at 2764, ft. 19. However, the Court did not analyze these questions, and by no means dismissed the possibility that § 1331 would

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provide for similar jurisdiction for torts in violation as the law of nations as § 1350. In fact, the Court's analysis in determining that ATS gives rise to some torts in violation of the law of nations, and its finding that *Erie* did not preclude the federal courts from developing some federal common law in the area of international law, provide strong support for the argument that § 1331 also gives rise to the same torts.

B. There is No Question that International Law is Part of Federal Common Law, and *Erie* Did Not Change This.

As recognized by the *Sosa* court, and consistent with numerous other federal and Supreme Court cases, the law of nations is considered to be part of federal common law, and thus part of the laws of the United States, and has been since the late 1700s. *See Sosa*, 124 S.Ct. at 2764-2765 (citing *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900)) ("International law is part of our law); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (The Court is bound by the law of nations which is a part of the law of the land); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("United States courts apply international law as part of our own"). *See also*, *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 297 n.* (C.C.D. Pa. 1793) ("law of nations is part of the law of the United States"); *United States v. The Ariadne*, 24 F. Cas. 851, 856 (C.C.D. Pa. 1812) (No. 14,465) ("the laws of the United States (the law of nations being included in them"); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820) ("the law of nations, (which is part of the common law)"); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (*Marcos Estate I)* (It is also well settled that the law of nations is part of federal common law) *cert. denied* 508 U.S. 972, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993); *Filartiga*, 630 F.2d at 886 (discussing precedent that stated the law of nations was part of the law of the United States). Restatement (Third) of Foreign Relations Law, § 111, cmt. e (1987) (describing customary international law as part of our law).

Moreover, the Court stated that it is clear that some (albeit few) torts in violation of the law of nations were understood to be within the federal common law in the late 1700's. *Sosa*, 124

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S.Ct. at 2759 (citing *Bolchos v. Darrel*, 3 F.Cas. 810 (No. 1,607) (D.S.C. 1795); *Moxon v. The Fanny*, 17 F.Cas. 942 (No. 9,895) (D. Pa. 1793); 1 Op. Atty. Gen. 57, 59 (1795) (federal court was open for a tort action growing out of the French plunder of a British slave colony in Sierra Leone: "[b]ut there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States."); *see also, Sosa*, 124 S.Ct. at 2764 ("We . . . agree . . . that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority.").

The Court further concluded that *no development* in the last two centuries has precluded federal courts from recognizing a claim under the law of nations as an element of common law. *Id.*, at 2764. The Court considered whether *Erie's* denial of "the existence of any federal general common law," *Sosa*, 124 S.Ct. at 2762, foreclosed tort claims based on federal common law's incorporation of the law of nations, and found that it did not. *Sosa*, 124 S.Ct. at 2764. The Court recognized that *Erie* allowed "limited enclaves" in which federal courts may derive some substantive law in a common law way, and one such enclave was the law of nations. *Id. See also, id.* at 2765, n. 18 (noting that *Sabbatino* "further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts.").[34] The Court further noted that Congress has not taken any action to limit this. *Sosa*, 124 S.Ct. at 2765. *See also,* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 Fordham L. Rev. 393 (1997) (discussing why *Erie*'s rejection of the general common law in federal courts did not include areas properly governed by federal law or those with a unique federal interest, including international law).

[34] The debate regarding whether international law is a part of our federal common law after *Erie* was brought to the surface by the *Filartiga* case. *Filartiga*, 630 F.2d at 876 (citing *Paquete Habana*, 175 U.S. 677). *Filartiga* also confirmed that international law is a part of our common law after *Erie*. *Id.* at 886.

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Thus, because customary international law is law that is uniquely federal and does not conflict with the division of law between state and federal courts after *Erie*, *Erie* does not pose any concerns or limitations on recognizing federal common law in the area of international law for purposes of federal jurisdiction, pursuant to § 1331, just as the Court found it did not for purposes of federal jurisdiction pursuant to § 1350.

C. Congressional Assumption at the Time § 1331 was Enacted was that Courts Could Recognize Causes of Action in Violation of International law, Similar to the ATS.

The Court in *Sosa* found that § 1350 provided federal district courts with jurisdiction over certain claims in violation of the law of nations primarily because there was a congressional assumption, or understanding, that courts at the time would recognize private causes of action in violation of the law of nations. *Sosa*, 124 S.Ct. at 2761 ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time"); *see also, Sosa*, 124 S.Ct. at 2765, n. 19. The Court, in footnote 19, raised the question, but did not consider, whether a similar or comparable congressional assumption extended to federal question jurisdiction, *i.e.*, § 1331. *Id.* Presumably, under the Court's analysis, if a similar assumption regarding the availability of private causes of action under federal common law existed when § 1331 was enacted, § 1331 would also provide jurisdiction over the same, limited number of torts in violation of the law of nations as does § 1350. A review of legislative and court history demonstrates there was such a similar assumption.

In 1875, Congress permanently granted federal question jurisdiction to the inferior federal courts, with the Judiciary Act of March 3, 1875. Donald L. Doernburg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purpose of Federal Question Jurisdiction*, 38 Hastings L.J. 597, 601 (1987). Over the years, there have been slight changes in the language, but by 1888, "Congress has settled on the final statutory contours of federal question jurisdiction, whether invoked originally or by removal."

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Doernburg, *supra*, at 606. Original jurisdiction language or concepts have not changed much since 1875. *Id.*

There is little legislative history for the 1875 Act or for what type of actions were incorporated under the term "arising under." Doernburg, *supra*, at 603. Similar to § 1350, because there is little history, intent must be inferred through context.

At the time § 1331 was enacted in 1875, it was still clear that the law of nations was a part of federal general common law. Nothing had changed. Not only had the various cases discussed above already been decided and were still good law, other cases throughout the 1800s continued to apply international law, *even in the absence of statutory authorization. See* Stephens, *supra*, at 416 (citing *Jecker v. Montgomery*, 59 U.S. (18 How.) 110, 112 (1855), holding that the law of nations is part of the domestic law of every nation). Many involved the "law of prize," an area to which the Constitution assigned federal jurisdiction and in which the federal courts regularly developed common law. Stephens, *supra*, at 416-417. Moreover, attorney general opinions from the time § 1331 was enacted make it clear this view still continued. *See* Stephens, *supra*, at 426, n. 113, (citing 11 Op. Att'y Gen. 297, 299 (1865), "That the laws of the nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and authority") and (citing 7 Op. Att'y Gen. 495, 503 (1855), "The laws of the United States [include] the Constitution, treaties, acts of Congress . . . and the law of nations, pubic and private, as administered by the Supreme Court, and Circuit and District Courts of the United States . . .").

Moreover, by 1875 there had been several cases where private parties brought claims of violation of international law under federal common law. There had been the earlier cases of *Bolchos* (1795) and *Moxon* (1793), cited by *Sosa* to establish that some torts in violation of the law of nations were understood to be within the common law, as discussed above. There were also other cases involving "prize", an area where the courts had been developing federal common law. *See* Stephens, at 416-417 (citations omitted).

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As the *Sosa* court stated, nothing has changed over the last two centuries that "has precluded federal courts from recognizing a claim under the law of nations as an element of common law." *Sosa*, 124 S.Ct. at 2764.

Therefore, the "congressional assumption" for both statutes was the same. Similar to § 1350, when federal question jurisdiction was enacted, there was a clear Congressional understanding that such jurisdiction would include claims of violation of the law of nations as part of our law. Additionally, there has been no legislative action to prevent § 1331 from applying to the law of nations on par with the ATS. Thus, federal question jurisdiction should include claims for violations of international law, including those that could lead to liability against private actors. Under *Sosa*'s reasoning, § 1331 should provide jurisdiction over the same violations of the law of nations as does § 1350.[35]

Such a finding is consistent with, and likely compelled by, Supreme Court cases finding that §1331 provides jurisdiction over claims founded on federal common law, even without statutory authority. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100, 31 L.Ed.2d 712, 92 S.Ct. 1385 (1972) (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (concurring), concluding that "laws" within the meaning of § 1331 embraced claims founded on federal common law).

Finding that §1331 provides jurisdiction for claims in violation of CIL is consistent with other courts' findings. Prior to *Sosa*, most courts avoided finding jurisdiction under §1331 because the plaintiffs were almost always aliens, and thus § 1350 was available to them.[36] Several courts found such jurisdiction exists under § 1331 or suggested that such likely exists.[37]

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[35] Ruling that § 1331 provides jurisdiction over such international law claims does not mean that the door will be opened broadly. Rather, such claims would be the same claims the Court discussed in *Sosa*: those with no less "definite content and acceptance among civilized nations" than the historical paradigms familiar with §1350 was enacted. *Sosa*, 124 S. Ct. at 2765.

[36] *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.22 (2d 1980); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273 (D.N.J. 1999); *Xuncax v. Gramajo*, 886 F. Supp. 162, 195 (D. Mass. 1995); *In re Apartheid*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).

[37] *See Filartiga*, 630 F.2d 876; *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127 (E.D.N.Y. 2000); *Abebe-Jiri v. Negewo*, No. 90-2010 (N.D. Ga. Aug. 20, 1993), *aff'd* 72 F.3d 84 (11th Cir. 1996); *Martinez-Baca v. Suarez-*

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Two courts expressed their reservations that § 1331 would provide jurisdiction, but both rested their reservations on the assumption that international law through federal common law did not provide an independent cause of action.[38] *Sosa* changed this, finding that international law *does* provide such causes of action.

D. Passage of the TVPA in 1991 Does Not Suggest that 28 U.S.C. § 1331 Does Not Provide Jurisdiction for Violations of the Law of Nations.

Finally, Defendant's argument that Congress would not have enacted the TVPA in 1991 if it thought that § 1331 provided jurisdiction over violations of international law is circular reasoning, is not supported by case law, and contravenes legislative history. In 1991, the Supreme Court had not yet clarified whether actions in violation of the law of nations could be brought under federal common law pursuant to §1350, let alone whether § 1331 provides such jurisdiction. As described in depth in the earlier section regarding TVPA exclusivity, Congress passed the TVPA in large part in response to Judge Bork's concurring opinion in *Tel-Oren*. Given that it was not at all clear at the time that a claim in violation of the law of nations could be brought under the ATS as part of our federal common law, it is understandable that Congress would feel the need to ensure that such a cause of action existed (and that U.S. citizens at least had the same rights bring claims of torture and extrajudicial killing that occurred abroad.)

Mason, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1538, 1543-44 (N.D.Cal. 1987).

[38] In *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir 1984) (Judges Edwards, Bork, and Robb writing separately), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985), the court expressed the view that § 1331 did not supply jurisdiction for claimed violations of international law unless the plaintiffs could point to a remedy granted by the law of nations or argue successfully that such a remedy was implied. *Id.* at 779 n. 4 (Edwards, J. concurring). In *Xuncax v. Gramajo*, 886 F. Supp. 162, 195 (D.Mass. 1995), the court expressed its reservations regarding whether § 1331 would provide jurisdiction over claims for violation of the law of nations. The *Xuncax* court stated quite clearly that cases arising under federal common law have been found to support statutory federal question jurisdiction, citing the Supreme Court cases of *Illinois* and *Romero*, *supra*. *Id.* at 194. But because the court found that international law itself was not the source of the private causes of action, but that ATS was, it was not part of federal common law, and thus there would be no jurisdiction under § 1331. This reasoning is now moot in light of *Sosa*, and the *Xuncax* court would likely find jurisdiction now under § 1331 in light of *Sosa*.

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E. To find that § 1331 Does Not Grant Such Jurisdiction Would be Unjust and Would Result in U.S. Citizens Having Less Rights Than Aliens to Bring Such Claims.

The Supreme Court in *Sosa* clearly held that § 1350 provides jurisdiction for aliens who bring claims in federal court based on a violation of the law of nations. If this Court concludes that U.S. citizens do not have a similar jurisdictional basis to bring such claims, it would create a situation in which aliens would have more rights and remedies for international wrongs than U.S. citizens—an outcome that would be unjust and clearly not intended by Congress. Thus, the Corries, through 28 U.S.C. § 1331, should be able to bring the same claims as do the Palestinian Plaintiffs for violations of the Geneva Conventions, cruel, inhuman and degrading treatment, as well as for claims of extrajudicial killing in violation of the law of nations.

V. PLAINTIFFS STATE A CLAIM UNDER THE TORTURE VICTIM PROTECTION ACT.

A. Plaintiffs Have Met the TVPA Exhaustion Requirement.

1. It is Appropriate for Plaintiffs to Bring Their Claim Against Defendant in the U.S., Because the Conduct Giving Rise to the Aiding and Abetting Occurred In the U.S.

The TVPA, Section 2(b), requires that plaintiffs exhaust remedies "in the place in which the conduct giving rise to the claim occurred." In this case, the claim against Defendant is for aiding and abetting extrajudicial killing by providing knowing substantial assistance to the IDF, which has committed extrajudicial killing in violation of international law. FAC at ¶¶ 97, 95. Plaintiffs allege that the conduct of Defendant that led to its substantial assistance to the IDF occurred here in the United States. FAC at ¶ 98. Thus, elements of the claim against Defendant occurred in the United States, and thus the United States is the proper place to bring a claim against Defendant for its aiding and abetting.

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2. Even if Required to Exhaust Abroad, Defendant Has Not Met Its Burden of Establishing that Plaintiffs Have Adequate and Available Remedy in the OPT or in Israel.

If the Court finds that Plaintiffs are required to exhaust their remedies in the OPT (or Israel) because that is where the injury occurred, Defendant has simply not met its burden in demonstrating that adequate and available remedies exist.

When a plaintiff files a case for extrajudicial killing under the TVPA, there is a presumption that the plaintiff would have filed a claim where the conduct giving rise to the claim occurred, if an adequate and available remedy was available. *Hilao v. Marcos*, 103 F.3d 767, 778, n. 5 (9th Cir. 1996) (citing Sen. Rep. No. 249 at 9-10). Thus, Defendant has the burden of raising the non-exhaustion of remedies as an affirmative defense, and must show that domestic remedies exist that the Plaintiffs did not use. *Id.* In other words, Defendant has the initial burden of demonstrating that the foreign court would be amenable to Plaintiffs' claims. *See, e.g., Wiwa v. Royal Dutch Petroleum Co,* 2002 WL 319887, at *17 (S.D.N.Y. 2002); *Sinaltrainal v. Coca-Cola Co.,* 256 F. Supp. 2d 1345, 1358 (S.D.Fla. 2003).

Defendant must also show that the foreign court is amenable to a suit similar to one that could be brought alleging violations of international law, such as one brought under the TVPA or ATS; in other words, the courts must be amenable to claim for extrajudicial killing in violation of international law, not simply a wrongful death action. *See, e.g., Wiwa,* 2002 WL 319887, at *17 (Defendant did not demonstrate that a Nigerian court would be amenable to a suit for violations of international law, brought against a non-citizen and non-resident); *Estate of Rodriquez v. Drummond Company, Inc.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003) (in analyzing exhaustion requirements of the TVPA, held that defendants failed to show that plaintiffs could have brought a *similar action* in Columbia). *See also, Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D.Mass. 1995) (discussing how domestic tort law "mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort . . ..it concerns the proper characterization of the *kind* of wrongs meant to be

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addressed...In this light municipal tort law is an inadequate placeholder for such values.") (italics original). Thus, the fact that a plaintiff might be able to bring a case for assault or wrongful death is *not enough* to meet the exhaustion requirements of the TVPA.

Only after the defendant makes a showing that adequate and available remedies exist where the conduct giving rise to the claim occurred does the burden shift to the plaintiff(s) to rebut by showing that the foreign local remedies are ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. *Marcos III*, 103 F.3d at 778, n. 5 (citing Sen. Rep. No. 249 at 9-10). The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however remains with the defendant. *Id.* Further it is important to note that, as the court in *Xuncax* concluded when reviewing the legislative history, the TVPA was "not intended to create a prohibitively stringent condition precedent to recovery under the statute." *Xuncax*, 103 F.3d at 778.

In this case, this Court should presume that Plaintiffs would have brought a case against Defendant in the OPT (or Israel) if such a remedy existed. The fact that Rachel Corrie's parents have brought claims against the *IDF* in Israel for *local torts* demonstrates this. It is because, as is clearly set forth herein, adequate and available remedies for the claims contained in the FAC were simply not available.

Here, Defendant has wholly failed to meet its burden of establishing that a remedy or claim for extrajudicial killing in violation of international law—like that provided by the TVPA or customary international law through ATS—is available to any of the Plaintiffs. First, Defendant has failed to explain why the OPT (Gaza or the West Bank) is not the proper place for the Court to look to for the exhaustion analysis; and second, it has wholly failed to establish that a claim for aiding and abetting extrajudicial killing in violation of international law can be brought against Defendant in either the OPT or Israel.

(a) Defendant has not sufficiently explained why the Court should not look to the Palestinian Authority courts in Gaza and the West Bank in

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reviewing whether there is an adequate and available remedy against Defendant.

If Plaintiffs could bring a suit, such should be brought in the OPT, as that is the location where the illegal demolitions and injury occurred. The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of September 28, 1995 recognizes the legitimate existence of an independent legal system within the Palestinian Authority ("PA"). Declaration of Michael Karayanni, (hereinafter "Karayanni Decl."), ¶ D(6); *see also*, State Dep't Bureau of Democracy, Human Rights, and Labor, Israel and the Occupied Territories County Report on Human Rights 2004, *The Occupied Territories Appendix* (Feb. 28, 2005), *available at*, http://www.state.gov/g/drl/rls/hrrpt/2004/41723.htm#occterr. Although Israel has "control" over parts of the OPT for different purposes (*see* Karayanni Decl., ¶ D(1)), Annex IV of the 1995 Interim Agreement limits the jurisdiction of the PA courts only to situations where Israel and/or Israeli citizens are a party to the suit. *Id.* at ¶ D(6). Such agreements do not provide that Israel would have jurisdiction over civil tort claims against a non-Israeli corporation like Defendant. In fact, the Interim Agreement does not limit the jurisdiction of the PA courts to deal with actions such as this one. *Id.*

Although Defendant alleges, through its expert opinion, that the Plaintiffs *could* sue Defendant in Israel, it does not adequately address which courts would properly have jurisdiction, nor does it explain this conclusory statement. More Decl. ¶ 16. In any event, Michael Karayanni, an expert in the area of jurisdictional matters (unlike Mr. More who seems to have little such expertise from his vitae), makes it clear that the PA courts would have jurisdiction over these claims. Karayanni Decl. ¶ D(6). In fact, it is likely that Israeli jurisprudence would lead to an Israeli court declining to exercise its jurisdiction over a case such as this—where neither party is Israeli, nor none of the injuries occurred in Israel. *Id.* at ¶ B(11).

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(b) Defendant has not established that an available and adequate remedy exists in the Gaza and/or the West Bank.

The proper question for this Court is whether Plaintiffs have an adequate and available remedy in the OPT. Thus, Defendant's burden is to show that domestic remedies exist inside the OPT (Gaza and the West Bank) and Plaintiffs have not used those remedies. Because Defendant is completely silent on these issues, the Court should find that Defendant has utterly failed to meet its burden, and that Plaintiffs can proceed with claims under the TVPA.

(c) Defendant has not established that an available and adequate remedy exists in Israel.

Even in the unlikely event that this Court finds that Israel is the place where Plaintiffs are required to exhaust their adequate and available remedies, Defendant has wholly failed to establish that Israeli courts would be amenable to a claim alleging violations of international law like that available under the TVPA or ATS.

Defendant's own expert opines that Israeli courts have never "confronted a claim" similar to this case; nor have they addressed the theory underlying the claim—that a corporation could be held liable as a result of a third party's use of its product. More Decl. ¶ 15. In other words, Israeli courts have not recognized a claim against a corporation for aiding and abetting, let alone aiding and abetting a violation of international law.

Moreover, Defendant's expert only discusses a potential claim for war crimes—not extrajudicial killing in violation of international law. Even with regard to the war crime claim, Defendant acknowledges that "it is not clear whether Israeli court would allow such a cause of action." More Decl. ¶10.

On whether claims for violations of international law, such as for extrajudicial killing like that allowed under the TVPA or the ATS can be brought in Israel, Defendant's expert is completely silent.[39] In fact, as discussed below, Dr. Yuval Shany, an expert in international

[39] Defendant's expert simply states that claims can be brought as regular torts in Israel. More Decl. ¶ 10. However, this is not the standard. The standard is not whether a state tort claim can be brought, but whether claims for torts in violation of international law can be brought. *See Wiwa*, 2002 WL 319887 at *17; *Rodriquez*, 256 F. Supp. 2d at 1267; *Xuncax*, 886 F. Supp. at 183.

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law's incorporation into Israeli tort law, makes it clear that "not only is there no known precedent for bringing a tort claim in Israel directly on the basis of international norms," it is highly unlikely that a tort claim alleging violation of international law, such as extrajudicial killing, could be brought in Israel. Declaration of Dr. Yuval Shany, ¶¶ 16, 17-20 ("Shany Decl."). There is no domestic law or enabling legislation that provides that a person can bring a claim for extrajudicial killing (or torture) in violation of international law similar to TVPA; in fact, the Israel Parliament (the "Knesset') has failed to incorporate into domestic law and/or thus provide causes of actions for almost all human rights and humanitarian law treaties to which Israel is a party. *Id.* at ¶¶ 6, 17. Moreover, it also does not incorporate customary international law into domestic tort law in any way including by any sort of jurisdictional statute similar to ATS. *Id.* at ¶ 19 ([U]nlike [ATS], Israeli law does not permit reliance on common law or international law standards, which were not codified in legislation, as the legal basis for a tort claim"). Indeed, "it would be difficult, if not outright impossible to read customary law into pre-existing domestic tort law." *Id.* Simply put, it is very unlikely that Israeli courts would accept international law as the basis of any of the specific complaints of Plaintiffs in this case. *Id.* at ¶ 58. Nor is there any statute that allows a person to sue in tort (or otherwise) against any defendant for violation of customary international law. *Id.* at ¶ 49.

To make matters even more grim, Israel has long maintained that the Fourth Geneva Convention, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, is inapplicable to the OPT, and has persistently argued before numerous international bodies that various human rights treaties to which it is a party, including the International Covenant on Civil and Political Rights (ICCPR), do not apply to the OPT. *Id.* at ¶¶ 11, 12. In addition to the fact that there is no vehicle to bring a tort for violation of customary international law, and thus is not really an option, these positions demonstrate the political and legal reality that any Israeli court will even find such norms apply to those in the OPT.

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Thus, if a tort claim were to be brought in Israel, it could only be brought on the basis of domestic tort law, such as for Defendant's complicity in assault, trespass, or negligence. *Id.* at ¶ 21 (Even claims under domestic tort law would likely be completely futile, as discussed later in the Shany Decl. and below.). Under the exhaustion analysis, this is simply not acceptable—a Plaintiff must be able to bring tort claims in violation of international law—such as that provided by the TVPA or ATS in order to meet the TVPA's exhaustion requirement. *See Wiwa*, 2002 WL 319887 at *17 (S.D.N.Y. 2002); *Rodriquez*, 256 F. Supp. 2d at 1267, *Xuncax,* 886 F. Supp. at 183.

Defendant's expert opines that there are claims pending in Israeli courts dealing with the "same issue" presented in Plaintiffs' FAC, namely, home demolitions. More Decl. ¶ 18. He further states that a court decision on "this subject" is pending. *Id.* However, Mr. More does not explain what types of cases are pending, whether the demolitions at issue in those claims were or are similar to the demolitions at issue in this case, or whether the legal issues are the same. If he is referring to the case brought by human rights groups challenging various demolitions similar to those at issue in this case, that petition was dismissed in July, after he submitted his expert opinion. Shany Decl. ¶ 32-33. Thus, Defendant has clearly failed to meet its burden that the Israel courts would be amenable to a claim against Defendant for aiding and abetting extrajudicial killing (or any other tort) in violation of international law or that a remedy for such claims is available to Plaintiffs. Rather, Plaintiffs' expert has clearly opined that Israeli courts would not be amenable to either type of claim.[40] Thus, this court should allow the TVPA claims to proceed.

[40] Moreover, Defendant has provided no evidence, opinion, or argument that an Israeli court (or courts in the OPT) would even have personal jurisdiction over it. In fact, whether the Israel courts would have personal jurisdictional is quite complicated. *See generally,* Karayanni Decl. ¶¶ A and B. Personal jurisdiction in Israel is determined by service of the opening summons. *Id.* ¶ A(1). One basic condition for granting leave to serve the opening summons when the defendant is "absent" from Israel, is that the plaintiff must prove to the Israeli court that it is the *forum conveniens* for the litigation. *Id.* at A(13).

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(d) Success of any claim against a corporation for aiding and abetting is also extremely remote.

Not only has Defendant wholly failed to establish that Israeli (or OPT) would be amenable to claims for violations of international law such as that provided for under the TVPA or ATS, its expert admits that Israeli courts have never recognized a claim against a corporation for aiding and abetting a tort (let alone an international human rights violation) in circumstances not based on a manufacturing or design defect, as is the case here. More Decl. ¶ 15. In fact, such claims are unheard of under Israeli law, and would unlikely be recognized in this context; in fact, the chances of the Israeli courts recognizing a claim against a corporation for aiding and abetting either a violation of international law or a local tort are "minuscule." Shany Decl. ¶ 21.

3. Even if Defendant Could Meet Its Burden, Bringing a Case for Aiding and Abetting Extrajudicial Killing in Violation of International Law Would Be Futile.

Even if the Court finds that Defendant has met its burden of showing that Israeli courts are amenable to claims similar to those under the TVPA, Plaintiffs can establish that such remedies would be ineffective, unobtainable, inadequate, and/or or obviously futile. Numerous obstacles to obtaining any remedy exist, and, as discussed below, Palestinians who bring such claims involving home demolitions in Israeli courts meet legal and political hostility.

(a) Bringing such claims will be futile, as Israel has immunity for compensation claims like those presented in this case, and this same immunity will almost certainly apply to Defendant.

At the outset, it should be noted that in July 2005, the Knesset passed an amendment to their Civil Torts (State Responsibility) Law (1952) that provides that Israel cannot be sued for any torts occurring from September 2000 forward, which took place in "zones of conflict,"—the areas where Plaintiffs were injured.[41] Moreover, under Israeli tort law, where the principle tortfeaser enjoys immunity from claims, his or her accomplices would enjoy similar immunity. Shany Decl. at ¶ 54. Thus, because the limitation on liability would most probably also apply to the Defendant in this case, this new amendment would almost certainly result in the blocking of

[41] This is also sometimes referred to as Civil Wrongs (Liability of the State) Law 5712-1952.

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Plaintiffs' claims in Israel courts. Shany Decl. ¶¶ 40, 56, 57 (c); *see also,* Karayanni Decl. ¶ B(12). For this reason alone, the Court should find that no available remedy exists to Plaintiffs. *See Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1153 (E.D.Cal. 2002) (El Salvador's amnesty law prohibited liability of defendant and thus court found remedies were unobtainable). The passage of this amendment also reinforces the futility of, and hostility against injured parties, such as Plaintiffs, who seek compensation for all acts in the OPT.

Even if it was not for this new amendment, which would seemingly block all of Plaintiffs' claims, the Civil Wrongs law, as amended in 2002, Article 5, provides relief from liability in a tort action brought by any person (whether Palestinian, U.S. or even Israeli) for what it deems a "war operation" performed by the IDF. Shany Decl. ¶ 51. In 2002, the Israeli Supreme Court held that an act is a "war operation" if it constitutes, *inter alia*, an army-military operation. *Id.* The statute itself defines the term to include not only "any action of combating terror, hostile actions, or insurrection," but also an action "*intended to prevent* terror, hostile actions, or insurrection…" Civil Wrongs Law, Article 1; Shany Decl. ¶ 52 (emphasis added).

In fact, the very type of demolitions at issue for three of the plaintiffs in this case - demolitions of homes of innocent civilians during military incursions into Nablus, the Jenin and Khan Yunis refugee camps - will almost certainly be characterized by Defendant as "combat related" even though they targeted civilians, and thus prevent liability against not only the IDF, but Defendant.[42] Shany Decl. ¶ 29, 40. Such clearly could also be applied to demolitions to clear land to create buffer zones for preventative purposes, would also seemingly fit into this category, preventing claims by the Abu Hussein and Corrie plaintiffs.

(b) The Israeli Supreme Court has consistently ruled that demolitions in the OPT such as those at issue in Plaintiffs' Complaint are permissible.

There have been no successful tort claims brought before Israeli Courts for damages associated with home demolitions. Shany Decl. ¶ 26. Moreover, the Israeli Supreme Court

[42] Defendant's expert does not even discuss this law in his opinion or attempt to distinguish it.

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continually rejects administrative law cases challenging the home demolitions similar to those in this lawsuit—those for "accommodation of military needs," and those it deems "combat operations," such as those intentional demolitions against non-combatant civilian homes occurring during incursions into refugee camps. *Id.* at ¶¶ 26, 47. Applications to stop the demolitions are almost always rejected, often accompanied by either explicit or implicit approval of house demolitions. *Id.* at ¶ 47.

During the last intifada, Palestinians and NGOs attempted on several occasions to challenge before the Israeli Supreme Court specific house demolitions operations that were taking place during large scale military operations in the OPT, and all were rejected. *Id.* at ¶ 29, 30. Moreover, almost all petitions against even non-combat house demolition operations undertaken for what the IDF deemed "security needs" were dismissed. *Id.* at ¶ 38. Furthermore, with regard to demolitions involving house demolition operations outside combat situations—such as to build a buffer zone or a barrier—the Supreme Court in recent years has allowed the IDF to dispense with prior hearings that are supposed to occur. *Id.* at ¶ 36. Thus, it is highly improbable that any Israeli Court would find such demolitions unlawful; and it is highly unlikely that a tort case challenging the general policy would be successful.[43] *Id.* at ¶ 39. Demolitions that led to the deaths of Rachel Corrie, the injuries of the Abu Hussein family, and possibly the death of Jamal Fayed, were likely demolitions that fit into this category.

Based on all these factors, Dr. Shany concludes that the Plaintiffs' chances of prevailing in a tort claim brought before Israeli courts against the defendant for home demolitions such as are present here are virtually "non-existing." *Id.* at ¶ 49. It simply is nearly inconceivable the

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[43] A petition brought by the Israel-Arab NGO Adala challenged the IDF's excessive resort to military necessity or security reasons and the ensuing widespread demolition of houses; it was recently rejected by the Supreme Court. *Id.* at ¶ 32. It is believed this is the petition referred to by Mr. More in ¶ 18 of his declaration. The decision was not decided on its merits, but the dismissal demonstrates the Israeli Supreme Court's limited ability and willingness to intervene in the demolitions, and renders it extremely unlikely that any decisions prohibit such demolitions operations will be issued in the foreseeable future. Shany Decl. at ¶ 33. As mentioned above, any tort action resulting from the various incursions and the ensuing large-scale demolitions will be effectively blocked by the Civil Torts Law. *Id.* at ¶ 30.

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Israeli courts would allow a case against Defendant for aiding and abetting destruction of a home, which they have consistently found to be legal and have consistently failed to prevent or address. *See id.* at ¶ 58. Thus, "Plaintiffs have no reasonable prospects of obtaining in Israeli court proceedings remedies analogous to those provided under the U.S. laws and legal doctrines which grant remedies for violations of international law standards." *Id.* at ¶ 59.

B. Defendant Can Be Liable Under the TVPA for Aiding and Abetting.

First, it is clear from the TVPA legislative history and numerous court decisions that the TVPA provides for indirect liability, including against those who aid and abet torture or extrajudicial killing. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1156-57 (11th Cir. 2005) ("the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting the violation."); *Aldana v. Del Monte Fresh Produce,* Inc., 2005 WL 1587302, at *4 (11th Cir. 2005) (finding a "claim for state-sponsored torture under the Alien Tort Act or the Torture Victim Protection Act may be based on indirect liability as well as direct liability."); *Wiwa v. Dutch Petroleum*, No. 96 CIV. 8386, 2002 WL 319887, at *15 (S.D.N.Y. 2002) (citing S. Rep. No. 102-249, at 8-9 & n.16, 102d Cong., 1st Sess. (1991), stating that the act provides for liability against those who "ordered, abetted, or assisted in the torture."); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148 (E.D.Cal. 2004).

Defendant does not appear to dispute this well-settled law. Rather, Defendant argues that Plaintiffs do not state a claim for aiding and abetting under the TVPA because 1) corporations cannot be liable under the statute, and 2) the statute requires a showing of "state action" on the part of Defendant, which Defendant argues has not been shown. MTD at pp. 22-23. Defendant is wrong about both these propositions.

1. Corporations Can Be Liable for Violations of the TVPA.

This court should find that corporations can be held liable under the TVPA because: 1) a review of the legislative history clarifies that Congress did not intend to exclude corporations from liability under the act for their complicity; and 2) under concepts of international law, to

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which the Court is directed to look in its interpretation of the TVPA, corporations can be liable for their complicity in acts of torture and extrajudicial killing.

As Defendant notes, courts have found that corporations can be liable under the TVPA. *See Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1266-1267 (N.D. Ala. 2003); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-1359 (S.D. Fla. 2003). Other courts, including the Ninth Circuit, have tacitly acknowledged corporate liability under the TVPA by not addressing that issue *sua sponte*. *See Wiwa v. Royal Dutch Petroleum*, No. 96 CIV. 8386, 2002 WL 319887, at *12 (S.D.N.Y 2002) (assuming corporate liability under the TVPA without deciding); *see also, Deutch v. Turner Corp.*, 324 F.3d 692, 717-18 (9th Cir. 2003) (holding that Plaintiffs could not amend their complaint to add TVPA claims against a corporation, given that the statute of limitations had run, but remaining silent on the liability of corporations under the act).

Both *Rodriguez* and *Sinaltrainal* concluded that the term "individual" was meant to include corporations. *See Estate of Rodriquez*, 256 F. Supp. 2d at 1265 (finding that that the plain language interpretation contradicts the legislative history of the statute); *Sinaltrainal*, 256 F. Supp. 2d at 1358 (finding that an individual is a corporation). In *Sinaltrainal*, the court found that the term "'individual' is consistently viewed in the law as including corporations. *Sinaltrainal*, 256 F. Supp. 2d at 1358. The court also cited the Senate Judiciary Report, which explains that the purpose of the TVPA is to permit suit "against *persons* who ordered, abetted or assisted in torture" *Id.* Because a corporation is generally viewed the same as a person in other areas of the law, the *Sinaltrainal* court thought it reasonable to conclude that had Congress intended to excluded corporations, it would have expressly done so. *Id.*

Moreover, after a review of the legislative history, both courts found that Congress did not intend to exclude corporations from liability under TVPA. *Sinaltrainal,* 256 F. Supp. 2d at 1358-1359; *Rodriquez,* 256 F. Supp. 2d at 1266-67. There is convincing evidence that Congress used the term "individual" so that it was clear foreign states or their entities could not be held

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liable, not to exclude corporations. *See, e.g., Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 382 (E.D. La 1997) (citing S.Rep.No. 249, 102nd Cong. 1st Sess. 1991, 1991 WL 258662, at *6, stating, "The legislation uses the term 'individual' to make crystal clear that *foreign states or their entities* cannot be sued under this bill under any circumstance." (emphasis added), and H.R. Rep. No. 367(I), 102nd Cong. 1st Sess. 1991, 1992 U.S.S.C.A.N. 84 1991 WL 255964, at *4, stating "[o]nly 'individuals', not *foreign states*, can be sued under the bill." (emphasis added)).

The fact that corporations should not be excluded from liability is supported by general principals of international law, to which Congress directed courts to look. *See* S. Rep. 249, at *9-10 (the TVPA's Senate Report states that "as this legislation involves international matters and judgments regarding the adequacy of procedures in foreign courts, the interpretation of section 2(b), *like the other provisions of this act,* should be informed by general principles of international law) (emphasis added).

Under international law, corporations can be held liable for violations of international human rights. *See Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988) (recognizing that ATS liability could attach to corporations); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (opining that "no logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law. Corporations should not be shielded from liability for aiding and abetting such violations simply because of their corporate status."). Moreover, corporations have been held liable for complicity in extrajudicial killing and torture brought under the law of nations pursuant to ATS. *Sinaltrainal,* 256 F. Supp. 2d at 1358 (courts have held corporations liable for violations of international law under the related ATS) (citing *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D. Ca. 1997)); *Wiwa,* 2002 WL 319887 (both allowing suits against private corporations under ATS).

Thus, for all these reasons, the Court should find that corporations can be held liable under the TVPA.

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2. Plaintiffs Allege Sufficient Facts to Establish that Defendant was Acting Under "Color of Law" for Purposes of the TVPA.

It is well-settled that the TVPA permits injured parties to pursue recovery, not only against those who are directly liable, but against those that conspired with or assisted those directly liable on conspiracy or accomplice liability theories. *See Cabello v. Fernandez Larios*, 402 F.3d 1148, 1156 (11th Cir 2005).

The TVPA requires that for a person to be liable under the Act for subjecting another to extrajudicial killing, that person must be acting under "color of law." 28 U.S.C. § 1350, n. 2. As discussed below, those who aid and abet or assist state actors in the commission of the torture or extrajudicial killing are considered to be "joint actors," and thus meet the requirement of "color of law" required for liability under the TVPA.

At the outset, it is important to note that courts have found that a 12(b)(6) motion is not the appropriate means for dismissing a case for lack of "state action" or color of law. *Estate of Rodriquez,* 256 F. Supp. 2d at 1264 (stating that the court does not engage in a fact-bound inquiry of the alleged joint action with, or the symbiotic relationship between, the defendants, the paramilitaries, and the Colombian military. Such a factual inquiry is "more easily resolved on summary judgment than on a motion to dismiss because the court must review the facts and circumstances surrounding the challenged action in their totality."). Unlike a legal question, such as whether corporations can be liable under the TVPA, or whether the TVPA provides the exclusive remedy for extrajudicial killing, whether Plaintiff has established enough facts to establish "color of law" or "joint action" is a very fact-intensive process. No discovery has taken place yet in this case. Thus, the Court should not consider this motion at this time. However, if the court decides to consider this motion, the Court should look to the allegations in Plaintiffs' FAC which are clearly sufficient to establish the color of law requirement.

In determining whether a plaintiff has adequately alleged state action, courts generally look to agency principles and the standards developed under 42 U.S.C. § 1983. *See Kadic,* 70 F.3d 232, 245 (2d Cir. 1995); *Wiwa*, 2002 WL 319887, at *13; *Estate of Rodriquez*, 256 F. Supp.

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2d at 1264-5 (citing *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000) ("Color of law jurisprudence of . . . § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.") A defendant acts under color of law when it acts together with state officials. *Kadic*, 70 F.3d at 245; *Wiwa*, 2002 WL 319887, at 13. The relevant test is the "joint action" test, under which private actors are considered state actors if they are "willful participant[s] in joint action with the state or its agents." *Wiwa*, 2002 WL 319887, at *13 (citing *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980)). *See also, Wiwa,* 2002 WL 319887, at *12; *National Coalition Government of Burma*, 176 F.R.D. 329, 345 (C.D.Cal. 1997) (Where there is a "substantial degree of cooperative action" between the private actors and the government in violative conduct, state action is present (citing *Collins v. Womancare*, 878 F.2d 1145, 1150 (9th Cir. 1989)).

When applying these tests, it should be considered that in passing the TVPA, Congress did not want to establish too stringent of a test to determine "state action" which would prevent those who aid and abet violators from liability. For example, the *Kadic* court cites legislative history which "confirms that this language was intended to 'make clear that the plaintiff must establish *some* governmental involvement in the torture or killing to prove a claim,' and that it did not want to address torture or killing by purely private groups (or individual)." *Kadic,* 70 F.3d at 245 (citing H.R.Rep. No. 367, 102d Cong. 2d Sess. at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87) (emphasis added); *Doe v. Qui*, 349 F. Supp. 2d 1258, 1314 (noting that the House report provided that the plaintiff must establish some governmental involvement, as the TVPA bars suits brought against "purely private groups."); *see also, Saravia*, 348 F. Supp. 2d at 1150, ("to meet this definition [of color of law], plaintiff must show 'some governmental involvement' in [the act]."). Thus, Congress wanted to clarify that purely private individuals acting on their own—with no government involvement—were excluded from the law. It did not intend to limit the liability of persons (including corporations) who were otherwise involved in assisting official (government) torture or killing. Thus, where, as here, the extrajudicial killing

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Defendant is accused of aiding and abetting was done by a government actor, the "color of law" requirement as envisioned by the TVPA has been met.

In their FAC, Plaintiffs have alleged sufficient facts to establish the requisite level of assistance needed to establish it acted under "color of law." Plaintiffs have alleged that Defendant was a willful participant in the human rights violations because it substantially cooperated with the IDF by supplying, armoring, and repairing bulldozers that were knowingly being used to commit human rights violations. FAC at ¶ 13. Plaintiffs further allege that Defendant substantially cooperated with the IDF by providing training, manuals, and specialized knowledge, and/or instructions regarding such bulldozers. *Id.* Thus, Plaintiff has alleged sufficient facts to establish joint action.

Further, an alleged conspiracy between a private party and a government clearly satisfies the joint action test. *See, e.g., Fonda v. Gray,* 707 F.2d 435, 437 (9th Cir. 1983) ("A private party may be considered to have acted under color of state law when it engages in a conspiracy or acts in concert with state agents to deprive one's constitutional rights."). In fact, Plaintiffs have alleged that Defendant and the IDF conspired together, and have listed numerous ways in which Defendant closely cooperated and assisted the IDF. FAC at ¶ 111-122.

Finally, the fact that Israel is likely to apply its own immunities for claims based on the illegal home demolitions at issue in this case (*see* Shany Decl. ¶ 47) to Defendant, also lends to the argument that Defendant's complicity should be construed as color of law for purposes of the TVPA. If Defendant is likely to receive immunity for their acts through the IDF's actions, then it should also be considered to be acting under color of law for purposes of the TVPA. Any other result would be unfair and likely not what Congress intended.

For all these reasons, the Court, if it decides to consider this issue at this time, should find that Plaintiffs have alleged sufficient facts to support "state action."

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3. Plaintiffs Have Alleged Sufficient Facts for Aider and Abettor Liability.

Defendant also argues that Plaintiffs have failed to allege any facts to support their aiding and abetting claim. MTD at p. 22. This is simply wrong. As discussed below, Plaintiffs allege ample facts to support an aiding and abetting claim.

To establish aiding and abetting liability under international law, a plaintiff must show that the defendant provided practical assistance, encouragement, or moral support, which had a substantial effect on the perpetration of the crime.[44] *Mechinovic v. Vukovic*, 198 F. Supp. 2d 1322, 1355 (N.D.Ga. 2002); *Presbyterian Church,* 244 F. Supp. 2d 289, 323 (S.D.N.Y. 2003) (an actor may be liable under a theory of complicit liability if the actor intended to facilitate the violation and if the aid or assistance significantly contributed to [the] commission of the actual violation). "Substantial" means that "the criminal act most probably would not have occurred in the same way had not someone acted in the role that that accused in fact assumed." *Presbyterian Church,* 244 F. Supp. 2d at 324 (citing *Prosecutor v. Tadic* (Case No. IT-94-1-T), Opinion and Judgment (May 7, 1997) at ¶ 68).

The defendant does not have to share the same wrongful intent as the principal wrongdoer; only that its actions will assist the perpetrator in the commission of a crime. *Mechinovic*, 198 F. Supp. 2d at 1355; *see also*, *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1149 (E.D.Cal. 2002) (sufficient that the accomplice knows that his or her actions will assist the perpetrator in the commission of the crime). The defendant's knowledge can be actual or constructive. *Talisman*, 244 F. Supp. 2d at 323. Plaintiffs do not need to show that Defendant knew the precise crime that the IDF intended to commit; only that Defendant is aware that one of a number of crimes would probably be committed, one of those crimes was in fact committed, and that Defendant intended to facilitate the commission of that crime. *Mechinovic*, 198 F. Supp.

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[44] For ATS and TVPA claims, courts look to an international standard of aiding and abetting, defined by international tribunals like the International Criminal Tribunal of Yugoslavia, and the International Criminal Tribunal of Rwanda. *See Cabello Barrueto v. Fernandez Larios,* 205 F. Supp. 2d at 1333; *Doe I v. Unocal Corp.*, 395 F.3d at 949. If the court were to adopt the Restatement standard for aiding and abetting, however, Plaintiff has still alleged sufficient facts to withstand a motion to dismiss. *See* Restatement of Torts (Second) § 876 (2000).

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2d at 1355. Moreover, the assistance provided does not need to constitute an indispensable element, that is, a *condition sine qua non* for the acts of the principal. *Presbyterian Church*, 244 F. Supp. 2d at 324 (citing *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T), Judgment (Dec. 10, 1998) at ¶ 209).

Plaintiffs' FAC alleges sufficient facts to establish aiding and abetting liability. As early as 1967, Defendant had constructive knowledge that the IDF was demolishing homes with the bulldozers it was supplying. FAC ¶ 44. Defendant likely knew the conduct was in violation of international law since at least 1989 and likely before. FAC ¶ 12. Despite this knowledge, Defendant continued to render assistance by supplying its bulldozers (and/or parts, repairs, manuals, instructions, and specialized knowledge, or other assistance related to the bulldozers) to IDF, which were used by the IDF to commit violations of international law. FAC at ¶¶ 7, 13. Defendant knew the bulldozers and other assistance related to the bulldozers would be used to commit further abuses, and that injuries and deaths were foreseeable consequences of that assistance. FAC at ¶ 54. Defendant trained IDF forces on the operation and maintenance of D9 bulldozers, and was involved in significant collaboration and technology sharing with the IDF. FAC at ¶ 122.

Thus, just as prosecutors in *Presbyterian Church* alleged sufficient facts to support a conviction against the supplier of Zyklon B, the poison gas used for mass executions in many German concentration camps, Plaintiffs here have alleged sufficient facts that Defendant aided and abetted the IDF in its destruction of Plaintiffs' homes in violation of international law by supplying the bulldozers and other technical assistance, knowing that such would be used to commit violations humanitarian and human rights law. *See Presbyterian Church*, 244 F. Supp. 289 at 322 (citing *United States v. Tesch*, 1 L. Rep. Tr. War.Crim. 93 (1947)(finding that supply of the poison used for mass execution in many German concentration camps was violation of the laws of war, in that the supplier directly supplied the gas, knowing how it would be used)).

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VI. PLAINTIFFS HAVE STATED CLAIMS UNDER RICO.

Plaintiffs have stated valid claims under RICO because they sufficiently pleaded a RICO enterprise, predicate acts and a pattern of racketeering activity are present in the facts, Plaintiffs allege RICO injuries, and RICO applies extraterritorially under the "conduct" test. Defendant's arguments in support of its motion to dismiss the RICO claims (Fourth Claim for Relief) are based on a series of mistakes about the legal requirements of RICO. Defendant's contentions concerning the sufficiency of the pleadings rest on the unstated and mistaken contention that there is some heightened pleading standard for any RICO pleading. Defendant's argument that Plaintiffs have failed to state RICO claims rest on the erroneous assumption that predicate acts under § 1961 are bound by the territorial aspects of specific state criminal codes. Similarly, defendant's unsupportable assertion that 18 U.S.C. § 1964 cannot define a predicate act because murder does not result in an injury to business or property is clearly erroneous in that murder is one of the enumerated crimes under § 1961. Likewise, Defendant's argument that its conduct was not the proximate cause of plaintiff's injuries creates a requirement that a defendant directly participate in the predicate act despite the fact that no case law supports such a conclusion. Defendant's argument on the extraterritorial reach of RICO ignores the relevant law of this Circuit and disregards the allegations of the FAC. Defendant's argument on Plaintiffs' conspiracy claims simply repeated its previous mistaken arguments.

A. Plaintiff's FAC Is Governed By Rule 8 and Sufficiently Alleges a Rico Enterprise.

In this jurisdiction, RICO pleadings, except in cases involving allegations of fraud or mistake, are governed by the notice pleading requirements of Rule 8. *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 827-28 (9th Cir. 2003). The Amended FAC sufficiently pleads the elements of a RICO claim under sections 1962 (a), (c), and (d).

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Court reaffirmed that the federal rules of civil procedure require only "notice pleading"—complaints need only include "a short and plain statement of the claim showing that the pleader

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is entitled to relief." 507 U.S. 163, 168 (1993) (emphasizing that plaintiffs need only give fair notice to defendants on their claims and the grounds upon which they rest). This Circuit's ruling in *Wagh* is consistent with *Leatherman.* Absent fraud or mistake, as here, notice pleading is all that may be required herein because all of Plaintiffs' allegations are governed by Rule 8. *Wagh* found persuasive the reasoning of the Second Circuit in Commercial *Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 385 (2d Cir. 2001), to the effect that a plaintiff in a RICO case may not be required to plead more than is legally sufficient to set out the elements of a claim. 363 F.3d at 827-28. In doing so, the *Wagh* court recognized that RICO pleadings were governed by Rule 8 in the absence of allegations of fraud or mistake. *Id.* Indeed, "[t]he Ninth Circuit does not require a detailed showing of an enterprise." *Nat'l Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316, 1324 (N.D. Cal. 1985) (citing *United States v. Bagnariol*, 665 F.2d 877, 891 (9th Cir. 1981)).

RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "RICO simply requires a nexus between the enterprise and the racketeering activity. *Sun Savings and Loan Ass'n v Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987). *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996) and the other cases on which defendant relies simply require that the complaint alleges the "enterprise" as "an entity separate and apart from the pattern of [racketeering] activity in which it engages." Plaintiffs have alleged that defendant and others, including the IDF were an association in fact with a continuous purpose since 1967. FAC at ¶¶ 42, 113. Since that time, the Defendant sold and/or transferred equipment to the IDF; renewed leases with the IDF; provided training and training manuals; manufactured, designed, financed, negotiated with the IDF; and transported the equipment to Israel and provided other technical support. *Id.* at ¶¶ 52, 54, 122. Thus, the FAC makes clear that the association in fact was on-going and "functioned as a continuing unit over time" through

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a "consensual [contractually–negotiated] decision-making structure." *See Comwest, Inc. v. Am Operator Servs., Inc.* 765 F. Supp. 1467, 1475 (C.D. Cal. 1991).[45]

Defendant next suggests that there is no "enterprise" because the relationship between the defendant and the IDF was based solely on a "buyer and seller" relationship and that they therefore could not share a common purpose. MTD at pp. 37, 16-17. However, no case supports Defendant's broad generalization. Indeed *RD Mgmt.*, upon which the Defendant relies to support this contention, supports the opposite conclusion: namely that Plaintiffs herein have sufficiently alleged a "common purpose." *RD Management Corp. v. Samuels*, 2003 WL 21254076 at *6 (S.D.N.Y. 2003). The court in *RD Mgmt.* held that a "common purpose" existed where a broker had knowledge of and profited from an unlawful insurance scheme, despite the parties' relationship as buyer-seller. *Id.* at *6. The FAC in the instant case alleges that defendant had actual and constructive knowledge of the IDF's unlawful conduct and nevertheless continued to sell, develop, maintain and train the IDF in the unlawful uses of Defendant's product.

B. Plaintiffs Allege Predicate Acts and a Pattern of Racketeering Activity.

Predicate acts enumerated under § 1961(1) are identified, *inter alia*, as "any act or threat involving murder . . . arson, robbery." Defendant mistakenly argues that none of the acts alleged support a RICO because they occurred outside the territorial limitations of Washington's criminal code. Defendant cites no case law to support the contention that the criminal conduct described in § 1961(1) is limited to specific state criminal law violations. All authority is to the contrary.

"Under RICO . . . state offenses are included by generic designation," and "[r]eferences to state law serve [merely] a definitional purpose, to identify *generally* the kind of activity made illegal by the federal statute." *United States v. Bagaric*, 706 F.2d 42, 62 (2d Cir. 1983),

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[45] Assuming that some "magic" words are required which are absent, Plaintiffs should be granted leave to amend. A court must not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

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abrogated on other grounds, National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994). *See also, United States v. Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991) ("[S]ection 1961(1)(A) merely describes the type of generic conduct which will serve as a RICO predicate and satisfy RICO's pattern requirement."); *United States v. Paone*, 782 F.2d 386, 393 (2d Cir. 1986) ("The statute [1961] is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge."). The reference to state crimes was not intended to incorporate the elements of the state crimes. *United States v. Miller*, 116 F.3d 641, 645 (2d Cir. 1997) (holding that RICO's allusion to state crimes was not intended to incorporate elements of state crimes, but only to provide general substantive frames of reference").

No court in this Circuit has directly addressed the argument that all of the elements of the state penal code are a necessary element in a RICO predicate act. However, the reasoning of the cases cited above was approved in *U.S. v. Dhringa*, 371 F.3d 557, 564 (9th Cir. 2004), in which the Court of Appeals for the Ninth Circuit noted that "in the RICO context, . . . a statute's mere allusion to state crimes . . . identifies the type of conduct that serves as a predicate to prosecution under RICO."

In *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 at *24 (S.D.N.Y. 2002) the court considered whether location of the crime is an "essential" element. Based on the generic nature of RICO's references to "chargeable under state law," the court concluded that "location is best categorized as a procedural obstacle to conviction of the sort that plaintiffs are not required to satisfy in order to allege a predicate act under RICO." *Id.* As in *Wiwa*, the fact that the injuries occurred in OPT rather than in Washington does not bar Plaintiffs' RICO claims,[46] and the acts of murder, extortion and robbery set forth in the FAC at ¶¶ 56, 57, 59, 60, 61, 64, 77, 78, 80 adequately allege a pattern of racketeering activities under § 1961(5).

[46] Even assuming that the reference to state crimes incorporated the location of the offense, the fact that preparatory acts occurred within the jurisdiction of Washington would be sufficient to meet the jurisdictional requirements. *See State v. Ashe*, 182 Wash. 598, 693, 48 P.2d 213 (Wash. 1935) ("The criminal act, the motive of the perpetrator, the cause, and the effect, are but parts of the complete transaction. Wherever any part is done, that becomes the locality of the crime as much as where it may have culminated.").

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Plaintiffs also allege predicate acts enumerated in § 1961, including that defined in 18 U.S.C. § 2332(c)(2). Ignoring the fact that this section is specifically identified in § 1961(1), Defendant argues that this section does not define a predicate act because it rejects that the death of Rachel Corrie is a cognizable personal injury under § 1964(c). MTD at p. 39. Defendant has simply confused different provisions of RICO. Clearly, some of the enumerated offenses, including murder, cause personal injury and the victims of those acts may not bring claims for damage. Nevertheless, those acts may still form part of a pattern of racketeering activity. Defendant cites no case law supporting its unique and unwarranted misinterpretation of § 1961.

Plaintiffs have also adequately alleged the predicate act of extortion under the Hobbs Act. Defendant argues that there was no Hobbs Act extortion claim because, even if Plaintiffs were deprived of their property, there was no "acquisition" of property. Defendant correctly states the law but disregards the facts alleged. In ¶ 10, the FAC alleges that the IDF took Plaintiffs' property to create "buffer zones."

C. Plaintiffs Have Alleged Rico Injuries.

A RICO plaintiff must show that his or her injury was caused by "by the conduct constituting the violation" of RICO. *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). Plaintiffs must show that the injury was caused by one or more RICO predicate acts. *See Beck v. Prupis*, 529 U.S. 494, 505 (2000). That predicate act must be not only a "but for" cause of his injury, but a proximate cause of it as well. *First Nationwide Bank v. Gelt Financing Corp.*, 27 F.3d 763 , 769 (2nd Cir. 1994); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992); *Cox v. Admin. United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994). The proximate cause of an injury is that which is "a substantial factor in the sequence of responsible causation." *Oki Semiconductor Co. v. Wells Fargo Bank Nat'l Assoc* 298 F.3d 768, 773 (9th Cir. 2002) (quoting Cox, 17 F.3d at 1399).

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Defendant first asserts that "but-for" causation is lacking because the IDF could have contracted with another entity. MTD at p. 39. "But-for" causation requires that the predicate act cause the harm. It is irrelevant to that analysis that persons other than defendant *could* have acted with the IDF. In this case it was Defendant's concerted conduct with the IDF that caused Plaintiffs' injuries.

Defendant also wrongly argues that the "injurious conduct" alleged herein lacks a "direct relationship" to the injuries asserted. MTD at p. 40. However, the injurious conduct alleged—the ongoing provision of an instrumentality to an entity known to be using that instrumentality to destroy homes, lives, and businesses—resulted directly in the harms suffered by Plaintiffs. FAC at ¶¶ 56, 57, 59, 60, 61, 64, 77, 78, 80. In contrast, the authorities cited by Defendant involved persons who were indirectly affected by injuries suffered by the direct victims of the predicate acts. Thus, in *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928-29 (9th Cir. 1994), the Court found the direct harm of the predicate acts ran to a master tenant only and that the plaintiff sublettor was only indirectly harmed by the tenant's attempt to pass on the increased cost. In *Imagineering, Inc. v. Kiewitt Pac. Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992), the predicate acts deprived the prime contractors of specified projects, which in turn caused the prime contractor to deprive the plaintiff subcontractors of further business. The Court concluded that the "direct harm" ran to the prime contractors and that "intervening inability of the prime contractors to secure the contracts was the direct cause of plaintiffs' injuries." As the Supreme Court noted in *Holmes,* 503 U.S. 258 at 268-69, "[A] plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." But in the case at hand, Plaintiffs' injuries were not the results of harms "visited upon a third person." The predicate acts were the proximate cause of Plaintiffs' injuries.

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D. RICO Applies Extraterritorially Under the Conduct Test.

This Court has jurisdiction over Plaintiffs' RICO claims because the conduct that materially furthered the unlawful conspiracy occurred in the United States. The RICO statute is silent on the question of whether it confers subject matter jurisdiction to claims involving foreign entities, or acts and conspiracies occurring outside the United States. The Ninth Circuit has looked to "the tests used to assess the extraterritorial application of the securities laws to provide useful guidelines for evaluating whether the jurisdictional minimum exists." *Poulis v. Ceasars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004). In doing so, this Circuit has approved the application of the "conduct" test, which considers whether the defendant's conduct in the United States was significant with respect to the alleged violation, not merely preparatory, and whether it materially furthered the unlawful scheme. *Id. See also, Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1358-59 (9th Cir. 1988) (en banc); *Butte Mining PLC v. Smith,* 76 F.3d 287, 290–91 (9th Cir. 1996) (approving a test articulated in *Grunenthal v. Holz*, 712 F.2d 421, 424 (9th Cir. 1983)). In *Grunenthal*, the Ninth Circuit held that the plaintiff had satisfied the conduct test, even though the transaction at issue involved foreign securities and foreign corporations and citizens, because the parties held one meeting in Los Angeles during which the defendants made misrepresentations that were "significant with respect to the alleged violations" and "furthered the fraudulent scheme." *Grunenthal*, 712 F.2d at 425.

Plaintiffs meet this standard because Defendant's domestic conduct was "significant" with respect to the predicate acts, and that Defendant's conduct furthered the predicate acts, irregardless of where the acts themselves occurred. *Id.* at 424. The FAC alleges that: Defendant engaged in conduct in the United States, which furthered the predicate acts including but not limited to 1) the manufacture of bulldozers, 2) the research, design and development of bulldozers, 3) the finance, sales and servicing efforts, 4) the training of IDF regarding operation and maintenance of bulldozers, and 5) the transportation of bulldozers, related technology and spare parts. FAC at ¶¶ 97, 98, 122. Defendant produced the bulldozers in the United States and

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possibly modified them for special military use there; the sales and/ leases to the Israeli government were concluded with Defendant's U.S. office, and that office had the right to recall or cancel the leases; Defendant's U.S. offices had knowledge of the uses to which their equipment was being put by the IDF. *Id.* at ¶¶ 42-55.

Defendant also argues that "RICO claims are particularly suspect in ATS actions." MTD at p. 41. Defendant cites two Florida district court decisions, *Sinaltrainal v. Coca-Cola Company*, 256 F. Supp.2d 1345, 1359-60 (S.D. Fla. 2003) and *Aldana v. Fresh Del Monte Produce*, 305 F .Supp. 2d 1285, 1306 (S.D. Fla. 2003), neither of which analyze the RICO claims with reference to the related ATS claims. Moreover, Defendant simply ignores those cases that successfully pled both ATS and RICO claims. In *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp.2d 1229, 1249 (N.D.Cal. 2004), the court recognized the applicability of the "conduct" test and reconfirmed its earlier decision finding jurisdiction over the RICO claims. As in the pending case, the *Bowoto* predicate acts and the injuries occurred outside the United States. *Bowoto v. Chevron Texaco,* No. C 99-2506-SI, slip op. at 12-13 (N.D. Cal. Jan 21, 2003). Also, in *Wiwa v. Royal Dutch* Petroleum Co., 2002 WL 319887 at **21-22 (S.D.N.Y. 2002), the court considered RICO claims which were brought together with claims under the ATS and found that jurisdiction was appropriate because defendants obtained a competitive advantage for the oil produced by defendants in Nigeria and imported into the United States.

Defendant next argues that jurisdiction will not lie because Plaintiffs have not alleged "that any unlawful conduct occurred in the United States." MTD at p. 41. Defendant fails to cite a single case that imposes such a requirement. Rather, as noted above, the "conduct" test requires only that domestic conduct materially furthered the unlawful scheme. *Republic of the Philippines,* 862 F.2d 1355, 1358–59. Here, the domestic conduct developed, tested, sold, maintained, and trained for the use of specially adapted bulldozers which were necessary to completion of the unlawful conduct which took place in OPT.

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Punishing unlawful conduct by its own citizens is a proper and widely recognized basis for extraterritorial jurisdiction. *See, e.g., Euro Trade & Forfaiting, Inc. v. Vowell*, No. 00 CIV 8431, 2002 WL 500672 at *10 (S.D.N.Y 2002) (suggesting that subject matter jurisdiction exists over transactions by aliens where a plaintiff can "identify a U.S. party who requires protection or punishment.").

E. Plaintiffs Have Adequately Pled a RICO Conspiracy.

Section 1962(d) provides civil liability for conspiring to engage in conduct described in §§ 1962(a), 1962(b), or 1962(c). In order to state a claim under this section, Plaintiffs must allege an agreement between defendants and others to facilitate the commission of a violation of § 1962(c). *See Salinas v. United States,* 522 U.S. 52, 63 (1997) (holding that there is no "overt act" requirement for a RICO conspiracy). A conspirator under RICO "must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it is sufficient that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65. As set forth above, Plaintiffs have adequately alleged substantive RICO violations.[47]

Defendant argues that Plaintiffs have not pled "any factual basis for finding a conscious agreement" between defendant and the IDF. MTD at p. 42. "The essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an *agreement* to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity." *United States v. Blinder,* 10 F.3d 1468, 1477 (9th Cir. 1993). Moreover, a co-conspirator need not participate personally in two predicate act offenses. *Id.* The FAC alleges facts from which Defendant's agreement to participate in the affairs of the enterprise can be inferred: Defendant knew that its bulldozers were being used to commit predicate acts but nevertheless continued to develop, sell, maintain, and train members of the IDF to use the equipment necessary to the commission of the predicate acts.

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[47] Even assuming that defendant was not part of the enterprise, "an 'enterprise' under § 1962(c) can exist with only one actor to conduct it" *Salinas*, 522 U.S. at 65.

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VII. PLAINTIFFS HAVE SUFFICIENTLY STATED CLAIMS FOR WRONGFUL DEATH, PUBLIC NUISANCE, AND NEGLIGENCE.

A. Choice of Law

Defendant claims, without providing any substantive analysis that Israeli law applies to Plaintiffs' non-federal claims. MTD at p. 31 (Israeli law will govern Plaintiffs' tort claims). Defendant is wrong.[48] In fact, Israeli law is the least likely to apply.

A federal district court applies the law of the forum state—here, Washington—to tort claims unless a conflict of laws between Washington and another interested state is presented to the court. *DP Aviation v. Smiths Industries Aerospace and Defense Systems Ltd.*, 268 F.3d 829, 845 (9th Cir. 2001). In determining whether conflicts exist, the court should look to the law of the potentially concerned jurisdictions. *Southwell v. Widing Transp., Inc.*, 101 Wash. 2d 200, 204, 676 P.2d 477 (Wash. 1984). In this case, such jurisdictions are: Washington, Illinois, Gaza and West Bank. In fact, Israel is the state *least likely* to be concerned with this tort action against Defendant given that none of the Plaintiffs or Defendant resides there, and the injuries did not occur there. Rather, the Plaintiffs are from Washington, Gaza and the West Bank; Defendant is headquartered in Illinois, and the injuries and deaths occurred in Gaza and the West Bank. Moreover, even if Israel would arguably have jurisdiction over any claim brought in the OT, Israel would likely apply the law of Gaza and the West Bank, respectively.[49] Karayanni Decl. ¶ F(1).

In any event, however, there do appear to be conflicts between the laws of Washington, Illinois, and Israel. First, Israel has never recognized a claim against a third party for negligence in a circumstance such as the one here. More Decl. ¶ 15. Second, Israel has a statute that prevents liability of itself, and likely of Defendant as well. Shany Decl. ¶ 54, 56. Third, Israeli law requires pecuniary loss for a claim of public nuisance. More Decl. ¶ 12. This is not required

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[48] Defendant suggests there are no conflicts between the laws of Israel, Washington, and Illinois, and then concludes Israel law applies. If in fact there are no material conflicts as Defendant suggests, then the law of Washington is the appropriate law to apply— not Israel.

[49] Israeli courts apply the law of the place where the tort was committed. *Id.* ¶¶ F(1), and A(7).

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under either Washington or Illinois law. *See infra,* pp.69–70. Finally, neither Washington nor Israel allow a personal representative to recover damages on behalf of parents who lost a child of majority age, if they were not being supported by their children; but Illinois law does. More Decl. ¶ 11; Wash. Rev. Code § 4.20.020; 740 Ill. Comp. Stat. 180/2 (2003).

Given that there is an actual conflict, the court engages in a choice of law determination. *Rice v. Dow Chem. Co.,* 124 Wash.2d 205, 210, 875 P.2d 1213 (1994) (citing *Burnside v. Simpson Paper Co,* 123 Wash.2d 93, 864 P.2d 937 (1994)). A federal district court applies the choice-of-law principles of its forum state in order to establish the substantive rule of decision for a plaintiff's non-federal claims. *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). As Defendant points out, Washington applies the "most significant relationship" test, outlined in the Restatement (Second) of Conflicts of Laws §145. *Martin v. Goodyear Tire & Rubber Co.*, 114 Wash. App. 823, 829, 61 P.3d 1196 (2003). Under this test, the law of the state *where the injury occurred* applies, unless another state has a greater interest in determining a particular issue. Thus, unless the Court determines that another state has a great interest, this Court should apply the law of Gaza and the West Bank to the non-federal claims.

In making a choice of law decision in personal injury cases, the principles a court is to consider are:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws §§ 6, 145 (1971).

In determining which state has the most significant relationship to the occurrence and parties, the contacts that are to be taken into account in applying these principles are: a) the place where the injury occurred; b) the place where the conduct causing the injury occurred; c) the

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domicile, residence, nationality, place of incorporation and place of business of the parties, and d) the place where the relationship, if any, between the parties is centered. Restatement (Second) § 145.

The injuries and deaths occurred in the West Bank and Gaza, as did the demolitions. Moreover, most of the Plaintiffs reside in the OPT. The relationship between the Plaintiffs and Defendant were centered there are well. Clearly, the OPT has an interest in what occurs there. While it is possible that the laws of Gaza and the West Bank should apply, it is likely that their laws will be difficult to ascertain and apply.

Illinois is likely the next forum with the strongest interest. Defendant's primary place of business is Illinois. FAC at ¶ 6. Under the significant relationship test, Defendant's place of incorporation and principal place of business are important factors that weigh in favor of applying the law of the forum where incorporation and headquarters exist. *Mackey v. MBNA America Bank, N.A.*, 343 F. Supp. 2d 966, 969 (W.D.Wash. 2004). Furthermore, the place where the conduct causing the injury occurred — the distribution/sale of the Caterpillar bulldozer — likely occurred in Illinois. Defendant may also have justified expectations that its conduct will be governed by Illinois law, and that such will apply to transactions that arise out of Illinois. Moreover, Illinois, has a strong policy interest in regulating the conduct of corporations like Defendant that are incorporated, headquartered, and transact business under Illinois law. Illinois has a legitimate interest in applying its own law to corporations headquartered in that state. Thus, it is also possible that the law of Illinois should apply. Washington law may also apply, given that one set of Plaintiffs reside here.

Israel, however, is the state with the *least* significant relationship to this tort action. Moreover, in determining choice of law questions, there is an interest in ensuring that the plaintiff has a remedy — especially when the conduct is also considered to be in violation of the law of nations. *See, e.g., Alvarez-Machain v. Sosa*, 331 F.3d 604, 635 (9th Cir. 2003), *overturned on other grounds, Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159

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L.Ed.2d 718 (2004). Thus, because it is unlikely that Plaintiffs would have a remedy against defendant under Israeli law, as discussed above, Israeli law should not apply.

B. Plaintiffs' Amended Complaint Sufficiently Alleges State Tort Claims.

If this Court determines that it is the law of Gaza and the West Bank that should apply to these claims, Defendant has failed to discuss the applicable law or analyze the claims under the appropriate law, and thus its motion should be denied.

If the Court applies Illinois law, or Washington law, the Court should still deny its motion. Taking the facts and reasonable inferences as alleged in the FAC in the light most favorable to Plaintiffs, the state tort claims alleged here are more than sufficient to prove a set of facts that would entitle Plaintiffs to relief.

1. Negligent Entrustment, Sale, Distribution

Plaintiffs' FAC alleges that Defendant was engaged in "supplying, selling and/or *entrusting* bulldozers used to destroy homes and inflict severe emotional distress." FAC at ¶ 142. (emphasis added). Negligent entrustment, a type of negligence, presumes third party use and arises from the act of entrustment between the defendant and the third party, not from the relationship between the Defendant and the injured party.

Defendant's motion completely fails to address negligent entrustment. Although it may be true that under a *general* negligence theory, manufacturers of legal products do not owe a duty of care to persons who might be inured by a third party's illegal use of those products absent a special relationship, this rule does not apply to negligent entrustment. Defendant's reliance on precedent and cases that analyze general negligence is simply not instructive. As discussed below, both states firmly recognize that a defendant may be liable for a third party's harmful uses of its product.

Illinois has long recognized the tort of negligent entrustment. *See, e.g., State Farm Fire & Cas. Co. v. McGlawn*, 84 Ill. App. 3d 107, 110, 404 N.E.2d 1122, 39 Ill. Dec. 531 (1980). In order to state a cause of action for negligent entrustment two elements must appear: (1) A

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negligent entrustment, and (2) that the incompetence of the entrustee was the proximate cause of the injury. *Id.* Negligent entrustment is a similarly well-established common law doctrine in Washington. *See, e.g., Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 929, 932 653 P.2d 280 (1982) (finding firearm seller could be liable for negligent entrustment where he sold rifle to intoxicated man, who killed his wife with the rifle shortly thereafter).[50]

Under negligent entrustment, there is no requirement that a special relationship exist between the defendant and victim; rather, it is found when Defendant: (1) permits use of a thing "which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others;" or (2) supplies chattel for use by a person "whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them." Restatement (Second) of Torts § 308 (1965); Restatement (Second) of Torts § 390 (1965).

The test for negligent entrustment turns on whether entrustment occurred, whether the actor knew or should have known that the entrustee would use the thing/chattel in a manner risking harm, and whether the entrustee proximately caused the harm. *Evans v. Shannon*, 201 Ill. 2d 424, 776 N.E.2d 1184, 434, 267 Ill. Dec. 533 (2002).

Manufacturers of legal products owe a duty of care to persons who are injured by a third parties' *foreseeable* illegal use of those products. Criminal acts of third parties, like those of the IDF, may be found to be foreseeable, and if so found, negligence can be predicated thereon. *Bernethy*, 97 Wash. 2d at 934. Where foreseeability is not found, it is where unexpected intervening actions of unknown criminals for which defendants have no knowledge. *See Young*

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[50] Note that the *Bernethy* court adopted the Restatement (Second) of Torts for purposes of negligent entrustment analysis. *Bernethy*, 97 Wash.2d at 933.

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v. Bryco Arms, 213 Ill.2d 433, 821 N.E.2d 1078, 290 Ill. Dec. 504 (2004) (finding that defendants could not foresee that manufacture and sale of firearms would create public nuisance when there was no prior knowledge of purchasers, illegal use, or location of illegal use; *see also, Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wash. App. 267, 748 P.2d 661 (1988) (finding that defendant had no knowledge of facts to alert him to danger associated with third party); *Watson v. Enterprise Leasing Co.*, 325 Ill. App. 3d 914, 757 N.E.2d 604, 258 Ill. Dec. 915 (2001) (finding that defendant did not have foresight of illegal activity when the criminal actor was twice removed from the entrustee). However, contrary to the situations in *Young*, *Knott*, and *Watson*, Defendant here had ample knowledge about the illegal use of its bulldozers in specific locations with resulting harm.

It is objectively reasonable that Defendant knew or should have known about the unreasonable risk of harm to others from permitting/supplying the IDF with bulldozers because it has been explicitly told as much. *See Schmid v. Fairmont Hotel Company-Chicago*, 345 Ill. App. 3d 475, 803 N.E.2d 166, 280 Ill. Dec. 936 (2003). Plaintiffs allege numerous facts regarding notice to Defendant about the harm associated with the IDF using its bulldozers to demolish homes in Gaza and the West Bank. FAC at ¶ 44–53. Defendant here was warned—by direct and constructive notice—and thus it knew or should have known of IDF's use of its bulldozers in violation of humanitarian law and international human rights, and it is not unjust to require Defendant to anticipate the crimes complained of in Plaintiffs' FAC. *See Kim v. Budget Rent A Car Systems, Inc.*, 143 Wash.2d 190, 198, 15 P.3d 1283 (2001) (finding that where defendant had no warning, it could not foresee theft of vehicle that was used to injure).[51] Based on the facts alleged, Defendant has engaged in transactions with the IDF that, "although not illegal, are suggestive of a willingness to serve customers who may intend to circumvent the

[51] Note that Plaintiff failed to argue negligent entrustment in this case although the court appears to have analyzed the theory in any case. *Kim*, 143 Wash. 2d at 197, n. 1.

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law." *Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 394, 821 N.E. 2d 1099, 290 Ill Dec. 525 (2004) (finding that a defendant who engages in such transactions would foresee injury).

Finally, the relevant issue of causation under a negligent entrustment theory relates to the *third party's* proximate cause of the injuries to Plaintiffs. *See State Farm*, 84 Ill. App. 3d 107 at 110. As discussed above, the entrustee IDF foreseeably caused, and foreseeably was the legal cause, of the harm to Plaintiffs.

Imposing liability on Defendant will not render it strictly liable to anyone who used its bulldozers illegally. *See Young*, 213 Ill. 2d at 454; *see also, Chicago*, 213 Ill. 2d 351 (cautioning that altering entire firearm industry to guard against prospective criminal use of firearms was too immense a burden). Here, only Defendant's supply of bulldozers to one client, and not those of the entire bulldozer industry, is involved. Defendant's liability is contained to the narrow third party use that is *foreseeable* (and foreseeable that such use was illegal), that of the IDF in the OT. Public policy factors and well-established law militate in favor of requiring Defendant to guard against the foreseeable harm of third party use of its products. Defendant's arguments fail and its motion should be denied.

The facts presented by Plaintiffs demonstrate an unbroken nexus between the harm alleged in the FAC and Defendant's provision of its bulldozers to the IDF. Thus, this case should be allowed to reach a jury to determine that there is an adequate causal link between decedents' deaths, Plaintiffs' injuries and Defendant's conduct.

2. Wrongful Death

Washington permits a wrongful death action "when the death of a person is caused by the wrongful act, neglect or default of another . . .." Wash. Rev. Code § 4.20.010 (1996). Illinois similarly permits a wrongful death action based on a wrongful act, neglect or default. 740 Ill. Comp. Stat. 180/1 (2003). Plaintiffs allege that decedents' deaths were caused by the wrongful acts, namely the negligent entrustment, sale, distribution of Defendant's bulldozers to the IDF.

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FAC at ¶ 127. Thus, under both Washington and Illinois law, Plaintiffs have properly alleged a claim for wrongful death and Defendant's motion should be denied.

3. Public Nuisance

Defendant has created a public nuisance by conducting its business in an unreasonable manner. Illinois and Washington courts unequivocally recognize a public nuisance claim. "A public nuisance is an unreasonable interference with a right common to the general public." Wash. Rev. Code § 7.48; *Chicago,* 213 Ill.2d at 366 (adopting definition in Restatement (Second) of Torts § 821B (1979)). Both Illinois and Washington courts recognize that "in determining whether a public nuisance exists, each case must be decided on its own peculiar facts." *Shields v. Spokane School Dist. No. 81*, 31 Wash.2d 247, 259, 196 P.2d 352 (1948); *Young*, 213 Ill.2d at 441. Ultimately, with regard to public nuisance, it is not relevant if Defendant's business itself is lawful—the proper focus is on the detrimental outcome related to operation of its business—here, the negligent entrustment of bulldozers to the IDF. *See Tiegs v. Boise Cascade Corp.,* 83 Wash. App. 411, 419, 922 P.2d 115 (1996). Based on the particular facts of this case, including facts related to death, injury, and extensive property destruction, Plaintiffs have met their burden and Defendant's motion should be denied.

The court's public nuisance analysis in both Washington and Illinois focuses on the same kind of factors. In Washington, a public nuisance is defined as "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." Wash. Rev. Code § 7.48.130 (1961). Similarly, under Illinois law, the elements for a nuisance claim are: 1) rights common to the general public; 2) defendants' substantial and unreasonable interference with a right common to the general public; 3) proximate cause; and 4) injury. *Young,* 213 Ill.2d at 369. Notably, Defendant's motion does not challenge the adequacy of Plaintiffs' facts alleged related to the specific elements of public nuisance.

In any case, Plaintiffs' FAC alleges injuries that affect equally the rights of the entire community/neighborhood, which are also rights common to the general public. The demolitions

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are detrimental to rights common to the general public including health, public safety, public peace, public comfort, and public convenience for all; clearly, the extent of the damage for particular individuals, as demonstrated by the different harm suffered by Plaintiffs, varies. FAC at ¶¶ 136; 25–40; 56–80. An injury to a right common to the general public includes injuries to health, the public safety, the public peace, the public comfort, and the public convenience. Restatement (Second) of Torts § 821B(2)(a)(1979);[52] *Chicago v. Baretta*, 213 Ill. 2d at 539.

Having established that existence of a common right, Plaintiffs also allege ample facts to demonstrate that the public nuisance "is specially injurious." Wash. Rev. Code § 7.48.210 (2003); *Young,* 213 Ill. 2d at 369, (citing Restatement (Second) of Torts § 821 C (1979) ("When an individual brings an action for public nuisance, the person must have 'suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."). Plaintiffs, because they allege facts related not only to the public harm, but also about their own distinct harms, meet the "specially injurious" and "harm of a kind different from that suffered by other members of the public" prongs of the public nuisance analysis. Indeed, "[p]ersonal injury to a plaintiff normally is different in kind from that suffered by the general public." Restatement (Second) of Torts § 821C, Comment d (1979). Where courts find that the conditions created by businesses do not rise to the level of creating a special injury, it is when there is no real injury—only trifling or imaginary annoyances. *See, e.g., Westgate Terrace Community Associates, Inc. v. Burger King Corp.*, 66 Ill. App. 3d 721, 23 Ill. Dec. 32, Ill. App. 1 Dist., (1978). Plaintiffs' injuries, including deaths of family members, traumatic injuries, and being made homeless, do not amount to trifling or imaginary annoyances. FAC at ¶¶ 56–80. In addition, "pecuniary loss to a plaintiff resulting from a public nuisance is normally a different kind of harm from that suffered by the general public." Restatement (Second) of Torts § 821C, Comment h. Here, as alleged in the

[52] Note that Washington courts look to the Restatement (Second) of Torts in analyzing public nuisance claims. *Hostetler v. Ward*, 41 Wash. App. 343, 357, 704 P.2d 1193 (1985).

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FAC, not only have Plaintiffs suffered personal injury and death, but also, significant property and pecuniary loss due to loss of home and possessions. FAC at ¶¶ 56–80; 123. Furthermore, Plaintiffs allege many facts to show that they suffered their injuries, harm from the unlawful house demolitions, while exercising a right common to the general public, which are discussed above. FAC at ¶¶ 25–40, 56–80.

In addition, under Illinois law, whether there has been an unreasonable interference with rights common to the general public depends on whether the industry is "regulated" or "not regulated". If a court finds that the selling of bulldozers *is not* a regulated industry, there are three circumstances which give rise to unreasonable interference: 1) conduct involving "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience"; 2) conduct that is "proscribed by a statute, ordinance or administrative regulation;" or 3) conduct that is "of a continuing nature . . . and, as the actor knows or has reason to know, has a significant effect upon the public right." *Chicago,* 213 Ill. 2d at 376.

As discussed above, Plaintiffs have alleged sufficient facts to support the unreasonable interference. FAC at ¶¶ 25–40, 56–80.

Even if the Court finds that the selling of bulldozers is found to be a "commercial enterprise highly regulated by state or federal law," Plaintiffs have alleged sufficient facts so that Defendant may still be held liable in public nuisance for their substantial and unreasonable interference with their rights. The facts show that Defendant's conduct easily meets the factors adopted by the Illinois Supreme Court: (1) the defendant's conduct is not in compliance with the law; or (2) the defendant was otherwise negligent. *Young*, 213 Ill. 2d at 444; *Chicago,* 213 Ill. 2d at 389. Plaintiffs have demonstrated both.

Next, Plaintiffs also allege ample facts related to proximate cause. Indeed, as with negligent entrustment, foreseeability is the touchstone of the proximate cause analysis regarding public nuisance. *City of Chicago v. American Cyanamid Co.*, 355 Ill. App. 3d 209, 224–225,

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291, 823 N.E. 2d 126, Ill. Dec. 116(2005) (finding no proximate cause between defendant manufacturers and sellers for sale and promotion of lead-based paint decades ago, which was subsequently *lawfully* used by others, when plaintiff also did not identify any specific product used in any specific location). As discussed, Plaintiffs have alleged sufficient facts to establish that Defendant knew or should have known that the IDF was using its bulldozers in manner that creates a public nuisance. Unlike the case in *Young* and *Watson*, Defendant here sells bulldozers directly to a third party that is using the bulldozers for illegal purposes. Unlike the situation in *American Cyanamid*, Defendant here has knowledge about where the certain, unlawful use of the bulldozers in specific locations. FAC at ¶¶ 44–53. "Legal cause will be found if reasonable persons in the businesses of manufacturing and selling [specially designed bulldozers] would have seen the creation of a public nuisance in [the Occupied Territory]. *Young*, 213 Ill. 2d at 453.

Finally, the injury to Plaintiffs is amply alleged. FAC at ¶¶ 56–80. In summary, because Plaintiffs have alleged sufficient facts to support a public nuisance claim, Defendant's Motion should be denied.

VIII. THE POLITICAL QUESTION AND ACT OF STATE DOCTRINES DO NOT PRECLUDE THIS LAWSUIT.

A. The Political Question Doctrine Does Not Bar Plaintiffs' Claims.

Defendant inaccurately claims that because this case arises in the context of the Israeli-Palestinian conflict and challenges a U.S. corporation's behavior, Plaintiffs' lawsuit is precluded by the political question doctrine. MTD at p. 36-37. The political question doctrine reflects a concern for the separation of powers of the branches of the United States Government. *See Powell v. McCormack*, 395 U.S. 486, 518 (1969). Defendant has utterly failed to meet its burden of establishing that the political question doctrine bars Plaintiffs' claims against Defendant, a U.S. corporation. "Courts in the United States have the power, and ordinarily the obligation, to

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decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

The political question doctrine does not preclude cases simply because foreign relations may be implicated. The "mere fact that this case raises difficult and politically sensitive issues connected to our foreign relations does not preclude us from carrying out the legislative mandate of Congress under §1350." *Alvarez-Machain v. Sosa*, 331 F.3d 604, 615, n. 7 (9th Cir. 2003), *overturned on other grounds*, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). The "potential overtones that this case may have on relations with the [state] leadership do not . . . warrant dismissal." *Alperin v. Vatican Bank*, 410 F.3d 532, 542 n.6 (9th Cir. 2005) (citing *Antolok v. United States,* 873 F.2d 369, 392 (D.C. Cir. 1989)) (Wald, C.J., concurring in judgment only) ("I read [*Baker v. Carr*] as a reminder that our focus should be on the particular issue presented for our consideration, not the ancillary effects which our decision may have on political actors."). The political question doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker v. Carr*, 369 U.S. 186, 217 (1962). Moreover, "judges should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in [the] context of human rights." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

The Supreme Court has warned against broadly dismissing cases because they relate to foreign relations: "[I]t is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker,* 369 U.S. at 211.[53] Indeed, courts cannot "shirk this responsibility merely because [a] decision may have significant political overtones." *Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

In fact, courts routinely reject dismissal on the grounds of political question where such violations are alleged to have occurred in armed conflict or civil war, including when such acts

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[53] *See also, Dames & Moore v. Regan*, 453 U.S. 654 (1981) (determining the constitutionality of the Executive agreement settling claims arising out of the crisis with Iran); *Regan v. Wald*, 468 U.S. 222 (1984) (adjudicated challenge to ban on travel to Cuba); *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.C. Cir 1990) ("courts are routinely deciding cases that touch upon or even have a substantial impact on foreign and defense policy.").

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are taken by government officials. *See, e.g., Kadic*, 70 F.3d 232. Plaintiffs' claims simply involve the Court reviewing whether specific conduct, which Defendant is alleged to have aided and abetted, violates the laws of war and customary international law. This is an analysis courts routinely engage in when reviewing claims brought under the ATS and TVPA.

1. Application of the *Baker* Factors to this Case Supports the Justiciability of All of Plaintiffs' Claims.

Cases relating to foreign relations must not be summarily dismissed, but must be subjected to "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. *Baker,* 369 U.S. at 211-12. The Supreme Court in *Baker* held that one of six factors must be present and inextricably linked to a case in order for it to be dismissed on political question grounds. None of these factors are present in this case, and Defendant only argues for the presence of two of them.

The Supreme Court also made clear that, "it is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker,* 369 U.S. at 211; *see also, Dames & Moore v. Regan*, 453 U.S. 654 (1981) (determining the constitutionality of the Executive agreement settling claims arising out of the crisis with Iran); *Regan v. Wald,* 468 U.S. 222 (1984) (adjudicated challenge to ban on travel to Cuba); *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.C. Cir 1990) ("courts are routinely deciding cases that touch upon or even have a substantial impact on foreign and defense policy.").

The *Baker* factors used to assess whether the political question doctrine precludes relief must be applied to *each* claim: "we take a surgical approach rather than a broad brush in benchmarking the *Baker* formulations against the individual claims. It is incumbent upon us to examine each of the claims with particularity." *Alperin,* 410 F.3d at 547. Notably, in arguing for dismissal based upon political question grounds Defendant does not specifically address

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Plaintiffs' claims for extrajudicial killing, cruel, inhuman or degrading treatment of punishment, RICO violations, wrongful death, public nuisance, or negligence.

(a) Textually Demonstrable Commitment

The first *Baker* factor assesses if there is a textually demonstrable commitment to a coordinate political department. None of Plaintiffs' claims raise issues that are constitutionally committed to either the executive or legislative branches. "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury,* 5 U.S. (1 Cranch) 137, 177 (1803). The claims raised by Plaintiffs all involve the application of a clear legal standard to a set of facts, a function that is uniquely judicial. Courts have consistently addressed claims for tortious violations of international law like those raised in this case. *See, e.g., Sosa*, 124 S. Ct. at 2739 (2004) ("it is correct to assume that the First Congress understood that district courts would recognize private causes of action for certain torts in violation of the law of nations"); *see also, Kadic,* 70 F.3d at 249 (quoting *Klinghoffer*, 937 F. 2d at 49) ("'[T]he department to whom this [international law] issue is "constitutionally committed" is none other than our own—the Judiciary.'").

To support its novel argument that a court cannot declare that a foreign government has committed war crimes, Defendant relies exclusively on *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005). In *Alperin*, plaintiffs claimed that the Vatican Bank profited from the genocidal acts of the Ustasha regime during World War II, including through looted assets and slave labor. *Alperin,* 410 F.3d at 538. In determining the justiciability of plaintiffs' claims, the court divided them into "property claims" (including those for conversion, unjust enrichment, restitution, and an accounting with respect to lost and looted property), and those it deemed to be "war objective claims". *Id.* at 548.

The Ninth Circuit determined that plaintiffs' claims to recover any profits by the Vatican Bank from assets improperly taken by anyone acting in furtherance of the Nazi or Ustasha regime in Ukraine or Yugoslavia were "garden-variety legal and equitable claims". *Id.* at 548-

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49. The court applied the *Baker* factors to the property claims and found that they were not committed to the political branches and were therefore justiciable. *Id.* at 548. Similarly, Plaintiffs' state tort and RICO claims are garden-variety claims that are routinely adjudicated by the courts. Moreover, Plaintiffs' claims for violations of customary international law are also justiciable.

The *Alperin* plaintiffs' "war objective claims", however, which alleged that the defendants actively assisted the war objectives of the Ustasha Regime, were found by the court to be nonjusticiable political questions for entirely different reasons than those presented here. *Alperin,* 410 F.3d at 549. As to plaintiffs' claims for war crimes, crimes against peace, and crimes against humanity, the court decided that it would not step in a half-century later and intrude on the Allies' policy choice not to prosecute defendant through the Nuremburg Trials for war crimes committed by an enemy of the United States during World War II. *Id.* at 560. Those involved a government with which the U.S. was at war, since the Constitution vests the Executive with the ability to discipline enemies who violate the law of war in attempts to impede our military effort, and the Executive had exercised its authority not to prosecute through the Nuremberg Trials.[54] *Id.* at 559-561. Conversely, there is no corresponding constitutional commitment in this case; Plaintiffs are not asking the Court to discipline a foreign country with whom the U.S. has been at war. Moreover, no international tribunal has adjudicated the war crimes described in Plaintiffs' FAC. Significantly, Defendant glosses over the fact that Plaintiffs do not seek any judgment against Israel or related to U.S. foreign policy, but only against Defendant, a U.S. corporation, and there certainly has been no decision by the U.S. Government not to prosecute Defendant.

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[54] The court applied the same analysis to plaintiffs' claims that defendant was unjustly enriched by profits derived from slave labor, which would have required an indictment of the Ustasha regime for its conduct. *Id.* at 560-561Drawing from this constitutional analysis, the court also said that in applying the third *Baker* factor, any condemnation of the Ustasha regime's use of forced labor during WWII "must first emanate from the political branches." *Id.* at 561.

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Defendant's claim that this case is non-justiciable because it would require the Court to declare that a foreign government has committed war crimes is clearly inaccurate. MTD at p. 35. "[T]here is no foreign civil war exception to the right to sue for tortious conduct that violates the fundamental norms of the customary laws of war". *Linder v. Portocarrero,* 963 F.2d 332, 336 (11th Cir. 1992) (holding that political question doctrine did not apply when there is no challenge to the legitimacy of United States foreign policy concerning contras and when court not required to say which side was "right" in Nicaraguan civil war).[55] War crimes are justiciable claims. *See, e.g., Kadic,* 70 F.3d 232 (rejecting political question defense for war crimes committed in the former Yugoslavia).[56]

Even in a case against corporations alleged to have provided their product to the *United States* Government to commit war crimes in a foreign country, the court in *In re Agent Orange,* 373 F. Supp. 2d 7, 164-65 (E.D.N.Y. 2005) refused to bar plaintiffs' claims based on the political question doctrine, "given the importance of international law today in preventing abuse by nations and individuals, and the importation of that law into ruling federal law". Like the corporate defendants in that case, Defendant here has too "broadly construe[d] the types of controversies whose adjudication would impermissibly interfere with the conduct of foreign relations," resulting in an avoidance of the "well-accepted principle that 'international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their

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[55] *See also, Deutsch v. Turner Corp.*, 324 F.3d 692, 713 n.11 (9th Cir. 2003); *Committee of U.S. Citizens Living in Nicaragua v. Reagan,* 859 F.2d 929, 935 (D.C. Cir. 1988).

[56] The *Alperin* court distinguished *Kadic v. Karadzic,* in which the court rejected the political question defense in a class action for damages brought by Croat and Muslim citizens of Bosnia-Herzegovina who claimed they were victims of various atrocities, including brutal acts of rape and other torture and summary execution carried out by Bosnian-Serb military forces in the course of the Bosnian genocide (*Kadic,* 70 F.3d at 249-50). The court noted that the claims in *Kadic* "focused on the acts of a single individual during a localized conflict rather than asking the court to under-take the complex calculus of assigning fault for actions taken by a foreign regime during the morass of a world war." *Alperin,* 410 at F.3d at 562. Plaintiffs' claims against one entity, a private corporation, which arose within the context of a localized conflict, clearly more closely resemble the justiciable claims in *Kadic.*

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determination.'"[57] *In re Agent Orange,* 373 F. Supp. 2d at 148-49 (citing *The Paquete Habana,* 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900)).

In another case alleging war crimes, extrajudicial killings, and property confiscation and destruction, the court also dismissed the corporate defendant's political question argument. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 347-49 (S.D.N.Y. 2003). Citing to the Second Circuit's decision in *Kadic,* the *Talisman* court agreed to hear the case despite the "complexity of the underlying events and despite the sensitivity of the questions involved," as the issues in front of it were "not nearly as complex as [defendant] makes them out to be." *Presbyterian Church,* 244 F. Supp. 2d at 347. The court noted that it "need not act as a truth and reconciliation commission and unravel the intricacies of Sudan's civil war." *Id.* Instead, it merely had to determine "whether Sudan and Talisman violated international law by committing certain acts" prohibited by "judicially-ascertainable" standards of behavior under international law. *Id.* Similarly, despite Defendant's argument that this case raises foreign policy implications, this court can, and must confine its judgment to the legal issues before it. *See, e.g., Republic of Aus. v. Altmann*, 541 U.S. 677, 726 (2004) ("Court of Appeals wrongly assumed responsibility for the political question, rather than confining its judgment to the legal one.").

(b) Judicially Discoverable and Manageable Standards

The second *Baker* factor, which Defendant did not address, relates to whether there are judicially discoverable and manageable standards for resolving the issue. A case should not be held nonjusticiable under this test "without first undertaking an exhaustive search for applicable standards." *Alperin,* 410 F.3d at 552. The judiciary is reluctant to reject damages claims for violations of individual rights as non-justiciable. *Koohi v. United States*, 976 F.2d 1328, 1332

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[57] In fact, the court cited at length the confused and unstable ground on which the political question doctrine stands, noting that "experts have observed that 'the political question doctrine is in a state of some confusion' . . . [while] others have gone further, some saying that the doctrine is useless, still others that it does not exist."). *In re Agent Orange*, 373 F. Supp.2 at 151-65.

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(9th Cir. 1992) ("Damage actions are particularly judicially manageable" and "are particularly nonintrusive"); *see also, In re Agent Orange,* 373 F. Supp. 2d at *158 ("since *Baker,* the [Supreme] Court has generally refused to hold that an individual's claims of personal injury present nonjusticiable political questions").[58] The focus of this factor is "whether the courts are capable of granting relief in a reasoned fashion or, on the other hand, whether allowing the [claims] to go forward would merely provide 'hope' without a substantive legal basis for a ruling. *Alperin,* 410 F.3d at 553.

Each of the claims raised by Plaintiffs has been adjudicated by previous courts applying judicially discoverable and manageable standards. The international law claims have been most recently recognized by the Supreme Court as involving such standards. *See, e.g., Sosa,* 124 S. Ct. 2739; *see also, Kadic,* 70 F. 2d at 249 ("[U]niversally recognized norms of international law provide judicially discoverable and manageable standards . . .."). Applicable standards for adjudicating claims for public nuisance, negligence, and wrongful death have been extensively developed by the judiciary, and statutes such as the TVPA and RICO are enacted to provide standards for so as to create justiciable claims.

(c) Initial Policy Determination

The third *Baker* factor concerns whether it is possible to adjudicate the case without making an initial policy determination "of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Plaintiffs' discrete claims will not require the court to make any policy determination involving nonjudicial discretion, including any pronouncement on foreign policy. *See, e.g., Alperin,* 410 F.3d at 555. In fact, the Department of State has declared that vindication of human rights by the judiciary does not impair, and in fact furthers, United States foreign policy:

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[58] *See also, U.S. Dep't. of Commerce v. Montana*, 503 U.S. 442, 442, 458-459 (1992); *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *Davis v. Bandemer*, 478 U.S. 109 (1986); *United States v. Nixon*, 418 U.S. 683 (1974); *Powell v McCormack*, 395 U.S. 486 (1969); *Deutsch v. Turner Corp.*, 324 F.3d 692, 713 n.11 (9th Cir. 2003).

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> The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law . . . there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.

Memorandum for the United States in *Filartiga v. Pena-Irala*, 19 I.L.M 585, 604 (2d 1980).

This case does not ask the court to make any judgment concerning the executive branch's discretionary power to formulate this country's foreign policy. Defendant would have this court ignore the *Baker* court's clear pronouncement that cases that touch upon foreign policy should not be dismissed on political question grounds. Defendant would have this court reverse clearly established Supreme Court precedent and rule in a way that would preclude any claim involving violations of international law. Moreover, the violations raised by Plaintiffs arise out of conduct that has been repeatedly and recently condemned by the executive branch As Secretary of State Colin Powell stated, "We oppose the destruction of [Palestinian] homes—we don't think that is productive."[59] Similarly, the State Department Spokesman has said, "First, I'll make clear again, as the White House has made clear, we and the Secretary have made clear, that we oppose the destruction of houses of innocent Palestinians."[60] Furthermore, State Department reports regularly find that Israel has violated the human rights of Palestinians in the OPT, including for the destruction of homes. FAC at ¶ 46.[61]

Defendant seems to argue that because sales to Israel have not been prohibited or restricted by the executive branch, Caterpillar cannot be liable for its unlawful conduct. MTD at p.36. Although it is unclear under what *Baker* factor Defendant makes this argument, such a

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[59] Laura King, *Israel Threatens More Demolitions*, L.A. TIMES, May 17, 2004, at A3.

[60] Press Conference with William J. Burns, Assistant Secretary for Near Eastern Affairs, State Department, in Bahrain (Jan. 12, 2002) at http://www.state.gov/p/nea/rls/rm/2002/7275.htm. William J. Burns of the State Department stated, "[w]e've said quite consistently that the demolition of homes, of Palestinian homes, has not been helpful in creating an atmosphere in which people can move toward ending violence and restoring a political process." *Id.*

[61] *See, e.g.,* State Dep't Bureau of Democracy, Human Rights, and Labor, Israel and the Occupied Territories County Report on Human Rights 2004, *The Occupied Territories Appendix* § 1(f),(g) and §4 (2005). In terms of arbitrary or unlawful deprivation of life, the 2004 report states, "killings by . . . Israeli forces . . . remained a serious problem." *Id.* at §1(a).

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sweeping rule would preclude liability for any unlawful conduct arising from a relationship between a private corporation and a foreign entity unless Congress or the Executive had very specifically prohibited it. Ignoring the facts of this case, Defendant instead provides irrelevant details regarding Israeli arms appropriations and Congressional attitudes about economic boycotts.[62] *Id.* The cases cited by Defendant are inapposite to Plaintiffs' claims against a private defendant. In *Dickson v. Ford*, 521 F.2d 234, 235 (5th Cir. 1975) and *Mahorner v. Bush*, 224 F. Supp. 2d 48 (D.D.C. 2002), the courts rejected a taxpayer's suit against the President of the United States alleging that foreign assistance to Israel was unconstitutional. In contrast, Plaintiffs' claims do not challenge any action by the United States.

Defendant inaccurately argues that Plaintiffs' case is non-justiciable because the political branches have the authority to question when and how U.S. companies engage in commerce with foreign states that allegedly engage in human rights violations. MTD at p. 37. Plaintiffs' lawsuit also does not seek to have all economic dealings with Caterpillar or Israel stopped; Plaintiffs seek damages from a private corporation for illegal conduct to vindicate their individual rights.[63] Defendant cites to inapposite authority for this argument, and ignores clearly applicable cases. Defendant's sole authority is *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), a case concerning the pre-emption under the Supremacy Clause of a state law concerning an economic boycott of Burma. *Crosby* involved issues of federalism between the federal and state governments, and not the political question doctrine. Defendant ignores *Doe v. Unocal*, 963 F. Supp. 880, 895 (C.D. Cal. 1997), in which the court rejected the corporate defendant's argument that Executive and Congressional decisions to encourage reform through investment in Burma by

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[62] Obviously any Government statements condemning terrorism are irrelevant to this case, as even the "war on terrorism" must be conducted within the bounds of international law.

[63] Insofar as this Court deems injunctive relief appropriate, Plaintiffs merely seek that the Court order Defendant to cease provision of the equipment and services complained of to the IDF until the resulting unlawful violations cease. Plaintiffs are not seeking any specific action by the political branches. Rather they just ask this Court to enjoin a U.S. corporation from continuing its unlawful activity. *See Alperin*, 410 F.3d at 548, n.10.

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U.S. companies precluded plaintiffs' claims for aiding and abetting international human rights violations by the *Burmese* government.

(d) Contradict Prior Political Decisions

The fourth, fifth, and sixth factors, which Defendant also does not address, concern whether claims can be resolved without showing a lack of respect for coordinate branches, requiring an unusual need to adhere to a policy decision, or causing embarrassment from multifarious pronouncements, respectively. *Baker,* 369 U.S. at 217. These factors are relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch, and where this contradiction would seriously interfere with important government interests. *Kadic,* 70 F.3d at 249. The political branches have not taken action on the issues raised by Plaintiffs' FAC, so it would be impossible for judicial resolution of this case to contradict prior decisions and therefore show a lack of respect, to stray from a policy decision, or to cause embarrassment by a conflicting pronouncement.[64]

Defendant argues Plaintiffs' case should be dismissed because the deaths and injuries occurred in a sensitive area of the world that concerns the U.S. government. MTD at p. 37. Plaintiffs seek to enforce their individual rights against a private corporation; the mere fact their claims arises in a politically charged context does not render them non-justiciable. The "fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question." *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 49 (2d Cir. 1991). Many U.S. courts have adjudicated cases in the context of the Israel-Palestine conflict. *See, e.g., Klinghoffer,* 937 F.2d at 49 (holding that killing of an American citizen by the Palestine Liberation Organization (PLO) on the high seas does not raise a political question); *see also, Ungar v. Palestinian Liberation Org.*, 402 F. 3d 274, 280 (1st Cir.

[64] The court in *Alperin* found that plaintiffs' claims that defendants helped war criminals flee from prosecution could also be levied against the United States, which had made a political decision to do the same, so challenging such practice would cause the court to sit in judgment regarding that U.S. foreign policy. *Alperin,* 410 F. 3d at 560. In this case, a judgment against Defendant would not similarly implicate any U.S. political decision. In fact, as noted above, the United States has consistently condemned the activity giving rise to Plaintiff's claims.

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2005) (holding that PLO could not invoke political question to bar shooting victims' claims since the fundamental nature of the action was a tort suit). In *Knox v. Palestinian Auth.*, 306 F. Supp. 2d 424, 448 (S.D.N.Y. 2004), the court also held that Palestinian government defendants could not invoke the political question doctrine against claims brought by survivors of a shooting victim. The court there stated: "Defendants assert that this case will require the Court to 'assess[] the Palestinian-Israeli conflict over the years' and to 'adjudicate history in progress.'... The Court will not, and need not, endeavor to answer...these broader and intractable political questions which form the backdrop to this lawsuit." *See also, Biton v. Palestinian Interim Self-Government Auth.*, 310 F. Supp. 2d 172, 184 (D.D.C. 2004) (court rejected Palestinian government defendants' political question argument regarding claims by a bombing victim's widow: "Although the backdrop for this case—*i.e.*, the Israeli-Palestinian conflict—is extremely politicized, this circumstance alone is insufficient to make the plaintiffs' claims nonjusticiable."). *See also, Sharon v. Time*, 599 F. Supp. 538, 552 (S.D.N.Y. 1984) (Prime Minister Ariel Sharon's libel suit regarding his role in the massacre of Palestinians was justiciable, because abstention is not appropriate when "individual rights in domestic affairs are at stake, even where the litigation touches upon sensitive foreign affairs concerns..."). Regardless of the context, whether the unlawful acts alleged by Plaintiffs occurred, and whether Defendant is liable, are justiciable questions which this Court is able and even required to decide.

Defendant's assertion that whether a foreign government has committed war crimes is a policy decision reserved to the executive branch is simply inaccurate. Even if this case were to directly challenge the acts of foreign officials during wartime, it is nonetheless justiciable. The Ninth Circuit has rejected the political question defense in actions against individuals or government officials for wrongful, illegal conduct during wartime. The Ninth Circuit in *Koohi* expressly held that federal courts are well equipped to review military decisions:

> Nor is the lawsuit rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation. The Supreme

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> Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.

Koohi, 976 F.2d at 1331.

The Supreme Court has repeatedly permitted damage actions to be brought against individual soldiers and officers for wrongful or otherwise tortious conduct taken in the course of warfare.[65] As the Supreme Court recently stated in relation to the United States military:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. *Korematsu* v. *United States*, 323 U.S. 214, 233-234, 89 L. Ed. 194, 65 S. Ct. 193 (1944) (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled"); *Sterling* v. *Constantin*, 287 U.S. 378, 401, 77 L. Ed. 375, 53 S. Ct. 190 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2649-50 (2004).

B. The Act of State Doctrine Does Not Bar Plaintiffs' Claims.

1. The Act of State Doctrine only applies to the acts of a sovereign government in its own territory.

The Act of State Doctrine (ASD) is inapplicable to this case because the acts complained of occurred in the OPT, not in Israel's territory. *See* FAC at ¶¶ 26-30, 57, 59, 61, 68, 77. The

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[65] See *also, Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (U.S. soldier sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878) (soldier was not exempt from civil liability for trespass and destruction of cattle if his act not done in accordance with the usages of civilized warfare); *Freeland v. Williams*, 131 U.S. 405, 417 (1889); *The Paquete Habana*, 175 U.S. 677 (1900) (court imposed damages for seizure of fishing vessels). *See also,* Robert B. McKinney, 53A Am. Jur. 2d *Military and Civil Defense* § 293 (1971); W. Winthrop, *Military Law & Precedents* 780 n. 31, 887-89 (2d ed. 1920). Most recently, in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2645 (2004), the Supreme Court rejected the U.S. Government's argument that "'[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process . . .." (quoting Respondents' brief). Cases such as *Underhill* which stand for the premise "that acts of *legitimate warfare* cannot be made the basis for individual liability...do not support the...findings that domestic tort actions are not appropriate remedies for injuries to non-combatants occurring outside of the United States during conflicts between belligerents." *Linder*, 963 F.2d at 337.

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Act of State doctrine dictates that "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, *done within its own territory*." *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897) (emphasis added) (quoted with approval in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 416 (1963)). The primary purpose of the ASD is to protect a sovereign authority's actions within its own territory. *See Risk v. Kingdom of Norway*, 707 F. Supp. 1159, 1168 (N.D. Cal. 1989) (rejecting application of the Act of State Doctrine for actions of Norwegian officials inside the U.S. and approved by officials in Norway), *aff'd*, 936 F. 2d 393 (9th Cir. 1991); *see also, El-Hadad, v. Embassy of the U.A.E.*, 69 F. Supp. 2d 69, 81 (D.D.C. 1999)("the Act of State doctrine applies only when the actions of the foreign state occur *within* that foreign state") (emphasis added) (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 21, 24 (D.D.C. 1998)) ("Political assassinations ordered by foreign states *outside* their territory, however, are not valid acts of state which bar consideration of the case.") (emphasis added). *See also*, Restatement (Third) of Foreign Relations Law §433 (1) (1987) ("[C]ourts in the United States will generally refrain from . . . sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.").

The Act of State Doctrine does not apply when the acts in question occurred in an occupied territory, as here. "The act of state doctrine has never been applied to official conduct of an enemy nation in territory beyond its boundaries under its temporary wartime military occupation." *State of the Netherlands v. Federal Reserve Bank*, 99 F. Supp 655, 667 (S.D.N.Y. 1951), *aff'd in part, rev'd in part on other grounds*, 201 F. 2d 455, 458 (2d Cir. 1953); *see also, Kalmich v. Bruno*, 450 F. Supp. 227, 229 n.2 (N.D. Ill. 1978) (denying summary judgment and stating the ASD cannot apply to Nazi forces occupying Yugoslavia because it "only applies to acts of a sovereign in its own territorial jurisdiction and not to acts of a belligerent force, during wartime, occupying the territory of an enemy nation."), *cited with approval on same point in,*

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Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1203 n.17 (C.D. Cal. 2001), *aff'd on other grounds*, 317 F. 3d 954 (2002), *aff'd on other grounds*, 124 S. Ct. 2240 (2004).

The actions alleged were not committed *within Israel's own territory*; but rather in the OPT, an area over which Israel has expressly stated it does not have sovereign authority. *See Second Periodic Report of Israel*, U.N. Hum. Rts. Comm., ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2, (2001) ("Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction . . .. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip . . .."). [66] The U.S. State Department agrees that Israel does not have sovereign authority over the OPT. [67]

Defendant acknowledges that an act must be performed within a sovereign's territory to apply the Act of State doctrine, yet fails to further address the issue, much less provide any support for application of the doctrine to acts in the OPT and thus outside Israel's sovereign territory. MTD at p. 38. Defendant has failed to meet its burden to justify application of the doctrine. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976); *see also, Liu v. Republic of China,* 892 F.2d 1419, 1432 (9th Cir. 1989). Even if Defendant were to argue that the OPT is within the territory of Israel, such argument could not be countenanced in that it is incompatible with Plaintiffs' factual allegations, is contrary to the clear position of the sovereign government of Israel, and is contrary to the announced policy of the United States.

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[66] This report continues: "Furthermore, pursuant to the Israeli-Palestinian Interim Agreement of 1995 ... the overwhelming majority of powers and responsibilities in all civil spheres . . . have been transferred to the Palestinian Council, which in any event is directly responsible and accountable vis-à-vis the entire Palestinian population of the West Bank and the Gaza Strip with regard to such issues . . .. Israel cannot be internationally responsible for ensuring the rights under the ICCPR in these areas." Second Periodic Report of Israel, U.N. Hum. Rts. Comm., ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (2001).

[67] "The lands known as 'the occupied territories'... were occupied by Israel in 1967 and have been under military occupation since then. Israel has not been recognized to have sovereign rights over any of the occupied territories...." Dep't of State, Country Reports on Human Rights Practices 1991: Report Submitted to the Comm. of Foreign Affairs, House of Representatives and the Committee on Foreign Relations, U.S. Senate, 102d Cong., 2d Sess. 1440 (February 1992); *See also*, State Dep't. Human Rights Report on Israel & the OPT 2004, *supra, The Occupied Territories Appendix* ("Israel exercised occupation authority through the Israeli Ministry of Defense's Office of Coordination and Liaison."). The U.N. has also recognized that Israel is an occupying force with no sovereign authority in the OPT. *See*, e.g., U.N. Security Council Resolution 242, November 22, 1967 (calling for "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict").

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See FAC at ¶¶ 25. Defendant's act of state argument must therefore be rejected outright. "Defendant's failure to meet his threshold burden of establishing the applicability of the act of state doctrine makes it unnecessary to proceed to an analysis of the *Sabbatino* factors." *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546, n. 9 (N.D. Cal. 1987).

2. The *Sabbatino* factors counsel against applying the Act of State Doctrine to this case.

The Supreme Court in *Sabbatino* established that a court should not examine the validity of a sovereign act of a foreign government committed within its own territory unless there is a high degree of international consensus concerning applicable legal principles. The first relevant *Sabbatino* factor governing the analysis concerns the degree of international consensus concerning the area of law at issue - whether Plaintiffs' claims are based on violations of well-settled principles of international and U.S. law. *Sabbatino*, 376 U.S. at 427-28. *See also, Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1190 (C.D.Cal. 2002); *Hirsh v. State of Israel*, 962 F. Supp 377 at 381 (S.D.N.Y 1997), *aff'd*, 133 F. 3d 907, *cert. denied*, 118 S. Ct. 1392 (holding the ASD does not apply to military commands that violate *jus cogens* norms, and that a "state violates *jus cogens* when it participates in such blatant violations of fundamental human rights as genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination"); *see also, Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995) (court recognized that civil liability for war crimes including "acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities . . . have long been recognized in international law as violations of the law of war.").

While Defendant argues that there are no standards for determining military necessity for civilian property destruction, courts and international tribunals have long adjudicated whether military necessity justifies violations of fundamental rights, and in so doing have applied clear legal principles accepted by the vast majority of the countries of the world. *See supra,* p. 14. "A claim arising out of an alleged violation of fundamental human rights ... would (if otherwise

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sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts." Restatement (Third) of Foreign Relations Law § 443 cmt. C. (1987). War crimes cannot be deemed official acts of state, as they are not legitimate acts of warfare. *Sarei,* 221 F. Supp. 2d at 1189 (C.D.Cal. 2002); *see also, Linder,* 963 F.2d at 337 (only "acts of legitimate warfare" are exempt from liability under *Underhill, supra*); *Doe v. Unocal Corp.,* 963 F. Supp. 880, 894-95 (C.D. Cal. 1997) ("Because nations do not, and cannot under international law, claim a right to torture or enslave their own citizens, a finding that a nation has committed such acts, particularly where, as here, that finding comports with the prior conclusions of the coordinate branches of government, should have no detrimental effect on the policies underlying the act of state doctrine."); *Sharon v. Times, Inc.* 599 F. Supp. 538, 544 (S.D.N.Y. 1984) (court rejected application of the ASD to bar adjudication of an action against a U.S. corporation even though "a trial of this action will require . . . judgment as to numerous acts of the State of Israel," because the acts in question (the massacre of Palestinian civilians at a refugee camp) could not be authorized by any state). At this point in the proceedings the Court must accept Plaintiffs' allegations that the deaths and injuries caused by Caterpillar Bulldozers operated by IDF soldiers violated customary international law norms and cannot be accepted as legitimate acts of warfare or acts of state. *See, e.g., Sarei,* 221 F. Supp at 1189 ("the court must, at this stage of the proceedings, accept plaintiffs' allegations as true, and consider" the act a form of genocide, rather than a legitimate act of warfare).

The second *Sabbatino* factor, the sensitivity of the issue with respect to U.S. foreign relations, also weighs against application of the Doctrine. The Executive Branch has clearly condemned Israel for demolishing the homes of civilians and for killing civilians. State Dep't 2004, *supra,* p. 86, n. 67.

> [I]nvocation of the act of state doctrine is not appropriate unless it is "apparent" that adjudication of the matter will bring the nation into hostile confrontation with the foreign state. Where, as here, the coordinate branches of government have

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> already denounced the foreign state's human rights abuses, it is hard to imagine how judicial consideration of the matter will so substantially exacerbate relations as to cause "hostile confrontation."

Unocal, 963 F. Supp. at 880.

Just because a "consideration of such questions [] no doubt touches on national nerves, and raises the possibility of embarrassment to the United States and Israel . . . a court should not refuse to apply established principles of human rights . . .. To the contrary . . . the act of state doctrine need not be applied to bar review of the violation of well recognized human rights." *Sharon,* 599 F. Supp. at 552. Defendant also argues that the court should request a statement of interest from the State Department to ensure the case will not have a negative impact on foreign policy. MTD at p.39. If the executive branch believed this litigation would interfere with U.S. foreign policy, it would not wait for this Court's invitation to express its views. The Supreme Court has noted, "often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically." *Sabbatino*, 376 U.S. at 436. This is particularly relevant when the state department has issued statements at other times for cases raising similar issues, but is silent in the case at hand. *Id.; see also, Alperin* at 557 (quoting, *Sosa,* 124 S. Ct. at 2766 n.21 ("Given the Executive Branch's continuing silence on [plaintiffs'] claims, however, we follow *Sosa*'s lead that at this time 'we need not apply here . . . a policy of case-specific deference to the political branches.'")).[68]

Finally, Defendant claims Israel was acting in the public interest. MTD at p. 39. To say that a state was acting in the public interest by intentionally destroying homes with civilians still inside and brutally crushing a U.S. citizen trying to protect one of those homes in the OPT, where it has no sovereign authority, is a perverse construction of the meaning of "public interest." "It would be difficult to contend that . . . violations of international human rights were

[68] Courts have consistently stated than even when a statement of interest is submitted, the Court will weigh their position accordingly. *See, e.g., First National City Bank v. Banco National de Cuba*, 406 U.S. 759, 788 (1972) (plurality opinion); *see also, In re Agent Orange*, 373 F. Supp.2d at 274-275 (court rejected application of political question doctrine despite U.S. statement of interest submission).

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"in the public interest." *Doe v. Unocal Corp.*, 963 F. Supp. 880, 893 (C.D. Cal. 1997); *see also, Doe v. Qi*, 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004) (it "would be difficult to conclude that the more specific actions allegedly taken in violation of international human rights—*e.g.* torture, cruel, inhuman or degrading treatment and arbitrary detentions—were "in the public interest.")

Defendant also makes the unsubstantiated assertion that it sold the bulldozers to Israel through the Foreign Military Sales Program pursuant to the Arms Export Control Act (AECA), and that items designated as defense articles for export under the AECA are not subject to judicial review. MTD at p. 40. This statement should not be considered by the Court, as there is no factual basis to support it; and it contradicts what has been alleged by Plaintiffs, which is that the sales are direct commercial sales. FAC at ¶55. Despite how Defendants' commercial sales were made (MTD at p.36), there is no authority to violate customary international norms which no entity has the authority to violate. The ASD concerns the legitimate sovereign acts of another government within its territory; it does not prevent a court from sitting in judgment of the actions of a U.S. corporation that has contributed to human rights violations outside of a foreign state's territory, and clearly does not preclude Plaintiffs' claims.

IX. CONCLUSION

For all the reasons discussed above, Defendant's Motion to Dismiss should be denied in its entirety.

DATED this 23nd day of August, 2005.

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