Case No. 05-36210

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CYNTHIA CORRIE and CRAIG CORRIE, *et al.*
Plaintiffs/Appellants,

v.

CATERPILLAR INC.,
Defendant/Appellee.

Appeal From A Judgment Of The United States District Court

For The Western District of Washington, Tacoma Division,

Case No. CV-05192-FDB

The Honorable Frank D. Burgess

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International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* Protocol I, Article 52 at ¶2022 .... 29, 30

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record for CATERPILLAR INC, Defendant-Appellee, certifies that, to their knowledge, Caterpillar Inc. has no parent corporations and that there are no publicly held companies that own 10% or more of its stock.

I. INTRODUCTION

The district court properly dismissed appellants' complaint, which is based on the legally unsupportable proposition that Caterpillar should be liable in tort for the independent acts of the Israeli Defense Forces ("IDF") solely because it sold bulldozers – ordinary construction equipment – to Israel after human rights organizations put it on "notice" that the IDF might use bulldozers in violation of international law. Appellants concede that Caterpillar did not control or even influence the decisions of the IDF and its soldiers.

Appellants are Palestinians (the "Palestinian Plaintiffs") who live in the Gaza Strip and the West Bank, and the parents of a young American activist who died in the Gaza Strip in 2003 (collectively "Plaintiffs"). Plaintiffs allege that the IDF committed war crimes and other international and municipal torts by demolishing Palestinian houses. Plaintiffs' theory of relief – that the seller of legal, non-defective construction equipment can be liable for a foreign government's independent decision on how to use that equipment – is unsupported by any principles of international, federal, or state law. It would be an unprecedented expansion of the kinds of international law claims permitted in the federal courts, defying the Supreme Court's recent mandate to exercise "great caution" in recognizing such claims. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (hereafter "*Sosa*"). It would stretch the concept of "aiding and abetting" beyond any reasonable or predictable limits. It would also replace well-established principles of proximate causation with a foreseeability concept that threatens any U.S. exporter with liability for failing to predict the conduct of a foreign

government in dealing with its citizens or making battlefield decisions. The district court correctly recognized these defects in Plaintiffs' theory and dismissed the case.

The district court also correctly recognized that Plaintiffs' claims represent an attempt to shape U.S. foreign policy. The political branches of the federal government have decided that U.S. foreign policy is served by providing the Israeli military with material support worth billions of dollars a year. In fact, U.S. government funds paid for the bulldozers that Caterpillar sold to Israel. Through this litigation, Plaintiffs seek relief amounting to an economic boycott. Plaintiffs also seek a determination that the Israeli military is guilty of war crimes. Plaintiffs' foreign policy objectives are precluded by the political question, foreign affairs, and act of state doctrines, which recognize that the executive and legislative branches of the federal government, not the courts, are constitutionally empowered to handle foreign relations.

The district court's order should be affirmed.

II. STATEMENT OF JURISDICTION

For the reasons discussed below, the Court has no subject matter jurisdiction over Plaintiffs' claims under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, or over the purported international law claims of the family of Rachel Corrie under 28 U.S.C. §1331. Further, the case is non-justiciable, and the Court therefore has no subject matter jurisdiction, under the political question doctrine.

The appeal is from a final judgment entered against Plaintiffs on November 29, 2005. 28 U.S.C. §1291. Plaintiffs' Notice of Appeal was timely filed on December 21, 2005.

III. ISSUES PRESENTED

1. Whether Plaintiffs' international law allegations satisfy the restrictive standard the Supreme Court established in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), for ATS claims.

2. Whether Plaintiffs have stated a claim against Caterpillar for aiding and abetting alleged international law violations of the IDF by selling bulldozers to the Israeli government.

3. Whether the Court has jurisdiction over the purported international law claims of the family of Rachel Corrie under 28 U.S.C. §1331.

4. Whether Plaintiffs have stated a claim under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 (note).

5. Whether Plaintiffs' allegations that Caterpillar sold bulldozers to Israel are sufficient to support tort claims under state law.

6. Whether Plaintiffs' claims are justiciable under the political question, act of state, and foreign affairs doctrines.

IV. STATEMENT OF THE CASE

A. Plaintiffs' Allegations

Plaintiffs allege that the government of Israel has engaged in a practice of demolishing homes in areas Israel occupied following the 1967 Six Day War. ER 15:7, ¶25. Allegedly, Israel demolished homes in these Occupied Territories: to create "buffer zones" around military bases and other areas; to discourage growth of the Palestinian population in certain areas; to clear paths for the IDF's tanks and other weaponry; and as punitive measures against persons connected to suspects in attacks against Israeli civilians or soldiers. ER 15:7-8, ¶¶27-31. Plaintiffs' central

contention against Caterpillar is that it sold bulldozers to Israel "when it knew, or should have known," that the IDF was using Caterpillar bulldozers for "unlawful" home demolitions. ER 15:3, ¶7.

Allegedly, Caterpillar has sold bulldozers to Israel since 1967. ER 15:10-11, ¶42. Plaintiffs allege that Caterpillar had "constructive" notice since 1989 that Israel was using those bulldozers to demolish homes, in violation of international law, based on public statements and reports by human rights groups, the United Nations, and the State Department. Plaintiffs allege Caterpillar had "actual" notice since 2001 through a letter-writing campaign by "a coalition of human rights and non-profit organizations to educate Caterpillar about the illegal use of its bulldozers." ER 15:12, ¶50. According to Plaintiffs, the goal of these groups is to convince Caterpillar to "stop selling or otherwise providing its bulldozers to Israel." *Id.* The Corries allege that they also participated in this campaign "regarding IDF's use of the Caterpillar bulldozers." ER 15:12, ¶52.

Plaintiffs allege that Rachel Corrie was killed while she was working with a group of "protesters" from "around the world." ER 15:16, 18 ¶¶67, 72. According to the Complaint, on March 16, 2003, Corrie was protesting the demolition of a Palestinian home in the Gaza Strip. IDF soldiers allegedly were using two Caterpillar bulldozers, accompanied by an Armored Personnel Carrier (or "tank"), to demolish homes in the area of the protest. ER 15:17, ¶69. Corrie stood in front of a bulldozer as it approached a home to "protect it from demolition." ER 15:17, ¶71. The soldier operating a bulldozer allegedly intentionally ran over Corrie, killing her. ER 15:17-18, ¶¶ 71, 73.

The Complaint alleges that the Palestinian Plaintiffs suffered personal injuries, deaths of relatives, and the loss of their homes when the IDF used Caterpillar bulldozers to destroy their houses. ER 15:14-16, 17-19. The Complaint does not allege that Caterpillar had any involvement in the incident leading to Corrie's death, or in any of the alleged incidents resulting in the Palestinian Plaintiffs' losses, other than selling bulldozers to Israel.

The Complaint asserts claims for war crimes, extrajudicial killing, and "cruel, inhuman or degrading treatment or punishment" ("CIDTP") allegedly arising under international law, as well as claims under the TVPA, RICO and tort claims under state law.

B. Proceedings Below

Caterpillar moved to dismiss under Fed. R. Civ. P. 12 on a number of grounds, including Plaintiffs' failure to: (1) state claims for international law under the Supreme Court's requirements for such claims in *Sosa*; (2) allege state action as required by Plaintiffs' international law and TVPA claims; (3) state a claim for aiding and abetting, or any other theory supporting liability for the sale of legal products to a foreign government; (4) state a claim under the TVPA and to show exhaustion of local remedies; (5) state a claim under RICO; and (6) show causation and duty under Plaintiffs' state-law claims. Caterpillar also moved to dismiss on the ground that Plaintiffs' claims are barred under the political question and act of state doctrines. In addition, Caterpillar filed a motion requesting that the district court solicit a Statement of Interest by the State Department.

In an Order dated November 22, 2005, the district court granted Caterpillar's motion in full, and on November 29, 2005, entered judgment against Plaintiffs.

The district court denied as moot Caterpillar's motion requesting a Statement of Interest. E.R. 62:017.

Plaintiffs have abandoned their RICO claims on appeal, but otherwise assert error in the district court's dismissal.

V. SUMMARY OF ARGUMENT

1. The district court correctly dismissed Plaintiffs' international law claims under the standard the Supreme Court has established for ATS claims. In *Sosa*, the Court directed that courts exercise "great caution" in recognizing federal claims for violations of international law, and held that, to be actionable, such claims must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" (piracy, violations of safe conduct, and interference with the rights of ambassadors). *Sosa*, 542 U.S. at 725. Courts must also exercise judgment concerning the "practical consequences" of recognizing a particular federal claim. *Id.* at 733.

Plaintiffs' claims against Caterpillar do not pass that test. Sale of construction equipment to a foreign government accused of human rights violations does not violate any international norm, much less a norm that satisfies *Sosa*'s restrictive standard. Moreover, like the arbitrary detention claim the Supreme Court rejected in *Sosa*, the practical implications of such a claim are "breathtaking." Under Plaintiffs' proposed claim, any manufacturer of a product sold to a foreign government (such as China, Iraq or Egypt) might be liable for the government's use of that product in connection with alleged human rights violations, so long as the manufacturer was on "notice" of accusations about such

violations. Plaintiffs' litigation tactic to call their claim "aiding and abetting" does not change this conclusion. Whether a federal claim satisfies *Sosa* depends on the conduct alleged, not the label applied to it.

Plaintiffs' claims for destruction of civilian property against the IDF also do not satisfy the *Sosa* standard, as they depend upon the absence of military necessity. Judgments concerning military necessity are inherently subjective and fact-dependent, precluding a ***definite*** international norm as *Sosa* requires.

2. Plaintiffs have failed to allege an aiding and abetting claim. There is no civil claim under federal common law or international law for aiding and abetting the violations Plaintiffs have alleged. Moreover, merely selling a commercial product does not constitute aiding and abetting under any potentially applicable standard.

3. Plaintiffs' international law claims fail for lack of state action. Cases interpreting the state action requirement under 42 U.S.C. §1983 provide the relevant standard for determining whether the international law state action requirement is met. Under this Court's §1983 precedents, a private party is not liable for the conduct of a state actor unless the private party ***controlled*** the state actor's conduct. Caterpillar did not control the conduct of the IDF soldiers.

4. The Corrie Plaintiffs have no ATS claim, as they are not aliens. *Sosa* confirms that international law claims do not "arise under" federal law for purposes of jurisdiction under 28 U.S.C. §1331. Thus, there is no jurisdictional basis for the Corrie Plaintiffs' international law claims apart from the TVPA.

5. Plaintiffs have also failed to state a claim under the TVPA. Plaintiffs have not exhausted their local remedies in Israel, where the Corrie Plaintiffs

already filed suit. In addition, for the same reasons that they do not allege state action under international law, Plaintiffs fail to allege action under "color of state law" as the TVPA requires. Moreover, Plaintiffs do not allege "extrajudicial killing" as defined by the TVPA. Finally, the text of the statute makes clear that only individuals, not corporations, can be liable.

6. The foreign affairs doctrine – which recognizes the federal government's prerogative to conduct U.S. foreign relations – precludes Plaintiffs' state law claims. The claims fail in any event for lack of proximate causation and the failure to allege the elements of negligent entrustment.

7. Each of Plaintiffs' claims is barred by the political question and act of state doctrines. Those doctrines preclude claims that impinge upon the responsibility of the political branches of the federal government to conduct U.S. foreign policy. Plaintiffs seek an injunction and damages that would preclude Caterpillar from selling bulldozers to Israel. Such relief amounts to an economic boycott, and is inconsistent with the political branches' decision to provide material support to the Israeli military amounting to billions of dollars per year. Moreover, Plaintiffs seek a determination that the IDF is guilty of war crimes. Thus, both the claims that they assert and the relief that they seek interfere with the foreign policy prerogatives constitutionally committed to the political branches, making their claims non-justiciable.

VI. STANDARD OF REVIEW

A district court's dismissal under Fed. R. Civ. P. 12 is reviewed *de novo*. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). In reviewing the sufficiency of

the allegations in a complaint, the Court need not accept conclusory allegations or make unreasonable inferences. *Id.*

VII. ARGUMENT

A. The District Court Correctly Dismissed Plaintiffs' Alien Tort Statute Claims

Plaintiffs' first three claims are for alleged war crimes, extra-judicial killing, and CIDTP. The Palestinian Plaintiffs ground these purported international law claims in the ATS, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. As the district court correctly held, these claims fail to state a claim for relief for several reasons.

1. Plaintiffs' Allegations Against Caterpillar Do Not State A Claim Under The ATS

a. Caterpillar's Conduct Cannot Be The Basis For A Claim Under The *Sosa* Standard

In *Sosa*, the Supreme Court for the first time interpreted the ATS, a "terse provision" of uncertain origin enacted by the first Congress as part of the Judiciary Act of 1789. *Id.* at 713. The Court rejected the argument that the ATS provides "authority for the creation of a new cause of action for torts in violation of international law" and instead held that "the statute was intended as ***jurisdictional*** in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." *Id.* at 714 (emphasis added). However, the Court concluded that the First Congress would have enacted the provision with 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" namely, violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 723. The Court also concluded that the First Congress would not have expected the federal courts to lose the capacity to recognize similarly well-established and definite international norms in the future. *Id.* at 729.

Thus, "the door is still ajar" to claims based upon contemporary international norms, but only "subject to vigilant doorkeeping." *Id.* at 729. The courts must exercise "great caution" in recognizing any such claims. *Id.* Caution is necessary for a number of reasons – including the primacy of the legislative role in creating private rights of action, the potential implications for United States foreign relations of recognizing new international claims, and the lack of a "congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 728.

For these reasons, any claim based upon the "present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Id.* at 725. In determining whether to recognize a claim, the courts must also exercise judgment concerning "the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 733.

Plaintiffs' claim against Caterpillar does not satisfy this standard. Plaintiffs agree that Caterpillar's conduct is limited to selling bulldozers to Israel. Caterpillar did not operate the bulldozers or participate with the IDF in deciding how to use them. As alleged, Caterpillar's conduct amounts to nothing more than the sale of

commercial products to Israel – a United States ally – with purported actual or "constructive" notice that the IDF had committed human rights violations using the product.

Plaintiffs do not cite any authority that selling products to a sovereign government accused of human rights violations is itself a violation of international law, much less that such conduct violates an international norm as specific and well-accepted as the eighteenth century "paradigm" offenses. There is no such international norm. *See In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 551-54 (S.D.N.Y. 2004) (rejecting under *Sosa* an ATS claim based upon doing business with the South African apartheid regime).

Permitting claims for the conduct Plaintiffs allege would also raise enormous practical concerns and serious implications for U.S. foreign policy. Under Plaintiffs' theory, any seller of goods or services that might be misused by a foreign government purchaser potentially would be liable for "foreseeable" injuries resulting from such use. Citizens of countries around the world, such as China, Egypt or Iraq, could bring claims in federal court based upon U.S. companies' sale of products to their governments, alleging that the products aided human rights abuses. For example, under Plaintiffs' proposed claim Iraqi citizens might sue in federal court for damages arising from security operations by Iraqi soldiers using equipment supplied by American companies. There is no apparent limit on the types of products that could be the subject of such suits, which might include, for example, construction supplies for prisons or the barrier wall in the West Bank, surgical supplies used to disfigure, or loans or consulting assistance to foreign governments. Indeed, under the facts alleged here, if Caterpillar could be liable for

selling bulldozers to Israel there is no principled reason why other companies could not be liable for selling the diesel fuel used to power the bulldozers, or the communication equipment that the IDF used in operating them, or any other imported products that the IDF uses in its operations.[1]

In *Sosa*, the Supreme Court declined to recognize an ATS claim for arbitrary detention in violation of domestic law, noting that the practical implications of permitting such a federal claim would be "breathtaking." 542 U.S. at 736. Similarly, here, the practical implications of Plaintiffs' claim are both profound and unpredictable. Many governments around the world, particularly in developing countries, are accused of human rights abuses. Permitting ATS claims by foreign citizens based upon the sale of products to such governments would affect international commerce and investment and overwhelm the federal courts with claims. Plaintiffs' claims therefore do not survive scrutiny under the practical judgment that the Supreme Court mandated in *Sosa.*

The theory of liability that Plaintiffs propose also is not "defined with a specificity comparable to the features of the 18th-century paradigms. . . .," – as

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[1] Unless precluded by defenses such as the military contractor defense (which generally "shields a contractor from liability for injuries caused by products ordered by the government for a distinctly military use. . . .," *In re Agent Orange,* 818 F.2d 187, 190 (2d Cir. 1987), *cert. denied,* 487 U.S. 1234 (1988)), or the political question doctrine (*see infra* at 47-52), Plaintiffs' proposed claim would also apply to U.S. contractors' licensed sales of weapons and military equipment for use by Israel. The United States appropriates approximately $2.2 billion per year for such sales to Israel alone. *See infra* at 24-25. Alternatively, if such defenses do immunize contractors' sale of ***weapons*** to Israel, it would be anomalous to conclude that Caterpillar could be liable for selling bulldozers, which are used for construction purposes unrelated to alleged violence.

Sosa requires. 542 U.S. at 725. Plaintiffs do not suggest any specific limits or clearly articulated parameters for their proposed claim. To the contrary; the standard they propose is intentionally vague. By calling their claim "aiding and abetting" and relying on the broad language of the Restatement of Torts, Plaintiffs would leave to the subjective judgment of particular judges or juries whether a particular seller had sufficient "knowledge" of human rights violations to support a claim, and whether the product that it sold provided "substantial assistance" to a foreign government. Appellants' Brief at 25-26. Such open-ended concepts may be acceptable in a domestic tort regime, but they do not define a ***specific*** norm. *See Sosa* at 724; *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 188 (1994) ("[The] rules for determining aiding and abetting liability are unclear, in 'an area that demands certainty and predictability'").[2]

b. Plaintiffs' Claim Must Pass Scrutiny Under *Sosa* Regardless Of The Label Plaintiffs Apply To It

Plaintiffs argue that their aiding and abetting allegation is immune from analysis under the *Sosa* standard because it is a "theory of liability" rather than a claim for relief in its own right. Whatever Plaintiffs mean by "theory of liability," the distinction between these concepts is meaningless under *Sosa*.

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[2] Domestic tort law typically incorporates social policies such as the spreading of risk and apportioning the costs of injury to those most able to pay. Fluid standards of liability may be appropriate to vindicate such policies. In contrast, the ATS was not intended to further such economic goals, but apparently arose out of congressional concern in the early days of the nation that there be adequate judicial mechanisms to redress wrongs of international scope to avoid diplomatic embarrassment and potential conflict. *See Sosa* at 714-716.

Sosa makes clear that purported international law claims must be analyzed based upon the ***factual*** allegations that a plaintiff makes, not the label the plaintiff chooses for those allegations. Indeed, the *Sosa* Court employed such a fact-based analysis in rejecting an arbitrary detention claim. The Court recognized the possibility that some kinds of detention might be actionable, but held that the ***facts*** presented in that case could not support a federal claim: "[i]t is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738. The Court considered the practical consequences of recognizing a federal claim for the facts alleged, which would "support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the jurisdiction in which it took place." *Id.* at 737. The district court below also correctly observed that other courts following *Sosa* have adopted such a fact-based approach to analyzing whether a plaintiff's proposed claims should be recognized. ER 62:7.

The other reasons for judicial caution that the Supreme Court identified in *Sosa* – including appropriate deference to the legislature in creating claims and the potential implications for foreign policy – also apply to the particular ***conduct*** underlying a claim, not its name. *See* 542 U.S. at 725-27.

The argument of Plaintiffs and *amici* that federal courts have discretion under *Sosa* to fashion and "manage" claims under federal common law misses the point. Even if federal common law is ultimately the source of the limited international torts that *Sosa* envisions, the Court's unmistakable point in *Sosa* is that any such claims must be carefully scrutinized under the standard the Supreme

Court established. An aiding and abetting theory is not a mere procedural rule like standing or a statute of limitations, as *amici* suggest. Amicus Brief of International Law Scholars Philip Alston, et al. ("Alston Amicus Brief") at 4-5. Nor (as *amici* admit) is it a theory of vicarious liability, such as *respondeat superior*. *Id.* at 12. Rather, aiding and abetting is a claim for relief based upon particular ***conduct*** by a particular defendant. The argument that the federal courts can create a theory of relief without bothering to engage in the searching analysis that *Sosa* mandates is simply an invitation to ignore Supreme Court precedent.[3]

Finally, immunizing aiding and abetting from analysis under *Sosa* would reward and encourage creative pleading. Plaintiffs do not contest that their allegations against Caterpillar would be subject to scrutiny under the *Sosa* standard if they had called their claim "doing business with an oppressive government" rather than "aiding and abetting." Plaintiffs' choice of label is not a logical or permissible basis to determine the propriety of their claim.

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[3] The *amici* law professors' argument on this point (as well as much of the rest of their brief) is also irrelevant because it is based on their interpretation of United States law – in particular, the *Sosa* decision – rather than on their knowledge of international law. *See, e.g.,* Alston Amicus Brief at 7 (characterizing the judicial caution mandated by the Supreme Court in *Sosa* as "rhetoric"). Opinions of international legal scholars are not even reliable guides to the content of ***international*** law when they are based upon legal argument rather than a dispassionate effort to describe the actual state of the law. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 264-65 (2d Cir. 2003). Such opinions are even less relevant when they merely purport to interpret decisions of United States courts.

c. There Is No Legal Basis For Plaintiffs' Aiding And Abetting Theory

Because Plaintiffs' factual allegations do not pass scrutiny under *Sosa*, this Court need not reach the question whether there may be an actionable international law aiding and abetting claim on other facts. However, if this Court does consider the issue, there is no support for aiding and abetting liability for the international torts Plaintiffs allege here.

Plaintiffs rely upon federal common law as the source of their aiding and abetting claim, Appellants' Brief at 21-22, but federal common law does not create such a claim. All of the justices in *Sosa* agreed that after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the federal courts did not have authority to create common law claims. Further, in *Central Bank of Denver v. First Interstate Bank*, *supra,* the Supreme Court held that there is no aiding and abetting liability under Section 10(b) of the Security Exchange Act of 1934. In so doing, the Court held that, when Congress creates statutory claims, "there is no general presumption that the plaintiff may also sue aiders and abettors." 511 U.S. at 182.

Thus, civil aiding and abetting liability is a creature of statute, not an inherent feature of federal common law. The ATS does not reveal any intention to create such a claim. To the contrary; the statute refers to a tort "***committed*** in violation of the law of nations." 28 U.S.C. §1350 (emphasis added). That language is inconsistent with liability by any defendant who does not himself "commit" the tort in question. In light of this language and the holding in *Central Bank*, Plaintiffs' argument that federal courts can fashion an aiding and abetting claim from a "residual common law discretion" is baseless.

Plaintiffs are also wrong in purporting to find a basis for a civil aiding and abetting claim in international law. The decisions of international ***criminal*** tribunals do not support the existence of a well-accepted international law ***civil*** claim. *Cf. Central Bank, supra*, 511 U.S. at 181 (noting that aiding and abetting is an "ancient criminal law doctrine" with uncertain application to civil claims). Criminal prosecution seeks to punish wrongdoing rather than compensate for loss. It includes limiting factors – such as a strict *mens rea* standard and a prosecutor's charging decision – that are not present in civil claims. The lack of prosecutorial discretion is particularly significant under *Sosa*. *See* 542 U.S. at 727.[4]

d. The Alleged Conduct Does Not Constitute Aiding And Abetting Under Any Potentially Applicable Standard

(1) The Alleged Facts Do Not Support Aiding And Abetting Under Federal Common Law

Citing the Seventh Circuit's detailed discussion of seller liability in *United States v. Blankenship*, 970 F.2d 283, 285-87 (7th Cir. 1992), the district court

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[4] As Plaintiffs note, post-*Sosa* district court decisions are split on whether aiding and abetting liability is possible under the ATS. Appellants' Brief at 23 & n.5. Circuit decisions also do not resolve the issue. This Court's pre-*Sosa* decision in *Hilao v. Marcos*, 103 F.3d 767, 776 (9th Cir. 1996), was based on a theory of command responsibility "that holds a superior responsible for the actions of subordinates," *id.* at 777, not aiding and abetting as Plaintiffs would have the Court define it. Although the Eleventh Circuit decided *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005), after *Sosa*, the court inexplicably never mentioned *Sosa*. Its aiding and abetting analysis was unnecessary in any event, as it was clear that the defendants had personally participated in an alleged killing. In *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005), the court simply relied upon its prior holding in *Cabello* without further analysis.

correctly held that "where a seller merely acts as a seller, he cannot be an aider and abettor. . . ." ER 62:8. Contrary to Plaintiffs' argument, the court's opinion in *Blankenship* concerned more than just conspiracy claims: the court addressed general principles of accessory liability derived from the Model Penal Code and other sources governing when a seller can be liable for the crimes of persons who purchase its products. 970 F.2d at 285-87. Those principles apply to aiding and abetting. *See, e.g., id.* at 287 ("[a] stationer who sells an address book to a woman whom he knows to be a prostitute is not an aider and abettor.") With respect to any theory of accessory liability, a seller is not complicit in a buyer's offense – even if the seller knows that the offense will occur – if the seller has no stake in the venture beyond normal revenues on the sale of a commercial commodity. *See id.* at 286 ("[A] supplier joins a venture only if his fortunes rise or fall with the venture's, so that he gains by its success.")

The district court also correctly held that, in the absence of such participation in the buyer's venture, a seller lacks the specific intent necessary to be an aider and abettor. ER 62:8. It could not be otherwise. If "knowledge" or "forseeability" were the only intent necessary for aiding and abetting, every commercial supplier of a product that is likely to be used illegally by some people (such as guns, knives, poison, or even cars) could be liable as an aider and abettor.[5]

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[5] The subjective nature of military necessity is another reason why Caterpillar could not have the intent necessary for aiding and abetting liability under any standard. *See infra* at 30. Caterpillar cannot possibly make a judgment as to whether each decision by the IDF to use force against a civilian target was necessary or proportional to a legitimate military objective.

Even in those specific areas where federal law permits civil aiding and abetting liability, courts apply a strict specific intent standard amounting to purposeful conduct. For example, in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *MGM v. Grokster, Ltd.*, 125 S.Ct. 2764, 2776 (2005), the Court considered the scope of a seller's liability for inducing copyright infringement – a theory of secondary liability equivalent to aiding and abetting that "emerged from common law principles. . . ." *Grokster*, 125 S.Ct. at 2776. The Court held in *Sony* that simply selling video cassette recorders "with knowledge that some would use them to infringe" was not sufficient to support liability. *Sony,* 464 U.S. at 439. The Court confirmed that ruling in *Grokster,* noting that the inducement doctrine "absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused." 125 S. Ct. at 2777-78. For secondary liability to attach there must be "purposeful, culpable expression and conduct." *Id.* at 2781.

Similarly, cases that permitted aiding and abetting liability in securities and RICO cases prior to *Central Bank* required the intent to facilitate the violation. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 270 (3d Cir. 1995) (RICO); *DiLeo v. Ernst & Young*, 901 F.2d 624, 628-29 (7th Cir. 1990). Aiding and abetting liability under the Anti-Terrorism Act, 18 U.S.C. §2331, *et seq.*, also requires proof that the defendants " '***desired*** to help [terrorist] activities succeed. . . .'" *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 107 (D.D.C. 2003) (quoting *Boim v. Quaranic Literacy Inst. & Holy Land Found. For Relief and Dev.*, 291 F.3d 1000, 1023 (7th Cir. 2002)) (emphasis added).

Plaintiffs cite no case that permits civil aiding and abetting liability under federal law merely for selling a product with knowledge that it will be used to violate the law. Plaintiffs do not, and could not, allege that Caterpillar sold bulldozers with the specific intent to further war crimes or other torts. The district court therefore correctly dismissed their aiding and abetting claim.

(2) International Law Does Not Support Plaintiffs' Aiding And Abetting Claim

Plaintiffs' international authorities also do not support civil aiding and abetting liability based upon the sale of a legal product. Plaintiffs rely upon cases from the Nuremberg war crimes tribunal. Appellants' Brief at 24, 27. Decisions of such tribunals do not create binding international law – much less binding precedent concerning the application of international law to particular facts – but at most provide some evidence of customary international law. *See Flores*, *supra*, 414 F.3d at 263-64.

In any event, the decisions that Plaintiffs cite do not support their theory. The defendant in *United States v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1949), was a Nazi who personally contributed a blank check to Himmler, the SS leader, without any significant compulsion, and lent his good reputation to the criminal program of the SS. The evidence in *In re Tesch*, 13 Int'l L. Rep. 250 (BR.MIL.CT. 1946), showed that the defendants profited by shipping up to two tons of poison gas per month for Auschwitz/Birkenau, which they knew would be used for the Nazis' criminal purposes. One of the defendants also offered instruction on how the gas could be used to kill people. In contrast, persons who

merely sold products to the Nazi government, such as petroleum, rubber and medicine, were acquitted although they knew the products aided the war effort. *United States v. Krauch*, 8 Trials of War Crimes Before the Nuernberg Military Tribunals, 1114, 1115-26 (1952).

The federal cases that Plaintiffs cite also do not support an aiding and abetting claim under international law based upon a buyer's misuse of the seller's products. The defendant in *Talbot v. Janson*, 3 U.S. 133 (1795), was not liable merely for outfitting a privateer, but because he and the privateer "acted in concert; they cruize together, they fought together, they captured together." *Id.* at 156. In *Burnett v. Al Baraka, supra*, the plaintiffs alleged that the defendant "provided material support to al Qaeda with knowledge of, ***and the intent to further***, al Qaeda's terrorist activities." 274 F. Supp. 2d at 104 (emphasis added). The defendant in *Presbyterian Church of Sudan v. Talisman Energy,* 244 F. Supp. 2d 289, 327 (S.D.N.Y. 2003), allegedly collaborated in ethnic cleansing through its business operations within Sudan. The court's discussion of aiding and abetting in *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), was entirely hypothetical, as the court concluded that the sale of defoliants to the U.S. government for use in the Vietnam war did not violate international law.[6]

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[6] Plaintiffs also cite *Rechtsbanks'-Gravenhage* [Rb] [District Court, the Hague], 23 Dec. 2005, 09/751003-04 (Neth.). Plaintiffs provide no details about the case, which apparently was decided in a Dutch criminal court applying Dutch law. Even international tribunals do not "create binding norms of customary international law," *Flores,* 414 F.3d at 263-64; domestic decisions from other nations certainly do not.

(3) The Restatement Standard Does Not Apply Here And Would Not Support Plaintiffs' Claim If It Did

Plaintiffs' heavy reliance on the Restatement (Second) of Torts underscores the weakness of their argument. Because federal courts are not to create federal common law after *Erie*, the Restatement has no relevance.[7] Moreover, the conduct that Plaintiffs allege against Caterpillar does not even constitute aiding and abetting under the Restatement standard that they propose.

Plaintiffs argue that the standard permits liability when a person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other."[8] Caterpillar did not give "substantial assistance" to

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[7] As the Second Circuit observed, courts must be cautious in relying upon Restatement formulations as a source of international law, even when those formulations are contained in the Restatement of the Foreign Relations Law of the United States. *See United States v. Yousef*, 327 F.3d 56, 99-100 & n.31 (2d Cir. 2003). That caution is doubly true for the accessory liability principles discussed in the Restatement (Second) of Torts, which the Supreme Court questioned as a source of domestic law in *Central Bank*. 511 U.S. at 181-82.

[8] Plaintiffs' reliance on *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983), for the proposition that this "domestic tort law" standard requires only knowing and substantial assistance and not an agreement to "join the wrongful conduct" is suspect since *Halberstam* was decided before both *Central Bank* and *Sosa*, and applied D.C. common law, not federal law. In any event, the *Halberstam* court clearly concluded that "substantial assistance" for aiding and abetting involves ***participation*** in an illegal enterprise. In the court's view, the defendant's "knowing" assistance demonstrated a "deliberate long-term intention to participate in an ongoing illicit enterprise," and her continuing participation "reflected her intent and desire to make the venture succeed." *Id.* at 488. Plaintiffs also improperly cite this Court's pre-*Sosa* panel decision in *Doe I. v. Unocal Corp.*, 395 F.3d 932, 951 (9th Cir. 2002), *vacated* 395 F.3d 978 (2003), which the Court vacated on grant of rehearing with the direction that it not be cited. 395 F.3d at

(Continued...)

alleged human rights violations simply by selling construction equipment that Israel could have obtained elsewhere. Even without bulldozers, the IDF had means to demolish buildings, including tanks, missiles, and other weapons. Notably, in discussing the Restatement standard, the Alston Amicus Brief acknowledges that "nothing in the ATS or its interpretation revokes the law of proximate cause," and that "mere indirect economic benefit from wrongful conduct does not by itself constitute a tort for these purposes." *Id.* at 12 (citing *Bigio v. Coca-Cola*, 239 F.3d 440, 449 (2d Cir. 2001)).

Caterpillar also did not "know" that the IDF would commit war crimes and other torts under the facts alleged. Plaintiffs now disclaim any intent to challenge the Israeli government's home demolition ***policies***, and assert that they only challenge a "specific set of home demolitions." Appellants' Brief at 1. But Caterpillar could not possibly have "known" that particular soldiers would commit the alleged violations in connection with specific home demolitions.

Moreover, notice of ***accusations*** does not establish ***knowledge*** that violations actually occurred or would occur in the future. Charging commercial suppliers such as Caterpillar with knowledge that products they export will be used unlawfully is particularly inappropriate here. The U.S. government spends over $2 billion every year on arms sales to Israel (*see* Congressional Budget Justification

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979. Other cases that Plaintiffs cite for their "substantial assistance" standard were decided before (or did not consider) *Sosa*, or concerned the TVPA rather than the ATS. Appellants' Brief at 26-27.

"Foreign Operations," Fiscal Year 2006, p. 450 available at http://www.state.gov/documents/organization/42252.pdf) and has not taken any steps to preclude other exports. Nor has the State Department identified Israel as a government that sponsors terrorism. *See* U.S. Department of State, State Sponsors of Terrorism, available at www.state.gov/s/ct/c14151.htm; SER 41:02. Under these circumstances, requiring Caterpillar to make foreign policy judgments regarding the Middle East –at peril of liability for actions of foreign governments thousands of miles away – is both illogical and inconsistent with sound public policy.

The deaths and other losses that Plaintiffs describe are undeniably tragic. Whether Plaintiffs have a claim against the IDF or particular soldiers for those losses is a question for another day and another forum. But there is no legal basis to hold Caterpillar responsible for the IDF's actions, and Plaintiffs should not be permitted to use litigation against Caterpillar as part of a political campaign against IDF policies.

e. Plaintiffs' Complaint Does Not Allege Facts Necessary To Establish Caterpillar's Responsibility For State Action

Historically, "[o]nly individuals who have acted under official authority or under color of such authority may violate international law." *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 501-02 (9th Cir. 1992) (citing *Tel-Oren v. Libyan Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J. concurring)). Plaintiffs do not allege such state action here.

Plaintiffs correctly recognize that courts interpreting the ATS state action requirement have looked to cases decided under 42 U.S.C. §1983 for guidance. Appellants' Brief at 31; *see, e.g., Bigio, supra*, 239 F.3d at 449. The district court correctly held that Plaintiffs have not alleged state action under this Court's §1983 precedent.

Plaintiffs assert that Caterpillar is responsible for the conduct of Israeli soldiers. Where a plaintiff seeks to charge a ***private party*** with the conduct of a ***state official***, the plaintiff must show that the private party ***controlled*** the state official's commission of the challenged acts. *See Arnold v. IBM*, 637 F.2d 1350, 1355-56 (9th Cir. 1981); *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986). Both *Arnold* and *King* involve allegations that private party defendants violated the plaintiffs' civil rights by setting in motion or cooperating with unlawful police activity that injured plaintiffs. In both cases this Court rejected the contention that defendants were state actors, because they did not ***control*** the conduct of the police and therefore did not proximately cause the acts of which plaintiffs complained, even if they subjectively wanted the state to take some action against plaintiffs. *See also Franklin v. Fox*, 312 F.3d 423, 445-46 (9th Cir. 2002) (finding no state action where private party did not control state actors' conduct in violating a prisoner's sixth amendment rights). Plaintiffs have not alleged that Caterpillar controlled the IDF.

While Plaintiffs correctly state that *Arnold* turned on the absence of proximate causation, they incorrectly suggest that proximate cause is irrelevant here. Where a plaintiff seeks to hold a private party responsible for a state actor's torts, the fact of state action by the state actor is clear, but two questions remain:

(1) whether the private party's action is so intertwined with the state actor's that the private party's conduct can fairly be characterized as "state action," and (2) whether the private party is the proximate cause of the plaintiff's injury. *See Franklin, supra*, 312 F.3d at 445. A private party is only the proximate cause of the state actor's conduct if he usurps the state actor's independent judgment by controlling the state actor's conduct. *See Arnold, supra.*

This Court's proximate cause analysis in the *Arnold* line of cases makes irrelevant Plaintiffs' argument that war crimes do not require state action under international law. Appellants' Brief at 30.[9] At most, that theory makes a non-state actor who ***actually commits*** the offense liable. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

Civil liability for such alleged crimes clearly requires proof of proximate cause. *See* Alston Amicus Brief at 12. Caterpillar could not be the proximate cause of the independent decisions of Israeli soldiers if it did not control their conduct. Thus, the Court's proximate cause analysis in §1983 cases precludes a finding that Caterpillar is responsible for Israeli soldiers' alleged war crimes, regardless of whether state action is necessary for such crimes under international law. *See Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1142-47 (C.D. Cal. 2002) (applying proximate causation analysis to allegations that a private party allegedly aided the war crimes of a foreign state).

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[9] In *Sosa*, the Court noted only that whether a private party "perpetrator" can be liable for some international offenses is related to the issue of whether an international norm is sufficiently definite to support a claim. *Id.* at 733, n.20.

Plaintiffs argue, without authority, that aiding and abetting "provides a sufficient nexus" with the state to afford liability under international law and domestic law. Appellants' Brief at 32. However, under this Court's rulings in *Arnold* and its progeny, that would be true only if the alleged "aiding and abetting" involved control over the state actor's conduct. Whether Plaintiffs call it "aiding and abetting" or "joint conduct establishing state action," Appellants' Brief at 31 (citing *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)), a plaintiff must prove that the defendant shared an unlawful goal with state actors. *Franklin v. Fox, supra*, 312 F.3d at 445. A joint economic goal is not enough. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995). Plaintiffs do not allege that Caterpillar shared any goal to commit war crimes or the other alleged international torts. [10]

2. Plaintiffs' Allegations Against the IDF Do Not Support An ATS Claim

By adopting an "aiding and abetting" theory, Plaintiffs attempt to shift focus from the implications of their claims against ***Caterpillar*** to the alleged conduct of the IDF. But even that argument fails, as the "underlying" international torts that they allege against the IDF do not state an actionable federal claim under *Sosa.*

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[10] Plaintiffs' argument that the issue of state action can never be decided on the pleadings is baseless. Claims of state action are not exempt from the Federal Rules of Civil Procedure. Where, as here, plaintiffs fail to allege facts supporting an essential element of their claim, their complaint must be dismissed. *See Bigio v. Coca-Cola, supra,* 239 F.3d at 449 (granting motion to dismiss ATS claim for lack of state action).

a. Plaintiffs' Destruction Of Civilian Property Claims Involve A Subjective Standard, Not A Definite International Norm

(1) Judgments About Military Necessity Are Inherently Subjective

Plaintiffs allege that the IDF committed "war crimes" by destroying the Palestinian Plaintiffs' houses in connection with military security operations. The district court correctly concluded that such claims require subjective judgments about the military necessity of attacks on civilian property, and therefore are not based on a "clear, specific norm" as *Sosa* requires. ER 62:5.

Regrettably, civilian property sometimes becomes a legitimate military target in war, even if civilians are endangered. International law recognizes this harsh reality. For example, in its *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* Protocol I, Article 52 at ¶2022, the International Committee of the Red Cross ("ICRC") noted that: "[m]ost civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives."[11] U.S. military publications to which Plaintiffs cite incorporate this principle. Appellants' Brief at

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[11] The subject of this ICRC commentary, Protocol I, is often cited as a source of customary international law. *See* 1999 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against The Federal Public of Yugoslavia, at ¶42 and discussion at ¶¶34-47 (available at www.un.org/icty/pressreal/nato061300.htm) ("Yugoslavian Final Report").

13, n.1; *see, e.g.,* Air Force Pamphlet 14-210 at 147. Article 53 of the Fourth Geneva Convention, cited in Plaintiffs' Complaint, similarly reflects this principle in stating that destruction of personal property is prohibited "except where such destruction is rendered absolutely necessary by military operations."

Judgments about the necessity of force against civilian property are inherently subjective. Such judgments are even more difficult in a war involving terrorist acts, where terrorists hide and operate among the civilian population. In such conflicts, even the identification of persons as civilians or combatants is fraught with uncertainty.

The committee that investigated NATO target selection during the Kosovo conflict recognized the subjective nature of military necessity in its report recommending against an investigation by the Yugoslavian Tribunal. *See* Yugoslavian Final Report at ¶48. The committee noted that the answers to questions determining whether the use of force was proportional to a military objective are "not simple," and the answers "may differ depending on the background and values of the decision maker." *Id.* at ¶50.[12]

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[12] Plaintiffs' argument that the Yugoslavian Tribunal applied a military necessity standard despite the subjectivity inherent in such a standard is irrelevant, as the question here is not whether an international tribunal tasked with war crimes investigations is capable of making subjective judgments, but whether the norm involved is sufficiently specific to support a federal claim. In any event, uncertainty in applying the law was clearly a factor in the Tribunal's decision to recommend against an investigation of NATO's targeting decisions. *See* Yugoslavian Final Report at ¶90 ("In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence. . . .")

Such fact-specific qualitative judgments do not amount to a norm that provides the "certainty afforded by Blackstone's three common law offenses." *Sosa* at 737 (questioning whether "prolonged" arbitrary detention could be defined with such certainty); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (rejecting factual "egregiousness" as the benchmark for actionable international law torts based in part on the concern that the standard would be "subject to differing interpretations by the courts of different nations.")

Plaintiffs argue that the question of military necessity, like the "requirement of reasonableness," is an issue that fact-finders are capable of deciding. Whether fact-finders are capable of making subjective judgments is beside the point. The relevant question under *Sosa* is not whether judges or juries are sometimes called upon to make subjective judgments in a domestic tort system. Juries may decide questions concerning the duty of care in negligence cases, but that does not mean that the tort of negligence is sufficiently well-defined to constitute an actionable international norm. *Sosa's* specific "paradigm" offenses – piracy, etc. – include no such "reasonableness" judgment.

Sosa's reasons for judicial caution also weigh heavily against recognizing a federal claim based upon the alleged unnecessary targeting and destruction of civilian property during military war operations. There is clearly a "substantial element of discretionary judgment" involved in determining military necessity, weighing against any judicially-created claim. *Sosa*, 542 U.S. at 725. Requiring the federal courts to decide whether foreign commanders' battlefield decisions were justified in the circumstances also has large "potential implications for the foreign relations of the United States." *Id.* at 727. And creating a federal civil

claim "without the check imposed by prosecutorial discretion," *id.*, would give federal juries discretion to second-guess military commanders with little, if any, specific standards to do so.

These reasons for caution are reinforced by cases declining to review combat decisions by U.S. military commanders. In *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1366 (Fed. Cir. 2004), for example, the court declined on political question grounds to review the President's judgment that a purported Sudanese pharmaceutical plant was the property of al-Qaeda. The court questioned "how a federal court might go about testing the veracity of the intelligence relied upon by the President in deciding to attack the Plant," and noted the "complicated and sensitive nature of determining whether private property has in fact been pressed into use by terrorists." *See also DeCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (declining to examine the justification for mining North Vietnam harbors); *Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980) ("courts lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life.")[13] Battlefield decisions made by foreign military commanders are no

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[13] Plaintiffs' reliance on *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), is misplaced. The court in that case precluded the plaintiffs' claims on sovereign immunity grounds, and its discussion of the justiciability of military necessity was therefore dicta. Moreover, the cases on which the court relied did not involve military operations in time of war, but concerned military conduct in the civilian sector. *See id.* at 1331-32 and dissent at 1337-38. In any event, as discussed above, the question of whether it is ***possible*** for a federal court to decide a claim alleging the lack of military necessity is much different from the question whether such a claim is sufficiently specific under *Sosa*.

less difficult to second-guess, and doing so is no less likely to intrude upon political decisions that foreign governments view as theirs to make. *See infra* at 51.

Plaintiffs also refer to various United Nations resolutions and reports, apparently to suggest that the "international human rights community" has already decided that Israel's home demolitions violate international law. However, the Security Council resolution that Plaintiffs cite is not as definitive as they suggest, as it carefully avoids saying that Israel violated international law. It calls on Israel to "respect its obligations under international humanitarian law" and insists upon its "obligation not to undertake demolition of homes contrary to that law." Appellants' Brief at 14. In any event, such resolutions do not address whether any ***particular*** home demolition was justified.[14]

(2) Plaintiffs Do Not Allege Actionable Attacks On Civilians

Plaintiffs also argue that military necessity does not permit attacks on civilians, which are subject to a "clear and absolute prohibition." Plaintiffs cite the Fourth Geneva Convention, Article 3, which addresses violence directed against

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[14] Plaintiffs' argument that military necessity is an affirmative defense and a "question of fact" is irrelevant, as the question for present purposes is not whether the IDF's conduct was in fact justified but whether Plaintiffs have alleged violation of a ***definite*** international norm. In any event, military necessity is not an affirmative defense to a claim for destruction of civilian property. Rather, the lack of military necessity is an element of the claim. *See Trial Chamber Judgment in the matter of Prosecutor v. Dario Kordic & Mario Cerkez* (Feb. 26, 2001), available at http://www.un.org/icty/kordic/trialc/judgement/index/htm, at ¶¶ 330, 334, 341, 346.

civilians, "in particular murder of all kinds." However, Article 3 does not apply to the facts that Plaintiffs have alleged.[15]

Plaintiffs do not allege that the IDF murdered the deceased relatives of the Palestinian Plaintiffs.[16] Rather, Plaintiffs allege that these plaintiffs suffered deaths and injuries from the IDF's demolition of their houses during military operations. The destruction allegedly occurred during "attacks" in the city of Nablus (ER 15:14, ¶56), a "major offensive" in the Janin Refugee Camp (ER 15:8, 14-15 ¶¶29, 59), a "military incursion" into the Khan Yunis Refugee camp (ER 15:19, ¶80), and creation of a security "buffer zone" in Rafah (ER 15:7-8, 15, 17 ¶¶27, 61, 68). These allegations of attacks on civilian ***property*** during military operations, even though they resulted in some casualties, are far different from the claims of genocide and deliberated killing at issue in *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995), or the "brutal ethnic cleansing campaign" alleged in *Presbyterian Church of Sudan,* 244 F. Supp. 2d at 327, on which Plaintiffs rely.

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[15] The district court correctly held that the Geneva Convention is not self-executing and therefore does not itself create a private claim for relief. ER, 62:6. Plaintiffs do not challenge that ruling, and thus have abandoned any ATS claim based upon an alleged treaty violation. *Independent Towers of Wash. v. State of Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).

[16] Plaintiffs allege the murder of Rachel Corrie, but the Corrie Plaintiffs have no ATS or common law international law claim. *See infra* at 35.

b. The Torture Victim Protection Act Is Plaintiffs' Exclusive Remedy For Claims Of Extrajudicial Killing

The district court properly relied on the Seventh Circuit's post-*Sosa* decision in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), in concluding that the TVPA "provides the exclusive remedy for plaintiffs who allege extrajudicial killing under color of foreign law." ER 62:5. The *Enahoro* decision is well-reasoned, takes careful account of the Supreme Court's decision in *Sosa*, and should be followed in this Circuit. The *Enahoro* court concluded that the Supreme Court would not recognize an ATS claim for torture and extrajudicial killing, where "Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed." 408 F.3d at 886. This is consistent with *Sosa's* holding that deference must be given to Congress' decisions whether to create federal claims. 542 U.S. at 725-26.

Plaintiffs cite only one post-*Sosa* circuit decision that recognized a claim under the ATS for torture or extrajudicial killing, *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1251 (11th Cir. 2005). However, that decision does not adequately consider the judicial caution mandated by *Sosa*, and is therefore unpersuasive.[17]

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[17] In any event, Plaintiffs' argument that the ATS provides an independent claim for extrajudicial killing separate from the TVPA only matters if an ATS common law claim required less proof than the TVPA. But any conclusion that the common law provides ***more*** relief, or fewer procedural hurdles, than the TVPA makes no sense. The legislative history of the TVPA shows that, because the ATS is available to aliens only, Congress intended that the TVPA "extend a civil remedy

(Continued...)

c. Plaintiffs' CIDTP Claim Is Too Vague To Be Actionable

As Plaintiffs define it, their claim for CIDPT is based on the same alleged conduct as their war crime claim (Appellants' Brief at 20), and is therefore infirm for the same reasons. Moreover, Plaintiffs' vague definition of CIDTP as some suffering short of torture is not sufficiently definite to meet the *Sosa* standard. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005).

3. This Case Requires Deference To The Political Branches

In *Sosa*, the Court identified a policy of "case specific deference to the political branches" as a possible limitation on the recognition of ATS claims. 542 U.S. at 733. For all the reasons discussed *infra* at 47-52, Plaintiffs' claims raise issues and request relief that interfere with the political branches' foreign policy prerogatives. The claims are therefore non-justiciable under the policy identified in *Sosa* as well as the political question and act of state doctrines.

(...Continued)

also to U.S. citizens who may have been tortured abroad." S. Rep. No. 102-249, 7 (1991), 1991 WL 258662. Congress clearly intended remedies for U.S. citizens equal to or greater than those available to aliens. Thus, even if claims of extrajudicial killing can be asserted under the ATS, Congress must have concluded that such international law claims include the same procedural requirements, such as exhaustion of local remedies, that are incorporated in the TVPA. *See Enahoro*, 408 F.3d at 886.

4. The Court Has No Jurisdiction Over the Corrie Plaintiffs' Non-TVPA International Law Claims Under 28 U.S.C. §1331

The Corrie Plaintiffs are not aliens and therefore cannot claim jurisdiction under the ATS. They also have no other basis for jurisdiction over international law claims in the federal common law. As the Court noted in *Sosa,* "Section 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 we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.*" *Id.* at 731, n.19 (emphasis added).[18]

B. The District Court Correctly Dismissed Plaintiffs' TVPA Claims

1. The District Court Properly Found That Plaintiffs Had Not Exhausted Their Local Remedies

Section 2(b) of the TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28

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[18] Plaintiffs declined to address this issue in their opening brief, wrongly asserting that the district court did not decide it. The district court must have rejected any common law basis for the Corrie Plaintiffs' international law claims in dismissing the Corrie Plaintiff's claims on the ground that "they are not aliens, and therefore, cannot assert federal claims derived from international law." ER 62:7. By failing to address the issue in their opening brief, Plaintiffs have waived their right to argue error in the district court's ruling. *Independent Towers of Wash., supra*, 350 F.3d at 929. However, even if the issue is not waived, it is ripe for decision, as it goes to subject matter jurisdiction, which may be raised at any time.

U.S.C. §1350 (note). The district court considered competing expert declarations submitted by the parties on the remedies available in Israel (where the Corrie family had already filed an action against the Israeli government), and found that Israeli tort law provides adequate remedies. That decision was correct.

Plaintiffs argue that the Occupied Territories, not Israel, is the "place in which the conduct giving rise to the claim occurred."[19] However, the district court considered expert opinion evidence that Israel has taken an active role in adjudicating claims asserted by persons injured as a result of civil wrongs committed by the Israeli military government in the Occupied Territories. SER 43:6.[20] According to Professor More, Israel has been the forum of choice for Palestinians asserting claims arising from the government's conduct in the Occupied Territories. SER 23:8; 43:7. Other practical considerations also show that Israel is the relevant jurisdiction for purposes of a local remedy. Plaintiffs charge Israeli soldiers with abuses and challenge the home demolition practices of

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19 Plaintiffs have apparently abandoned the specious allegation in their Complaint that the conduct giving rise to the claim occurred in the U.S. because Caterpillar is located here.

20 In ruling that adequate remedies are available in Israel, the district court must necessarily have decided this issue, which was argued below and raised in the parties' declarations. SER 23; 43. The district court's decision on the factual issue of the *de facto* role of the Israeli government and courts in the Occupied Territories is entitled to deference. A district court's factual findings in ruling on the failure to exhaust nonjudicial remedies are reviewed for clear error. *Wilkins v. United States*, 279 F.3d 782, 785 (9th Cir. 2002). The legislative history of the TVPA shows that Congress intended the TVPA exhaustion requirement to be "generally consistent with common-law principles of exhaustion as applied by courts in the United States." S. Rep. No. 102-249, 7 (1991) 1991 WL 258662 (Leg. Hist.), *10 (citing *Honig v. Doe*, 484 U.S. 305, 325-29 (1988)).

the Israeli government. Israeli courts will be able to marshal the evidence relating to these claims, and will be in a better position to adjudicate facts than a U.S. district court.

Plaintiffs also argue that Israel is not an adequate forum because it would not recognize claims brought under international law. But the TVPA only requires that remedies be ***adequate***, not identical. The cases on which Plaintiffs rely do not support their contention that an international claim must be available in the local jurisdiction.

The record shows that adequate remedies are available in Israel. SER 23:4-6; 43:4. The Corrie Plaintiffs thought so, because they filed a lawsuit there. Plaintiffs dispute whether they would have a claim "against a corporation under these facts," but, as discussed above, Plaintiffs have no such claim in this case either. Moreover, the form of their claim and the defendants that they are permitted to name are immaterial; what matters is whether a remedy exists. The district court correctly relied upon the analogous area of *forum non conveniens*, where the rule is that a "foreign remedy [is] adequate unless it 'is no remedy at all.'" ER 62:6, citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

2. The TVPA Does Not Permit Actions Against Corporations

Section 2 of the TVPA only provides a right for relief against an "individual" who commits a violation. 28 U.S.C. §1350 (note). The statute does not define "individual" to include a corporation. Thus, the statute's plain language excludes corporations from liability.

This conclusion also follows from analysis of the term "individual" in context. In its definition of torture, the statute uses the term "individual" to refer to

victims upon whom pain and suffering is inflicted. Corporations cannot experience suffering.[21] Thus, under the principle of statutory interpretation requiring that identical words be given the same meaning in the same statute, "individual" cannot include corporations. *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932); *Mujica v. Occidental Petroleum Corp.*, *supra,* 381 F. Supp. 2d at 1164. Plaintiffs cite several district court opinions in favor of their interpretation, but other district courts have concluded that the TVPA does not reach corporations. *See Beanal v. Freeport-McMahon, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997), *aff'd on other grounds,* 197 F.3d 161 (5th Cir. 1999); *see also Arndt v. UBS AG,* 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004); *Friedman v. Bayer Corp.*, 1999 WL 33457825 at *2 E.D.N.Y. 1999).[22]

Plaintiffs and *amici* also rely on cases in which the term "individual" has been interpreted to include corporations. However, those cases either involved statutes that expressly defined "individual" to include corporations or whose legislative history supported the interpretation. In contrast, the legislative history of the TVPA is most consistent with the interpretation of "individual" as natural person. Congress used the term to make it clear that "only individuals not foreign states" can be sued under the Act. *See* H. R. Rep. No. 102-367, 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87.

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[21] This Court noted that obvious fact in *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000), which Plaintiffs cite. *Id.* at 1211 ("corporations . . . ***cannot*** suffer 'physical injury'") (citing *Black's Law Dictionary* 1147 (7th ed. 1999) (defining "physical injury" as "bodily harm or hurt")) (emphasis added).

[22] No circuit has yet decided the issue.

If Congress had intended the term "individual" to include corporations, it certainly could have said so, as it did in other statutes that *amici* cite.

3. Plaintiffs' Allegations Against Caterpillar Do Not Support Liability Under The TVPA

The TVPA only imposes liability on one who "subjects" another to torture or extrajudicial killing. Plaintiffs do not allege that Caterpillar "subjected" anyone to torture or extrajudicial killing.

Plaintiffs' "aiding and abetting" theory does not help them. The text of the TVPA does not refer to aiding and abetting. The legislative history does refer to aiding and abetting, but only in the context of ***command responsibility***, not aiding and abetting by remote actors who do not actually participate in the unlawful acts.[23] Under *Central Bank*, *supra*, a common law aiding and abetting claim cannot be read into the statute. In any event, for all the reasons discussed *supra* at 18-21, even if the TVPA is interpreted to include a common law aiding and abetting claim, the facts Plaintiffs allege do not support such a claim.

Plaintiffs' TVPA claims also fail because they do not allege that the IDF engaged in "extrajudicial killing" as contemplated by the statute. The TVPA's legislative history shows that its definition of extrajudicial killing was "derived from article 3 common to the four Geneva Conventions of 1949." H. R. Rep. No.

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[23] In contrast, 42 U.S.C. §1983 reaches some accessories by using the term "causes to be subjected." *See Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). The TVPA's legislative history shows that Congress was aware of §1983. *See* S. Rep. No. 102-249, at 8-9. Congress could have included accessories who merely "cause" (but do not participate in) extrajudicial killings within the TVPA's scope if it intended to do so.

367, at 5. That article distinguishes between ***murder*** and ***extrajudicial killing***, which are addressed in separate subsections. Extrajudicial killing is the "passing of sentences and carrying out of executions" without judicial process. Geneva Conv. at Art. 3(1)(a) and 3(1)(d). Plaintiffs do not allege that the Palestinian Plaintiffs' relatives were executed; they allege only that they were killed as a result of house demolitions when they could not escape. Plaintiffs make the far-fetched allegation that the bulldozer operator intentionally ran over Rachel Corrie, but they do not go so far as to allege that her killing was an extra-judicial "sentencing" or "execution."

4. Plaintiffs Do Not Allege Conduct Under "Color Of Law"

The TVPA only reaches the conduct of individuals who act "under actual or apparent authority, or under color of law, of any foreign nation. . . ." 28 U.S.C. 1350 (note) Section 2(a). The TVPA requirement that a defendant acted under "color of law" is the same as the requirement of proving *state action* in cases alleging a violation of international law. *See Sinaltrainal v. The Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003). The legislative history confirms that Congress intended the color of law requirement of the TVPA to be interpreted in light of the state action element of 42 U.S.C. §1983. *See* Senate Rep. No. 102-249 at *10. For the reasons discussed *supra* at 25, Caterpillar did not act under "color of law" and plaintiffs' TVPA claim should be dismissed.

C. The District Court Correctly Dismissed Plaintiffs' Municipal Tort Claims

Plaintiffs may not assert tort claims under the laws of Washington, Illinois or any other state. Such claims are barred for the same reasons that the political

question doctrine applies here: adjudication of state law claims would interfere with the Constitutional prerogative of the political branches of the federal government to conduct the country's foreign relations. *See infra* at 48-53.

The so-called "foreign affairs" doctrine invalidates ***state*** laws when they interfere with foreign relations. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383-86 (2000) (cited by district court below). That doctrine, most recently addressed in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003), invalidates an application of state law when it falls outside areas of "traditional state responsibility" even if there is no direct conflict between the state law and federal policies. State law is also invalid if it falls within the State's "traditional competence" but conflicts with federal policies on foreign relations. Where such a conflict exists, state law is preempted when the state interest is weak or there is a "more than incidental" conflict with the federal policy. *Id.* at 419-20 & n.11.

Plaintiffs' state law claims are barred by the foreign affairs doctrine, no matter which formulation of this test one applies. Plaintiffs' claims fall outside traditional state competence, because they are dependent on a determination that a foreign ally is guilty of war crimes and attempt to impose an economic boycott on that ally. By seeking to preclude Caterpillar from selling bulldozers to Israel, they also conflict with an important federal foreign policy decision to support the Israeli military with aid. *See infra* at 48-50.

Even if the foreign affairs doctrine did not bar Plaintiffs' state law claims, the district court correctly dismissed them because Plaintiffs fail to allege the elements of negligent entrustment or causation. In both Illinois and Washington the tort of negligent entrustment only applies to entrustment of dangerous articles

to incompetents, such as minors or drunks. *See, e.g.*, *State Farm Fire & Cas. Co. v. McGlawn*, 84 Ill. App. 3d 107, 110 (1980); *Hickle v. Whitney Farms, Inc.*, 148 Wash. 2d 911, 925 (2003). Any suggestion that the Israeli government is "incompetent" is nonsensical. Unlike children or intoxicated persons, the Israeli government is not "incapable of using the product in a safe manner." *Riordan v. Int'l Armament Corp.*, 132 Ill. App. 3d 642, 647 (1985). Courts in Illinois and Washington have recognized that an actor is not negligent for selling to those "who presumably can recognize the dangerous consequences" of and "assume responsibility" for their use of even an inherently dangerous product (*i.e.*, handguns). *See, e.g.*, *id.*; *Knott v. Liberty Jewelry and Loan, Inc.*, 50 Wash. App. 267, 274 (1988).

Plaintiffs improperly rely on Section 308 of the Restatement (Second) of Torts for the proposition that incompetence is proved whenever an actor knows or has "good reason to believe" that a third person will misuse the entrusted product. Plaintiffs do not cite any Washington or Illinois case that relies on the Restatement standard, which is inconsistent with the definition of incompetence in *Riordan* and *Knott*.

Moreover, even under the Restatement standard the Israeli government is not an "incompetent." Not surprisingly, Plaintiffs do not cite any negligent entrustment case that concludes that a government (or, indeed, any ***organization***) is an incompetent. Such cases focus on the competence of particular ***individuals***. *See, e.g.*, *Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d 929 (1982) (gun purchaser was visibly drunk). Any other standard would be irrational and unworkable. For example, statistics may show that sellers of police cars to city governments have

"reason to believe" some percentage of police officers will use their cars in connection with a violation of civil rights, but such sellers cannot be liable for negligently entrusting vehicles to those officers. Similarly, Caterpillar did not negligently entrust bulldozers to the IDF soldiers who allegedly used them to commit torts.[24]

Caterpillar also was not the proximate cause of Plaintiffs' alleged injuries. As discussed *supra*, this Court's precedent under 42 U.S.C. §1983 shows that a private party does not proximately cause the conduct of an independent state actor unless the private party ***controls*** that conduct. Caterpillar's sale and support of bulldozers does not establish control over the Israeli military, and Plaintiffs do not argue otherwise.

Moreover, even the distribution of an inherently dangerous product does not make a manufacturer liable for a purchaser's independent decision to use the product illegally. For example, courts in both Illinois and Washington have dismissed lawsuits against gun manufacturers seeking to hold the manufacturers responsible for the criminal activity of purchasers. *Young v. Bryco Arms*, 213 Ill. 2d 433 (2004); *Chicago v. Beretta U.S.A. Corp*, 213 Ill. 2d 351, 414 (2004); *Knott*, 50 Wash. App. at 267. Those courts relied on concepts of causation and duty to conclude that manufacturers who simply sell legal products into the market are too remote from the harm caused by the intervening, intentional criminal acts by third

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[24] For the reasons discussed *supra* at 25, Caterpillar also cannot be charged with knowledge that the IDF actually committed, or would commit, international law violations.

parties. *See, e.g., Chicago*, 213 Ill. 2d at 432-33; *Young,* 213 Ill. 2d at 456; *Knott*, 50 Wash. App. at 273.

Plaintiffs attempt to distinguish these cases on the ground that Caterpillar's sales "involved only one customer" and "no independent act of an intervening third party was at issue." Appellants' Brief at 42. But Caterpillar did not sell bulldozers to particular soldiers; it sold bulldozers to the government of Israel. Plaintiffs challenge the individual acts of particular soldiers in combat situations. Such independent, intervening acts by third parties preclude proximate causation. Otherwise any supplier of products to a government would be liable for torts committed by government employees using those products on the theory that such torts are "foreseeable."

Plaintiffs' state law tort claims also fail for lack of a duty of care. Whether a duty of care exists is a legal question determined in part by issues of policy. *See Bernethy*, 97 Wash. 2d at 933; *Teter v. Clemens*, 131 Ill.App.3d 434, 439 (1985). Neither the Washington nor the Illinois Supreme Courts has found a duty of care owed by a manufacturer of legal, non-defective products to persons who might be injured by the independent, intentional conduct of those who purchase the products. *See Riordan, supra*; *Knott, supra.* This Court should not impose such a duty in this case.[25]

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[25] Plaintiffs have waived any claims arising under foreign municipal law. If Plaintiffs intended to rely upon tort claims arising under foreign law, they had the burden under Fed. R. Civ. P. 44.1 to provide reasonable notice of their intention to rely on that law. They did not do so below or in this appeal. *See Heath v. Am. Sail Training Ass'n*, 644 F. Supp. 1459, 1471 (D.R.I. 1986).

D. The District Court Properly Dismissed Plaintiffs' Claims Under Doctrines Requiring Deference To The Political Branches Of Government

1. Plaintiffs' Claims Are Non-justiciable Under The Political Question Doctrine

As this Court recently explained in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the political question doctrine traces its origins to Justice Marshall's observation in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." In *Baker v. Carr*, 369 U.S. 186 (1962), the Court articulated six factors determining whether a court should defer a case to the political branches of government: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker*, 369 U.S. at 217. Dismissal is appropriate if any one of these six factors is "inextricable" from the case. *Alperin*, 410 F.3d at 544.

The district court correctly concluded that the political question doctrine requires dismissal here.

As the Court noted in *Alperin*, " 'cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary.' " 410 F.3d at 559 (*quoting Made in the U.S.A. Found. v. United States,* 242 F.3d 1300, 1313 (11th Cir. 2001)). In *Alperin*, the Court held that the plaintiffs' "garden-variety" tort claims could proceed, but that their claims accusing the Vatican of complicity with the Croatian Ustasha political regime in war crimes during World War II presented a nonjusticiable political question. Those claims would have required the court to condemn a foreign government for its wartime actions and to review a foreign policy judgment of the executive branch not to prosecute that government for war crimes violations. *Id.* at 548. This would violate the first *Baker* factor, as it would require the court to "'review[[] an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] committ[ed].'" *Id.* (citing *Goldwater v. Carter*, 444 U.S. 996 (1979) (Brennan, J. dissenting)). This conclusion was reinforced by the third *Baker* factor, which asks whether the issue can be decided " 'without an initial policy determination of a kind clearly for nonjudicial discretion.' " *Id.* at 544 (citing *Baker*, 369 U.S. at 217). The court concluded that "[i]t is not our place to speak for the U.S. Government by declaring that a foreign government is at fault for using forced labor . . . ." *Id.* at 561.

Here, Plaintiffs' claims would require this Court to "review an exercise of foreign policy judgment" by the political branches to provide material support to

the Israeli military. Congress appropriates approximately $2.2 billion per year in grants for Israeli arms purchases. *See* Congressional Budget Justification "Foreign Operations," Fiscal Year 2006, p. 450 available at http://www.state.gov/documents/organization/42252.pdf. Congress has also passed legislation criticizing the Arab League's boycott of Israel as well as the "secondary boycott of American firms that have commercial ties with Israel." SER 22:2. In expressing support for additional U.S. military aid to Israel, Congress has also defended Israel's military operations on the ground that they are "an effort to defend itself against the unspeakable horrors of ongoing terrorism and are aimed only at dismantling the terrorist infrastructure in the Palestinian areas . . ." SER 22:42. Moreover, Plaintiffs' claims not only undermine the political branches' general foreign policy toward Israel, but defy their specific decision to support Israel's purchases from Caterpillar. The U.S. government paid for the Caterpillar bulldozers that Israel purchased after the purchase contracts were approved by the appropriate governmental agency under the Foreign Military Financing program. SER 47:9; 48:3-7.[26] *See* Defense Institute of Security Assistance Management, "A

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[26] Caterpillar presented evidence supporting these facts below in connection with its motion requesting that the district court request a statement of interest by the State Department. The justiciability of Plaintiffs' claims under the political question doctrine raises the question whether the Court has jurisdiction to decide the case under Article III of the Constitution. *767 Third Ave. v. Consulate General of Yugoslavia*, 218 F.3d 152, 164 (2d Cir. 2000); *No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988). The Court therefore may consider facts outside the pleadings. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

comparison: Direct Commercial Sales & Foreign Military Sales," available at http://www.disam.dsca.mil/Research/Presentations/24%20FMS_DCS.PPT.

In defiance of these foreign policy decisions, Plaintiffs seek through this lawsuit to impose an economic boycott on sales of bulldozers to Israel. That goal is explicit in their request for injunctive relief against further sales to Israel, and is just as apparent in their effort to impose costs on Caterpillar for such sales in the form of damages.

That goal is inconsistent with the role of the judiciary. It is the constitutional prerogative of the political branches to decide whether aid to a foreign government is appropriate. Indeed, several courts have expressly held that challenges to foreign aid to Israel raise nonjusticiable political questions. *See, e.g., Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975); *Mahorner v. Bush*, 224 F. Supp. 2d 48, 52-53 (D.D.C. 2002).

Moreover, it is not just the relief that they seek, but also the nature of the claims they present that invades the constitutional province of the political branches. Plaintiffs' case is predicated on the contention that the Israeli military has used bulldozers as weapons in a manner that violates international humanitarian law. Plaintiffs cannot pursue this theory without asking a federal court to determine both that the Israeli military's conduct violated international law and that selling products to Israel was wrong.

Thus, as in *Alperin*, Plaintiffs here seek to pursue claims that would "indict" a foreign government for alleged violations of international law. 410 F.3d at 561. Plaintiffs' claims, although brought against a U.S. corporation, are a direct attack on both the Israeli government's policies concerning Palestinian terrorism and the

tactical decisions of Israeli soldiers in the field of combat. Similarly, they are a direct attack on the U.S. government's foreign policy decision to fund Israel's purchases of Caterpillar bulldozers at a time when the government had significantly more information about home demolitions than the "notice" Caterpillar received.

Plaintiffs' allegations here have an even greater potential to disrupt United States foreign policy than the plaintiff's claims in *Alperin*, as the claims in this case are levied against a current, important ally in an area of strategic importance rather than the former government of a wartime enemy. Although adjudication of tort issues is normally the responsibility of the judiciary, the choice of battlefield tactics is not. This Court's decision in *Alperin* shows that such adjudication is impermissible when it would require the courts to usurp the political branches' responsibility of deciding whether and how to condemn the conduct of foreign governments or to second-guess the political branches' decisions on the conduct of relations with such governments.[27] *See also Doe I v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005)(dismissing claims under the political question doctrine where they would require determination of "[t]he legality or propriety of the Israeli defendants' actions in the West Bank . . .").

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[27] Thus, Plaintiffs' attempt to distinguish *Alperin* on the ground that it concerned the executive branch's decision not to prosecute a former enemy for war crimes actually supports the conclusion that Plaintiffs' claims here raise a non-justiciable political question. A challenge to the political branches' authority to handle foreign relations with a current ally is far more intrusive than adjudication of whether the executive branch should have prosecuted a former enemy.

Thus, the political question doctrine requires dismissal not merely because the conduct at issue "occurred in the context" of the Israeli/Palestinian conflict, as Plaintiffs characterize the issue, but because adjudication of the claims would require the court to decide issues of foreign policy. Plaintiffs' other arguments are also unpersuasive. Even a cursory review of Plaintiffs' complaint confirms that this lawsuit does not simply "focus on the acts of a single individual during a localized conflict" as Plaintiffs contend. Appellants' Brief at 47 (citing *Kadic, supra*). Rather, Plaintiffs seek to put the Israeli military on trial for war crimes. Plaintiffs' argument that this Court's opinion in *Koohi* makes this case justiciable is also wrong. As discussed *supra*, *Koohi* was actually decided on foreign sovereign immunity grounds. In any event, unlike this case, *Koohi* did not seek to second-guess foreign policy decisions of the political branches toward another government or put that government on trial, but simply concerned alleged negligence by the U.S. military and its suppliers.

In sum, here, as in *Alperin*, the claims that Plaintiffs assert implicate both the first and the third *Baker* factors, because (1) questions of foreign aid and condemnation of a foreign government's alleged war crimes are committed by the Constitution to the political branches; and (2) deciding such questions requires policy determinations that are clearly not for judicial discretion. The remaining *Baker* factors also require dismissal. For the reasons discussed *supra* at 30, there are no manageable standards for deciding questions of military necessity in foreign countries made by foreign soldiers (who are not even amenable to process here), thus implicating the second *Baker* factor. With respect to the last three factors, a decision as to whether material support for the Israeli military is unlawful does not

respect the political branches' foreign policy decisions in this area, and also risks political embarrassment. The case is therefore non-justiciable under the political question doctrine.

2. The Act Of State Doctrine Bars Adjudication

The act of state doctrine precludes United States courts from judging the validity of a foreign sovereign's official acts. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405 (1990). Like the political question doctrine, the act of state doctrine is based upon the need to respect the separation of powers. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

The Court in *Sabbatino* articulated three principal factors to consider in deciding whether to apply the doctrine: (1) the degree of international consensus concerning the area of law at issue; (2) the sensitivity of the issue with respect to U.S. foreign relations; and (3) whether the government at issue still exists. *Sabbatino*, at 427-28. Each of these factors favors applying the doctrine here.

First, as discussed *supra* at 30, although there is general international agreement on the need for "military necessity" as a condition for the destruction of civilian property, the inquiry itself is inherently subjective and there is no clear understanding of how to evaluate such necessity in any particular situation or conflict. Second, for obvious reasons an accusation that a foreign military has engaged in a systematic pattern of war crimes is likely to be inflammatory. In addition, on the U.S. side, a lawsuit seeking what amounts to a commercial boycott of an important U.S. ally with respect to a product with a potential military use is completely inconsistent with the executive's position on arms sales, and threatens

to undermine the U.S./Israel relationship. Third, there is no dispute that the government of Israel still exists.

In addition to the three *Sabbatino* factors, this Court has also considered whether the foreign state was acting in the public interest. *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). That is clearly the case here. Plaintiffs allege that the Israeli government engaged in its challenged policies for military and security purposes. Whether or not those policies were lawful, they are for public purposes and not for a purely private or commercial venture. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) (whether or not the police power is abused, it is peculiarly sovereign in nature).[28] The conduct of a foreign military is a paradigm official act. This is reflected in the Supreme Court decisions that first recognized the act of state doctrine, which concerned just such conduct. *See Underhill v. Hernandez*, 168 U.S. 250, 254 (1897); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918). For this principle, the district court correctly cited *Roe v. Unocal Corp.*, 70 F. Supp. 2d 1073, 1079 (C.D. Cal. 1990), which relied upon *Underhill* and other Supreme Court decisions in concluding that military orders are traditionally viewed as sovereign acts.

Plaintiffs argue that adjudication of this lawsuit does not have implications for United State foreign relations because the executive branch has allegedly

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[28] Plaintiffs' argument that violations of human rights can never be "official" acts misses the point. The purpose of the act of state doctrine is to ***avoid*** deciding whether a foreign government violated international law so as not to interfere with the executive's conduct of foreign relations. *See Sabbatino, supra,* 376 U.S. at 431-32.

already condemned Israel for home demolitions. However, the statements that Plaintiffs cite (*e.g.*, that the United States does not believe that house demolitions are "productive" or "helpful," and that the United States opposes the "destruction of houses of innocent Palestinians," ER 37:16) do not accuse Israel of war crimes or other international law violations, and do not threaten the kind of economic sanction that Plaintiffs seek in this lawsuit.[29] Such statements do not change the basic facts of United States foreign policy toward Israel or the impact of this lawsuit on that policy.

Plaintiffs also argue that the act of state doctrine does not apply here because: (1) the challenged acts occurred in the Occupied Territories rather than Israel; and (2) Caterpillar did not show that the challenged acts were "official" acts of state. Neither argument provides a reason to reverse the district court's decision.

The reason that the act of state doctrine is generally limited to conduct within a state's own borders is simply that a foreign government is more likely to *expect* that its actions purporting to affect other sovereign countries will not necessarily be given deference. *See Tchacosh Co. v. Rockwell International Corp.*, 766 F.2d 1333, 1331 (9th Cir. 1985). That expectation is different in the unique situation in Gaza and the West Bank, which are adjacent to Israel's borders and which (until recently in Gaza) Israel has occupied and administratively controlled

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[29] Plaintiffs also rely on a State Department human rights country report for Israel, which is not a policy statement but simply a report, often of information provided by third parties to the State Department.

for decades. It is unlikely that Israel would expect the U.S. to reject the legitimacy of its official policies in the disputed territories undertaken with the stated purpose of protecting Israeli citizens from terrorism. Indeed, even adjudicating the status of the Occupied Territories and Israel's authority within them implicates the political branches' prerogatives. *See, e.g., Doe I v. State of Israel, supra*, 400 F. Supp. 2d 114 (applying act of state doctrine to challenged acts in the Occupied Territories because "the Court is not competent to adjudicate whether the West Bank, in dispute for decades, belongs to the Israelis or the Palestinians"); *cf. Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 103 (C.D. Cal. 1971) ("[t]he question of what are a country's boundaries, or of what nation has sovereignty over a piece of territory, are not for the judiciary to decide; they are political questions. . . .")

Plaintiffs' argument that the IDF soldiers' challenged conduct was not "official" is answered by their complaint. Plaintiffs seem to suggest that their allegations concern the rogue acts of a few soldiers rather than official conduct.[30] The suggestion cannot be reconciled with their complaint, which alleges destruction of houses in connection with military offenses and security operations, and is replete with allegations of a pattern of demolitions and explicit references to Israeli policies. *See, e.g.,* ER 15:7-10.[31]

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[30] Such an argument, of course, would be fatal to all Plaintiffs' claims against Caterpillar, since no theory of liability advanced would apply to Caterpillar with respect to isolated acts by rogue soldiers.

[31] Thus, no evidence was necessary to establish this point below; Plaintiffs' own allegations make it plain.

The district court's decision to dismiss under the act of state doctrine was therefore correct.

VIII. CONCLUSION

For all the foregoing reasons, the judgment should be affirmed.

Dated: June 6, 2006

HOWREY LLP

By: ______________________
David G. Meyer
Attorneys for Defendant-Appellee

STATEMENT OF RELATED CASES

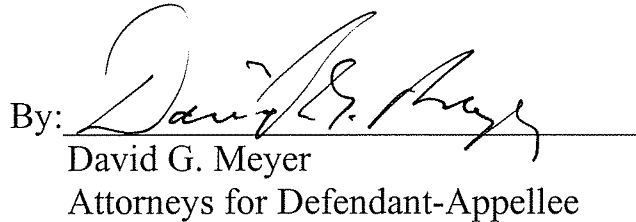
In addition to *Mujica v. Occidental Petroleum Corp.,* Nos. 05-56178 and 05-56056, identified by Appellant, the case entitled *Sarei v. Rio Tinto,* Nos. 02-56256 and 02-56390 raises similar legal issues to this case.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to F.R.A.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached opening brief is proportionally spaced, has a typeface of 14 points or more and contains 15,388 words. Pursuant to Circuit Rule 28-4, Appellee Caterpillar Inc. has previously filed a Notice extending the word count limit by 1,400 words under the provision of the rule concerning a response to multiple briefs.

Dated: June 6, 2006

HOWREY LLP



By:____________________________

David G. Meyer
Attorneys for Defendant-Appellee

ADDENDUM

28 § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

(June 25, 1948, c. 646, 62 Stat. 934.)

HISTORICAL AND STATUTORY NOTES

Torture Victim Protection

Pub.L. 102–256, Mar. 12, 1992, 106 Stat. 73, provided that:

"**Section 1. Short Title.**

"This Act may be cited as the 'Torture Victim Protection Act of 1991'.

"**Sec. 2. Establishment of civil action.**

"(a) **Liability.**—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

"(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

"(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) **Exhaustion of remedies.**—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

"(c) **Statute of limitations.**—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

"Sec. 3. **Definitions.**

"(a) **Extrajudicial killing.**—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"(b) **Torture.**—For the purposes of this Act—

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

CERTIFICATE OF SERVICE

I, Donna Johnson, hereby certify as follows:

I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 550 South Hope Street, Los Angeles, California 90071. Upon this day, I served a copy of the following **BRIEF OF APPELLEE CATERPILLAR INC.** on all interested parties through their attorneys of record listed below in the manner shown below:

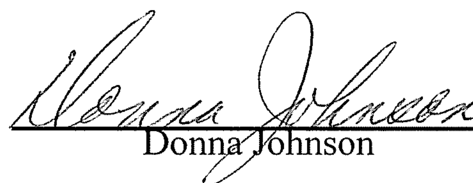
[X] **VIA THIRD-PARTY COMMERCIAL CARRIER PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 25.** I caused service to be made by providing a commercial carrier with a true copy of the above documents in an envelope addressed, for overnight delivery as follows:

[X] **VIA U.S. MAIL.** I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

[X] **BY ELECTRONIC MAIL.** By causing a true and correct copy of the document listed above to be transmitted by electronic mail to the individuals identified on the attached service list.

Executed on **JUNE 6, 2006** at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.



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