05-36210

UNITED STATES COURTS OF APPEALS

FOR THE NINTH CIRCUIT

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

v.

CATERPILLAR INC., a Foreign Corporation,

Defendant/Appellee

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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INTRODUCTION

Plaintiffs in this lawsuit are five representatives (heirs) of Palestinian civilians living in the Occupied Palestinian Territory ("OPT") who were killed or injured when the Israel Defense Forces ("IDF") used Caterpillar bulldozers to demolish their homes with their family members still inside. Plaintiffs also include the parents of a U.S. citizen who was intentionally run over with a Caterpillar bulldozer while she was protecting the home of a civilian pharmacist who had sheltered her. This suit seeks to hold Caterpillar liable for aiding and abetting these acts, because it has for years supplied the IDF with bulldozers and other assistance *knowing* such would be used in the demolition of civilian homes in the OPT in violation of customary international law and state law.

Plaintiffs are not challenging any official Israeli policy of home demolitions, but the practice of a specific set of home demolitions that clearly violates well-settled principles of international and domestic law - demolitions that have been publicly condemned by the U.S. government. The home demolitions in this case resulted in death or severe injuries to civilians, were directed against those who posed no threat, and were conducted without sufficient notice while the occupants were still inside the homes. The practice of demolishing civilian homes without necessity causing serious injury or death is well-recognized as a war crime under international humanitarian law, and the evidence supporting this is as extensive

and clear as the historical paradigm test set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Individuals who have suffered damages as a result of a U.S. corporation's complicity in violation of international law are entitled to seek relief in U.S. courts under, *inter alia*, the Alien Tort Statute ("ATS"), the Torture Victim Protection Act ("TVPA"), and state law. The fact that the wrongs occurred in a context that is controversial does not destroy this right; this lawsuit is seeking the adjudication of legal questions, not political ones.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S. C. §§ 1331 and 1350; and jurisdiction over state law claims pursuant to 28 U.S.C.§ 1367. This appeal is taken from a final judgment dismissing all claims entered on November 29, 2005. ER 63-1l. Thus, this Court has jurisdiction pursuant to 29 U.S.C. § 1291. Appellants timely filed a Notice of Appeal on December 21, 2005, pursuant to Federal Rule of Appellate Procedure Rule 4. ER 64-1.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err by finding that Plaintiffs' allegations that Caterpillar aided and abetted the IDF in war crimes, extrajudicial killing, and CIDTP were not cognizable?

2. Did the District Court err by finding that Plaintiffs failed to state claims under the Torture Victim Protection Act (TVPA)?

3. Did the District Court err in dismissing Plaintiffs' state law claims?

4. Did the District Court err by dismissing the complaint based on the political question and act of state doctrines?

STATEMENT OF THE CASE

A. Procedural History

Cynthia and Craig Corrie, parents of Rachel Corrie, filed their action against Caterpillar on March 15, 2005. ER 65-3. On May 2, 2005, a First Amended Complaint was filed against Caterpillar, adding Plaintiffs from the OPT: Mahmoud Al Sho'bi, Fathiya Muhammad Sulayman Fayed, Fayez Ali Mohammed Abu Hussein, Majeda Radwan Abu Hussein, and Eida Ibrahim Suleiman Khalafallah, all of whom are personal representatives of the estates and/or next of kin of those killed during illegal home demolitions, or represent their injured children. ER 15:4. Caterpillar filed a Motion to Dismiss on May 26, 2005. ER 65-4. After briefing, and without oral argument, the District Court issued its Order Granting Defendant Caterpillar's Motion to Dismiss and entered its Judgment on November 29, 2005. ER 62:1; ER 63:1. Plaintiffs timely filed a Notice of Appeal on December 21, 2005. ER 64:1.

The District Court dismissed the claims of aiding and abetting war crimes, cruel, inhuman or degrading treatment or punishment ("CIDTP"), and extrajudicial killing on the basis that selling legal, non-defective products to Israel is not cognizable under *Sosa*. ER 62:7-8. The court also held that the prohibition of

destruction of personal property except where such is "rendered absolutely necessary by military operations" was not a clear and specific norm because such determinations would have to be resolved on a case-by-case basis, and would involve a level of subjectivity by the decision-maker. ER 62:5-6. With regard to extrajudicial killing, the court found that the TVPA provides the exclusive remedy. ER 62:5. The court also dismissed the ATS claims on the basis that "only individuals who have acted under official authority or color of such authority may violate international law." ER 62:6.

The District Court dismissed Plaintiffs' TVPA claims on the basis that Israeli tort law provides adequate remedies for Plaintiffs injured as a result of tortious conduct (ER 62:6) and that a corporation cannot be held liable under the TVPA. ER 62:7. The court also dismissed the TVPA claims on the basis that Plaintiffs did not establish that Caterpillar acted under color of law because there was no allegation that Caterpillar had the right or ability to control the Israeli soldiers' conduct. ER 62:8.

The District Court dismissed Plaintiffs' state law claims on the grounds that there was no showing that the Israeli government was an incompetent and because the conduct of the IDF is too remote from the sale of bulldozers to hold Caterpillar liable for any alleged misuse. ER 62:15.

The court further dismissed the case on the basis that it would impinge upon the prerogatives of the Executive Branch. ER 62:16. Finally, the court found that the Act of State doctrine also barred adjudication of Plaintiffs' claims. ER 62:17.

B. Statement of Facts

On April 9, 2002, during an incursion into the Jenin Refugee Camp in the West Bank, an IDF soldier driving a Caterpillar bulldozer approached the home of Plaintiff Fathiya Muhammad Sulayman Fayed, where she lived with her husband, children (including her disabled 38 year-old son Jamal) and her six young grandchildren with the clear intent to demolish it. ER 15:14. Fathiya and her daughter pleaded with the IDF soldier to allow them to help Jamal leave the house because he was paralyzed. *Id.* Fathiya and other women were permitted to enter the home to remove him, but while they were inside, the bulldozer driver resumed demolition. ER 15:14-15. The women escaped and yelled at the driver to stop, but he continued demolishing the home with Jamal still inside, killing him. ER 15:15.

On April 25, 2002, during an attack on residential areas in the old city of Nablus in the West Bank, the IDF demolished the home of Plaintiff Mahmoud Al Sho'bi using a bulldozer supplied by Caterpillar, killing Mahmoud's two sisters, his brother, sister-in-law, their three children (ages 4, 7 and 9) and Mahmoud's 85

year-old father. ER 15:14. They were not given advance notice so they could evacuate. *Id.*

In the early morning of September 3, 2002, without warning, the IDF used a Caterpillar bulldozer to demolish the home of Plaintiffs Fayez and Majeda Abu Hussein in Rafah, Gaza. ER 15:15. The ceiling and walls collapsed, physically injuring Majeda Abu Hussein and five of her children (ages 2, 3, 11, 17 and 20), and traumatizing them and three other children. ER 15:16. The purpose of the demolitions is unclear, but appears to have been done to create a buffer zone and build a wall. ER 15:17.

On March 16, 2003, the IDF, using a bulldozer supplied by Caterpillar, approached the home of Dr. Samir Nasrallah, with whom decedent Rachel Corrie had previously stayed. ER 15:17. The IDF had been demolishing homes and property in the area for several days prior to March 16 to clear the way for a buffer zone and separation wall near the Egyptian-Gaza Border. *Id.* Rachel stood in front of the Nasrallah home in order to protect it from demolition while the family was inside. ER 15:2, 18. Although Rachel was clearly visible, the IDF soldier drove the bulldozer toward her, pushing a pile of debris onto her legs, and then continuing forward, ran her over and crushed her beneath its blade intentionally killing her. ER 15:18.

On July 12, 2004, just after midnight, during a large-scale military incursion into the Khan Yunis Refugee Camp in Gaza, the IDF used a Caterpillar bulldozer to demolish the home of Ibrahim Mahmoud Mohammed Khalafallah without warning. ER 15:18. Mr. Khalafallah, in his seventies, was disabled and could not walk or hear. ER 15:18-19. He lived in the home with his wife, Plaintiff Eida Ibrahim Sulayman Khalafallah, and other family members. ER 15:9. When the demolition began, Eida's daughter tried to tell the bulldozer driver to stop because Mr. Khalafallah was still inside and unable to leave, but the driver continued demolishing the home, killing Mr. Khalafallah. ER 15:19. When the bulldozer finally left at 4:30 a.m., his family found Mr. Khalafallah's broken body twenty meters from the home. ER 15:19.

All of the Plaintiffs and members of their households were unarmed civilians. ER 15:3. None of Plaintiffs' homes was demolished out of military necessity as that term has been defined under customary international humanitarian law, let alone due to an imminent threat. *See generally* ER 15:14-21.

The IDF often demolishes civilians' homes without warning and in violation of due process rights, but rarely offers compensation or redress to the victims of such demolitions. ER 15:3-4. There is consensus in the international community that demolitions of civilian homes in the OPT are illegal under international humanitarian law. ER 15:7. Even the U.S. State Department has criticized Israel

for its illegal home demolitions. ER 15:11. The IDF itself has admitted that not all house demolitions have been authorized or justified, and that the destruction caused by demolitions has been excessive. ER 15:10.

Since 1967, Caterpillar has supplied the IDF with the bulldozers it uses in home demolitions, as well as related parts, training and assistance. ER 15:3, 10-11. Caterpillar bulldozers are not sold to the IDF as part of the Foreign Military Sales Program (FMSP); rather, Caterpillar sells the bulldozers directly to the IDF as a direct, commercial sale. ER 15:13.

Since at least 1989, Caterpillar has had actual or constructive notice that the bulldozers and other assistance it supplies to the IDF are used to demolish civilian homes in violation of the Geneva Conventions and customary international law ("CIL"). ER 15:4, 5, 11, 12, 20. Beginning in 2001, human rights groups and concerned citizens began directly notifying Caterpillar that it was aiding and abetting human rights violations by supplying bulldozers to the IDF that it knew would be used to destroy homes. ER 15:4. Despite this knowledge, Caterpillar continued to supply bulldozers, parts and training to the IDF, knowing such would be used to commit further humanitarian law violations. ER 15:4-5, 20.

C. SUMMARY OF ARGUMENT

The question at the heart of this case is whether five families can hold a U.S. corporation accountable for knowingly assisting war crimes and other violations of

U.S. law. The District Court not only denied these families remedies for the killing of, or injury to their relatives, but it also undermined important legal principles in ways that will harm victims of human rights violations in the future.

The District Court erred in ignoring Plaintiffs' allegations that Caterpillar knowingly continued to provide assistance to the IDF which led to Plaintiffs' injuries and the deaths of their loved ones. The court mischaracterized Plaintiffs' claims as involving no more than the sale of a legal product which resulted in property loss. In stark contrast, Plaintiffs' claims for war crimes, extrajudicial killing, and CIDTP are all well-pled and universally recognized international norms that are specific and definite, and thus cognizable under *Sosa*. The court also made numerous errors regarding the elements of these violations, including failing to recognize that private actors can be held liable for war crimes.

Caterpillar continued to supply bulldozers to the IDF even though it was on notice of the harm caused by its product. In addition to ignoring Plaintiffs' allegations, the court made three critical errors in analyzing Caterpillar's aiding and abetting liability for international human rights violations. First, the court erred in stating that aiding and abetting liability had to meet the same test that *Sosa* had confirmed for substantive torts. Second, the court failed to recognize that aiding and abetting is well-recognized under international law, and would meet the *Sosa* standard if it did apply. Third, the court failed to apply the appropriate

standard to Plaintiffs' factual allegations – that Caterpillar had provided knowing, substantial assistance to a principal engaging in illegal conduct. Selling a legal product knowing it will be used to commit international law violations not only meets the definition, but has been recognized as a CIL violation since the beginning of our country's jurisprudence, during the Nuremberg trials, and through to present-day.

The court made several critical errors in its interpretation of the TVPA. Against the weight of authority and the legislative history of the Act, the District Court found that the TVPA pre-empted Plaintiffs' extrajudicial execution claims and that corporations could not be sued under the TVPA. The District Court misapplied the law to hold that Plaintiffs had not established that the acts aiding and abetting the IDF were done under color of state law and that Plaintiffs had not exhausted their remedies in Israeli courts, although the appropriate courts to look to are those in the OPT, where the acts occurred.

The District Court also wrongly dismissed Plaintiffs' state tort claims. Not only did the court fail to conduct a conflict of laws analysis or determine what law applied to Plaintiffs' state claims, but it ignored Plaintiffs' well-founded allegations that the use of Caterpillar's equipment to demolish homes and injure civilians in the OPT was foreseeable and sufficient to establish proximate cause.

In contrast to the court's opinion, Plaintiffs also proved the element of incompetence in their negligent entrustment claim.

Finally, the District Court reflexively invoked the political question doctrine to dismiss Plaintiffs' claims despite the Supreme Court's admonition to courts not to shirk their constitutional responsibility due to a case's political overtones. The court broadly construed Plaintiffs' claims as requiring a foreign policy decision to preclude Caterpillar's sales to Israel, rather than seeking adjudication of Caterpillar's liability for illegal activity. It also failed to properly consider the factors set forth by the Supreme Court to assess whether the separation of powers was actually at issue in this case.

The court also erroneously applied the act of state doctrine to acts which Caterpillar did not meet its burden to show were within Israel's sovereign territory or were officially authorized. Moreover, the court failed to examine the requisite Supreme Court factors, which demonstrate that adjudication is appropriate in this case.

D. STANDARD OF REVIEW

A district court's dismissal for failure to state a claim upon which relief may be granted is reviewed *de novo*. *Am. Family Ass'n, Inc. v. City and County of San Francisco,* 277 F.3d 1114, 1120 (9th Cir. 2002); *Arakaki v. Lingle,* 423 F.3d 954, 962 (9th Cir. 2005) (political question); *Liu v. Republic of China*, 892 F.2d 1419,

1424 (9th Cir. 1989) (act of state). Plaintiffs' allegations are assumed to be true; dismissal should be granted only if there is no possibility that Plaintiffs' facts may state a claim for relief. *Am. Family Ass'n*, 277 F.3d at 1120. If the allegations provide the basis for any claim for relief, the motion must be denied. *Id*.

ARGUMENT

I. PLAINTIFFS' CLAIMS FOR INTERNATIONAL LAW VIOLATIONS SATISFY THE *SOSA* TEST.

The underlying torts alleged by Plaintiffs – war crimes, extrajudicial killings, and CIDTP – all satisfy the standard endorsed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Under *Sosa*, courts recognize violations of any international norm with [no] less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted. *Id.* at 732. The Court stated that this standard is consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court, quoting with approval, *inter alia*, this Court's holding in *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (that actionable violations of international law must be of a norm that is specific, universal, and obligatory). *Sosa*, 542 U.S. at 732. *Sosa* held that modern federal courts could, "albeit cautiously," identify justiciable claims by looking to the "customs and usages of civilized nations, *Id.* at 734, citing *The Paquete Habana*,

175 U.S. 677, 700 (1900). Plaintiffs' allegations fall comfortably within the core of a small set of well-established human rights violations, and follow the standard that *Sosa* approved.

A. Plaintiffs' War Crimes Claims Are Cognizable.

Plaintiffs bring war crimes claims under customary international law, as evidenced and articulated by, *inter alia*, articles 27, 32, 33, 53 and 147 of the "Fourth Geneva Convention ("GCIV"). ER 15:20.

The District Court's first error was to ignore the clear and absolute prohibition against attacks against civilians. ER 37:11-13. Article 3 prohibits "violence to life and person, in particular murder of all kinds…at any time and in any place whatsoever with respect to [civilians]." *See also,* Optional Protocol I, Arts 51(2) and 85(3)(a). War crimes, which encompass attacks against civilians, are actionable under the ATS. *See, e.g., Sosa,* 542 U.S. at 762 (Breyer, J., concurring); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003); *In re Agent Orange Prod. Liab. Litig.,* 373 F. Supp. 2d 7, 113 (E.D.N.Y. 2005), *appeal docketed*, No. 05-1953-CV (2nd Cir. Sept. 30, 2005). The executive branch has condemned such attacks as CIL violations.[1]

[1] *See, e.g.*, SEC'Y OF THE AIR FORCE, U.S. AIR FORCE, AIR FORCE PAMPHLET 14-210, 147 (1998), *available at,* http://www.e-publishing.af.mil/pubfiles/af/14/afpam14-210/afpam14-210.pdf; DEP'T OF THE

Further, the practice of demolishing civilian homes without notice or necessity causing serious injury or death is well-recognized as a war crime under international humanitarian law. The evidence supporting this is as extensive and clear as the historical paradigm test in *Sosa*. Repeated UN Security Resolutions, General Assembly resolutions, and UN Reports have already indicated that demolitions of Palestinian civilian homes in the OPT were violations of international humanitarian law. *See, e.g.*, S.C. Res. 1544, ¶ 1, U.N. Doc. S/RES/1544 (May 19, 2004); Peter Hansen, Commissioner-General of UNRWA, Statement to the Special Political and Decolonization Committee 4-5 (Nov. 1, 2004) (transcript available at *http://www.un.org/unrwa/news/statements/01nov04.pdf*).

Ignoring Article 3, the District Court confined its ruling to Plaintiffs' CIL claims defined, *inter alia* by GCIV, Art. 53, which prohibits an occupying power from destroying any property except where "absolutely necessary." The court compounded that error by ruling erroneously that the "military necessity" exception contained in Article 53 does not set a clear and specific norm because it

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ARMY, FIELD MANUAL, NO. 27-10, THE LAW OF LAND WARFARE, §40(a) (1976), *available at*, http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/TJAGSAWeb.nsf/8f7edfd448e0ec6c8525694b0064ba51/8daeb722d746afd1852569e10053a0b2/$FILE/FM%2027-10.pdf#search='Department%20of%20the%20Army%20Field%20Manual%20No.%202710%20The%20Law%20of%20Land%20Warfare%201976'.

inherently contains a subjective element and must be decided on a case by case basis. ER 62:5. Specific norms often have a subjective element, such as the requirement of reasonableness. Under the District Court's analysis, any claims or defenses with a subjective element and/or that must be decided on a case by case basis could not meet the *Sosa* test, which would undercut the role of the judiciary.[2] The question is whether fact-finders can determine whether specific acts were militarily necessary – and they can.

Furthermore, U.S. courts have long adjudicated questions of military necessity. *See Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993) ("federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians").[3] This Court in *Koohi* noted that in *The Paquete Habana*, the Supreme Court rejected a

[2] The District Court wrongfully relied on the 1999 Yugoslavian Final Report to find that because resolution of a proportionate use of force analysis had to be done on a case by case basis, it did not meet the *Sosa* standard. ER 62:5. The NATO Report identified definite standards expressed by treaty and customary international law to aid a fact finder in determining whether violations of international law have been committed, and the Prosecutor chose not to proceed only because the *factual* record did not support the claims. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 13, 2000), *available at*, www.un.org/icty/pressreal/nato061300.htm.

[3] U.S. courts, including the Supreme Court, have also rejected military necessity or war powers as justification for violations of other fundamental rights. *See Rasul v. Bush*, 542 U.S. 466, 483-84 (2004); *United States v. Robel*, 389 U.S. 258, 264 (1967); *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1189 (C.D. Cal. 2002) (9th Cir. argued June 23, 2005).

military necessity claim by the U.S. Navy when it seized two civilian fishing vessels during the Spanish-American War. *Id.* at 1331 (*citing The Paquete Habana*, 175 U.S. at 713-14). The Supreme Court has stated that "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." *Laird v. Tatum,* 408 U.S. 1, 15-16 (1972).

Moreover, it is unclear whether Caterpillar will even raise the defense of military necessity on the part of the IDF. Thus, it is premature to decide this issue.

Finally, the question of military necessity is a question of fact. At this stage, the court must accept as true Plaintiffs' allegations that no direct military advantage could have been gained from demolishing a civilian home without even attempting to evacuate its unarmed sleeping or disabled inhabitants. ER 15:2, 3, 14, 15, 19. *See, e.g.*, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Sarei v. Rio Tinto Plc,* 221 F. Supp. 2d 1116, 1189 (C.D. Cal. 2002) (9th Cir. argued June 23, 2005) (plaintiffs' allegations of war crimes accepted as true to overcome military necessity defense on motion to dismiss).

B. <u>The ATS Provides a Remedy for Extrajudicial Killings.</u>

The District Court did not challenge whether extrajudicial executions constituted a norm which meet the *Sosa* standard, and rightly so. Extrajudicial killings have long been recognized as a violation of the law of nations, and thus

actionable under the ATS. *See Kadic*, 70 F.3d at 243; *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153 (E.D. Cal. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887 at **4,6. (S.D.N.Y. 2002).

Relying exclusively on *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), the District Court erroneously held that Plaintiffs' claims for extrajudicial killings were not cognizable under the ATS because the TVPA is the exclusive remedy for violations of extrajudicial killing. ER 62:5. It is well settled that repeals by implication are disfavored. *See Rodriguez v. United States*, 480 U.S. 522, 524 (YEAR). *Sosa* supports the continued vitality of an ATS remedy for extrajudicial killing, stating that "Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute." *Sosa*, 542 U.S. at 725. The legislative history of the TVPA also makes clear that Congress intended to "enhance the remedy already available" under the ATS by extending it to U.S. citizens. S.Rep. No. 102-249 at 5.

Other than *Enahoro*, Plaintiffs could locate no other case, before or after *Sosa*, finding that the TVPA is the exclusive remedy for extrajudicial killing. Rather, cases that have addressed this issue have found that such claims can also be brought under the ATS. For post-*Sosa* cases, *see Aldana v. Del Monte Fresh*

Produce, 416 F.3d 1242, 1251 (11th Cir. 2005) (in the absence of "clear and manifest" intent that Congress intended to amend the ATS with the TVPA, court refused to find that TVPA provides the exclusive remedy for torture); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1167, n.13 (C.D. Cal. 2005), *appeal docketed*, No. 05-56175, 05-56178, 05-56056 (9th Cir. Jan. 11, 2005); *Doe v. Saravia*, 348 F. Supp. 2d at 1144-45; *Chavez v. Carranza*, No. 03-2932 MI/P, 2005 WL 2789079 (W.D. Tenn. Oct. 26, 2005).

When this Court was presented with ATS and TVPA claims prior to *Sosa*, it allowed both to proceed. *Hilao v. Marcos*, 103 F.3d 767, 777–78 (9th Cir. 1996). Other pre-*Sosa* cases include *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied* 519 U.S. 830, 117 S.Ct. 96, 136 L.Ed.2d 51 (1996); *Wiwa*, 2002 WL 319887 at *4; *Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 380 (E.D. La. 1997); *Flores v. Southern Peru Copper Corporation*, 343 F.3d 140, 153 (2d Cir. 2003); *Kadic*, 70 F.3d at 241, 246. As the dissent in *Enahoro* correctly explained, "The majority…stands *Sosa* on its head." 408 F.3d at 889 (Cudahy, J, dissenting).

C. Plaintiffs' Claims for Cruel, Inhuman or Degrading Treatment or Punishment Are Cognizable.

The District Court dismissed Plaintiffs' CIDTP claim without directly addressing them. ER 62:89. This Court should find that the CIDTP alleged here meets the *Sosa* test.

CIDTP is condemned as a CIL violation along with torture; the difference between the two generally derives from the "intensity of the suffering inflicted." Restatement (Third) § 702 (Rep. Note 5). Courts have found that it is not necessary to define every aspect on the periphery of a violation to determine that acts within a core could be recognized. *Sosa* cited *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163-180 (1820) as an illustration of the specificity with which the law of nations defined piracy, one of the "historical paradigms familiar when §1350 was enacted." *Sosa*, 542 U.S. at 732. *Smith* expressly noted the diversity of definitions of piracy, but held that despite that diversity, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. 18 U.S. (5 Wheat.) at 161. *Smith* is consistent with modern ATS authority that considers whether the conduct at issue is clearly within the norm, but not whether every aspect of what might comprise the norm is fully defined and universally agreed upon. *See Xuncax*, 886 F. Supp. at 186-187 (specifically addressing the rejection of CIDTP by *Forti v. Suarez-Mason,* 694 F. Supp. 707);

Presbyterian Church of Sudan v. Talisman Energy, 374 F. Supp. 2d 331, 340-41 (S.D.N.Y. 2005).

Courts have found a justiciable standard using the "specific, universal, and obligatory" standard, including since *Sosa*. *Taveras v. Taveras,* 397 F. Supp. 2d 908, 915 (S.D. Ohio 2005) (*citing Sosa* and *Mujica,* the court found that the law of nations prohibited CIDTP); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001); *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998).

The District Court cited to *Mujica*, 381 F. Supp. 2d at 1175 (ER 62:7), which accepted the existence of a norm, but then rejected Plaintiffs' allegations in a broad statement of concern that any claim "that could result in extreme fear and anguish could constitute CIDT." In this case, Plaintiffs witnessed the killings or injuries of their relatives, including children, who were unable to escape before their homes were demolished. ER 15:14, 15, 18, 19. Plaintiffs' homes were destroyed in their presence, resulting not only in death, but in severe physical and psychological injuries, the loss of everything they owned, and displacement. ER 15:15, 16, 24. Facts analogous to those alleged by Plaintiffs have been found to be within the core of violations recognized as CIDTP. *See Xuncax*, 886 F. Supp. at 187 (plaintiffs forced to witness the torture or severe mistreatment of immediate relatives or soldiers ransack their homes and threaten their families); *Wiwa*, 2002

WL 319887 at *8 (plaintiffs forced into exile due to credible threat of physical harm or death, were beaten, and had property destroyed); *Chiminya v. Mugabe*, 216 F. Supp. 2d 262, 281-82 (S.D.N.Y. 2002) (plaintiffs dragged down the street in front of neighbors and loved ones, and were placed in fear of impending death"). This Court should find that Plaintiffs' CIDTP claims are justiciable.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' AIDING AND ABETTING CLAIMS AGAINST CATERPILLAR.

The District Court erred in holding that the conduct alleged by Plaintiffs, *i.e.*, aiding and abetting, does not rise to the level of a claim under *Sosa*'s "specific, universal, and obligatory" test. ER at 62: 8. Although aiding and abetting is well-recognized under customary international law and would in any event meet the *Sosa* test, only the underlying "tort"– not theories of liability such as aiding and abetting – need meet the *Sosa* standard for an actionable norm. *Sosa*, 542 U.S. at 725.

A. *Sosa's* "Specific, Universal, and Obligatory" Requirement Does Not Apply to Theories of Liability.

In *Sosa*, the Supreme Court specifically concluded that ATS claims are "claims under federal common law." 542 U.S. at 724. *Sosa* stated that the federal courts retain "residual common law discretion" to manage ATS claims and cited with approval the methodology applied by the lower courts in developing federal

common law principles and rules of liability within the ATS context. *Sosa*, 542 U.S. at 732-33, 738 (recognizing the approach taken in *Estate of Marcos*, 25 F.3d at 1475; *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980)); *accord Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law"). There is simply no requirement that liability rules such as aiding and abetting be "specific, universal and obligatory" in order to be actionable. *Sosa,* 542 U.S. at 748.[4]

B. The Overwhelming Weight of Authority Supports ATS Aiding and Abetting Claims.

This Court has recognized aiding and abetting liability under the ATS. *See, e.g., Hilao v. Marcos,* 103 F.3d 767, 776 (9th Cir.1996) (Ninth Circuit affirmed a jury instruction allowing a foreign leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance'"). Nearly every other court that has addressed the issue both before and after *Sosa* has specifically found that the ATS provides for aiding and abetting liability of private non-state actors, including corporations. *See In re Agent Orange*, 373 F. Supp. 2d at 53; *Presbyterian Church*, 244 F. Supp. 2d

[4] *See generally* Paul Hoffman and Daniel Saheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 Loy. L.A. Int'l & Comp. L. Rev. 47, 52-4 (2003).

at 321; *Presbyterian Church,* 374 F. Supp.2d at 337-41; *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Bowoto v. Chevron Texaco Corp.*, 312 F.Supp.2d 1229, 1247 (N.D. Cal. 2004); *Bodner v. Banque Paribas,* 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000). *See also, Mujica,* 381 F. Supp. 2d at 1173-74.[5]

The only two post-*Sosa* appellate decisions to deal with this issue both applied aiding and abetting liability under the ATS. In *Cabello v. Fernandez-Larios*, the Eleventh Circuit held that the ATS "reaches conspiracies and accomplice liability" and permitted recovery "based on [both] direct and indirect theories of liability." 402 F. 3d 1148, 1157-58 (11th Cir. 2005). The Eleventh Circuit reaffirmed this conclusion in *Aldana*, 416 F.3d 1242.

C. Aiding and Abetting Is Recognized Under International Law.

The Court below acknowledged that "international law may recognize accomplice liability in some instances…" (ER 62:8), but erred in its failure to

[5] Two recent cases have interpreted *Sosa* as precluding aiding and abetting liability. Both are against the weight of authority and incompatible with the analysis mandated by *Sosa*. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005), which reaches its conclusion with little to no analysis. *In re Apartheid*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004) (2nd Cir. argued Jan. 24, 2006), which rejected the precedents including the Nuremberg trials, the International Criminal Tribunal for the Former Yugoslavia, and U.S. case law, including the Court's well-reasoned ruling in *Presbyterian Church,* 244 F.Supp.2d at 321. *See also Presbyterian Church,* 374 F.Supp.2d 331 (post-*Sosa)*.

identify and apply such liability to Plaintiffs' allegations. Without a doubt, international law prohibits the conduct Plaintiffs allege.

In fact, one of the sources *Sosa* repeatedly relied upon as reflecting international law at the time the ATS was enacted recognized aiding and abetting liability under international law - William Blackstone, *Commentaries on the Laws of England*, Book IV, Chap. 5 (1769) [hereinafter *Commentaries*] (liability under international law of those who aided and abetted pirates).[6] International jurisprudence dating back to the Second World War has recognized that knowingly facilitating human rights abuses creates liability. *See, e.g., United States v. Flick*, 6 Trials at 1216-1223 (civilian industrialist convicted—despite not participating in or condoning atrocities—because he aided SS criminal activities by contributing money); *In re Tesch* (*Zyklon B Case*) 13 I.L.R. 250 (Br. Mil. Ct. 1946) (industrialists convicted for sending poison gas to a concentration camp, knowing that it would be used to kill civilians); *United States v. Ohlendorf*, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 569 (1949) (defendant could be convicted "as an accessory" because he turned over lists of communists knowing that "the people listed would be killed when found"); *United States v. Krauch*, 8 Trials of War Criminals Before the

[6] *Sosa* repeatedly relies on Blackstone as the authoritative statement of international law at the time the ATS was enacted. *Sosa*, 542 U.S. at 714, 718 n.12, 722, 723, 737.

Nuremberg Military Tribunals Under Control Council Law No. 10, 1081, 1169-72 (1952).

Contemporary international tribunals and widely-ratified treaties have also recognized aiding and abetting liability. *See, e.g., Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 661-662, 691-2 (May 7, 1997) (recognizing aiding and abetting liability as "beyond any doubt customary law").

Finally, the U.S. Government has also recognized aiding and abetting as a claim specifically defined in international law. *See, e.g.,* 1992 Torture Victim Protection Act ("TVPA") 28 U.S.C. § 1350, S. Rep. No 102-249, at 8 (1991) (Act codifying aiding and abetting liability, including "lawsuits against persons who ordered, abetted, or assisted in the torture"; Military Commission Instruction No.2, arts. 6(A), 6(B), 6(C), (April 30, 2003) (aiding and abetting listed as crime).

D. The District Court Applied The Wrong Definition Of Aiding And Abetting Liability To Plaintiffs' Claims.

In its analysis, the District Court applied an erroneous definition of aiding and abetting liability. The District Court held that "where a seller merely acts as a seller, he cannot be an aider and abettor." ER 62:8. The District Court's standard is not the standard that federal courts have applied before or after *Sosa.*

Courts have held, under both international and federal common law, that in order to prove aiding and abetting a plaintiff must prove the defendant provided

practical assistance that has a substantial effect on the perpetration of the crime, with knowledge that these acts would assist the commission of the offense. *See, e.g.*, *Cabello*, 402 F.3d at 1158; *Mehinovic*, 198 F. Supp. 2d at 1356; *Presbyterian Church*, 244 F. Supp. at 323-24; *Doe I v. Unocal Corp.*, 395 F.3d 932, 951 (9th Cir. 2002) *vacated*, 395 F.3d 978 (9th Cir. 2003); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004).

The definition for aiding and abetting under domestic tort law is virtually identical to the standard under international law. *See Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (standard is "whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not…whether the defendant agreed to join the wrongful conduct"). *See also*, Restatement (Second) of Torts § 876(b) (1977) (person liable if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.").

In finding no aiding and abetting liability, the District Court erroneously relied upon *United States v. Blankenship*, 970 F.2d 283 (7th Cir. 1992). *Blankenship* involved a criminal *conspiracy*, not aiding and abetting liability. *Id* at 284. Moreover, the case dealt with a one-time transaction, rather than the long history of transactions at issue here. *Id*. By relying on *Blankenship*, the District Court erred in requiring "specific intent to further the buyer's venture." ER 62:8.

Unlike criminal conspiracy, aiding and abetting does not require specific intent to further the wrongful act – only that the defendant gives knowing, substantial assistance to someone who engaged in violations of the law of nations. *See, e.g.*, *Presbyterian Church*, 244 F. Supp. 2d at 323-24. The defendant need not share the wrongful intent of the principal wrongdoer. *Mehinovic*, 198 F. Supp. 2d at 1355; *Saravia*, 348 F. Supp. 2d at 1149.

E. Plaintiffs Adequately Allege Aiding and Abetting.

Despite the District Court's conclusion to the contrary, Plaintiffs' allegations clearly comply with the established aiding and abetting standard and are analogous to a long line of cases in which courts have found aiding and abetting liability.

For instance, in *Talbot v. Janson*, the defendant was held liable for furnishing his accomplice's ship with guns and "aiding him to arm and outfit." 3. U.S. (3 Dall.) 133, 156 (1795). In the Nuremburg Trials, defendants were convicted of selling Zyklon B to the Nazis, even though such product was a legal, non-defective good that had both criminal and legal uses. More recent cases—both domestic and international—have found liability for the sale of non-defective goods used in violation of international law. *See, e.g., Burnett,* 274 F. Supp. 2d 86, 104-05 (allegations by victims of September 11th attacks that defendant knowingly provided material support to al Qaeda in the form of financing and weapons was sufficient to state a claim for aiding and abetting under the ATS); *Presbyterian*

Church, 244 F. Supp. 2d at 301, 324 (defendant, *inter alia*, provided military vehicles used in commission of abuses); Rechtbank s'-Gravenhage [Rb] [District Court, the Hague], 23 Dec. 2005, 09/751003-04 (Neth.) (Dutch businessman convicted of complicity in war crimes for knowingly selling Iraq materials used to make poison gas, even though materials could have been used for non-lethal purposes). *See also, In re Agent Orange*, 373 F. Supp. 2d at 52-54; 57-59; 113 (acknowledging the providing products, knowing such would be used to commit violations of humanitarian law, could result in liability under the ATS if the underlying act was a violation of the law of nations).

As with these cases, Caterpillar provided a legal product to an entity knowing it would be used by the recipient to engage in illegal activity. The District Court mischaracterized Plaintiffs' claims as resting on merely "doing business" with the IDF, *citing In re Apartheid*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (2nd Cir. argued Jan. 24, 2006). ER 62:4. Plaintiffs' allegations clearly go beyond simply "doing business." Plaintiffs allege that Caterpillar had both actual and constructive knowledge of human rights violations committed with its equipment yet continued to provide it to the perpetrator of these violations. *See, e.g.*, ER 15:4. Plaintiffs alleged sufficient facts demonstrating Caterpillar's notice of the IDF's violations of international law. ER 15:11-13 (1967: UN condemnation began; 1989: Israeli human rights organizations began issuing reports condemning

home demolitions; 1999: international human rights organizations began reporting). Caterpillar had actual notice, as evidenced by its public acknowledgment in 2001 of the protests against its sales to the Israeli government. ER 15:11, 12 (Caterpillar spokesperson Benjamin Cordani stated: "We do not base sales on customer's intended use for our product"). *See also*, ER 15:12 (describing specific communications, including letters and public protests to Caterpillar beginning in January 2002). This is simply not a case where an unwitting seller later discovers that his product has been put to illegal use. Plaintiffs have alleged sufficient facts that Caterpillar aided and abetted the IDF in its destruction of Plaintiffs' homes in violation of international law by supplying the bulldozers and other technical assistance, knowing that such would be used to commit violations of humanitarian and human rights law.

F. The District Court Improperly Dismissed Plaintiffs' Claims for Lack of State Action.

The District Court erred in determining that Plaintiffs' ATS and TVPA claims should be dismissed for lack of state action. ER 62:6-7.

First, the District Court improperly considered the state action requirement of Plaintiffs' ATS and TVPA claims at the motion to dismiss stage; because of the factual nature of establishing state action, "the proper time for addressing the state action requirement is at the summary judgment phase." *Estate of Rodriguez v.*

Drummond Co., 256 F.Supp 2d 1250, 1262 (N.D. Ala. 2003); *See also, Collins v. Womancare,* 878 F.2d 1145, 1150 (9th Cir.1989).

Second, with regard to the ATS claims, the District Court erroneously held that only individuals acting under official authority or color of such authority may violate international law. ER 62:6. U.S. courts and international jurisprudence have made clear that state action is not required for, *inter alia*, war crimes; nor is it required for violations committed during the course of war crimes, such as the CIDTP and extrajudicial killing claims at issue in this case. *Kadic*, 70 F.3d at 239, 243-244; *Bigio v. Coca-Cola,* 239 F.3d 440, 448 (2d Cir. 2002); *Sarei,* 221 F.Supp. 2d at 1144, n. 122; s*ee also,* Restatement (Third) of the Foreign Relations Law of the United States (1986) § 404 (Pt. II, introductory note); Developments in the Law – International Criminal Law: V, *Corporate Liability for Violations of International Human Rights Law*, 114 Harv. L. Rev. 2025, 2037 (May 2001). Thus, the ATS claims should not have been dismissed on the basis of lack of state action.

Third, for both the ATS (even if state action would be required) and TVPA claims, the District Court erred in requiring the element of "control" under a color of law analysis. ER 62:6-7. The court erroneously cited to *Arnold v. IBM,* 637 F.2d 1350, 1355-56 (9th Cir. 1981) for the proposition that Plaintiffs were required to allege that Caterpillar controlled state officials' commission of the acts or

participated in the IDF soldiers' conduct. ER 62:6-7. *Arnold* was not a case concerning color of law; rather it focused on the element of proximate cause in the context of 42 U.S.C. § 1983. *Arnold*, 637 F.2d at 1355-6. In *Arnold*, this Court specifically *refrained* from defining the test for color of law. *Id*.

In determining whether a plaintiff has adequately alleged state action in ATS and TVPA cases, courts generally look to agency principles and the standards developed under 42 U.S.C § 1983. *See Kadic*, 70 F.3d at 245; *Wiwa*, 2002 WL 319887 at *13*; Estate of Rodriguez*, 256 F. Supp. 2d at 1264-5 (citing *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000). In looking to § 1983 as a guide, a defendant acts under color of law when it acts together with state officials. *Kadic*, 70 F.3d at 245; *Wiwa*, 2002 WL 319887, at *13. The appropriate test is whether the defendant is a "willful participant in joint action with the state or its agents." *Id.* (*citing Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183 (1980)).

It should be kept in mind that § 1983 is meant as a guide only. Where state action is required, the concern is with ensuring that state action was present in the substantive claims, such as torture and extra-judicial killing, and that "purely private" conduct was not within the TVPA's reach. *Kadic*, 70 F.3d at 245 (*citing* H.R.Rep, No. 367, 102d Cong. 2d Sess. at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87) (plaintiff must establish only "*some* governmental involvement" in the killing to avoid claims for killing by purely private groups (or

individuals)) (emphasis added); *accord Doe v. Qui*, 349 F. Supp. 2d 1258, 1314; *see also*, *Saravia*, 348 F. Supp. 2d at 1150.

The act of aiding and abetting provides a sufficient nexus with the state to afford liability under international law and domestic law. Although the TVPA includes the term "color of foreign law," the Senate Committee Report noted that it covered suits against persons who "abetted, or assisted" torture. S. Rep. No 102-249, at 8 (1991). Since torture requires state action, recognition of aiding and abetting liability in the TVPA demonstrates that such liability extends to private parties who aid and abet government torts even if the tort requires state action.

Finally, although the District Court should have reserved a final determination regarding state action for summary judgment given its fact-based nature, Plaintiffs have already alleged sufficient facts to meet the Ninth Circuit's standard for joint action. *See* ER 15:10, 11, 12, 13 (the record reveals that Caterpillar substantially cooperated with the IDF, supplying and repairing bulldozers, providing training, manuals, and parts, all while on notice that its equipment and assistance was being used to commit human rights violations).

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' TVPA CLAIMS.

A. The District Court Erred in Ruling That Corporations Cannot Be Liable under the TVPA.

The District Court erroneously dismissed Plaintiffs' TVPA claims, finding that a corporation cannot be liable as an "individual" under the Act.[7] ER 62-7.

Courts that have examined the TVPA's legislative history have found that the TVPA does apply to corporations. *See Estate of Rodriguez v. Drummond Co., Inc*., 256 F.Supp 2d 1250, 1266-1267 (N.D. Ala. 2003) (finding that the term applies to corporations given the legislative history of the statute); *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp. 2d 1345, 1358 (S.D. Fla. 2003) (TVPA legislative history reveals Congressional intent was to exclude foreign states, not corporations). The District Court's reliance on *Mujica* is misplaced, as that court summarily found no "pertinent" history in the committee reports without further analysis. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 n.9 (C.D. Cal. 2005).

Sinaltrainal also relied on jurisprudence consistently interpreting the term "individual" to include corporations. *Id.* at 1358-59. *See also, Clinton v. New York,*

[7] The TVPA provides that an "individual who, under actual or apparent authority, or color of law, of any foreign nation….subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages." 28 U.S.C. § 1350, n. 2.

524 U.S. 417, 428 (1998) (finding "individual" synonymous with "person"); *U.S. v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993) (under RICO, the term "group of individuals" encompassed "a group of corporations" (citing *U.S. v. Feldman*, 853 F.2d 648 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989)); *U.S. v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) (rejecting ordinary dictionary definition of "individual" and relying, in part, upon Black's Law definition, to find that a corporation was an "individual" within the meaning of criminal statute).

Precluding corporate liability also frustrates Congressional intent to extend remedies for extrajudicial killings of non-citizens under the ATS (which applies to corporations) to U.S. citizens under the TVPA. *See* H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991).

B. Caterpillar Failed to Establish That Adequate and Available Remedies Exist.

The District Court erred in finding that Caterpillar met its burden of establishing that adequate and available remedies exist for Plaintiffs, as required by the TVPA. ER 62:6. When a plaintiff brings a TVPA claim, the presumption is that the plaintiff would have filed a claim where the conduct giving rise to the claim occurred, if an adequate and available remedy were available. *Hilao v. Marcos*, 103 F.3d 767, 778, n. 5 (9th Cir. 1996) (*Marcos III*) (*citing* Sen. Rep. No. 249 at 9-10). Thus, Caterpillar has the initial burden of demonstrating that the

foreign court would be amenable to Plaintiffs' claims. *See, e.g., Wiwa,* 2002 WL 319887 at *17); *Sinaltrainal,* 256 F. Supp. 2d at 1357-58. Only after the defendant demonstrates that adequate remedies are available where the conduct giving rise to the claim occurred does the burden shift to the plaintiff to rebut with evidence that the foreign local remedies are "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." *Marcos III*, 103 F.3d at 778, n. 5 (citing Sen. Rep. No. 249 at 9-10). Ultimately, however, the burden of proof and persuasion on the issue of exhaustion of remedies remains with the defendant. *Id.*

The District Court first erred by not requiring Caterpillar to demonstrate that adequate and available remedies existed in the place where the "conduct giving rise to the claim occurred." Because the conduct alleged by Plaintiffs (home demolitions and extrajudicial killings) took place in the OPT, the District Court should have required Caterpillar to demonstrate that the OPT provided adequate and available remedies for Plaintiffs' claims. Plaintiffs submitted evidence that the OPT, not Israel, would have jurisdiction over civil tort claims against Caterpillar.[8]

The District Court further erred in finding that Israeli tort law provided an adequate and available remedy for Plaintiffs' international law claims. ER 62:6.

[8] *See* Declaration of Michael Karyanni, ER 36: 23-28; *see also*, State Dep't Bureau of Democracy, Human Rights, and Labor, Israel and the Occupied Territories County Report on Human Rights 2004, *The Occupied Territories Appendix* (Feb. 28, 2005), *available at*, http://www.state.gov/g/drl/rls/hrrpt/2004/41723.htm#occterr (last viewed Mar. 20, 2006).

Courts have found that a court abroad must be amenable to a claim for extrajudicial killing in violation of *international law*, not simply a wrongful death action. *See, e.g., Wiwa*, 2002 WL 319887 at *17; *Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003). *See also, Xuncax v. Gramajo*, 886 F.Supp. 162, 183 (D. Mass. 1995) (describing the significance to Plaintiffs of bringing international claims versus "garden-variety" torts). That a plaintiff might be able to bring a case for assault or wrongful death is *not enough* to meet the exhaustion requirements of the TVPA.

The District Court erroneously assumes that simply because the Corrie Plaintiffs filed a claim in Israel *against the State of Israel* in March 2005, remedies for international law claims in Israeli courts must be available and adequate against Caterpillar. ER 62:6. As opined by Plaintiffs' expert—and undisputed by Caterpillar's expert—claims against a corporation under these facts, and for torts in violation of international law, have never been recognized in Israel, and it is highly unlikely that a tort claim alleging violation of international law could be brought there. Declaration of Dr. Yuval Shany, ¶¶ 16-20 ER 36:7-9. Moreover, as Caterpillar's own expert concedes, there is no precedent in Israel for bringing a claim against a corporation for aiding and abetting, even in *domestic* tort violations. *See* More Declaration. ¶ 15; ER 23:4-5. Next, the District Court completely ignored Plaintiffs' compelling evidence that multiple Israeli laws

specifically *prohibit* the very claims Plaintiffs[9] would pursue in an Israeli court. *See* Shany Decl. at ¶¶ 40, 50-56, ER 36:15, 18-20 . For this reason alone, the District Court should have found that Plaintiffs did not have an available remedy for their injuries. *See Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1153 (E.D. Cal. 2002) (El Salvador's amnesty law prohibited liability for defendant and thus court found remedies unobtainable).

The Court then failed to analyze whether Plaintiffs established that such remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile, as is required, even though Plaintiffs extensively briefed the issue. ER 36:11-15. Thus, if this Court finds that remedies do exist in Israel for claims against Caterpillar, remand is proper to determine whether Plaintiffs have demonstrated such.

IV. The District Court Did Not Address Whether the Corrie Plaintiffs Could Bring Claims for Violations of International Law under 28 U.S.C. § 1331.

The District Court ruled that because the Corries are not aliens, they could not assert federal claims derived from international law (ER 62:7), but failed to address whether 28 U.S.C. § 1331 provides such jurisdiction as the Corries alleged (ER 15:6, 22), despite Plaintiffs' extensive briefing on this issue. ER 37:4-11.

[9] The District Court entirely ignores whether the Palestinian Plaintiffs can bring a claim in Israeli courts. ER 62:6.

Thus, if this Court reverses the District Court on the ATS claims, as well as political question and act of state doctrines, and remands the case, this issue should be remanded to determine whether the Corries can bring claims under § 1331.

V. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS FOR NEGLIGENT ENTRUSTMENT, PUBLIC NUISANCE, AND WRONGFUL DEATH.

A. The District Court Erred in Failing To Conduct a Conflict Of Law Analysis and in Failing to Determine the Applicable Law.

The District Court erred in failing to conduct a conflict of laws analysis and determine which law applies to Plaintiffs' state tort claims. ER 62:14. Plaintiffs utilize both Washington and Illinois law here in the absence of any guidance from the lower court.

B. Plaintiffs' State Tort Claims Sufficiently Establish the Elements of Duty and Causation.

i. Negligent Entrustment

The District Court erred in dismissing Plaintiffs' claims for negligent entrustment for failing to show that the "Israeli government fit[] into the category of an incompetent." ER 62:15. As the court noted, the tort of negligent entrustment requires two elements: (1) a negligent entrustment, and (2) that the

incompetence of the entrustee was the proximate cause of the injury. *See, e.g., State Farm Fire & Cas. Co. v. McGlawn*, 84 Ill. App. 3d 107, 110, 404 N.E.2d 1122 (Ill. App. Ct. 1980).[10] "Incompetence" is proved when the actor entrusts an object to a third person and "knows that the third person intends to misuse it" or if the third person's "known character or the peculiar circumstances of the case are such as to give the actor good reason to believe that the third person may misuse it." Comment (b), Restatement 2d of Torts, § 308 (1965).

Thus, the test for negligent entrustment turns on whether the actor knew or should have known that the entrustee would use the thing/chattel in a manner risking harm, and whether the entrustee proximately caused the harm. *Evans v. Shannon*, 201 Ill. 2d 424, 434, 776 N.E.2d 1184 (Ill. 2002). Hence, manufacturers of legal products do owe a duty of care to persons who are injured by a third party's *foreseeable* illegal use of those products. *See, e.g. Young v. Bryco Arms*, 213 Ill. 2d 433, 453, 821 N.E.2d 1078 (Ill. 2004) (question of legal cause was "entirely one of foreseeability"). If the illegal or incompetent use of the product *is* foreseeable, negligence can be predicated thereon. *Bernethy v. Walt Failor's, Inc.*, 97 Wash. 2d at 929, 934, 653 P.2d 280 (Wash. 1982).

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

Forseeability is not found where unexpected intervening actions of unknown criminals occur for which defendants could have no knowledge. *See Young*, 213 Ill.2d at 456 (no prior knowledge of purchasers' illegal use, or location of illegal use); *see also, Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wash. App. 267, 271, 748 P.2d 661 (Wash. Ct. App. 1988) (defendant had no knowledge of facts to alert him to danger associated with third party); *Watson v. Enterprise Leasing Co.*, 325 Ill. App. 3d 914, 923-24, 757 N.E.2d 604 (Ill. Ct. App. 2001) (no foreseeability where criminal actor was twice removed from entrustee).

Foreseeability is established here because it was objectively reasonable that Caterpillar knew or should have known about the unreasonable risk of harm to others from permitting/supplying the IDF with bulldozers; it had been explicitly told as much. *See Schmid v. Fairmont Hotel Co.-Chicago*, 345 Ill. App. 3d 475, 803 N.E.2d 166 (Ill. Ct. App. 2003). Plaintiffs alleged numerous facts regarding notice to Caterpillar about the harm associated with the IDF's use of Caterpillar's bulldozers to demolish homes in Gaza and the West Bank. ER 15:11-13. Thus, Caterpillar had both direct and constructive notice that the customer's use of its product violated international humanitarian and human rights law. *See Kim v. Budget Rent A Car Systems, Inc.*, 143 Wash.2d 190, 198, 15 P.3d 1283 (Wash.

2001) (finding that where defendant had no warning, it could not foresee theft of vehicle that was used to injure).[11]

Moreover, based on the facts alleged, Caterpillar engaged in transactions with the IDF that, even if "not illegal, are suggestive of a willingness to serve customers who may intend to circumvent the law." *Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 394, 821 N.E. 2d 1099 (Ill. 2004) (finding that a defendant who engages in such transactions would foresee injury). Thus, because the criminal acts of third parties, like those of the IDF, were foreseeable, Plaintiffs have stated facts sufficient to meet their burden of establishing duty and causation.

Finally, the District Court wrongly relied on the gun cases to find that Plaintiffs had not sufficiently established proximate cause for claims of negligent entrustment because the IDF's conduct "was too remote from the sale of the bulldozers to the Israeli government" to hold Caterpillar liable. ER 62:15. In *Young*, 213 Ill. 2d at 455, a case upon which the District Court heavily relies, the court determined that the person whose criminal conduct directly caused the injury "was several steps removed from the defendant" and the instrument used to cause the injury, in that case a gun used to kill decedent, had "passed through at least six sets of hands before reaching" the criminal actor. *Id.* at 455. In deciding *Young*, the court also looked closely at a case in which the court found it "unreasonable" to

11 In *Kim*, the plaintiff failed to argue negligent entrustment, but the court apparently analyzed the theory anyway. *Kim*, 143 Wash. 2d at 197, n. 1.

expect a car rental company to "foresee a *single* accident caused by an intoxicated teenage driver who took car keys [from the person who rented the car] without permission." *Id.* (analyzing *Watson v. Enter. Leasing Co.*, 325 Ill. App. 3d 914 (Ill. App. Ct. 2001)).

Unlike the facts in the gun cases, where the criminal actor was "several steps removed" from the defendant, Caterpillar's supply and sale of its bulldozers involved only one customer, and no independent act of an intervening third party was at issue.[12] And, unlike the manufacturer defendants in *Young v. Bryco*, *Chicago v. Beretta*, or *Knott v. Liberty & Loan, Inc.*, Caterpillar did not merely "place" its products into the "stream of commerce." Here, Caterpillar's liability is contained to a narrow third party use that was foreseeable, as well as foreseeably illegal. In particular, the issue of causation under a negligent entrustment theory relates to the *third party's* proximate cause of the injuries to Plaintiffs. *See State Farm*, 84 Ill. App. 3d at 110. As discussed, the entrustee, the IDF, foreseeably caused, and foreseeably was the legal cause, of the harm to Plaintiffs. Furthermore, imposing liability on Caterpillar will not render it strictly liable to anyone who used its bulldozers illegally. *See Young*, 213 Ill. 2d at 454; *see also, Chicago*, 213 Ill. 2d 351, 393 (cautioning that altering entire firearm industry to guard against prospective criminal use of firearms was too immense a burden).

[12] There is no dispute that IDF soldiers are agents of the IDF, and therefore were not committing independent acts or acting as intervening third parties.

The facts demonstrate an unbroken nexus between the harm alleged in the FAC and Caterpillar's provision of its bulldozers to the IDF. Thus, this court should reverse the District Court's opinion to allow a jury to determine whether an adequate causal link exists between decedents' deaths, Plaintiffs' injuries and Caterpillar's conduct.

ii. Public Nuisance and Wrongful Death

The District Court erred in failing to analyze Plaintiffs' public nuisance and wrongful death claims, merely stating that they "fail[ed] as well under the foregoing analysis" of duty and causation of the negligent entrustment claim. ER 62:15. However, as supported by the duty and causation analysis above, Plaintiffs have pled sufficient facts to meet their burden with respect to both claims. ER 15:28.

VI. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE POLITICAL QUESTION DOCTRINE.

A. The Court Failed to Inquire into the Precise Facts of Plaintiffs' Case, Or Examine Each Claim With Particularity.

The District Court erred in applying the political question doctrine to dismiss all of Plaintiffs' claims, confusing the politics surrounding the case with a doctrine meant to protect the constitutional powers of each branch of government. The political question doctrine "is one of 'political questions,' not one of 'political

cases.'" *Baker v. Carr*, 369 U.S. 186, 217 (1962). "[I]t is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.*, 369 U.S. at 211-12. "[J]udges should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in [the] context of human rights." *Kadic, v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). The judiciary cannot shirk its constitutional responsibility to interpret statutes "merely because [a] decision may have significant political overtones." *Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

The District Court neglected to conduct a "discriminating inquiry into the precise facts and posture of the particular case", as required. *Baker* at 217. Rather than examine the facts in light of the *Baker* factors, the District Court summarily asserted that "neither of the other branches of government has urged or enjoined sale of weapons to Israel nor restrained trade with Israel in any other manner."[13] ER 62:16. In dismissing all of Plaintiffs' claims as political questions, the Court relied almost exclusively on a Supremacy Clause case, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). *Crosby* held invalid a state law restricting state agencies from purchasing goods or services from companies doing business with Burma because the law conflicted with, and was preempted by, a federal

[13] The court's apparent characterization of the bulldozers as weapons is not supported in the record. Plaintiffs allege that these items are sold directly to the IDF, not through the Foreign Military Sales Program. ER 15:13.

statute imposing sanctions on Burma. *Crosby* at 388. Despite the fact that Plaintiffs' case does not involve preemption issues, the Court relied solely on *Crosby* in concluding that "to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government." ER 62:16.[14] Commercial transactions between private companies and foreign governments do not become U.S. foreign policy decisions merely because the buyer is a foreign government, and certainly a lack of executive action on regulating the sale does not transform the transaction into a foreign policy decision.

The District Court also ignored this Court's directive "to examine each of the claims with particularity." *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005). The Court did not even address Plaintiffs' claims for damages and declaratory relief despite the fact that "[d]amage actions are particularly judicially manageable" and "nonintrusive." *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).

[14] The court could have rejected Plaintiffs' request for injunctive relief without dismissing all of Plaintiffs' claims. *See, e.g., Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004) (act of state doctrine barred claims for damages and injunctive relief but not for declaratory relief).

B. Plaintiffs' Claims Do Not Raise Issues Constitutionally Committed to the Political Branches.

The District Court did not analyze the *Baker* factors or specify whether its conclusion relied on any particular factor; an examination of the two factors even arguably considered shows how its finding is contrary to decisional authority. As to the first *Baker* factor, none of Plaintiffs' claims raises issues that are textually committed by the Constitution to either the executive or legislative branches. *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 937 F.2d 44, 49 (2d Cir. 1991) (tort issues "constitutionally committed" to the Judiciary). Plaintiffs' case seeks to hold Caterpillar liable for sales of particular products to the IDF based upon its knowledge of the illegal use to which they would be put. Adjudicating liability for such actions, even when they involve transactions with a foreign country, is simply not the prerogative of the political branches. *See Japan Whaling Ass'n.*, 478 U.S. at 230.

In *Alperin*, plaintiffs' war crimes claims were deemed non-justiciable because they would have required the court to intrude on the Executive's constitutionally committed decision not to prosecute war crimes committed by an enemy of the United States during World War II. *Id.* at 559-60. The Constitution vests the President with Commander in Chief power and the incidental power to discipline enemies of the United States who violate the laws of war. *Id.* (citing *Ex*

parte Quirin, 317 U.S. 1, 28-29 (1942)). Plaintiffs, however, do not ask the Court to discipline a foreign country with whom the U.S. was at war. *Alperin* distinguished *Kadic*, which like this case, "focused on the acts of a single individual during a localized conflict rather than asking the court to under-take the complex calculus of assigning fault for actions taken by a foreign regime during the morass of a world war." *Alperin* at 562. *Alperin* also found that plaintiffs' claims to recover from the Vatican Bank assets improperly taken by anyone "acting in furtherance of the Nazi or Ustasha regime" were justiciable "garden-variety legal and equitable claims" because there was no tribunal, treaty or executive agreement covering resolution of such claims. *Id.* at 548-51. Likewise there are no tribunals, treaties or executive agreements governing resolution of Plaintiffs' claims.

Claims against product manufacturers regarding the use of their product in wars in foreign countries have been held justiciable, even when the products were sold to and used by the U.S. government. In *Koohi*, this Court found justiciable design defects claims against weapons manufacturers and negligence claims against the U.S. government for shooting down a civilian aircraft during the Iran-Iraq war. 976 F.2d at 1331. In *In re Agent Orange*, the court found the political question doctrine did not bar plaintiffs' claims against American corporations that manufactured and supplied herbicides to the United States and South Vietnam

governments that were used in the commission of war crimes in Vietnam. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 64 (E.D.N.Y. 2005), Given that adjudicating claims involving the sale to and use of products by the U.S. government does not raise separation of power concerns, Plaintiffs' claims concerning the sale of equipment to a foreign government certainly do not.

C. Plaintiffs' Claims Do Not Require an Initial Policy Determination.

The third *Baker* factor concerns the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. A finding that Caterpillar is liable for the killing and injury of civilians and the demolition of homes requires a determination of fact and law, not of policy. *See, e.g., In re Agent Orange*, 373 F. Supp. 2d at 71 (even a determination of the President's conduct during war "is one of substantive international law, not policy"); *accord, Alperin* at 555 (finding that plaintiffs' stolen property claims arising from World War II would not "trigger the third *Baker* test"). Declaring that some home demolitions were illegal would not interfere with U.S. foreign policy, especially given that the Executive has explicitly condemned the demolition of homes by Israel. "Beginning at least in 2002, the U.S. government through the State Department began criticizing Israel for such home demolitions." ER 15:11; ER 37:80. *See e.g., Doe v. Unocal Corp.*, 963

F.Supp. 880, 893 (C.D. Cal. 1997); *Presbyterian Church*, 244 F. Supp. 2d at 346 (S.D.N.Y. 2003).

It cannot be that a *lack* of legislative or executive restrictions on trade with a foreign country would preclude a court from assessing liability for unlawful behavior related to commercial sales to that country, as the District Court apparently concluded. ER 62:16. Even where there have been specific political branch decisions to encourage human rights reform in a country through U.S. corporate investment, compensatory, declaratory, and *injunctive* claims against a corporation for aiding and abetting human rights violations by that country have been found justiciable. *See, e.g., Doe v. Unocal*, 963 F.Supp. 880, 895 (C.D. Cal. 1997).

D. The Remaining *Baker* Factors Also Support the Justiciability of Plaintiffs' Claims.

Were this Court to consider the other four *Baker* factors, none would be found "inextricable" from Plaintiffs' case. ER 37:74-84. Regarding the second factor, there are judicially discoverable and manageable standards for Plaintiffs' tort damages claims, under state, federal and international law. *See, e.g., Koohi*, 976 F.2d at 1332; *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035, 104 L. Ed. 2d 404, 109 S. Ct. 1933 (1989); *Kadic*, 70 F.3d at 249; *Klinghoffer*, 937 F.2d at 49; *In re Agent Orange*, 373 F.

Supp. 2d at 67. Here, as in *Alperin,* there is a substantive legal basis for a ruling and the Court is "capable of granting relief in a reasoned fashion." *Alperin,* 410 F.3d at 553. Courts have even found judicially discoverable and manageable standards to adjudicate *direct* challenges to *United States* military actions. *See, e.g., Koohi,* 976 F.2d at 1331; *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

The fourth, fifth, and sixth factors concern whether the claims can be resolved without expressing a lack of respect due the coordinate branches, requiring "an unusual need for unquestioning adherence to a political decision already made", or causing "embarrassment from multifarious pronouncements…on one question", respectively. *Baker,* 369 U.S. at 217. These factors are only relevant if contradiction of a prior political branch decision would "seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249. In *Alperin*, this Court noted that the Executive Branch had not submitted a statement of interest, and concluded that it need not apply a policy of case-specific deference. *Alperin* at 557. The Executive Branch has not submitted a statement of interest in this case.

Moreover, no pertinent prior decision has been made by the political branches to which adherence would be required, especially considering the Executive has made clear its opposition to the home demolitions challenged by Plaintiffs. ER 15:11. Finally, any ongoing diplomatic efforts by the U.S. to help

resolve the Israeli-Palestinian conflict are inapposite to the resolution of Plaintiffs' specific damages claims.

E. The Court Erroneously Found that "Delicate" Diplomacy and "Great" U.S. Interests in the "Region" Rendered Plaintiffs' Claims Non-Justiciable.

Although it is unclear if the District Court's perfunctory adoption of Caterpillar's assertion "'[t]hat this lawsuit challenges the official acts of an existing government in a region where diplomacy is delicate and U.S. interests are great'" applied to the political question and/or act of state analyses, it erred to the extent it relied on the circumstances in the "region" where Plaintiffs' injuries occurred to find their claims non-justiciable. ER 62:17. A "politically charged" context does not transform claims into political questions. *See Kadic*, 70 F.3d at 249; *Alperin* at 542, n.6 (the "potential overtones that this case may have on relations with the [state] leadership do not . . . warrant dismissal") (citing *Antolok v. United States,* 873 F.2d 369, 392 (D.C. Cir. 1989) (Wald, C.J., concurring in judgment only) ("the focus should be on the particular issue presented", not "the ancillary effects…on political actors").

That claims may arise out of ongoing conflicts in which the U.S. is involved or takes an interest does not render them non-justiciable. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2645 (2004) (rejecting separation of powers argument proffered to

limit judicial review of "military decision-making in connection with an ongoing conflict"); *Ibrahim v. Titan Corp*, 391 F. Supp. 2d. 10, 16 (D.D.C. 2005) (finding justiciable Iraqis' claims against private U.S. government contractors for torture during Iraq war); *Presbyterian Church*, 244 F. Supp. 2d at 347 (finding war crimes claims against Sudan and private corporation justiciable despite civil war context); *Linder v. Portocarrero,* 963 F.2d 332, 337 (11th Cir. 1992) (complaint for the killing of a civilian by the Nicaraguan contras justiciable since it "challenges neither the legitimacy of the United States foreign policy toward the contras, nor does it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war"). Plaintiffs do not challenge U.S. policy toward Israel, nor do they seek a judgment on the Israeli-Palestinian conflict. Rather, they seek compensation for certain home demolitions and deaths that violated the law.

Damages actions for incidents occurring in the context of the Israel-Palestinian conflict are no less justiciable than the cases noted above. *See*, *e.g.*, *Biton v. Palestinian Interim Self Gov't*, 310 F.Supp. 2d 172, 184 (D.D.C. 2004) ("Although the backdrop for this case - *i.e.*, the Israeli-Palestinian conflict - is extremely politicized, this circumstance alone is insufficient to make the plaintiffs' claims nonjusticiable"); *Knox v. PLO,* 306 F. Supp. 2d 424, 429 (S.D.N.Y. 2004) (finding no need to address "political questions which form the backdrop to this lawsuit", court found claims against the PLO for a killing not barred by the

political question). The Second Circuit in *Klinghoffer,* 937 F.2d at 49, conceded that its decision would "surely exacerbate the controversy surrounding the PLO's activities", but rejected defendant's claim that because the case raised foreign policy questions in a volatile context it was non-justiciable. *See also, Ungar v. Palestinian Liberation Org.*, 402 F. 3d 274, 280 (1st Cir. 2005) (shooting victims' claims against PLO justiciable since the fundamental nature of the action was a tort suit); *Sharon v. Time,* 599 F. Supp. 538, 552 (S.D.N.Y. 1984) (libel suit regarding Sharon's role in the massacre of Palestinians was justiciable, since "individual rights in domestic affairs are at stake, even where the litigation touches upon sensitive foreign affairs concerns").

VII. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE ACT OF STATE DOCTRINE.

The District Court erred in applying the act of state doctrine (ASD) to dismiss Plaintiffs' claims. First, despite the fact that Caterpillar has the burden of proof (*see, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691, 695 (1976)), no evidence was presented to the District Court showing that the challenged acts were acts of state. *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 713 (9th Cir. 1992); *Marcos,* 862 F.2d at 1361. "At a minimum, this burden requires that a party offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government's

interest." *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). To meet its burden, Caterpillar must have shown that: 1) Israel's acts were done within its own sovereign territory; and 2) that the acts were official public acts. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1963). Furthermore, the Court erred by failing to address the factors set forth in *Sabbatino* which counsel against application of the ASD to this case.

A. The Court Erroneously Applied the ASD to Acts Outside of Israel's Territory.

The ASD does not apply to acts outside of a sovereign's territory. *See Underhill v. Hernandez,* 168 U.S. 250, 252 (1897); *Sabbatino,* 376 U.S. at 401; *Risk v. Kingdom of Norway,* 707 F. Supp. 1159, 1168 (N.D. Cal. 1989), *aff'd*, 936 F. 2d 393 (9th Cir. 1991); *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-22 (2d Cir. 1985). An act occurring in an occupied territory, as here, is outside a sovereign's territory. *See, e.g.*, *State of the Netherlands v. Federal Reserve Bank*, 99 F. Supp. 655, 667 (S.D.N.Y. 1951), *aff'd in part, rev'd in part on other grounds*, 201 F. 2d 455, 458 (2d Cir. 1953); *see also, Kalmich v. Bruno*, 450 F. Supp. 227, 229 n. 2 (N.D. Ill. 1978), *cited with approval on same point, Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1203 n.17 (C.D. Cal. 2001), *aff'd on other grounds*, 317 F. 3d 954 (2002), *aff'd on other grounds*, 124 S. Ct. 2240 (2004). Each act complained of occurred *outside* of

Israel's own territory, in the *Occupied Palestinian Territory*. ER 15:2-3. Both the U.S. and Israel have consistently maintained that the OPT is *not* part of the sovereign territory of Israel. *Second Period Report of Israel, U.N. Hum Rts. Comm.* ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (2001); Dep't of State, Country Reports on Human Rights Practices 1991: Report Submitted to the Comm. of Foreign Affairs, House of Representatives and the Committee on Foreign Relations, U.S. Senate, 102d Cong., 2d Sess. 1440 (February 1992).

B. The Court Failed to Place the Burden on Caterpillar to Establish an Official Act of State.

Caterpillar failed to provide evidence of a "statute, decree, order, or resolution" of the Israeli Government authorizing the demolition of Plaintiffs' homes and the resulting injuries or deaths, *Dunhill* at 695, despite the fact that it has the burden "to establish foreign law to the extent necessary to establish its entitlement to the act of state defense." *Galu v. SwissAir*, 873 F.2d 650, 654 (2d Cir. 1989). Even so, the Court asserted that "Plaintiffs claim that Israel's official policy violates international law." ER 62:16. It is unclear what "official policy" the Court references, as none is identified in the record. Plaintiffs' allegations that home demolitions were widespread and well-known to Caterpillar do not imply the existence of an official, sovereign policy. This is not a case challenging official Israeli policy, but rather the illegal practice of certain demolitions.

Courts have repeatedly held that widespread military abuses were not, and could not be assumed to be acts of state without evidence to prove such. *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995); ; *National Coalition Gov't of Union of Burma* (NCGUB), 176 F.R.D. 352, 352 (C.D. Cal. 1997); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987); *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1188–1189 (C.D. Cal. 2002) (9th Cir. argued June 23, 2005). Finally, Plaintiffs' claims do not invoke the ASD as they do not require the Court to declare an official sovereign policy invalid. *See W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400, 407 (1990) (rejecting ASD since plaintiff "was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured it"); *see also, id.* at 407 (citing with approval *Sharon*, 599 F. Supp. at 546 (rejecting ASD because issue was not whether acts condoning the massacre of unarmed noncombatant civilians were valid, but whether they occurred).

Even if Defendant had presented evidence of an official Israeli act authorizing the demolitions at issue, the ASD still would not apply because war crimes, extrajudicial killings, and CIDTP can *never* be considered official acts of state. *See, e.g., Sarei*, 221 F. Supp. 2d at 1189 (war crimes cannot be deemed official acts of state because they are not legitimate acts of warfare); *accord Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992). Moreover, the legislative

history of the TVPA makes clear that since "no state officially condones torture or extrajudicial killings," the ASD cannot shield defendants from TVPA liability. S. Rep. No. 102-249, at 6 (1991). Because Plaintiffs' war crimes allegations must be accepted as true, the ASD cannot be applied at the motion to dismiss stage. *See Sarei*, 221 F.Supp at 1189.

Aside from a reference to *W. S. Kirkpatrick*, 493 U.S. at 405, the *only* case cited by the District Court was *Roe v. Unocal Corp.*, 70 F. Supp. 2d 1073 (C.D. Cal. 1999). ER 62:16. *Roe* held only that the doctrine barred a soldier from challenging an order by his superior officer to work without pay - an order that did not conflict with Burmese law, international law, or U.S. law. *Roe* at 1078-1080. The *Roe* court expressly refused to reconsider its holding in *NCGUB* that Unocal had failed to demonstrate that abuses by the Burmese military were acts of state. *Roe* at 1076, n. 1 (*citing NCGUB*, 176 F.R.D. at 349-57). The Court seems to find that the act of killing Rachel Corrie was officially authorized by Israel because the bulldozer driver who ran over her "received orders to continue with the demolitions, even with the protestors present." ER 15:18; ER 62:16. Any order to kill peaceful civilians would have been illegal under international law, U.S. law, and Israeli law, and is a far cry from the lawful order to a subordinate officer that was alleged in *Roe*.

Moreover, acts committed solely by a "subordinate government official" are not acts of state. *Forti*, 672 F. Supp. at 1546; *see also, Hilao v. Estate of Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994) (*quoting Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962) (it "is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies"). Caterpillar presented no evidence that any individual who gave such an order had "sovereign authority" or was acting within that authority.

C. The Court Erred by Failing to Apply the *Sabbatino* Factors, Which Counsel Against Application of the Doctrine.

Even if an act of state were being challenged here, the *Sabbatino* factors must be considered to determine if barring adjudication is appropriate; they cannot, however, render an unofficial act or an act outside a sovereign's territory an act of state. *See W.S. Kirkpatrick*, 493 U.S. at 409. The Court, however, erroneously failed to apply the factors, warranting reversal. ER 62:16, 17.

When applied, the *Sabbatino* factors support adjudication. The first factor considers the degree of international consensus concerning applicable legal principles. *Sabbatino*, 376 U.S. at 427-28. Plaintiffs' ATS claims, which must be based on specific, universal and obligatory norms, by definition have a high degree of international consensus. *See Sosa*, 542 U.S. at 748; *see also, Unocal*, 963 F.

Supp. at 894-95 (*jus cogens* violations); *Kadic*, 70 F.3d at 250; *Doe v. Qi*, 349 F. Supp. 2d 1258, 1296 (N.D. Cal. 2004) (CIDTP); *Liu*, 892 F.2d at 1433 (murder).

The second *Sabbatino* factor, the only one possibly adverted to by the Court, ER 62:17, relates to the "implications of an issue…for our foreign relations", and also weighs against application of the ASD, for the same reasons noted in the discussion of the political question doctrine. *Sabbatino*, 376 U.S. at 428. Invocation of the ASD "is not appropriate unless it is 'apparent' that adjudication of the matter will bring the nation into hostile confrontation with the foreign state." *Unocal*, 963 F. Supp. at 893; *see also*, *Marcos*, 862 F.2d at 1360. The District Court failed to consider the Executive Branch's condemnation of Israel for killing civilians and demolishing their homes.[15] "Where, as here, the coordinate branches of government have already denounced the foreign state's human rights abuses, it is hard to imagine how judicial consideration of the matter will so substantially exacerbate relations as to cause 'hostile confrontation.'" *Unocal*, 963 F.Supp. at 893; *accord Presbyterian Church*, 244 F. Supp. at 346.

Finally, the District Court failed to consider, as it must, "whether the foreign state was acting in the public interest." *Liu*, 892 F.2d at 1432. Violations of

[15] ER 37:16 (*citing, e.g.*, State Dep't Bureau of Democracy, Human Rights, and Labor, Israel and the Occupied Territories Country Report on Human Rights 2004, *The Occupied Territories Appendix* § 1(f),(g) and § 4 (2005)). State Department Human Rights Reports are admissible evidence. *See, e.g.*, *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000).

international human rights, such as war crimes, extrajudicial killings, and CIDTP, cannot be in the public interest. *See Liu Qi*, 349 F. Supp. 2d at 1306; *Unocal,* 963 F. Supp. at 893; *Mujica,* 381 F.Supp.2d at 1190-91.

CONCLUSION

For all the foregoing reasons the judgment should be reversed.

Statement of Related Case

Mujica v. Occidental Petroleum Corp., Nos. 05-56175, 05-56178 and 05-56056. This case raises the following similar issues to this case: political question doctrine; TVPA; and aiding and abetting.

Dated: March 20, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

The brief is proportionately spaced, has 10.5 or fewer characters per inch and contains 13,995 words.

Dated: March 20, 2006

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