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

Caterpillar takes positions in its Response that are inaccurate or unsupported by legal precedent. *Sarei* affirms Plaintiffs' position on nearly every issue in this appeal. *Sarei v. Rio Tinto*, No. 02-56256, 2006 WL 2242146 (9th Cir. Aug. 7, 2006). After *Sarei*, it is settled that aiding and abetting is viable in the context of Alien Tort Statute ("ATS") cases and not subject to the test for underlying violations outlined in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). Indeed, *Sarei* confirms that the pre-*Sosa* approach to ATS cases in this Circuit is the proper approach: "[t]he settled principles of law that governed the district court's analysis therefore remain sound post-*Sosa.*" 2006 WL 2242146 at *4. In so doing, *Sarei*, a case against a corporation for *inter alia* ATS claims, supports Plaintiffs' position that Caterpillar can be held liable for aiding and abetting. *Sarei* also foreclosed Caterpillar's argument that Plaintiffs' claims are barred by the political question doctrine, as ATS claims are constitutionally committed to the judiciary. *Id.* at *6. Finally, Sarei found that the Act of State doctrine does not preclude allegations of *jus cogens* violations, which "cannot constitute official sovereign acts." *Id.* at *11.

I. AIDING AND ABETTING LIABILITY IS ACTIONABLE UNDER ATS.

A. Aiding and abetting as a Theory of Liability Is Not Subject to the *Sosa* Test.

Caterpillar's argument that theories of liability must meet the *Sosa* test is inconsistent with *Sarei's* analysis of *Sosa.* Br. of Appellee Caterpillar ("CB") 13-16. In *Sarei*, this Court made clear that vicarious liability (e.g., aiding and abetting liability) is a well-recognized theory of liability under ATS post-*Sosa* and is not subject to the *Sosa* test. *Sarei*, 2006 WL 2242146, at *5 ("A predicate question is whether, post-*Sosa*, claims for vicarious liability for violations of *jus cogens* norms are actionable under ATS. We conclude that they are.") This accords with the Supreme Court's recognition that aiding and abetting is a species of liability. *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 184 (1994). *See also Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2785 n.40 (2006).

In *Sarei,* the Court first assessed whether the substantive tort claims met the "specific, universal and obligatory" test of *In re Estate of Ferdinand Marcos, Human Rights Litig.,* 25 F.3d 1467 (9th Cir. 1994), in accordance with *Sosa* and then addressed the "theories of vicarious liability," notably *not* using the *Sosa* test. 2006 WL 2242146 at *4-*5. It held that "there are well-settled theories of vicarious liability under federal common law." *Id.* Significantly, the Court observed that "violations of the law of nations have always encompassed

vicarious liability," and cited two eighteenth-century sources that recognized or codified aiding and abetting liability as support for this proposition. *Id*. at *5 n.5. By specifically referring to aiding and abetting provisions for its finding, contrary to U.S. assertions, US Amicus Br. ("USB") 11-12, the Ninth Circuit confirms that vicarious liability includes aiding and abetting.[1] As the plaintiffs in *Sarei* made aiding and abetting arguments as a basis for jurisdiction, such a determination by the Ninth Circuit was necessary. *Sarei v. Rio Tinto Plc,* 221 F. Supp. 2d 1116, 1142 (C.D. Cal. 2002), *rev'd on other grounds,* 2006 WL 2242146 (9th Cir. Aug. 7, 2006).[2]

B. Aiding and Abetting Liability Is Recognized Under Federal Common Law and the Law of Nations.

Caterpillar's argument that aiding and abetting liability did not survive either *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) or *Central Bank* also has been answered in *Sarei* CB:17, 23. Aiding and abetting was actionable at

[1] The US interpretation of a statute like ATS – involving no Congressional delegation to the executive and no presumptive expertise – is entitled to no special deference, especially if that construction violates the plain meaning of the statute or reflects a basic (and recent) misunderstanding of history. As noted by the Ninth Circuit the first time it rejected the Justice Department's view of ATS, the government's inconsistent positions "in different cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350. Rather, we are constrained by what § 1350 shows on its face." *In re Estate of Ferdinand E. Marcos, Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992). *See also, Republic of Aus. v. Altmann*, 541 U.S. 677, 701 (2004) (United States' views on statutory construction "merit no special deference").

[2] *See also*, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) (outlining framework for analyzing claims of vicarious liability, focusing on civil conspiracy and aiding and abetting).

the time ATS was enacted and continues to be actionable under ATS. *Sarei*, 2006 WL 2242146, at *4-*5 n.5. To determine the issue of secondary liability this Court drew on federal common law rather than international law. *Id.* at *5. Federal common law recognized and continues to recognize such liability. *See, e.g., Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795)(finding that individuals would be liable under ATS for "committing, aiding, or abetting" violations of the laws of war).[3] Additionally, aiding and abetting violations of the law of nations is actionable under international law, which is incorporated into federal common law. *See* Appellant's Opening Br. ("AOB") 23-25. Neither *Erie* nor *Central Bank* changed this.

Aiding and abetting clearly still exists as part of federal common law after *Erie. Sarei*, 2006 WL 2242146, at 5. *Sosa* specifically found that *Erie* does not bar the recognition of federal common law derived from the law of nations. *Sosa,* 542 U.S. at 725-30. For example, *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005), found liability could attach for contributory or vicarious infringement in the absence of an explicit provision in the Copyright Act,

[3] The U.S. argues that the Bradford Opinion supports the proposition that the ATS does not apply to a "foreign nation's action taken abroad against non-US citizens," (USB:6-7 & n.8). This proposition is refuted by *Sarei*, which relied on the Bradford Opinion in the context of a case involving exactly the kind of claims the Government would exclude. It also stands in stark opposition to the entire body of jurisprudence developed under the ATS, following the *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) decision, which the Supreme Court expressly approved in *Sosa*.

stating, "these doctrines of secondary liability emerged from common law principles and are well established in the law." 125 S. Ct. at 2776.

As reflected in the near unanimity of ATS cases decided since *Central Bank* finding aiding and abetting liability under ATS, *see* AOB:22-23, as well as in non-ATS cases, *Central Bank* is not controlling here. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp.2d 7, 53 (E.D.N.Y. 2005) *appeal docketed*, No. 05-1953-CV (2nd Cir. Sept. 30, 2005); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 262 (E.D.N.Y. 2006) (holding that "*Central Bank* does not . . . require an unequivocal congressional mandate before allowing a claim for secondary liability" in relation to TVPA claim).

The U.S. has successfully argued that federal common law provides aiding and abetting liability in a statutory scheme that otherwise is silent on the issue. *Boim v. Quranic Literacy Institute,* 291 F.3d 1000, 1019 (7th Cir. 2002). *Boim* concerned aiding and abetting liability in the Anti-Terrorism Act ("ATA"), 28 U.S.C. § 2333, which provides civil remedies for acts of international terrorism, and does not include any provision for aiding and abetting. In *Boim*, the government argued that the statute incorporated background federal common law principles to "extend tort liability to those who aid and abet." *Brief for the United States as Amicus Curiae,* at 10*, Boim v. Quranic Literacy Institute,* 291 F.3d 1000, 1019 (7th Cir. 2002) (Nos. 01-1969 & 01-1970). Since the ATA (like ATS), does not restrict the range of possible defendants, "[a]ny such restrictions therefore must arise, if at all, from

background tort principles that Congress presumably intended to incorporate." *Id.* The court agreed "[t]hat history, in combination with the language of the statute itself, evidences an intent by Congress to codify general common law tort principles" and that "those principles include aiding and abetting liability." 291 F.3d at 1019.

Furthermore, *Central Bank* rejected aiding and abetting liability in the specific context of Section 10(b) of the Securities Exchange Act, reasoning that the statute's lack of express inclusion of aiding and abetting liability indicated Congressional intent not to cover such liability. 511 U.S. at 179. It is unreasonable to expect that Congress would have included any particular liability standard in a jurisdictional statute such as ATS, which had the purpose of recognizing the federal courts' common-law powers.

C. <u>Caterpillar Uses the Wrong Standard for Aiding and Abetting.</u>

Caterpillar misstates the *mens rea* standard for aiding and abetting as "specific intent", "purposeful conduct", "intent to facilitate" or "desir[ed]" success. CB:18–23. Caterpillar also incorrectly submits that "participation" in an illegal enterprise is required for aiding and abetting. CB:23, n. 8. The correct standard for aiding and abetting violations of the law of nations is *knowing* practical assistance that has a substantial effect on the perpetration of the crime. AOB:25-27.

Caterpillar incorrectly reads *Halberstam* to require that the aider and abettor share the intent to make the venture succeed and participate in an illegal

enterprise. In distinguishing aiding and abetting from conspiracy, the court did not suggest that participation and intent were required for aiding and aiding liability, and set out the same elements as Plaintiffs for such liability. *Halberstam v. Welch*, 705 F.2d 472, 478-88 (D.C. Cir. 1983).

Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984) and *Grokster* support Plaintiffs' position. In both cases, the Court was clear that selling certain products with *actual knowledge* that specific copyright infringers were using them to violate copyright law would create common law secondary liability. *Sony* was an "imputed knowledge" case, which reversed the Ninth Circuit's holding that putting products with legitimate, unobjectionable purposes in the stream of commerce, without actual knowledge that the products would be used to commit violations, was sufficient to create liability. *Sony*, 464 U.S. at 439-42. *Grokster* found the Ninth Circuit had misread *Sony* to preclude all common law secondary liability without specific knowledge. Although the Court found contributory copyright infringement could occur where the defendant encouraged and promoted the use of its equipment to infringe copyright, it did not hold that such promotion or encouragement was required for all secondary liability. 125 S. Ct. at 2778-80.

Caterpillar's proposition that intent to facilitate the violation is required is equally flawed. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp.2d 86 (D.D.C. 2003) and *Boim* are not relevant for considering the *mens rea* of aiding and abetting under ATS because that aspect which Caterpillar relies on is

relevant to the application of aiding and abetting under the ATA, which define "international terrorism" as an act that would be a criminal violation of a statute that requires intent. 18 U.S.C. § 2331, *et seq.* Similarly, in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3rd Cir. 1995), there must be a violation of the criminal statute, 18 U.S.C. §1962, in order to recover civil remedies under RICO. 46 F.3d at 269.

Caterpillar attempts to dismiss *In re Agent Orange,* suggesting the court's extensive analysis of the issue was "entirely hypothetical." CB:22. After a careful review of domestic and international case-law, the court found that the defendants, having *knowingly* distributed the pesticides, would have been found liable for aiding and abetting violations of international law under ATS had the use of agent orange as an exfoliate been a violation of international law at the time it was used. *In re Agent Orange,* 373 F.Supp. 2d at 54-57. The Supreme Court recently confirmed that examining the jurisprudence of post-World War II criminal tribunals and the United Nations *ad hoc* international criminal tribunals is appropriate to determine the status of a legal theory under customary international law. *Hamdan*, 126 S. Ct. at 2784-85 & n.40 (examining such sources to determine whether conspiracy is recognized under customary international law).

D. A Reasonable Fact-Finder Could Find that Caterpillar's Conduct Satisfies the Aiding and Abetting Standard.

Plaintiffs have alleged that Caterpillar supplied bulldozers, as well as the training and follow-up materials necessary for the operation thereof, knowing the IDF *had used* and knowing the IDF *would* use such bulldozers in the demolition of civilian homes in a manner that constituted war crimes. ER:15 ¶¶ 7-13, 25-55.

Caterpillar cannot escape liability by arguing that someone else could have provided the bulldozers to the IDF. CB:23-24. To show substantial assistance, Plaintiffs simply need to establish that the IDF could not have committed the crimes in the same way had someone not played the role Caterpillar played in providing the bulldozers. *See Presbyterian Church of Sudan v. Talisman Energy Company*, 244 F. Supp., 2d 289, 324 (S.D.N.Y. 2003) (assistance is substantial if "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed," *citing Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶688 (May 7, 1997).[4] In *Talisman*, the provision of vehicles was found to be one means of providing support for a genocidal campaign. *Id.* at 301.

[4] *See also, Prosecutor v. Blaskić,* Judgement, Case No. IT-95-14-A, ¶48, (July 29, 2004)(assistance must have "substantial effect" on commission of crime, but need not have served as condition precedent for it).

E. The Application of Aiding and Abetting in this Case Would Not Create "Breathtaking" Consequences.

Caterpillar erroneously argues that under Plaintiffs' theory, any manufacturer of a product sold to a foreign government that might be liable for the government's use of that product. CB:7-8, 10-14. Plaintiffs' claim is not that Caterpillar is liable for simply "doing business" with Israel; nor is it that "selling legal products" that might facilitate international crimes is itself a violation of international law. Plaintiffs are alleging that the IDF *directly* used the product which Caterpillar had provided to commit the violations, and that Caterpillar *knew* the product was being used for such a purpose. Liability in these circumstances has been recognized since Nuremberg. *See In re Tesch* (*Zyklon B Case*) 13 I.L.R. 250 (Br. Mil. Ct. 1946)(industrialist convicted for sending poison gas to concentration camp, knowing it would be used to kill).[5]

The Supreme Court rejected similar arguments about consequences in *Grokster*, dismissing defendant's contention that development of beneficial technologies could be limited by imposing liability on distributors of software based on its potential for unlawful use, finding the article of commerce doctrine

[5] The U.S. argues that permitting aiding and abetting liability in this case would interfere with its ability to conduct foreign policy, including pursuance of economic engagement programs as a means to prompt reform. USB:13-19. The *Amici* Brief of Career Foreign Service Diplomats directly addresses this argument, arguing that holding corporations complicit in the commission of human rights violations *furthers* U.S. foreign policy, as it promotes respect for human rights and furthers the policy of "constructive engagement." Diplomats Br.:7-22.

"leaves breathing room for innovation and vigorous commerce". 125 S. Ct. at 2778. Where there is direct knowledge that a buyer will misuse the product, however, liability attaches. *Id.*

Finally, Plaintiffs are not suggesting that there is a duty to conduct an independent evaluation of a prospective buyer's intended use for a product, as the U.S. suggests, USB:15. Rather, Plaintiffs position is that once the seller is on notice of a use that violates international law, it has at least an obligation to cease providing substantial assistance to the perpetrator to carry out the violations.

F. State Action Is Not Required for Plaintiffs' ATS Claims.

Caterpillar's position that "state action" is required for Plaintiffs' ATS claims (violations of the laws of war and crimes committed pursuant thereto) is untenable. CB:25-27. Caterpillar, like the district court, incorrectly cites to *In re Estate of Marcos* for the proposition that individuals can bear responsibility for international law violations only if they have acted under official authority or under color of law. In that case, the Ninth Circuit was addressing charges of torture, which is one of the violations that does require state action. 978 F.2d at 501-02. War crimes and crimes committed in the course of the commission of war crimes, however, do not. *See* AOB 30. Indeed, nearly 200 years ago the Supreme Court found that the definition of piracy, one of the "primary" offenses under the law of nations at the time that ATS was enacted, included the conduct of a private actor. *United States v. Smith,* 5 Wheat. 153, 163-180 (1820).

II. ATS DOES NOT REQUIRE EXHAUSTION, AND THE TVPA IS NOT THE EXCLUSIVE REMEDY FOR EXTRAJUDICIAL KILLING.

Sarei addressed the question of whether an exhaustion requirement should be read into ATS, and squarely held that it should not. 2006 WL 2242146 at *18 n.26; & *22.

The Ninth Circuit also questioned the reasoning of *Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005), which found that the TVPA provides the exclusive remedy for extrajudicial killings. *Sarei,* 2006 WL 2242146, at *18 n.26. The Court found that the TVPA "has expanded rather than narrowed U.S. remedies for torture and extrajudicial killings overseas," and stated: "We do not read torture and extrajudicial killing out of the ATCA." *Id.*

III. WAR CRIMES CLAIMS ARE ACTIONABLE.

The Ninth Circuit has confirmed that war crimes and violations of the laws of war are actionable under ATS. *Sarei,* 2006 WL 2242146, at 5.

A. Attacks on Civilians.

Plaintiffs have alleged war crimes which include attacks on civilians.[6] Caterpillar's claims to the contrary ignore the allegations in the complaint.[7]

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[6] Plaintiffs FAC also alleges collective punishment, another claim of violation of the laws of war (GC IV, Art. 33) which the district court did not address. ER:15 ¶ 31.

[7] Caterpillar is incorrect in stating that Plaintiffs rely solely on Art. 3 of GC IV for the prohibition of attacks on civilians. CB:33-34. This prohibition is codified

CB:33. *See*, ER:15 ¶¶ 32, 83-84, Plaintiffs allege direct attacks upon civilians and acts against a civilian population in violation of the Fourth Geneva Convention ("GC IV"), including*, but not limited to*, Arts. 27, 32, 33, and 53.[8] ER:15 ¶¶ 32, 83-84.

One of the "cardinal principles" of international humanitarian law is that all parties limit their attacks to specific military objectives; civilians and civilian objects must never be the object of an attack. *See, e.g., Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, ¶54 (Dec. 17, 2004) ("prohibition against attacking civilians and civilian objects nay not be derogated from because of military necessity"). Those conducting the attack are required to determine whether it is likely to cause incidental loss of life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive compared to the concrete military advantage anticipated. Additional Protocol I to the Geneva Conventions ("Protocol I"), Art. 57. In such cases, "an attack shall be *cancelled* or *suspended*". *Id.* (emphasis added). *See*, *Id.,* Art. 51.

B. <u>Destruction of Civilian Property.</u>

Caterpillar's focus on "military necessity" is based on the premise that the property at issue here was a military objective, which is contrary to Plaintiffs' allegations that their homes were civilian property. ER 15:14-19; *see*

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in Art. 147 of GC IV as well as Arts. 48, 51 and 85(3)(a) of Protocol I. *See, Prosecutor v. Galić*, Case No. IT-98-29-T, Judgement, ¶¶42-62 (Dec. 5, 2003).

[8] Plaintiffs also allege extrajudicial killing. ER:15 ¶¶ 94-95.

Protocol I, Art. 52(2). Destruction of such property is prohibited, except when rendered absolutely necessary by military operations.

Neither *Sarei* nor any other case has excluded destruction of private property where not absolutely necessary for military operations from actionable claims. No case has suggested that this well-recognized principal is no longer actionable post-*Sosa* because of the exception for absolute necessity. *See generally* Br. of *Amici Curiae* Professors Roger Clark, Deena Hurwitz, Derek Jinks, Naomi Roht-Arriaza, and Beth Stephens ("Clark Br.").

Caterpillar attempts to shift the issue under consideration from *whether* there exists a specific, universal and obligatory norm related to the prohibition against the destruction of civilian property except when rendered absolutely necessary by military operations, to *how* to apply the facts to the law when adjudicating such claims. CB:29-34. As US case-law and the jurisprudence of the ICTY and the International Court of Justice ("ICJ") demonstrate, such claims are sufficiently defined so as to be capable of judicial review. *See* AOB:14-16 and Clark Br.:22-23 (reviewing U.S. case-law involving questions of military necessity or review of military decisions); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶¶132, 135 (July 9) (reviewing claim under Art. 53 of GC IV and finding destruction in question not rendered absolutely necessary by military operations); *Prosecutor v. Kordić and Čerkez* and *Prosecutor v.*

Strugar, Case No. IT-01-42-T, Judgement, (Jan. 31, 2005) (adjudicating charges brought under Protocol I, Art. 52).

Caterpillar misconstrues *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1360-64 (Fed. Cir. 2004) – a just compensation case. The issue was whether the President's designation of property as enemy property could be reviewed. The court held it could not be under the political question doctrine because declaring what property is "enemy property" is covered by the President's inherent war powers and the Constitution specifically grants him this power. *Id.*

Caterpillar suggests that judgments regarding absolute necessity in the destruction of civil property are complicated where "terrorists hide and operate among the civilian population…even the identification of persons as civilians or combatants is fraught with uncertainty." CB:30. This is simply an attempt to inject the case with facts that are contrary to the allegations and inconsistent with the reasons proffered by the IDF for the demolitions. ER:15 ¶10 There is no evidence that "terrorists" were hiding among the civilian population whose homes were destroyed and Caterpillar's attempt to inject "terrorism" into this case is disingenuous.

IV. THIS COURT NEED NOT ADDRESS WHETHER 1331 PROVIDES JURISDICTION.

Caterpillar's citation to *Independent Towers of Washington v. State of Washington,* 350 F.3d 925 (9th Cir. 2003) to support an argument that Plaintiffs

waived their §1331 claims is misplaced. CB:37, n.18. In *Independent Towers,* this Court found the party did not make a coherent legal argument; in the instant case, the District Court did not give a reasoned opinion that Plaintiffs could even appeal. The Court should remand the issue because it was not decided below, regardless of whether a lower court's decision is ultimately affirmed or overturned. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001).

If this Court addresses the issue, it should find that §1331 provides courts with jurisdiction to hear citizens' claims in violation of the law of nations. Defendant mistakenly asserts that *Sosa* decided the issue in footnote 19. In fact, the Court had not been presented with any argument to support §1331 jurisdiction. The only circuit court to rule on this question post-*Sosa* found that §1331 does provide such jurisdiction. *Igartua-De La Rosa v. U.S.*, 417 F.3d 145, 178 (1st Cir. 2005). In fact, numerous sections of *Sosa* support §1331 jurisdiction, including *Sosa*'s basic premise that international law is part of federal common law, and that no development, including *Erie,* changed this. *Sosa*, 542 U.S. 692, 728-30. To deny §1331 jurisdiction would provide non-citizens with more rights in federal courts than U.S. citizens. Finding that §1331 provides for such jurisdiction is consistent with, and likely compelled by, Supreme Court cases that find §1331 provides jurisdiction over claims founded on federal common law, even without statutory authority. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972).

V. TVPA CLAIMS SHOULD SURVIVE.

A. Caterpillar Failed to Meet Its Burden on Exhaustion.

Caterpillar failed to demonstrate that Plaintiffs could exhaust its remedies by suing "where the conduct giving rise to the claim occurred" - in the OPT. 28 U.S.C. 1350 (2005), note. The OPT would have jurisdiction over these claims against Caterpillar under the 1995 Interim Agreement, ER 36:27-8, but Caterpillar has never stated it would submit to jurisdiction there. CB:37-39.

Even if Plaintiffs were required to exhaust remedies in Israel, Caterpillar has not met its burden of demonstrating that available remedies exist, ignoring a July 28, 2005 Knesset law that bars Plaintiffs' claims against Israel, an immunity that Caterpillar would seem to share. ER 36:19-20. Other Israeli laws would also likely preclude remedies for Plaintiffs here. ER 36:15, 18-20.

Finally, Caterpillar's argument that any "adequate" claim is the same as an international law claim contradicts the TVPA history itself, the express purpose of which is to provide a remedy for the international violations of torture and extrajudicial execution. 28 U.S.C. 1350, note, sec 3(a); S. Rep. No. 102-249, at 2-3 (1991).

Piper Aircraft Co. v. Reyno, 454 U.S 235 (1981) does not support Caterpillar's argument. First, Caterpillar cites no authority that a *forum non conveniens* analysis is applicable to the TVPA's exhaustion analysis. Moreover, the case does not stand for the proposition that "a foreign remedy is adequate unless it is no remedy." CB:39. Rather, the Court discussed a situation

where "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all," in effect applying a similar test as the TVPA. 454 U.S at 254. Finally, even if adequate and available remedies did exist, the District Court failed to examine whether Plaintiffs had demonstrated that such were ineffective, unobtainable, unduly prolonged, inadequate or obviously futile. *Hilao v. Marcos*, 103 F.3d 767 (9th Cir. 1996).

B. <u>TVPA Reaches Corporations.</u>

The cases cited by Caterpillar do not support its argument that the TVPA excludes corporations. In determining the meaning of a statute, courts are directed to "look to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and case law, and to legislative purpose and intent." *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013 (9th Cir. 2005). Caterpillar acknowledges that Plaintiffs' TVPA authority supports the interpretation that "individuals" include corporations, and does not address other authority cited by Plaintiffs, AOB:33, and Amicus International Labor Rights Fund ("ILRF"). CB:40. Of Caterpillar's cases, only *Beanal v. Freeport-McMahon, Inc.,* 969 F. Supp. 362 (E.D. La. 1997), *aff'd on other grounds*, 197 F.3d 161 (5th Cir. 1999), provides any analysis, and it concluded that Congress did not appear to have had the intent to exclude private corporations from liability under the TVPA. 969 F. Supp. at 382.

Alt. Cleaners & Dyers, Inc., v. United States, 286 U.S. 427 (1932) supports Plaintiffs' position, stating, "It is not unusual for the same word to be

used with different meanings in the same act…." 286 U.S. at 433. *Mujica* erroneously relies on this case, as well as on *Desert Palace, Inc. v. Costa*, where the Supreme Court indicated it would not give the same term in the same act different meaning, "absent some congressional indication to the contrary". 539 U.S. 90, 101 (2003). Here, there is congressional indication to the contrary. *See* AOB:33; ILRF 9-12. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, *Inc*., 467 U.S. 837, 843 (1984). Congressional intent indicates corporations should be included as possible defendants under the TVPA.

C. <u>Plaintiffs Adequately Allege "State Action" and "Color of Law."</u>

As a threshold matter, the act of aiding and abetting provides a sufficient nexus with the state to extend liability to private parties, even if the tort requires state action. In adopting the TVPA, Congress noted that the statute covered "lawsuits against persons who ordered, abetted, or assisted in the torture," S. Rep. No 102-249, at 8 (1991), and cited to international law as the source. *Id*., at 9 and n.16.

The applicable test is joint action, satisfied by willful participation. Plaintiffs' allegations of aiding and abetting satisfy it. *See supra,* p.8. Caterpillar misconstrues 42 U.S.C. §1983 case-law to argue that there can be no liability unless the private defendant controlled the state actor. CB:26-27. In

discussing "control," *Arnold v. IBM,* 637 F.2d 1350 (9th Cir. 1981) and the other cases cited concern the second element of establishing a §1983 claim against a private actor – that the actor "causes to be subjected" a person to the harm. 637 F.2d at 1355. *See also* 42 U.S.C. §1983 (2005). This unique language does not exist in the TVPA (or with regard to the ATS), and is therefore not applicable. Rather than incorporate the "causes to be" language, the TVPA provides that complicity, as reflected in the congressional testimony and affirmed in the case law, including aiding and abetting, establishes liability.[9]

Caterpillar's reliance on *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116 (C.D. Cal 2002) is misplaced. There, the court was examining §1983's control test as *one* way that liability could be established *in the alternative* to the joint action test. *Id.* at 1145, 1148.

D. Extrajudicial Killing Does Not Require the Passing of an Official Judgment.

Caterpillar's argument that the deaths at issue here were not extrajudicial killings under the TVPA because there was no "passing of a sentence" is without any case authority and is contrary to the TVPA's definition of extrajudicial killing. Extrajudicial killing does not require the passing of an

[9] However, even if proximate cause is required for liability, Plaintiffs have adequately pled that the "injury is the natural and probable consequence of the negligent or wrongful act and ought be foreseen in light of the circumstances." *Burnett*, 274 F. Supp 2d at 105. ER:15 ¶¶87, 90, 96, 97, 100, 106, 108, 128, 133, 137, 138, 143, 144. If the Court finds that proximate cause has not been adequately pled, Plaintiffs seek leave to amend their complaint.

official judgment; it requires the killing by a state without a judgment issued by a court with judicial guarantees of due process, which is satisfied here.

VI. PLAINTIFFS' STATE LAW CLAIMS ARE ACTIONABLE.

A. The Foreign Affairs Doctrine Does Not Bar Adjudication.

Caterpillar argues that the "foreign affairs" doctrine bars adjudication of the state law claims, as adjudication would interfere with the conduct of U.S foreign relations. CB:42-43. This argument must be rejected, as it was not raised below. *Glover v. United States*, 531 U.S. 198, 205 (2001) It must also be rejected for all the same reasons that Plaintiffs' claims do not conflict with foreign policy. *See infra,* sec. VII. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S 363 (2000) is distinguishable. *Crosby* involved a direct conflict between a state and federal statute. 530 U.S. at 373-88. Unlike Plaintiffs' claims for wrongful death, public nuisance and negligence -- which fall squarely within the "traditional competence" of states - the state law in *Crosby* was adopted specifically to restrict the purchase of goods or services from companies doing business with Burma with the purpose of directly impacting upon foreign relations. This case is *not* seeking to impose an "economic boycott on an ally," as Caterpillar claims. CB:43.

B. The IDF is Responsible for the Actions of its Soldiers.

Caterpillar cannot rely on the argument that the IDF is not responsible for demolitions carried out by its soldiers. The doctrine of respondeat superior states that when an employer is acting through the facility of an employee or

agent, the employer is liable for the employee's negligence or intentional actions committed within the scope of employment; the same standard applies to the military as an employer. *See Lutz v. United* States, 685 F.2d 1178 (9th Cir. 1982).

There is no suggestion that the IDF soldiers where acting outside orders when they carried out house demolitions, including demolitions that resulted in the death of civilians. Under the principle of "responsible command," commanders are responsible for the actions of their subordinates. *See* Protocol I, arts. 86 and 87; *In Re Yamashita*, 327 U.S. 1 (1945).

VII. PLAINTIFFS' CLAIMS DO NOT PRESENT A POLITICAL QUESTION.

Caterpillar's contention that Plaintiffs' claims raise political questions relies essentially on two arguments, CB:52, both of which fail on the law, and if accepted, would subvert the separation of powers that the doctrine seeks to protect.

A. Plaintiffs' War Crimes Claims Are Justiciable.

Caterpillar's argument that war crimes claims are not justiciable was rejected by this Court in *Sarei*. War crimes are not a "choice of battlefield tactics," CB:51, but are actionable under the ATS. *Sarei* confirmed that "the resolution of claims brought under the ATCA has been constitutionally entrusted to the judiciary." *Sarei,* 2006 WL 2242146 at *6 (citations omitted). Caterpillar's argument that the application of the first factor in *Baker v. Carr*,

369 U.S. 186 (1962), is fatal to Plaintiffs' claims is therefore foreclosed. Claims for damages for extrajudicial killings brought pursuant to the TVPA are similarly committed to the judiciary. 28 U.S.C. § 1350 (2005), note.

Sarei also precluded Caterpillar's reliance on *Alperin v. Vatican Bank,* 410 F.3d 532 (9th Cir. 2005). *Sarei* found that plaintiffs' claims for alleged war crimes were not foreclosed by *Alperin* because that holding applied "only to the narrower category of war crimes committed by enemies of the United States." 2006 WL 2242146 at *9. Reviewing acts of U.S. enemies from WWII would risk conflicting with the Executive's decision not to prosecute them at Nuremberg, as the power to discipline enemies who violate the laws of war is constitutionally committed to the Executive. *Id.* at *9 (citing *Alperin,* 410 F.3d at 560). Plaintiffs' claims do not involve an Executive decision not to prosecute a U.S. enemy for war crimes.

Caterpillar's argument that Plaintiffs' claims will be more likely to disrupt U.S. foreign policy because Israel is an "important ally" must also be rejected (CB:51). In analyzing justiciability, the court in *Sharon v. Time*, 599 F. Supp. 538 (S.D.N.Y. 1984) found the fact that "the United States and Israel are close allies with good relations [was] reason to adjudicate this suit rather than to abstain." 599 F. Supp. at 551.

Caterpillar's reliance on *Alperin* in arguing that the third *Baker* factor precludes adjudication because it would require an initial policy determination is similarly misplaced. CB:48. In *Alperin*, the Court applied the war crimes

analysis and found that adjudicating claims of unjust enrichment from slave labor would also require reviewing the Executive's constitutionally committed decision not to prosecute a U.S. enemy. *Alperin,* 410 F.3d at 560-561. The Court found that its determination that slave labor claims ran afoul of the first *Baker* factor was reinforced by the third *Baker* factor, since it would be required to make an initial policy determination to condemn a U.S. enemy for its conduct during WWII when the Executive chose not to do so. *Id.* at 561.

Indeed, Plaintiffs' claims do not require any policy determination, but rather a determination of law. *See, e.g., In re Agent Orange*, 373 F. Supp. 2d at 71. In passing the ATS and TVPA, Congress made a policy determination that plaintiffs should be able to challenge fundamental human rights abuses in U.S. courts, even when implicating foreign government conduct. "[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which *obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion*." *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995) (emphasis added). As explained in the Diplomats' Amicus, "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." 22 U.S.C. § 2304(a)(1) (2005). The Executive Branch has in fact condemned Israel's home demolitions. ER 15:11.

B. Plaintiffs' Claims Against Caterpillar Do Not Challenge U.S. Foreign Aid to Israel.

Caterpillar argues that Plaintiffs challenge the decision of the U.S. government to give foreign aid "because U.S. government funds paid for the bulldozers that Caterpillar sold to Israel."[10] CB:3. Because Congress appropriated more than $2 billion to Israel in Foreign Military Financing ("FMF") assistance in 2006, and because some FMF funds were used, at least in 2001, to reimburse Israel for its purchase of D9 bulldozers, Caterpillar essentially argues that enforcement of the law would undermine U.S. foreign policy toward Israel. CB:48-49. This argument fails for three reasons.

First, Caterpillar's assertion that U.S. funds paid for the bulldozers at issue is based on facts not alleged in Plaintiffs' complaint. Plaintiffs alleged that Caterpillar sold bulldozers directly to Israel, a fact which is not disputed.[11] ER 15:13. The precise scope of which Caterpillar bulldozers are "at issue," and determining the circumstances of those sales and funding, requires discovery.[12] Despite having brought its motion to dismiss pursuant to Fed R. Civ. P.

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[10] Contrary to Caterpillar's specious claim, seeking damages is not the equivalent of imposing a boycott. CB:50. *See, e.g., Doe v. Unocal*, 963 F.Supp. 880, 895 (C.D. Cal. 1997).

[11] Caterpillar concedes its sales to Israel were direct commercial sales, CB:3, as opposed to sales through the Foreign Military Sales Program, which it has previously claimed. ER 15:13; ASER 51:14.

[12] Notably, Caterpillar has foregone its argument that export licenses are required for the bulldozer sales. SER 48:3-4. Caterpillar's submission (SER 48:6-7), as well as a State Department letter submitted by Plaintiffs, provides evidence that export licenses are not required. ASER 56:4.

12(b)(6), Caterpillar now claims that the political question doctrine is a jurisdictional issue, and therefore the Court can consider facts outside the pleadings. CB:3 49n. 26. This Circuit, however, has explained that it is unclear "whether dismissal on political question grounds is jurisdictional or prudential in nature, and thus whether it is properly classified under *Rule 12(b)(1)* or *12(b)(6)*". *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005), *vacated on other grounds, Lingle v. Arakaki,* 126 S. Ct. 2859 (2006). In *Sarei,* this Court found it had subject matter jurisdiction to proceed before it addressed the political question doctrine. 2006 WL 2242146 at *5.

If reviewed under Rule 12(b)(6), the court cannot look outside the pleadings unless it converts the motion to a Rule 56 motion and provides all parties with time for discovery. *See, e.g., Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981). If construed as a jurisdictional issue, Plaintiffs should still be provided the opportunity to obtain limited discovery if facts outside the pleadings are considered. *Timberlane Lumber Co. v. Bank of America*, 574 F. Supp. 1453, 1461 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).[13]

Second, Caterpillar relies almost exclusively on two cases that taxpayers brought against the U.S. President seeking to prevent foreign assistance to

[13] Plaintiffs requested that the Court allow limited discovery if it did not strike the evidence submitted by Caterpillar in its Motion Requesting that the Court Solicit the views of the United States Department of State. ASER 51:2, 10. Caterpillar has submitted such evidence as part of the record on appeal. SER 48:1-7.

Israel. CB:50. Plaintiffs do not challenge the decision to provide government aid to a foreign country. The non-justiciability of foreign aid challenges cannot preclude Plaintiffs' suit against a U.S. company for its failure to comply with the law in its transactions with a foreign country, even if the U.S. provided funds to the foreign country to reimburse it for the purchase.

Finally, Caterpillar's broad-reaching assertion would effectively insulate any private party from liability related to a transaction with any entity that receives aid from the United States. Taken to its logical conclusion, Caterpillar should not have to comply with any laws, including any enactment of Congress, with regard to its sales to Israel reimbursed by the U.S., because to do so may discourage Caterpillar from selling to Israel. It would not only be tort and human rights laws that Caterpillar would be exempt from, but also laws requiring payment of taxes, prohibiting fraud and bribery, governing contracts and regulating anti-competitive behavior. Such a conclusion is clearly impermissible.

C. The U.S. Argument that this Case Challenges Foreign Policy is Wrong.

The U.S. Amicus, in contrast to a State Department Statement of Interest ("SOI"), does not represent "the considered judgment of the Executive on a particular question of foreign policy." *Republic of Aus. v. Altmann*, 541 U.S. 677, 702 (2004). If this Court is inclined to accept that the assertions regarding foreign policy expressed in the U.S. Amicus reflect the Executive Branch

position, Plaintiffs must have the opportunity to scrutinize the underlying factual basis for such views, and fully brief the relevance of those views to the issues at hand and the weight they should be given. ASER 51:12; *Sarei*, 2006 WL 2242146 at *9, n.13 (evidence submitted "would seriously undercut the State Department's concerns"); *see also Sarei*, 221 F. Supp. 2d at 1182 (C.D. Cal. 2002) ("court may not take judicial notice of the facts that underlie" U.S. position"). Even if the State Department did submit an SOI in this case, which it has not, it would not be controlling. *Sarei*, 2006 WL 2242146 at *9.

The U.S. argues that Plaintiffs' claims were properly found nonjusticiable, incorrectly imputing to the District Court a finding it did not make, namely that adjudicating Plaintiffs' claims would be impossible without showing a "lack of respect due coordinate branches of government." USB:28.[14] The District Court did not rely on this *Baker* factor and Caterpillar did not brief it. The U.S. does not explain the basis for its argument, nor how a decision would "seriously interfere with important governmental interests," as required. *Sarei* at *7 (quoting *Kadic*, 70 F.3d at 249). The U.S. does not claim that its foreign policy is to encourage the human rights violations alleged here, which it has condemned. ER 15:11. Indeed, it expresses its deep regrets for the tragic

[14] The U.S. argues that because FMF funding is implicated, this is an appropriate case for the exercise of "case-specific deference to the political branches." USB:27 (citing dicta in *Sosa*, 542 U.S. at 733 & n.21). Although the U.S. separates this point from its political question argument, *Sosa* did not create a new doctrine of case-specific deference that allows courts to dispense with the requirements of existing abstention doctrines in ATS cases.

deaths and "losses *resulting* from the *practice* of demolitions." USB:3 (emphasis added). The U.S. also does not claim it made a "foreign policy determination" to approve the reimbursement to Israel for the purchase of Caterpillar D9s, or specifically earmarked FMF funds for that purpose, as opposed to merely providing a routine ministerial approval of the reimbursement.[15] The U.S. certainly does not claim that it did so in order to facilitate war crimes.

Rather, the U.S. asserts that Plaintiffs' claims implicate the foreign policy of "continuing to provide FMF funds to Israel."[16] USB:27. As discussed above, this is a case about Caterpillar's liability and not U.S. aid to Israel. Plaintiffs' claims against Caterpillar for damages from past sales do not implicate the continuation of U.S. FMF funding to Israel, conflict with any past determination to give funding to Israel, or limit the use of FMF funding in any way. Touching on foreign policy does not create a political question; to preclude adjudication, one of the *Baker* factors must be *inextricable* from the case. *Baker*, 369 U.S. at 217.

The U.S. provides no support for its contention that it made a foreign policy determination "to encourage equipment manufacturers like Caterpillar to

[15] Caterpillar's assertion that the political branches made a "specific decision to support Israel's purchases from Caterpillar" is likewise unsupported. CB:49.
[16] The U.S. also inaccurately claims that the Court's political question decision related to the political branches' foreign policy prerogative regarding "military funding to foreign nations." *Id.* The District Court opinion did not mention military funding, and in fact declared that the U.S. has *not* urged the sale of weapons to Israel. ER 62:16.

sell its goods to foreign states receiving such FMF funds." USB:15. No evidence has been submitted that equipment manufacturers are *encouraged* to sell their goods through direct commercial sales funded by FMF, or that such sales are materially different from sales that Israel pays for itself. There is also no reason why a "threat of suits" would pose "a significant disincentive to suppliers' participation in FMF sales" and "undoubtedly deter" future suppliers from selling to foreign governments receiving FMF. USB:15. The broad exemption from the law that the U.S. apparently argues for would effectively allow the U.S. government to even immunize unlawful behavior after the fact by simply reimbursing the foreign actor. There is also no evidence that finding aiding and abetting liability could increase the cost of the FMF program or jeopardize the program's effectiveness. USB:15-16.

Finally, the U.S. provides no legal authority that any of these speculative harms would actually render Plaintiffs' claims nonjusticiable. Even challenges to U.S. military actions are routinely deemed justiciable. *See e.g., The Paquete Habana*, 175 U.S. 677 (1900); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004); *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992).[17] An argument that any consequent increase in cost to the U.S. government should preclude

[17] Caterpillar's attempt to distinguish *Koohi* as "simply" concerning "negligence by the U.S. military" is unavailing. CB:52. The *Koohi* Court found that a challenge to Executive Branch conduct that was "part of an authorized military operation" during a war was justiciable. 976 F.2d at 1331.

adjudication is untenable, and contrary to the separation of powers underlying the political question doctrine.

D. Caterpillar Cites No Authority for its New Argument that the Remaining *Baker* Factors Apply.

Caterpillar's feeble attempt to argue for the first time, without any citations, that the remaining *Baker* factors also preclude adjudication must be rejected. Plaintiffs have addressed the second factor related to judicially discoverable and manageable standards (AOB:49-50), and standards for military necessity are addressed *supra* at III, and in depth in the Clark Brief. This Court recently analyzed *Baker* factors four, five and six in *Sarei,* also a case against a corporation for its complicity in a foreign government's war crimes, and found that but for a SOI submitted by the State Department, there was "little reason" to dismiss the case on political question grounds, and "no independent reason" to find it infringed on the prerogatives of the Executive Branch. *Sarei*, 2006 WL 2242146 at *8. As noted above, the State Department has not submitted a SOI in this case. High level State Department officials who met with Plaintiff Craig Corrie did not express any concerns regarding the lawsuit when informed of it in May 2005, nor have they since. ASER 56:2-3. Even in *Sarei,* where the SOI was given "serious weight," the Court decided it would not control its determination, and found that "[e]ven if the continued adjudication of this case does present some risk to the Bougainville peace process, that is not sufficient to implicate the final three *Baker* factors...." *Id.* at *9. As none of the *Baker*

factors is inextricable from Plaintiffs' claims, the political question doctrine does not bar this case.

VIII. THE ACT OF STATE DOCTRINE DOES NOT BAR ADJUDICATION.

The District Court erred in applying the act of state doctrine (ASD) because: (1) Israel's acts were not done within its own sovereign territory, and (2) war crimes and other *jus cogens* violations cannot be official public acts. *Sarei* at *11. In order to qualify as an act of state, an act must be within a state's territory. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1963). Caterpillar concedes that the acts alleged were not carried out within Israel's territory by admitting that Gaza and the West Bank are "adjacent to Israel's borders." CB:55. Nevertheless, Caterpillar proceeds to argue that whether the OPT is within Israel's territory is a political question that cannot be adjudicated, and therefore the ASD applies. CB:56 (citing *Doe v. Israel*, 400 F. Supp. 2d 86, 114). Caterpillar, however, bears the burden of proof to establish an act of state. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691, 695 (1976). If the status of the OPT were an open political question, Caterpillar could not meet its burden to prove an act of state. Caterpillar attempts to dispose of the territoriality requirement by misinterpreting *Tchacosh Co. v. Rockwell International Corp.,* 766 F.2d 1333 (9th Cir. 1985), which applied the ASD only after finding that the government

"fully executed any acquisition of property or assets…within its own territory". 766 F.2d at 1339.

The Ninth Circuit's opinion in *Sarei* confirmed that allegations of *jus cogens* violations "cannot constitute official sovereign acts," a requirement for the ASD. 2006 WL 2242146 at *11. It also reaffirmed that war crimes are *jus cogens* violations. *Id.* at *5. War crimes cannot be official acts, even if the government's practice is widespread.[18] *Id*. at *11. Moreover, Caterpillar has never provided evidence that an Israeli "statute, decree, order, or resolution" authorized the demolitions, as required to assert an act of state. *Alfred Dunhill*, 425 U.S. at 695.

Even if an official act within Israel's territory were at issue, the Court erred by failing to address the *Sabbatino* factors, which counsel against application of the ASD in this case. AOB:58-60. Caterpillar's argument that Israel was acting in the public interest is without merit, as war crimes cannot be in the public interest. *See, e.g., Doe v. Liu Qi,* 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004). *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) is inapposite, as it addressed the commercial exception to the Foreign Sovereign Immunities Act, not the ASD. The ASD simply does not bar adjudication of Plaintiffs' claims.

[18] Plaintiffs have never claimed that the acts alleged were the "rogue acts of a few soldiers," CB:56, but rather that the IDF has destroyed at least 10,000 Palestinian homes since 1967. ER 15:3.

CONCLUSION

For all the foregoing reasons the judgment should be reversed.

Dated: August 31, 2006

Respectfully submitted,

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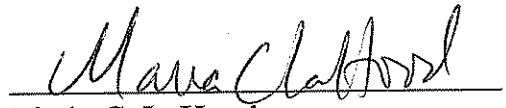
CERTIFICATE OF COMPLIANCE

I certify Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 8315 words. Plaintiffs filed a Notice dated August 18, 2006, extending the word count limit by 1,400 words pursuant to Circuit Rule 28-4 concerning a response to multiple briefs.

Dated: August 31, 2006

By: 

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