The Honorable Franklin D. Burgess
Note on Motion Calendar: June 17, 2005
ORAL ARGUMENT REQUESTED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CYNTHIA CORRIE AND CRAIG CORRIE, ON THEIR OWN BEHALF AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF RACHEL CORRIE AND HER NEXT OF KIN, INCLUDING HER SIBLINGS, MAHMOUD OMAR AL SHO'BI, ON HIS OWN BEHALF, ON BEHALF OF HIS SURVIVING SIBLINGS MUHAMMAD AL SHO'BI AND SAMIRA AL SHO'BI, AND ON BEHALF OF HIS DECEASED FAMILY MEMBERS, UMAR AL SHO'BI, FATIMA AL SHO'BI, ABIR AL SHO'BI, SAMIR AL SHO'BI, ANAS AL SHO'BI, AZZAM AL SHO'BI AND ABDALLAH AL SHO'BI; FATHIYA MUHAMMAD SULAYMAN FAYED, ON HER OWN BEHALF AND ON BEHALF OF HER DECEASED SON, JAMAL FAYED AND HIS NEXT OF KIN; FAYEZ ALI MOHAMMED ABU HUSSEIN ON HIS OWN BEHALF AND ON BEHALF OF HIS SONS, BAHJAT FAYEZ ABU HUSSEIN, AHMED FAYEZ ABU HUSSEIN, NOUR FAYEZ ABU HUSSEIN AND SABAH FAYEZ ABU HUSSEIN; MAJEDA RADWAN ABU HUSSEIN ON HER OWN BEHALF AND ON BEHALF OF HER DAUGHTERS, HANAN FAYEZ ABU HUSSEIN, MANAL FAYEZ ABU HUSSEIN, INSHERAH FAYEZ ABU HUSSEIN, AND FADWA FAYEZ ABU HUSSEIN; EIDA IBRAHIM SULEIMAN	No. C05-5192-FDB **MOTION TO DISMISS BY DEFENDANT CATERPILLAR INC. PURSUANT TO FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM AND PURSUANT TO THE POLITICAL QUESTION AND ACT OF STATE DOCTRINES; MEMORANDUM OF LAW IN SUPPORT** **ORAL ARGUMENT REQUESTED** **NOTE ON MOTION CALENDAR: JUNE 17, 2005**

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KHALAFALLAH ON HER OWN BEHALF AND ON BEHALF OF HER DECEASED HUSBAND, IBRAHIM MAHMOUD MOHAMMED KHALAFALLAH AND NEXT OF KIN,

Plaintiffs,

vs.

CATERPILLAR, INC., a foreign corporation,

Defendant.

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DEFENDANT CATERPILLAR INC. ("Caterpillar") moves the Court for an order dismissing Plaintiffs' First Amended Complaint ("FAC" or "Complaint") in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) and pursuant to the political question and act of state doctrines. Plaintiffs' Complaint, and each purported claim contained in it, fails to state a claim on which relief can be granted. Plaintiffs allege that Caterpillar sold a legal product – bulldozers – to the government of Israel, which allegedly used them to violate human rights. Neither this allegation nor any other alleged facts in the Complaint are sufficient to state a claim under international law, the Torture Victim Protection Act, the Racketeer Influenced and Corrupt Organization Act, or the tort laws of any potentially relevant jurisdiction. Moreover, Plaintiffs' claims are non-justiciable under the political question and act of state doctrines, because they challenge the actions of a foreign government and implicate United States foreign policy.

This motion is based upon this motion and memorandum, the Declaration of Professor Daniel More and the Request for Judicial Notice filed herewith, the pleadings on file in this action, and such further argument as may be presented at the hearing on this motion.

I. INTRODUCTION

Plaintiffs in this case are the family of Rachel Corrie ("Corrie"), a young American activist who died in the Gaza Strip in 2003, and a number of Palestinians (the "Palestinian Plaintiffs"), who live in the Gaza Strip and the West Bank, areas that Israel has controlled since the 1967 "Six Day War." Plaintiffs allege that soldiers of the Israeli Defense Forces ("IDF") killed Corrie while she was protesting the demolition of a Palestinian house, and claim that IDF soldiers demolished the Palestinian Plaintiffs' homes, causing injuries and the deaths of relatives. Plaintiffs seek to hold Caterpillar legally responsible for these losses because Caterpillar allegedly manufactured the bulldozers that the IDF soldiers were operating when they ran over Corrie and demolished the Palestinian Plaintiffs' homes.

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The deaths and other losses alleged in Plaintiffs' FAC are undeniably tragic. However, Plaintiffs' claim that Caterpillar caused those losses is misguided and wrong. There is no legal basis for the allegation that Caterpillar can be liable in damages for selling a legal, non-defective product to the government of Israel. Nor is there any tort theory that imposes liability on Caterpillar for its customers' independent decisions about how to use the products Caterpillar sells. Caterpillar did not control or participate in the Israeli government's conduct alleged in the Complaint, and therefore cannot be liable for Plaintiffs' alleged losses under federal law or the tort laws of any relevant jurisdiction.

Plaintiffs' tort claims fail for lack of causation or any duty of care. Plaintiffs' federal statutory claims – which allege violations of the Racketeer Influenced and Corrupt Organization Act ("RICO") and the Torture Victim Protection Act ("TVPA") – also fail for numerous reasons. Caterpillar did not participate in any RICO "enterprise" with the Israeli government, or anyone else, merely by selling products in a commercial transaction. Caterpillar also did not participate in any "pattern of racketeering activity" as RICO requires. Similarly, Caterpillar did not control the actions of the IDF soldiers, and did not participate with them in the conduct that Plaintiffs challenge, and Caterpillar therefore did not act under "color of law" of a foreign nation as the TVPA requires. Nor did Caterpillar "aid and abet" any alleged extrajudicial killings merely by selling construction equipment. Finally, Plaintiffs have not met the procedural prerequisites for a TVPA claim, because they have not exhausted their local remedies in Israel.

Faced with these barriers to proving any recognized federal or state claim, Plaintiffs expand their focus and attempt to construct a federal claim around various alleged principles of international law. FAC ¶¶88, 95, 107 (Counts 1-3). Plaintiffs charge that Caterpillar committed a broad range of alleged war crimes and other international offenses by selling tractors that the Israeli government used to destroy Palestinian homes. Such a theory does not provide Plaintiffs

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with any federal claim against Caterpillar, whether or not the Israeli government violated some provision of international law.

The United States Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, __ U.S. __, 124 S. Ct. 2739 (2004), makes this clear. In that case, the Supreme Court interpreted the statute that provides federal jurisdiction for civil actions by aliens alleging a tort in violation of international law (28 U.S.C. § 1350, often referred to as the "Alien Tort Statute" or the "Alien Tort Claims Act"), which the Palestinian Plaintiffs cite as a basis for federal jurisdiction here. The Court called for "judicial caution" when determining the kinds of international law norms that will create a private claim and instructed that the courts consider "the practical consequences" of recognizing such a claim. *Id*. at 2762, 2765-66. In particular, the Court directed that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id*. at 2765.

The claim Plaintiffs assert here – selling a legal, non-defective commercial product to a foreign government that might use it in violation of international law – is not a recognized international violation at all, much less the kind of well-defined and broadly accepted international offense that can support an actionable claim under this restrictive requirement. Moreover, like the purported international law tort of "arbitrary detention" that the Supreme Court rejected in *Sosa*, the practical implications of the tort Plaintiffs propose here would be "breathtaking." *Id.* at 2768. Plaintiffs' theory of liability would open the federal courts to claims against U.S. manufacturers by any plaintiff, foreign or domestic, who alleges that a foreign government used the manufacturer's commercial products in some way to commit a human rights violation.

Plaintiffs' Complaint reveals another reason for the wide-ranging scope of Plaintiffs' claims aside from the effort to create some theory under which this action could proceed.

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Plaintiffs' Complaint makes clear that their ultimate goal is to require Caterpillar to stop doing business with the Israeli government. FAC ¶¶50, 52. Plaintiffs seek damages on the theory that Caterpillar is "complicit" in the Israeli Defense Forces' alleged "human rights violations and war crimes" against Palestinians (*id.* at ¶7), and ask for an injunction "directing Defendant to cease its participation in the provision of equipment and services to the Israel Defense Forces until the resulting human rights violations and war crimes. . . cease." *Id* at p.31 (prayer, ¶e).

This lawsuit is not an appropriate means to pursue that political goal. The claims Plaintiffs allege, and the relief they seek, implicate U.S. foreign policy, and impinge on the prerogative of the executive and legislative branches of government to handle relations with foreign governments. Plaintiffs seek relief that is designed to stop commercial sales and, in essence, to boycott the Israeli government. Moreover, the theory under which Plaintiffs seek that relief requires this Court to preside over a proceeding in which the Israeli government is put on trial for alleged war crimes.

Under the standards for international claims that the Supreme Court established in *Sosa*, the "potential implications for the foreign relations of the United States" of Plaintiffs' claims provide another compelling reason for this Court to conclude that Plaintiffs have failed to state a claim. *Sosa,* 124 S. Ct. at 2763. In addition, the Court should dismiss this case under well-recognized doctrines governing cases affecting U.S. foreign relations, including the act of state doctrine and political question doctrine. Those doctrines require deference to the political branches of government in cases, such as this, that threaten to interfere with United States foreign policy.

II. SUMMARY OF ARGUMENT

- **Plaintiffs fail to allege any actionable violation of international law (Counts 1-3).**
  - ➢ Caterpillar cannot be directly liable for the acts of the IDF in Israel, because Caterpillar did not control the IDF. The allegations of selling a product to Israel are insufficient

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to create liability under any theory of accessory liability.

- There is no federal tort for "doing business with" a country that violates international law, and as *Sosa* teaches, this Court should not create one.
- The IDF's destruction of property, with the resulting loss of lives, in the circumstances alleged in the Complaint, does not state a claim under any universally recognized norm of international law that is sufficiently definite to satisfy the United States Supreme Court's restrictive requirements set forth in *Sosa*.
- Plaintiffs have not alleged and have no factual basis to allege that Caterpillar was a "state actor" as Plaintiffs' international law claims require.
- No provision of federal law allows the Corrie plaintiffs to sue for violations of international law.

- **Plaintiffs' allegations of "extrajudicial killing" also fail to state a claim under the Torture Victim Protection Act, 28 U.S.C. §1350 (note) (Count 2).**
  - Plaintiffs have not fulfilled the TVPA's requirement of exhausting their remedies in Israel. In fact, at the same time they filed this action, Rachel Corrie's parents filed a lawsuit in Israel against the Israeli government, which is currently pending.
  - In selling construction equipment to Israel, Caterpillar did not act under "color of law" of a "foreign nation" as the TVPA requires.
  - Caterpillar did not participate in any alleged killings, and did not aid and abet the Israeli soldiers involved in the incidents alleged in the Complaint simply by selling bulldozers.
  - By its terms, the TVPA only applies to "individuals," not to corporations such as Caterpillar.
- **Plaintiffs do not state a claim for violation of the Racketeer Influenced and Corrupt Organization Act ("RICO") (Count 4).**

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- The allegation that Caterpillar sold products to Israel is insufficient to allege the existence of a RICO enterprise.
- Plaintiffs do not identify any "racketeering activity" within the definition of the Act. The acts alleged do not constitute crimes under state or federal law.
- Plaintiffs' RICO claims fail because they have not alleged a direct causal relationship between Caterpillar's sale of tractors and Plaintiffs' alleged injuries.
- The conduct that caused Plaintiffs' losses occurred outside the United States, and RICO does not apply to such extraterritorial conduct.
- Plaintiffs' RICO conspiracy claim cannot survive in the absence of a substantive RICO violation. In addition, there is nothing other than a conclusory conspiracy allegation to support the claim.

- **Plaintiffs' state law tort claims (Counts 5-7) must be dismissed for lack of causation or any duty of care from the sale of legal, non-defective products.**
- **This action must be dismissed because adjudicating Plaintiffs' claims would interfere with the prerogative of the executive and legislative branches of government to conduct the nation's foreign relations.**
  - Plaintiffs accuse the IDF of war crimes and ask this Court to preclude Caterpillar from engaging in commercial trade with the Israeli government. This suit challenges the legitimacy both of a foreign government's official acts in conducting a war against Palestinian terrorism and the political response of the United States government. This country currently provides $2.2 billion of military aid to the Government of Israel. Entertaining this lawsuit would encroach on matters that are given to the executive branch by the Constitution, and, therefore, this Court should dismiss this suit pursuant to the political question doctrine.

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- The conduct of the IDF is an official act of the State of Israel. The act of state doctrine precludes the federal courts from sitting in judgment of the policies of a foreign sovereign.
- Should the Court be in any doubt on these issues, it should seek guidance from the State Department as many other district courts have done when presented with similar issues.

III. FACTUAL ALLEGATIONS[1]

Plaintiffs allege that the government of Israel has engaged in a policy of destroying Palestinian homes in areas Israel occupied following the 1967 Six Day War. FAC ¶25. Plaintiffs claim that Israel has demolished homes in these Occupied Territories for several reasons, including to create "buffer zones" around military bases and other areas; to discourage growth of the Palestinian population in certain areas; to clear paths for the IDF's tanks and other weaponry; and as punitive measures against persons connected to suspects in attacks against Israeli civilians or soldiers. *Id.* at ¶¶27-31. Plaintiffs' claims against Caterpillar are all based on the central contention that Caterpillar sold bulldozers to Israel "when it knew, or should have known," that the Israeli government was using Caterpillar tractors in this policy of home demolitions. *Id.* at ¶7.

According to the Complaint, Caterpillar has supplied tractors to Israel since 1967. *Id.* at ¶42. Plaintiffs allege that Caterpillar had "actual" notice since 2001 and "constructive" notice since 1989 that Israel was using tractors it manufactured to demolish Palestinian homes, allegedly in violation of international law. Plaintiffs' allegations of "constructive" notice are

[1] In ruling on a motion to dismiss for failure to state a claim, the Court of course must accept the allegations in the Complaint as true. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). However, the Court need not accept conclusory allegations or make unreasonable inferences. *Admiralty Fund v. City National Bank*, 677 F.2d 1315, 1316 (9th Cir. 1982) (refusing to accept conclusory allegations of aider and abettor liability). In ruling on the motion, the Court may also consider matters that are appropriate for judicial notice. *Mullis v. U.S. Bank*, 828 F.2d 1385, 1388 (9th Cir. 1987).

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based on alleged public statements and reports by human rights groups as well as the United Nations and the State Department. Plaintiffs' allegations of "actual" notice focus on a campaign by "a coalition of human rights and non-profit organizations to educate Caterpillar about the illegal use of its bulldozers." *Id.* at ¶50. According to Plaintiffs, the goal of these groups is to convince Caterpillar to "stop selling or otherwise providing its bulldozers to Israel." *Id.* Plaintiffs allege that Rachel Corrie's parents also participated in this campaign by writing to Caterpillar's CEO "regarding IDF's use of the Caterpillar bulldozers." *Id.* at ¶52.

Plaintiffs do not allege that Caterpillar had any role in Israel's alleged policy of destroying Palestinian houses other than selling tractors and tractor parts to Israel and failing to "recall" tractors it manufactured after receiving notice of Israel's conduct. Plaintiffs allege that Israel used armored tractors in its demolition of Palestinian homes, and they claim that Caterpillar advertises bulldozers adapted for military use, including "armor kits." *Id.* at ¶¶41, 43. However, Plaintiffs do not allege that Caterpillar actually sold armored bulldozers to Israel. *Id.*

Plaintiffs allege that Rachel Corrie was killed while she was working with a group of "protesters" from "around the world" *Id.* at ¶¶67, 72. According to the Complaint, on March 16, 2003, along with a group of volunteers, Rachel was protesting the demolition of a Palestinian home in the Gaza Strip. Israeli Defense Forces allegedly were using two Caterpillar bulldozers, accompanied by an Armored Personnel Carrier (or "tank"), to demolish homes in the area of the protest. *Id.* at ¶68. Rachel stood in front of a home to "protect it from demolition." *Id.* at ¶71. The Complaint alleges that the soldier operating one of the Caterpillar bulldozers intentionally ran over Rachel, killing her. *Id.* at ¶¶ 71, 73.

The Complaint alleges that the Palestinian Plaintiffs suffered the loss of their homes, and, in some instances, personal injury or the deaths of relatives, when the IDF used Caterpillar tractors to destroy their houses. *Id.* at ¶¶56-64, 77-80. Plaintiffs allege that, in several such instances, IDF demolitions occurred in the context of other military activity, including "attacks

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on Palestinian residential areas" (*id.* at ¶56), "a large scale Israeli military incursion" into a refugee camp (*id.* at ¶80) and gunfire directed toward neighbors and relatives of injured Plaintiffs (*id.* at ¶61).

The Complaint does not allege that Caterpillar had any involvement in the incident leading to Corrie's death, or in any of the alleged incidents resulting in the Palestinian Plaintiffs' losses, other than selling the tractors that the Israeli government used.

IV. PLAINTIFFS' FIRST, SECOND AND THIRD CLAIMS FOR RELIEF FAIL TO STATE ANY CLAIM FOR VIOLATIONS OF INTERNATIONAL LAW

A. Caterpillar Is Not Liable For The Israeli Government's Alleged Conduct

Plaintiffs assert claims for alleged war crimes, "cruel, inhuman or degrading treatment or punishment," and extrajudicial killing. Although Plaintiffs make the conclusory allegation that Caterpillar is directly liable for some of these violations (*see, e.g., id.* at ¶86), the Complaint alleges no facts that support such a claim. The Complaint does not allege that Caterpillar participated in or directed any of the IDF's challenged conduct. Caterpillar sold construction equipment to the government of Israel. That conduct falls far short of participation in war crimes or other international law violations that Plaintiffs accuse the Israeli government of committing.

The recent opinion in *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (hereafter "*Apartheid Litigation*"), makes clear that selling products to a foreign government does not make one a participant in international law violations. In that case, plaintiffs alleged that various United States corporations violated international law by doing business with the apartheid regime in South Africa. The court rejected the claim that defendants participated in violations, concluding that "[t]he apartheid regime, and not defendants, engaged in the behavior that is the subject of [the alleged violations]." *Id.* at 552 n.16.

Caterpillar also cannot be liable for the Israeli government's alleged conduct under any theory of accessory liability. This is not a case involving alleged "command responsibility" or some theory of agency in which Caterpillar is alleged to have had the right or ability to control

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the conduct of Israeli soldiers.[2] *Cf. Hilao v. Estate of Marcos*, 103 F.3d 767, 777-78 (9th Cir. 1996) (defendant could be liable in ATCA case under command responsibility theory). Nor is it a case where Caterpillar is alleged to have been an active participant in the alleged violations. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (affirming aiding and abetting liability for a military officer based upon his "active participation" in execution).

Aiding and abetting by nature is a concept derived from criminal law. *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994). One who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture. *See, e.g., United States v. Blankenship*, 970 F.2d 283, 285-87 (7th Cir. 1992) ("[a] stationer who sells an address book to a woman whom he knows to be a prostitute is not an aider and abettor'") (quoting *United States v. Giovanetti*, 919 F.2d 1223, 1227 (7th Cir. 1990)). Any universally-accepted international norm of aiding and abetting that Plaintiffs might claim exists must, at a minimum, be consistent with this well-established principle of United States criminal law. *See United States v. Yousef*, 327 F.3d 56, 92 n.25 (2d Cir. 2003) ("[I]t is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States . . . could be deemed to qualify as a *bona fide* customary international law principle"). Similarly, Plaintiffs allege no facts that support a conspiracy claim against Caterpillar. *See Blakenship, supra*, 970 F.2d at 285 ("[s]omeone who sells sugar to a bootlegger knowing the use that will be made of that staple is not a conspirator") (citing *United States v. Falcone*, 311 U.S. 205 (1940)).

[2] For that reason, language in the Complaint referring to "ratification" also cannot support any theory of liability. Ratification is an agency concept. *See* RESTATEMENT (SECOND) of AGENCY § 82. There are no facts to suggest that the Israeli Defense Forces acted as Caterpillar's agent – the sale of a product does not form an agency relationship.

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B. Plaintiffs Cannot State A Claim Against Caterpillar For Selling Products To Israel

Plaintiffs' forced and unsuccessful attempt to fit their claims into some familiar category of liability – such as "aiding and abetting" – confirms what is evident from the facts they allege: Plaintiffs propose a previously unrecognized federal claim for doing business with a foreign government that violates international law. That claim cannot succeed, because it does not satisfy the restrictive standards for defining new international law claims that the Supreme Court recently articulated in *Sosa.*

In *Sosa*, the Court considered the types of claims plaintiffs may assert under the Alien Tort Statute, which provides federal jurisdiction "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Court directed that federal courts exercise "great caution" in adapting the law of nations to private rights. *Sosa*, 124 S.Ct. at 2764. The Court articulated several reasons for such caution, including possible "collateral consequences" to the foreign relations of the United States of private actions alleging that a foreign government violated the law of nations, and the lack of a "congressional mandate to seek out and define new and debatable violations of the law of nations. . . ." *Id.* at 2763. In light of these reasons for caution, the Court held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" (namely, violations of safe-conduct, infringement of the rights of ambassadors, and piracy). *Id*. at 2761-62. Plaintiffs' purported international law claims fail that test.

Apartheid Litigation again is directly on point. Plaintiffs alleged that defendants "supplied resources, such as technology, money and oil," that the South African government used to further its policies of oppression and persecution. For example, plaintiffs claimed that "the South African police shot demonstrators 'from cars driven by Daimler-Benz engines, . . . the

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regime tracked the whereabouts of African individuals on IBM computers, . . . the military kept its machines in order with oil supplied by Shell, . . . and the government received needed capital and favorable terms of repayment of loans from defendant banks. . . ." *Apartheid Litigation*, 346 F. Supp. 2d at 545. The court concluded that plaintiffs did not state a claim under *Sosa* for aiding and abetting the South African government or for "doing business in apartheid South Africa," and granted defendants' motion to dismiss.

As the Supreme Court instructed in *Sosa*, the court in *Apartheid Litigation* considered the "collateral consequences" of recognizing "a new international law violation." In addition to the diplomatic repercussions, the court was persuaded by the dramatic expansion of liability and effect on commerce that such a ruling would cause: "In a world where many countries may fall considerably short of ideal economic, political and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous effects on international commerce." *Id*. at 554.

This holding is fully consistent with the Supreme Court's mandate in *Sosa,* which directed federal courts to use "judgment about the practical consequences" of making an international claim available to federal litigants. 124 S. Ct. at 2766. Indeed, the Court in *Sosa* itself exercised such practical judgment in rejecting plaintiff's proposed claim for "arbitrary detention," noting the "breathtaking" consequences of plaintiff's proposed tort for the kinds of claims that persons could bring based upon events occurring anywhere in the world. *Id*. at 2768.

Plaintiffs' proposed claim here has similar staggering implications. If recognized, Plaintiffs' claim would open the courtroom doors to citizens of every country for suits against U.S. manufacturers who supply products to a government that allegedly engaged in international law violations. One can only speculate concerning the number of U.S. manufacturers that sell

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products to governments in countries such as China, Russia, Pakistan, Saudi Arabia, Egypt, and now Iraq that would face such suits in federal court. Nor would Plaintiffs' theory place any limits on the types of products that would subject a U.S. manufacturer to liability. Sales of construction equipment used to build government facilities (such as prisons or the disputed separation wall in Israel), vehicles used to transport soldiers, or even computer equipment used in government operations would be fair game under Plaintiffs' proposed international tort if they were used in a way that allegedly violated an international norm. If commercial manufacturers can be liable under international law for foreign governments' decisions about how to use commercial products they supply, then commerce with many troubled countries will be threatened.

Plaintiffs' proposed claim does not just pose practical problems for the courts, but also interferes improperly with the other branches of government. In *Sosa*, the Supreme Court identified the danger of "impinging on the discretion of the Legislative and Executive branches in managing foreign affairs" as an additional limitation on the kinds of international law claims that the federal courts may entertain. 124 S. Ct. at 2763. This case poses such a danger. Plaintiffs ask this court to adjudicate a dispute that would hold the government of Israel responsible for war crimes. Such a request has untold consequences for the conduct of United States foreign policy.

C. Plaintiffs' Accusations Against The Israeli Government Do Not State A Claim

Even if Caterpillar could be held responsible for the Israeli government's conduct, Plaintiffs do not have a claim for extrajudicial killing under international law. As the Seventh Circuit recently held, the TVPA provides the exclusive remedy for plaintiffs who allege extrajudicial killing under color of foreign law. *Enahoro v. Abubakar*, No. 03-3089, 2005 U.S.App. LEXIS 9353 (7th Cir. May 23, 2005).

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Plaintiffs also do not have a claim under *Sosa* for the Israeli government's decisions to destroy civilian property in an alleged war zone. There is no *absolute* prohibition against the destruction of private property for military purposes, even when it threatens injury to civilians. The harsh reality, recognized in international humanitarian law, is that civilian property can be a legitimate target if justified by military necessity. Article 53 of the Fourth Geneva Convention, which Plaintiffs cite, recognizes this principle in stating that destruction of personal property is prohibited "except where such destruction is rendered absolutely necessary by military operations."[3] Thus, the lawfulness of decisions to destroy civilian property for military purposes can only be determined on a case-by-case basis.

This is an inherently imprecise and subjective inquiry. For example, the 1999 Yugoslavian Final Report (*supra* at note 3), which recommended against an investigation of NATO's bombing target selection during the Kosovo war, observed that it may be necessary to resolve questions about the proportionate use of force on a case-by-case basis, and the answers "may differ depending on the background and values of the decision maker." *Id.* at ¶¶48-50.

This type of vague and subjective norm does not provide the kind of "certainty afforded by Blackstone's three common law offenses" that are the benchmark for actionable international law claims. *See Sosa,* 124 S. Ct. at 2769 (noting the difficulty of fashioning a definition of "arbitrary detention" that would meet that standard). Under *Sosa*, there is even more reason for

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[3] *See also* International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* Protocol I, Article 52 at ¶2022 ("Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives"). The subject of this ICRC commentary, Protocol I, is often cited as a source of customary international law. *See* 1999 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at ¶42 and discussion at ¶¶34-47 (available at www.un.org/icty/pressreal/nato061300.htm) ("Yugoslavia Final Report").

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hesitation where (as here) Plaintiffs seek to pursue a civil action for an alleged violation of an international criminal norm, unchecked by prosecutorial discretion. *Id.* at 2763.

Thus, there is no norm of customary international law that will support a federal claim for injuries caused by the destruction of Palestinian property. Plaintiffs also have no treaty claim. In their first claim for relief, Plaintiffs purport to state a claim for direct enforcement of the Fourth Geneva Convention. That claim fails because the Geneva Convention is not "self-executing," that is, it does not expressly or impliedly create a private claim for relief. *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *United States v. Fort*, 921 F. Supp. 523, 526 (N.D. Ill. 1996); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 n.16 (D.N.J. 1999) ("Courts have unanimously held that neither the Hague nor Geneva Conventions are self-executing").[4]

It is neither appropriate nor possible in this lawsuit to decide whether Israel violated international law on any particular occasion in deciding to destroy Palestinian property. The strife and violence on both sides of the Israeli/Palestinian conflict is well-known, and even the question of whether someone is a civilian or a combatant in a conflict characterized by suicide bombings and assassinations can be cloudy and controversial. Plaintiffs' claims concerning the alleged destruction of Palestinian property in violation of international law therefore do not support a federal claim.

[4] Several district courts have recently departed from this seemingly settled rule and have recognized the right of detainees to assert claims under the Third Geneva Convention against the United States government. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). The issue of whether the Third Geneva Convention provides such a right is now before the D.C. Circuit. *Id.* In any event, regardless of whether some provision of the Geneva Conventions might imply some private right to assert a claim against the United States government – a party to the agreement – no provision can be read to imply a private right of action for damages against a non-government actor.

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D. Plaintiffs Do Not Allege And Have No Basis To Allege That Caterpillar Was A State Actor

The Ninth Circuit has held that "[o]nly individuals who have acted under official authority or under color of such authority may violate international law." *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 501-02 (9th Cir. 1992) (citing *Tel-Oren v. Libyan Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J. concurring)). This "state action" requirement is based on the traditional definition of the "law of nations" as "'the body of rules and principles of action which are binding *upon civilized states* in their relations with one another.'" *Tel-Oren,* 726 F.2d at 792 n.22 (italics in original) (citing J. Brierly, *The Law of Nations* 1 (6th ed. 1963)).[5]

Here, the complaint alleges that state actors – Israeli soldiers – were the immediate cause of Plaintiffs' injuries. In this circumstance, to allege that *Caterpillar* acted under color of Israeli law, the complaint must contain facts showing that Caterpillar *conspired* with or *willfully participated* in the soldiers' conduct. *Sinaltrainal v. Coca-Cola Company*, 256 F. Supp. 2d 1345 (S.D. Fl. 2003). *See also Apartheid Litigation, supra*, 346 F. Supp. 2d at 548 (the color of law provision requires that a private individual "'act together with state officials or with significant

[5] In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the court held that war crimes are included in a limited class of international offenses that can be committed by private individuals even in the absence of state action. *Id.* at 242. In *Sosa,* the Supreme Court did not resolve the question whether state action is a prerequisite for war crimes, noting only that the issue of "whether international law extends the scope of liability" to a private actor is "related" to the fundamental question of whether the norm itself is actionable under the standards the Court prescribed. *Sosa*, 124 S. Ct. at 2766, n.20. Whether or not state action is a requirement for war crimes, state action analysis is relevant to each of Plaintiffs' claims, because, as discussed below, that analysis focuses upon whether Caterpillar's conduct can be considered a proximate cause of the plaintiffs' alleged losses. *See Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1142-47 (C.D. Cal. 2002) (applying state action proximate cause analysis to determine whether there was a sufficient nexus between the alleged war crimes of a foreign state and a private corporation that allegedly aided the state). In any event, in their second and third claims for relief Plaintiffs have alleged international torts other than war crimes for which state action is necessary. *See* 28 U.S.C. § 1350 (note) (requiring proof of conduct "under color of law" for liability under the Torture Victim Protection Act); *Kadic*, 70 F.3d 243 (summary execution, when not a war crime, requires state action).

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state aid.'") (quoting *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2001)). The Complaint does not, and could not, contain any such allegations.

The cases are clear that a plaintiff cannot meet the color of law requirement simply by alleging that a defendant engaged in business transactions with a foreign government, even if those transactions allegedly furthered the foreign government's violations of international law. The court's opinion in *Apartheid Litigation* is again directly on point. Despite plaintiffs' allegations in that case that defendants supplied "resources, such as technology, money, and oil" to the South African government that were used to further "policies of oppression and persecution," the court held that defendants "engaged in no behavior which, because of its connection with the apartheid regime, 'may be fairly treated as that of the State itself.'" *See Apartheid Litigation*, 346 F. Supp. 2d at 549 (quoting *Abdullahi v. Pfizer, Inc.*, 2002 U.S. Dist. LEXIS 17436 at *5 (S.D.N.Y. 2002)); s*ee also Bigio*, 239 F.3d at 449 ("an indirect economic benefit from unlawful state action" is not sufficient).

This conclusion is also consistent with Ninth Circuit civil rights cases interpreting the "color of law" requirement under 28 U.S.C. § 1983. Courts have looked to that area of law in deciding whether private individuals acted under color of state law for purposes of international claims. *See Bigio*, *supra*; *Apartheid Litigation*, 346 F. Supp. 2d at 548-49.

Under Ninth Circuit precedent, a private actor cannot be liable under § 1983 for a state official's wrongful conduct if the private actor is not a proximate cause of the state official's acts. Proximate causation is established only by proof that a private actor *controls* the state official's commission of the challenged acts. *See Arnold v. IBM*, 637 F.2d 1350, 1355-56 (9th Cir. 1981); *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986). Both *Arnold* and *King* involve allegations that private party defendants violated the plaintiffs' civil rights by setting in motion or cooperating with unlawful police activity that injured plaintiffs. In both cases the Ninth Circuit rejected the contention that defendants were state actors, because they did not

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control the conduct of the police and therefore did not proximately cause the acts of which plaintiffs complained. *See also Franklin v. Fox*, 312 F.3d 423, 445-46 (9th Cir. 2002) (finding no state action where private party did not control state actors' conduct in violating a prisoner's sixth amendment rights). Here, Caterpillar did not control or participate in the IDF soldiers' alleged conduct, and therefore was not a state actor.

E. No Provision Of Federal Law Permits Rachel Corrie's Family To Sue For Alleged International Law Violations

In *Sosa*, the Court considered whether the ATS, a little-understood provision passed by the first Congress in 1789, is simply a jurisdictional statute or whether, as some appellate courts held, it actually creates a cause of action under international law. The Court held that the ATS is "in terms" only jurisdictional. However, the Court also concluded that, in enacting that statute, the first Congress "assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction." *Sosa,* 124 S. Ct. at 2765.

Thus, the Supreme Court's holding in *Sosa* is based on its understanding of the legislative intent *underlying the ATS*. Importantly, the Court indicates that this same Congressional understanding of the federal courts' ability to recognize international law claims under federal common law – even subject to the severe restrictions the Court imposed in *Sosa* – does not apply outside the context of the ATS. The majority made this point in responding to Justice Scalia's concurrence, which suggests that the majority's analysis "renders the ATS unnecessary for federal jurisdiction over (so-called) law-of-nations claims," because, under the Court's view, any plaintiff can obtain federal question jurisdiction under 28 U.S.C. § 1331 simply by alleging an actionable violation of international law. *Id.* at 2773, n *. The majority disagreed: "Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; *and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.*" *Id.* at 2765 n.19 (emphasis added).

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Because Rachel Corrie and her family are not aliens and therefore do not claim jurisdiction under the ATS, they have no basis to assert federal claims derived from international law. This conclusion finds further support in the TVPA's legislative history. The House Report on the TVPA notes that the Act was necessary in part to "extend a civil remedy also to U.S. citizens who may have been tortured abroad," because the "Alien Tort Claims Act provides a remedy to aliens only." H.R. Rep. No. 102-367(I) (1991) 1992 U.S.C.C.A.N. 84 (1991 WL 255964) *4. This observation would have been unnecessary if federal common law created such a claim apart from the ATS. *See also Alvarez-Machain v. U.S.*, 107 F.3d 696, 703 (9th Cir. 1996) ("where the ATCA allows only aliens to bring actions in U.S. courts for extraterritorial torture, the TVPA allows aliens *and* citizens to bring such claims.")

V. PLAINTIFFS' SECOND CLAIM FOR RELIEF DOES NOT STATE A CLAIM UNDER THE TORTURE VICTIM PROTECTION ACT

A. Plaintiffs Have Not Exhausted Their Remedies In Israel

Section 2(b) of the TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 (note). "Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996) (citing S. Rep. No. 249 at 9-10 (1991).[6]

[6] In the Ninth Circuit, a motion to dismiss is the proper procedure for challenging whether a plaintiff has properly exhausted his or her remedies prior to filing suit, even if the court must resolve disputed facts. *Wyatt v. Terhune*, 315 F.3d 1108, 1119-1120 (9th Cir. 2003). The legislative history of the TVPA shows that Congress intended the TVPA exhaustion requirement to be "generally consistent with common-law principles of exhaustion as applied by courts in the United States." S.Rep.No. 102-249, 1991 WL 258662 (Leg. Hist), *10, citing *Honig v. Doe*, 484 U.S. 305, 325-29 (1988)).

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Plaintiffs have a remedy in Israel that they did not exhaust. Rachel Corrie's family recognized that fact by deciding to pursue an action against the Israeli government in Israel arising from the identical incident that they challenge here. As in this case, in the Israeli action Rachel Corrie's family seeks damages for Rachel's death under "international human rights law" and tort theories. *See* Exhibit "A" to Request for Judicial Notice. Plaintiffs seek over $300,000 in compensatory damages plus punitive damages. *Id.* at ¶36. Plaintiffs filed that action on March 15, 2005, and it is thus in an early procedural stage.

These Plaintiffs' decision to pursue an action in Israel is inconsistent with the allegation that Plaintiffs have no adequate remedy in that country. FAC at ¶99. It is reasonable to conclude that the Corrie family would not have filed suit in Israel if they believed they had no reasonable prospect of obtaining a fair hearing for their claims.

Plaintiffs' allegation is baseless in any event. Israel has a well-developed, fair legal system, and U.S. courts have recognized the independence of Israeli judges. Indeed, as recognized in other cases, the courts of Israel generally are considered to provide an adequate alternative forum for civil matters. *See, e.g.*, *Diatronics, Inc. v. Elbit Computers,* 649 F. Supp. 122, 127-29 (S.D.N.Y. 1986); *Motown Record Co., L.P. v. iMesh.com, Inc.*, No. 03 Civ. 7339, 2004 U.S. Dist. LEXIS 3972 *19 (S.D.N.Y. March 12, 2004); *Postol v. El-Al Israel Airlines, Ltd.*, 690 F. Supp. 1361 (S.D.N.Y. 1988). Israel is an adequate forum, even where the case involves "serious charges, involving a great deal of money, against high officials of the Israeli government." *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1077 (S.D.N.Y. 1972).

The accompanying Declaration of Professor Daniel More ("More Decl.") confirms that Israeli courts are fair and independent, even when claims against the state are involved. *Id.* at ¶¶15-16. Mr. More, who is a professor of law at Tel-Aviv University, is both an expert on Israeli law and an Israeli lawyer with first-hand knowledge of the Israeli courts' willingness to

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adjudicate Palestinian's claims. Mr. More himself recently prevailed in the Israeli Supreme Court on behalf of a Palestinian who was severely injured by Israeli soldiers. *Id.* at ¶16.

Plaintiffs' other justification for their failure to exhaust local remedies is equally meritless. Plaintiffs' complaint alleges that "the conduct giving rise to [Plaintiffs'] claim occurred in the United States," and Plaintiffs are therefore "exhausting their remedies by bringing this action domestically." FAC ¶98. This allegation is inconsistent with the express language as well as the purposes of the TVPA exhaustion requirement.

Section 2(b) of the TVPA requires exhaustion of a plaintiff's remedies "in the place in which the conduct giving rise to the claim occurred." "As a general rule, a tort does not 'arise' until all elements of the cause of action exist, including causation and damages." *Smith v. Salish Kootenai College*, 378 F.3d 1048, 1054 (9th Cir. 2004). The alleged proximate cause of Plaintiffs' injuries is the bulldozer operators' conduct in Israeli-controlled territories.

The legislative history of the TVPA confirms that Congress intended plaintiffs alleging torture or extrajudicial killings to exhaust their remedies in the place *where the alleged torture or killing occurred*. The House Report on the TVPA explains that the exhaustion requirement "ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." 102 H.R. Rep. No. 102-367(I) (1991), 1992 U.S.C.C.A.N. 84 (1991 WL 255964) ("House Report"); *see also Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1137 n.103 (C.D. Cal. 2002) (summarizing similar statements in the TVPA legislative history).

Consistent with the House Report, this is a case that is "more appropriately handled by courts where the alleged . . . killing occurred." Proof of unlawful intentional conduct is essential to Plaintiffs' TVPA claim, which requires a "*deliberated* killing." Section 3(a) (emphasis added). The only intentional killing alleged in the Complaint is the allegation (upon information

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and belief) that the "bulldozer driver knew Rachel was in front of the bulldozer and intentionally ran her over." FAC ¶71. The witnesses and other evidence necessary for determining whether the tractor operator's alleged conduct was deliberate are all located in Israel or where the events occurred. Likewise, if Plaintiffs intend to prove that the other killings described in the Complaint were "deliberate[]," the evidence relevant to those claims is also in Israel or in the Israeli-controlled territories where the events occurred. Plaintiffs are required to exhaust their remedies in Israel before attempting to pursue a TVPA claim in this court.

B. Plaintiffs Do Not And Cannot Allege That Caterpillar Acted "Under Color Of Law Of Any Foreign Nation"

The TVPA only reaches the conduct of individuals who act "under actual or apparent authority, or under color of law, of any foreign nation. . . ." Section 2(a). The requirement that a defendant acted under "color of law" for purposes of the TVPA is the same as the requirement of proving "state action" in cases alleging a violation of international law. *See Sinaltrainal v. The Coca-Cola Company*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003). For the reasons discussed above, Caterpillar did not act under "color of law" and plaintiffs' TVPA claim should therefore be dismissed. *See supra* at IV. D.

C. Plaintiffs Do Not State A Claim For Aiding And Abetting Under The TVPA

Plaintiffs' claim for aiding and abetting the Israeli soldiers' alleged violation of the TVPA is baseless. For all the reasons discussed above, Plaintiffs fail to allege facts that could support any aiding and abetting claim. Moreover, as the court held in *Apartheid Litigation,* permitting an aiding and abetting claim here is inconsistent with the TVPA's explicit requirement that a defendant must have acted under "color of law." 346 F. Supp. 2d at 555.

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D. The TVPA Does Not Permit Actions Against Corporations

The TVPA only provides a right for relief against an "individual" who commits a violation. 28 U.S.C. § 1350 (note). Thus, by its express terms, the statute does not create an action against corporations.

Based upon the statute's plain language, district courts have concluded that the TVPA does not permit suit against corporate defendants. For example, in *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997), *aff'd on other grounds,* 197 F.3d 161 (5th Cir. 1999), the court relied upon the plain meaning of the statute's language to conclude that an action could not proceed against a corporate defendant. *See also Arndt v. UBS AG,* 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004); *Friedman v. Bayer Corp.*, 1999 WL 33457825 (E.D.N.Y. 1999). Other district courts have held that actions against corporations are permissible under the TVPA on the ground that Congress would not have intended to exclude corporations from its scope. *See Sinaltrainal v. Coca-Cola, supra*, 256 F. Supp. 2d at 1358-59; *Wiwa v. Royal Dutch Petroleum Co*., No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002).

Neither the Ninth Circuit nor any other circuit has yet decided this issue. However, the language of the statute is clear. Any attempt to infer a meaning that is inconsistent with the plain statutory language is improper. *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). Thus, based upon the express language of the statute, the TVPA does not create a claim against corporate defendants, and the TVPA claim against Caterpillar should be dismissed.

VI. PLAINTIFFS' FOURTH CLAIM FOR RELIEF FOR VIOLATIONS OF RICO FAILS TO ALLEGE A CLAIM

Plaintiffs allege that Caterpillar violated RICO by participating in the "conduct of the affairs of [an] enterprise through a pattern of racketeering activity," and by conspiring to do so. But Plaintiffs' complaint provides no explanation of what this alleged enterprise is, much less what Caterpillar allegedly did to participate in its affairs. The only conduct that Plaintiffs allege against Caterpillar is the manufacture of construction equipment and its sale to the government

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of Israel in commercial transactions. This is not a RICO violation, and Plaintiffs' effort to create a RICO claim out of such allegations is futile.

A. Plaintiffs Do Not Allege A RICO "Enterprise"

18 U.S.C. § 1962(c) provides that it is unlawful for a person "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity. . . ." To plead a violation of § 1962(c), a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

Section 1961(4) defines an "enterprise" to include "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This element requires allegations sufficient to show an organization, "formal or informal," that is "'an entity separate and apart from the pattern of [racketeering] activity in which it engages.'" *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)); *Hansen v. Ticket Track, Inc.*, 280 F. Supp. 2d 1196, 1205 (W.D. Wash. 2003).

To survive a motion to dismiss "plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise." *Comwest, Inc. v. Am. Operator Servs., Inc.*, 765 F. Supp. 1467, 1475 (C.D. Cal. 1991) (quoting *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989)). The facts necessary for an "association in fact" constituting an enterprise are those that show "an ongoing organization, formal or informal, that functions as a continuing unit over time through a hierarchical or consensual decision-making structure." *Id*. at 1476. Factors showing such an ongoing organization can include "'the existence of a system of authority,' 'decision-making apparatus,' and structure to distribute proceeds of the transactions." *Hansen*, 280 F. Supp. 2d at 1206 (quoting *Chang*, 80 F.3d at 1300).

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Plaintiffs allege no such facts here. Their enterprise allegations consist of three conclusory sentences that simply claim an enterprise exists, and assert that the "enterprise" includes Caterpillar and "its agents and/or co-conspirators, including the IDF." FAC ¶¶112-13. The Complaint provides no description of the alleged enterprise's structure, organization, decision-making apparatus, or any other facts identifying the nature of the alleged entity or association. *Id*. ¶¶112-13. The only *facts* Plaintiffs allege are that Caterpillar manufactured and sold construction equipment to a customer. These facts are not sufficient to establish the existence of any enterprise under RICO.

The essence of a RICO enterprise is "a group of persons associated together for a *common purpose* of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. at 583 (emphasis added). Plaintiffs do not allege such a common purpose here. Plaintiffs do not (and cannot) allege that Caterpillar and the Israeli government had any relationship other than as seller and buyer. No shared purpose or intent is present in such arms-length sales transactions. *See supra* at IV. A; *RD Mgmt. v. Samuels*, No. 02 Civ. 4876, 2003 U.S. Dist. LEXIS 9013 at *15-16 (S.D.N.Y. May 29, 2003) (real estate company and insurance brokers could not constitute a RICO enterprise because the company and the brokers "were in a vendor-customer relationship and thus did not share a common purpose.")

B. Plaintiffs Do Not Allege A Pattern Of Racketeering Activity

RICO requires a "pattern of racketeering activity," which is defined as "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5). Plaintiffs fail to allege *any* actionable RICO racketeering act, much less a pattern.

Plaintiffs allege racketeering acts consisting of murder, robbery and extortion under federal and Washington state law, and "physical violence resulting in serious bodily injury to a national of the United States" under 18 U.S.C. §2332(c)(2). FAC ¶120. None of these alleged acts can support a RICO claim here.

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The property destruction and killings alleged in the Complaint do not constitute crimes under Washington law, because they did not occur in or affect Washington. "Every person, regardless of whether or not he is an inhabitant of this state, may be tried and punished under the laws of this state for an offense *committed by him therein*, except when such offense is cognizable exclusively in the courts of the United States." WASH. REV. CODE §9A.04.070 (emphasis added). *See also* WASH. REV. CODE §9A.04.030 (defining territorial limitations on Washington criminal jurisdiction). To constitute racketeering activity under RICO, state criminal offenses (including murder, robbery and extortion) must be "chargeable under State law." 18 U.S.C. § 1961(1). The acts Plaintiffs allege, which occurred in Israeli-controlled areas outside the United States, are not chargeable in Washington.

Plaintiffs also do not allege acts constituting murder, robbery or extortion under federal law. The federal statutes Plaintiffs cite contain a jurisdictional element that is not met here. 18 U.S.C. § 1111, the federal murder statute, only applies to acts that occur "within the special maritime and territorial jurisdiction of the United States." Similarly, 18 U.S.C. § 1951 (the Hobbs Act) which prohibits "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery or extortion…," only applies to intrastate and interstate commerce and "all other commerce over which the United States has jurisdiction." 18 U.S.C. § 1951(b)(3). The unlawful acts that Plaintiffs allege occurred wholly outside this country and had no effect on U.S. commerce.

In addition, "the extortion provision of the Hobbs Act … require[s] not only the deprivation but the *acquisition* of property." *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 404 (2003) (citing *United States v. Enmons*, 410 U.S. 396, 400 (1973)) (emphasis added). In other words, "a person must 'obtain' property from another party to commit extortion." *Id.* Plaintiffs do not allege that the IDF acquired, or attempted to acquire, any property from them,

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but simply claim that the IDF destroyed their homes. Accordingly, the acts alleged in the complaint are not extortion and cannot be considered racketeering acts under RICO.

Plaintiffs also allege a violation of 18 U.S.C. § 2332(c)(2), which concerns acts of violence outside the United States causing injury to a national of the United States. Even if Plaintiffs had alleged facts under which Caterpillar could be responsible for the death of Rachel Corrie, one act alone does not constitute a "pattern of racketeering activity." *See* 18 U.S.C. § 1961(5) ("requiring at least two acts of racketeering activity"). Thus, Plaintiffs have failed to allege the necessary element of a pattern of racketeering activity.

Rachel Corrie's death cannot support a RICO claim in any event. The only plaintiffs who suffered injury from Corrie's death do not have, and do not assert, a RICO claim. Corrie's family has no claim under RICO, because RICO only permits claims for damage to "business or property." 18 U.S.C. § 1964(c). As the Ninth Circuit has made clear, "personal injuries are not compensable under RICO." *Oscar v. Univ. Students Co-op Assoc.*, 965 F.2d 783, 785 (9th Cir. 1992); *see also Grogan v. Platt*, 835 F.2d 844, 846-48 (11th Cir. 1988) (finding family of murder victim could not recover under RICO for economic consequences of murder).

The only compensable injury under the RICO statute is for "'harm caused by [the] predicate acts.'" *Reddy v. Litton Indust., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)). The plaintiffs alleging RICO claims did not suffer any injury from the alleged predicate act causing Rachel Corrie's death. Thus, they do not allege actionable injury, and have no standing to bring a RICO claim.

C. Plaintiffs Have Failed To Allege A Direct Causal Relationship Between Caterpillar's Conduct And Their Alleged Injuries

To maintain a cause of action under RICO, "a plaintiff must show not only that the defendant's violation was a 'but for' cause of his injury, but that it was the proximate cause as well." *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994) (citing *Holmes v.*

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Securities Investor Protection Corp., 503 U.S. 258, 268 (1992)). Plaintiffs can show neither aspect of causation here.

Caterpillar's manufacture and sale of tractors to Israel is not a "but-for" cause of Plaintiffs injuries, as Plaintiffs do not allege any reason why the IDF needed Caterpillar tractors to demolish houses. Even if Caterpillar had not sold tractors to Israel, the Israeli government could have used tractors from another source or some other different type of vehicle (such as a tank) to accomplish its purposes. Indeed, the Plaintiffs allege that the IDF used military equipment, including tanks and helicopter gunships, in its military operations that destroyed Palestinian houses. FAC ¶80.

Caterpillar's sale of tractors also is not the proximate cause of Plaintiffs' alleged injuries. Proximate causation under RICO "requires that there must be a direct relationship between the injury asserted and the injurious conduct alleged." *Pillsbury,* 31 F.3d at 928 (quoting *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992). In the absence of such a direct relationship, proximate causation cannot be shown even if a plaintiff's injury was foreseeable. *Id.* at 929. The proximate cause of Plaintiffs' injuries was not Caterpillar's sale of tractors to Israel, but the independent intervening conduct of IDF soldiers in deciding how they should use those tractors. Neither common sense nor sound policy justify a finding of proximate cause under the facts alleged. *See infra* at VII. B.

D. RICO Does Not Apply To Conduct Outside The United States

The Ninth Circuit has held that RICO does not reach alleged unlawful conduct occurring overseas. In *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996), the court dismissed the plaintiff's RICO claims after concluding that the district court did not have jurisdiction over the alleged securities fraud that the plaintiffs asserted as predicate acts. The securities fraud "allegedly occurred completely outside the jurisdiction of the United States," and the court held that "[t]here is no reason to extend the jurisdictional scope of RICO to make criminal the use of

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the mail and wire in the United States as part of an alleged fraud outside the United States," even if "peripheral preparations" occurred within this country. *Id.* at 291.

RICO claims are particularly suspect in ATS actions such as this brought by foreign plaintiffs against United States companies based upon alleged unlawful conduct occurring overseas. Several courts have dismissed RICO claims in such cases for lack of conduct or effects within the United States.

For example, in *Sinaltrainal v. The Coca-Cola Company*, 256 F. Supp. 2d 1345, 1359-60 (S.D. Fla. 2003), the court dismissed RICO claims against The Coca-Cola Company and others that were allegedly based upon the murder of a labor leader in Columbia. The court noted that the plaintiffs' complaint "does not contain any allegations of improper activity or tortious conduct occurring within the United States," and held that the plaintiffs' allegations concerning conduct within the United States "are too far removed from the injury or are preparatory activities," and therefore could not support jurisdiction over the RICO claims. *Id*. at 1360. Similarly, in *Aldana v. Fresh Del Monte Produce*, 305 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003), the court dismissed RICO claims against Del Monte Fresh Produce Company and several U.S. and Guatemalan subsidiaries alleging that the defendants had participated in a conspiracy to kidnap and intimidate Guatemalan labor activists. *Id*. The court observed that, "[u]nder the 'conduct' test, a court may assert subject matter jurisdiction over a RICO claim only if conduct material to the alleged crime or directly causing the alleged loss occurred in the United States." *Id*. The court held that such allegations were absent in that case, as the allegations concerned "preparatory activities for foreign conduct." The court held that there was no jurisdiction over the RICO claims "even if the scheme was hatched in the United States, as Plaintiffs allege. . . ." *Id*.

Here, Plaintiffs do not allege that any unlawful conduct occurred in the United States, but claim only that Caterpillar engaged in the normal business activities of manufacturing, research

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and development, product support, and the like. FAC ¶122. Such conduct is not even "preparatory" to any acts unlawful under RICO, but is simply typical commercial activity by a domestic manufacturer. The alleged wrongful conduct here occurred wholly outside the United States, and the Court therefore does not have jurisdiction over Plaintiffs' RICO claims.

E. Plaintiffs' RICO Conspiracy Claim Also Fails For The Lack Of Any Substantive RICO Violation And The Lack Of Any Factual Basis For A Conspiracy

Where a plaintiff fails to plead a substantive RICO violation, the plaintiff also cannot maintain a RICO conspiracy claim under 18 U.S.C. § 1962(d). *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000); *Religious Tech. Ctr. v. Wollersheim,* 971 F.2d 364, 367 n.8 (9th Cir. 1992). Because Plaintiffs failed to plead an actionable substantive RICO claim, they also may not maintain a RICO conspiracy claim.

Plaintiffs' conspiracy allegations are insufficient to state a claim in any event. Like their enterprise allegations, Plaintiffs' conspiracy allegation simply asserts the existence of a conspiracy among Caterpillar, "its agents and co-conspirators, including the IDF. . . ." FAC ¶117. Such a conclusory allegation is insufficient to support a claim. "To state a claim for conspiracy to violate RICO, 'the complaint must allege some factual basis for the finding of a conscious agreement among the defendants.'" *Sebastian Int'l, Inc. v. Russolillo*, 186 F. Supp. 2d 1055, 1069 (C.D. Cal. 2000) (quoting *Hecht v. Commerce Clearing House*, 897 F.2d 21, 26 n. 4 (2d Cir. 1990)); s*ee also Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989) (RICO conspiracy allegations "must be sufficient to describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in that conspiracy.") quoting *Alfaro v. E.F. Hutton & Co.*, 606 F. Supp. 1100, 1117-18 (E.D. Pa. 1985). Plaintiffs do not, and cannot, make any such allegations here, as there are no facts to support any claim that Caterpillar conspired with the Israeli government or anyone else.

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VII. PLAINTIFFS' FIFTH, SIXTH AND SEVENTH CLAIMS FOR RELIEF FAIL TO STATE A TORT CLAIM UNDER THE LAWS OF ANY POTENTIALLY RELEVANT JURISDICTION

A. Plaintiffs Do Not State A Claim Under Israeli Law

Israeli law will govern Plaintiffs' tort claims. When considering state law claims under the rules of diversity or supplemental jurisdiction, district courts apply the choice of law analysis of the forum state. *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1138 (9th Cir. 2002); *MRO Commins, Inc. v. AT&T Co.*, 197 F.3d 1276, 1282 (9th Cir. 1999). Washington has adopted the "most significant relationship" test as set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) for determining which law applies to a particular issue. *Rice v. Dow Chemical Co*., 124 Wash. 2d 205, 213 (1994). Under this test, for torts causing personal injury "the law of the state where the injury occurred applies unless another state has a greater interest in determination of that particular issue." *Martin v. Goodyear Tire & Rubber Co.*, 114 Wash. App. 823, 829 (2003). Thus, under Washington law, this Court will need to ascertain and apply the law applicable in Gaza and the West Bank.

Israeli law is the governing law. More Decl. ¶21. Israeli tort law generally applies doctrines of common law derived from English jurisprudence. *See id.* at ¶3. These doctrines include the requirement to show causation. *Id.* at ¶13.

The Israeli courts have not considered a claim similar to the one that Plaintiffs assert in this case. More Decl. ¶15. However, Israeli courts would apply principles of causation "employing a decision-making process and legal analysis" close to those that U.S. courts would employ. *Id.* Thus, analysis of Plaintiffs' tort claims under Israeli law is substantially similar to analysis under principles of factual and proximate causation applied in the United States, including under the laws of Washington and Illinois (discussed below). Under general principles of causation and duty, Plaintiffs cannot state a claim by alleging the lawful sale of a non-

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defective product that a customer intentionally used to injure a third party. *See infra* at VII. B. Thus, whether analyzed under Israeli, Illinois, or Washington law, Plaintiffs fail to state a claim.

B. Neither Washington Nor Illinois Permit Tort Claims Against Sellers of Legal, Non-Defective Products For Their Buyers' Alleged Illegal Conduct

Plaintiffs fail to state a claim under the law of Washington or Illinois. It is well-settled under the law of both states that manufacturers and distributors of non-defective, legal products cannot be liable in tort for alleged criminal acts committed with those products by third parties. *Young v. Bryco Arms*, 213 Ill. 2d 433 (2004); *Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 414 (2004); *Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wash. App. 267, 273-74 (1988). Courts in both states struck down such claims against manufacturers and distributors on the ground that they are not the legal cause of the injuries sustained by the third parties and owe no duty of care to third parties injured by non-defective products.

For example, both Illinois and Washington courts dismissed lawsuits against gun manufacturers seeking to hold the manufacturers responsible for the criminal activity of gun purchasers. *Young*, 213 Ill. 2d at 351; *Chicago*, 213 Ill. 2d at 433; *Knott*, 50 Wash. App. at 267. The courts deciding those cases relied on concepts of causation and duty to conclude that manufacturers who simply sell legal products into the market are too remote from the harm caused by the intervening, intentional criminal acts by third parties. *See, e.g., Chicago*, 213 Ill. 2d at 432-33; *Young,* 213 Ill. 2d at 456; *Knott*, 50 Wash. App. at 273.

With respect to causation, the court in *Young* explained that "[i]f the defendant's conduct merely furnishes a condition by which injury is made possible, and a third person, acting independently, subsequently causes the injury, the defendant's creation of the condition is not a proximate cause of the injury." *Young*, 213 Ill. 2d at 449 (citing *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257-258 (1999); s*ee also* 6 WAPRAC WPI 15.01 (a plaintiff's injury must occur "in a direct sequence, unbroken by any new independent cause"); *Petersen v. State*, 100 Wash. 2d 421, 435-436 (1983); *Smith v. Great Northern Ry. Co.*, 14 Wash. 2d 245, 249

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(1942) ("Respondent's acts, of which appellant complains, did no more than supply a condition by which the injury was made possible, and as the subsequent independent act of [a third party] caused the injury).

Legal causation is based upon principles of fairness and common sense in determining how far the legal consequences of a party's act should extend. *Bruns v. PACCAR, Inc.*, 77 Wash. App. 201, 214 (1995); *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 455 (1992); *Anderson v. Weslo, Inc.*, 79 Wash. App. 829, 838 (1995). Permitting claims against the manufacturers of legal, non-defective products results in those manufacturers being the insurer of all criminal acts committed using such products, merely on the basis that such businesses lawfully placed such products into the stream of commerce. *See Cherry v. General Petroleum Corp. of California*, 172 Wash. 688, 695 (1933) (noting that the concept of legal cause prevents one from becoming the insurer of remote events). That result is both unfair and unwise.

Similarly, manufacturers of legal products do not owe a duty of care to persons who might be injured by a third party's illegal use of those products. It is a fundamental principle of our common law that, absent a special relationship between a defendant and an injured person, the defendant has no duty to protect that person from the criminal acts of third parties. *Tortes v. King County*, 119 Wash. App. 7 (2003); *Hosein v. Checker Taxi Co., Inc.*, 95 Ill. App. 3d 150, 154 (1981).

Thus, in *City of Chicago,* the Illinois Supreme Court rejected plaintiffs' nuisance claim against gun manufacturers for lack of a duty of care as well as lack of causation. 213 Ill. 2d at 432. *See also Young,* 213 Ill. 2d at 456. In reaching this conclusion, the court noted that creating such a duty would place an immense burden on manufacturers and distributors to alter their business practices. *Chicago*, 213 Ill. 2d at 393. The Court also noted that any alleged benefit from such a duty presumes that the legal product could not be obtained from other sources. *Id.* Similarly, Washington courts recognized that a manufacturer of a non-defective

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legal product has no duty to control the distribution of that product to the general public. *Knott*, 50 Wash. App. at 273-274 (noting that courts in other jurisdictions similarly hold that no duty exists). "The negative consequences of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others will be an unprecedented expansion of the law . . ." *Chicago*, 213 Ill. 2d at 393.

Like the plaintiffs in *City of Chicago, Young* and *Knott*, Plaintiffs here seek to hold Caterpillar responsible for selling a legal, non-defective product merely on the ground that it is "foreseeable" that a third party would use that product illegally. Like the claims in those cases, Plaintiffs' tort claims here should be dismissed. As in the gun manufacturer cases, Caterpillar does not control, and cannot be the insurer of, the ways in which purchasers use the legal, non-defective products that it sells.

Moreover, as discussed above, apart from the policies that preclude proximate causation or duty here, Caterpillar's sale of the tractors that allegedly caused Plaintiffs' injuries was not a "but-for" cause of those injuries, because the IDF could have use tractors purchased from another source, or some other means, for the demolitions that Plaintiffs allege. *See Chicago*, 213 Ill. 2d at 413 (rejecting causation in part on the ground that third parties could obtain guns from other sources). Plaintiffs' tort claims should therefore be dismissed.

VIII. PLAINTIFFS' CLAIMS MUST BE DISMISSED BECAUSE THEY ARE NON-JUSTICIABLE, AS THEY WOULD INTERFERE WITH THE FOREIGN POLICY OF THE UNITED STATES

A. The Political Question Doctrine Precludes Litigation Of This Case, As It Seeks A Judicial Determination That A Foreign Government Is Guilty Of War Crimes

The political question doctrine traces its origins to Justice Marshall's observation in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court articulated six

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factors determining whether a court should defer a case to the political branches of government: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker*, 369 U.S. at 217. Dismissal is appropriate if any one of these six factors is "inextricable" from the case. *Alperin v. Vatican Bank*, 405 F.3d 727 (9th Cir. 2005). Several of those Baker factors are present here.

As the Ninth Circuit recently confirmed, "'cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary.'" *Alperin*, 405 F.3d at 753-754. In *Alperin*, the Ninth Circuit Court of Appeals held that the plaintiffs' claims accusing the Vatican of complicity with the Croatian Ustasha political regime in war crimes during World War II presented a nonjusticiable political question. With respect to the first Baker factor, the plaintiffs' claims would have required the court to condemn a foreign government for its wartime actions and to review a foreign policy judgment of the executive branch not to prosecute that government for war crimes violations. *Id*. at 753-755. This would violate the first *Baker* factor, as it would require the court to "'review [] an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] committ[ed].'" *Id*. at 955 (citing *Goldwater v. Carter*, 444 U.S. 996 at 1006 (Brennan, J. dissenting)). This conclusion was reinforced by the third *Baker* factor, which asks whether the issue can be decided "'without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id*. (citing

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Baker, 369 U.S. at 217). The court concluded that "[i]t is not our place to speak for the U.S. Government by declaring that a foreign government is at fault for using forced labor . . . ." *Id*.

The same *Baker* factors preclude litigation of this lawsuit. Plaintiffs' claims would impose liability on a U.S. manufacturer for selling a commercial product to the Israeli government on the theory that it has been used as a weapon, and they seek to enjoin further sales. But the executive branch of the government has not prohibited sales of *arms* to Israel despite the Israeli government's alleged conduct, much less restricted the sale of commercial products such as tractors.

In the last two years, Congress has appropriated approximately $2.2 billion per year in grants for Israeli arms purchases. *See* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat.3, 163 (2004); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2987 (2005). Congress has also passed legislation criticizing the Arab League's boycott of Israel as well as the "secondary boycott of American firms that have commercial ties with Israel." *See* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 535, 118 Stat. 3, 183 (2004), Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 535, 118 Stat. 2809, 3008-09 (2005). In expressing support for additional U.S. military aid to Israel, Congress has also defended Israel's military operations on the ground that they are "an effort to defend itself against the unspeakable horrors of ongoing terrorism and are aimed only at dismantling the terrorist infrastructure in the Palestinian areas." H.R. Res. 392, 107th Cong. (2002) (enacted). Thus, by attacking Caterpillar's sales to Israel in this lawsuit, Plaintiffs are seeking a remedy for alleged war crimes in the nature of an economic boycott that the executive branch has declined to adopt, and are asking this Court to second-guess the foreign policy decisions of the branch of government that is charged with the responsibility for the conduct of that foreign policy.

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In addition, as in *Alperin*, Plaintiffs' lawsuit asks this Court to declare that a foreign government is at fault in the commission of war crimes, which is a policy decision reserved to the executive branch. Indeed, this lawsuit impinges even more directly upon the policy prerogatives of the executive branch than the plaintiffs' claims in *Alperin*, as it seeks a judicial declaration with respect to an ongoing conflict in a currently sensitive area of the world that is integral to current U.S. foreign policy objectives. It is difficult to conceive of a single foreign policy issue that has consumed more time and energy of the executive and legislative branches of the United States government since 1990 than the Israel-Palestine Conflict.

The political branches of the federal government have the authority to address the questions of when and how U.S. companies can engage in commerce with foreign states that allegedly engage in human rights violations. For example, in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383-86 (2000), the Court held that a Massachusetts law restricting U.S. companies doing business in Burma was preempted by Congressional legislation. The Court accepted representations by the executive branch that the Massachusetts law "stands in the way of U.S. policy objectives." *Id*. at 387. The political branches are also tasked with the responsibility of determining when military assistance to foreign governments is appropriate. Indeed, several courts have held that challenges to foreign aid to Israel raise nonjusticiable political questions. *See Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) (dismissing challenge to statute authorizing military assistance to Israel); *Mahorner v. Bush*, 224 F. Supp. 2d 48, 52, 53 (D.D.C. 2002) (rejecting claim for injunctive relief against military and economic assistance to Israel).

Plaintiffs' lawsuit seeks to transfer the political branches' foreign policy responsibility to this Court. The political question doctrine precludes that result, and Plaintiffs' claims should therefore be dismissed.

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B. The Act Of State Doctrine Also Bars Adjudication Of This Action, As This Action Would Interfere With The Conduct Of United States Foreign Policy

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

Courts find that a claim is barred by the doctrine if it (1) involves an official act of a foreign sovereign; (2) is performed within its own territory; and (3) it seeks relief that would require the court to sit in judgment on the sovereign's official acts. *Kirkpatrick*, 493 U.S. at 405. Each of those conditions is present here.

Plaintiffs directly challenge the official acts of a foreign sovereign. Plaintiffs claim that the Israeli government has adopted an official policy that violates international law in dealing with Palestinians. In addition, with respect to the particular events surrounding Rachel Corrie's death in Israel, Plaintiffs allege that the operator of the bulldozer that killed Rachel "had received orders to continue with the demolitions, even with the protestors present." FAC ¶59. Military orders are official acts of the sovereign. *Roe v. Unocal*, 70 F. Supp. 2d 1073, 1079 (9th Cir. 1999).

In *Kirkpatrick*, the Supreme Court also instructed that courts should evaluate whether the policies of the doctrine favor its application. *Kirkpatrick*, 493 U.S. at 409. The Court in *Sabbatino* articulated three principal factors to consider in making that determination: (1) the degree of international consensus concerning the area of law at issue; (2) the sensitivity of the issue with respect to U.S. foreign relations; and (3) whether the government at issue still exists. *Sabbatino*, at 427-28. Each of these factors also favors applying the doctrine here.

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First, as discussed above, although there is general international agreement on the need for "military necessity" in the destruction of civilian property, there is no clear understanding of how to evaluate such necessity in any particular situation or conflict. Second, for obvious reasons an accusation that a foreign government has engaged in a policy amounting to war crimes is likely to be inflammatory. On the U.S. side, a lawsuit seeking what amounts to a commercial boycott of an important U.S. ally with respect to a product with a potential military use is completely inconsistent with the executive's position on arms sales, and threatens to undermine the U.S./Israel relationship. Third, there is no dispute that the government of Israel still exists.

In addition to the three *Sabbatino* factors, the Ninth Circuit has also considered whether the foreign state was acting in the public interest. *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989). That is clearly the case here. Plaintiffs allege that the Israeli government engaged in its challenged policies for military and security purposes. Whether or not those policies were lawful, they are for public purposes and not for a purely private or commercial venture. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) (whether or not the police power is abused, it is peculiarly sovereign in nature).

All of these reasons support dismissal of this case on act of state grounds. However, if any doubt remains concerning the potential impact of this lawsuit on the executive branch's conduct of foreign policy, this Court should follow the procedure approved by both the Supreme Court and the Ninth Circuit and request a statement of interest by the State Department. Where the State Department provides a statement of interest advising the courts that a particular action would interfere with a foreign policy objective, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa, supra*, 124 S. Ct. at 2766 n.21. *See also Alperin*, *supra*, at 750 ("case specific intervention [by the executive branch] is not uncommon in cases involving foreign affairs")

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(citing *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1179-80 (C.D. Cal. 2002)). Indeed, the court in *Sarei* noted that "Plaintiffs have not cited, and the court has not found, a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here." *Id.* at 1192.

Such a request for a statement by the State Department is particularly appropriate here. If this case were to proceed past the pleading stage, the facts will show that Caterpillar sold tractors to the Israeli government pursuant to the Foreign Military Sales Program, a U.S. government sponsored and financed program, and pursuant to a federal export license under the Arms Export Control Act. By statute, "the President is authorized to designate those items which shall be considered as defense articles and defense services . . . and to promulgate regulations for the import and export of such articles and services." 22 U.S.C. § 2778(a)(1). The President's designation of items as defense articles or services subject to export regulations "shall not be subject to judicial review." 22 U.S.C. § 2778(h). Thus, the executive branch is tasked with the responsibility to regulate the export of defense articles, and is therefore likely to have a keen interest in the relief Plaintiffs seek in this lawsuit.

IX. CONCLUSION

For all the foregoing reasons, Plaintiffs' Complaint should be dismissed in its entirety.

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