

# **“When Caterpillars<sup>®</sup> Kill”: Holding U.S. Corporations Accountable for Knowingly Selling Equipment to Countries for the Commission of Human Rights Abuses Abroad**

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I. INTRODUCTION: CATERPILLAR D-9—“THE TERRIFYING BEAST OF THIS WAR”<sup>1</sup>

*The bulldozer has become as much a symbol of Israeli occupation as the rifle and the tank.*<sup>2</sup>

Amnesty International has reported extensively over the years on Israel’s demolition of Palestinian homes in the occupied territories.<sup>3</sup> In its 1999 report, Amnesty stated:

Early in the occupation whole villages were cleared of Palestinians, demolished and then redeveloped on the same or an adjacent site for Jewish settlement. . . . In later years demolition of homes has been on an individual basis, either on “security” grounds, as punishment, or for “planning” reasons (i.e. for building without a permit in contradiction to a plan). These are not entirely separate since “planning” demolitions are in order to leave land for settlement, which has itself been justified on grounds of “security.”<sup>4</sup>

The home demolitions are almost always accomplished through the use of the Caterpillar D-9 bulldozer, which is monstrous in its proportions, standing as tall as a small house.<sup>5</sup> The D-9 gained much attention in April 2002 when the Israeli occupation forces re-invaded Jenin Refugee Camp in the West Bank.<sup>6</sup> Human Rights Watch reported

1. Gavin Rabinowitz, *Israel to Raze Palestinian Homes with Robot Bulldozers*, ASSOCIATED PRESS ONLINE, Oct. 30, 2003 (quoting Israeli commentator Nahum Barnea).

2. *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A, U.N. ESCOR, Commission on Human Rights, 60th Sess., Agenda Item 8, at 14, U.N. Doc. E/CN 4/2004/6 (2003) [hereinafter Dugard Report]* (quoting Jeff Halper, Coordinator, Israeli Committee against Home Demolitions).

3. See AMNESTY INT’L, ISRAEL AND THE OCCUPIED TERRITORIES: DEMOLITION AND DISPOSSESSION: THE DESTRUCTION OF PALESTINIAN HOMES (1999), available at <http://web.amnesty.org/library/index/ENGMDE150591999>.

4. *Id.*

5. Rabinowitz, *supra* note 1.

6. For accounts of the April 2002 Jenin invasion, see NAT’L LAWYERS GUILD, “IN THE NAME OF SECURITY”: ISRAEL AND THE DESTRUCTION OF PALESTINIAN CULTURE & CIVIL SOCIETY: PRELIMINARY REPORT FROM THE NATIONAL LAWYERS GUILD’S DELEGATION TO THE WEST BANK, MAY 16-24, 2002 (2002), available at [http://www.nlg.org/programs/mideast/name\\_of\\_security.pdf](http://www.nlg.org/programs/mideast/name_of_security.pdf); U.N. RELIEF & WORKS AGENCY, UNRWA

that “[p]articularly in the initial stages of the incursion, witnesses described how the [Israeli Defense Force’s] armored bulldozers began destroying their homes while they were still inside, endangering the lives of civilians.”<sup>7</sup>

The UN Human Rights Committee condemned the actions of Israel that resulted in “the frightening increase in the loss of life, the invasion of Palestinian cities and villages . . . and the serious and systematic destruction of homes, installations and infrastructure in the territory as reported by the High Commissioner for Human Rights. . . .”<sup>8</sup> After an October 2003 incursion into Gaza in which Israel demolished 230 homes, killing eight Palestinians including two children,<sup>9</sup> Amnesty International called Israel’s “deliberate and wanton destruction of homes and civilian property” war crimes.<sup>10</sup>

The U.S. State Department has also documented Israel’s alleged human rights abuses over the years. In the 2002 Country Report for Israel, the State Department asserted that “Israel’s overall human rights record in the occupied territories remained poor and worsened in several areas as it continued to commit serious human rights abuses.”<sup>11</sup> The report further states:

Israel carried out policies of demolitions, strict curfews, and closures that directly punished innocent civilians. Israel intentionally punished innocent Palestinians by demolishing the homes of families and relatives of suspected terrorists. Israel’s demolitions left hundreds of Palestinians not involved in terror attacks homeless.<sup>12</sup>

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EMERGENCY APPEAL: FIFTEENTH PROGRESS REPORT COVERING MARCH AND APRIL 2002 4-6 (2002), available at <http://www.reliefweb.int/library/documents/2002/unrwa-opt-30apr.pdf> [hereinafter *UNRWA Report*].

7. Human Rights Watch, *Israel, the Occupied West Bank and Gaza Strip, and the Palestinian Authority Territories: Jenin: IDF Military Operations*, Vol. 14, No. 3(E), May 2002, at 42.

8. *Situation of human rights in the occupied Palestinian territories*, U.N. ESCOR, Commission on Human Rights, 28th mtg., U.N. Doc. E/CN.4/Res/2002/1 (2002).

9. Molly Moore, *Gaza Operation by Israel Leaves many Homeless: Effort to Find Tunnels in Refugee Camp is Called Most Destructive Incursion*, WASHINGTON POST, Oct. 15, 2003, at A16.

10. *Id.*

11. U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS: ISRAEL AND OCCUPIED TERRITORIES (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18278.htm>.

12. *Id.*

Anti-occupation activists argue that Caterpillar Corporation should be held accountable for the misuse of its equipment by the state of Israel.<sup>13</sup> Nationwide campaigns have been launched calling on Caterpillar Corporation to stop selling its bulldozers to Israel.<sup>14</sup> According to Ruth Jennison of University of California, Berkeley's Students for Justice in Palestine, "[h]ome demolitions in the already war-torn occupied territories cause needless suffering to innocent Palestinian families. Caterpillar should not allow its products to be used to carry out human rights abuses."<sup>15</sup>

Apparently in response to the controversy surrounding the use of Caterpillar bulldozers by Israel, the Caterpillar Corporation posted this statement on its website:

Caterpillar shares the world's concern over unrest in the Middle East and we certainly have compassion for all those affected by the political strife. However, more than two million Caterpillar machines and engines are at work in virtually every country and region of the world each day. We have neither the legal right nor the means to police individual use of that equipment. We believe any comments on political conflict in the region are best left to our governmental leaders who have the ability to impact action and advance the peace process.<sup>16</sup>

Still, Caterpillar claims that it "accepts the responsibilities of global citizenship. Wherever we conduct business or invest our resources around the world, we know that our commitment to financial success must also take into account social . . . priorities."<sup>17</sup> Caterpillar also claims that "[a]s a global company, we use our strength and resources to improve the lives of our neighbors around the world."<sup>18</sup> It can be argued that Caterpillar Corporation has not improved the lives of Palestinians in the occupied territories; to Palestinians—"the name D-9 has become synonymous with destruction."<sup>19</sup>

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13. See, e.g., Jewish Voices for Peace, Stop Caterpillar Campaign, at <http://www.catdestroyhomes.org>. See also Elizabeth Gillespie, *Family of Protestor Killed by Bulldozer Suing Caterpillar*, SEATTLE POST-INTELLIGENCER, available at [http://seattlepi.nwsource.com/local/aplocal\\_story.asp?category=6420&slug=WA%20Protester%20Killed%20Lawsuit](http://seattlepi.nwsource.com/local/aplocal_story.asp?category=6420&slug=WA%20Protester%20Killed%20Lawsuit).

14. See *id.*; U.S. Campaign to End the Occupation, at <http://www.endtheoccupation.org>. See also Teresa Watanabe, *Jews Target Caterpillar Shareholder Effort; Divesting Stock because of Israeli Bulldozing of Palestinian Homes is Unfair, some Leaders Say*, THE LOS ANGELES TIMES, Apr. 13, 2005.

15. Jewish Voices for Peace, *Activists Target Caterpillar Corporation's Role in Palestinian Home Demolitions*, Aug. 1, 2002, available at <http://www.catdestroyhomes.org/article.php?id=75>.

16. Press Release, Caterpillar Corp., Middle East, at <http://www.cat.com> (May 18, 2004).

17. Caterpillar Corp., Making a difference: Your guide to making sustainable growth possible, available at <http://www.cat.com/cda/components/securedFile/displaySecuredFileServletJSP?fileId=89215&languageId=7>.

18. "Caterpillar Corp., Code of Worldwide Business Conduct: Working with Integrity," available at [http://www.cat.com/cda/files/89286/7/worldwide\\_code.pdf](http://www.cat.com/cda/files/89286/7/worldwide_code.pdf).

19. Rabinowitz, *supra* note 1.

In October 2003, Israel announced that it expected Caterpillar bulldozers operated by remote-control and equipped with machine guns to go into service.<sup>20</sup> An Israeli army spokesperson stated that “this innovative development is intended to enable the bulldozer to be operated under fire while the operator controlling it from afar remains behind safe cover.”<sup>21</sup> Israel has been working with Technion, an Israeli technical university, in the development of the remote-control technology. It is not clear whether Caterpillar has participated in or played any role in facilitating the design of these remote control bulldozers.

With the recent trend towards holding corporations accountable for aiding and abetting human rights abuses abroad,<sup>22</sup> this paper asks the question whether corporations should be held liable for knowingly facilitating human rights abuses abroad by selling equipment widely known to be used in such abuses. To this end, the case of Caterpillar’s sales to Israel will here be examined. Part II provides an overview of the history of the Alien Tort Claims Act (ATCA)<sup>23</sup> and its applicability in United States courts. Part III gives an overview of how corporate liability for human rights abuses abroad developed under the ATCA. Part IV examines the most significant case to date involving corporate liability for human rights abuses abroad, *Doe I v. Unocal Corp.*<sup>24</sup> Part V analyzes the case that may be made against Caterpillar Corporation for its sales to Israel. Finally, Part VI concludes by discussing the policy reasons supporting the extension of corporate liability for sales of equipment to countries that violate internationally recognized human rights.

## II. THE ALIEN TORT CLAIMS ACT AND ITS APPLICATION IN THE UNITED STATES

The ATCA has been in existence since 1789.<sup>25</sup> It is both a federal

20. *See id.*

21. Press Release, Technion, “Remote Control” in the Service of the IDF: Technion Experts Develop Remote Control for Driverless D-9 Bulldozer and Hummer Jeep (Oct.21, 2003), available at [http://pard.technion.ac.il/archives/presseng/Html/PR\\_d-9Eng\\_20\\_10.Html](http://pard.technion.ac.il/archives/presseng/Html/PR_d-9Eng_20_10.Html) (last visited Feb. 4, 2005).

22. Amnesty International, USA, *Defend the Alien Torts Claims Act (ATCA)*, Business and Human Rights available at <http://www.amnestyusa.org/business/atca.html>.

23. 28 U.S.C. § 1350 (West 1993).

24. *Doe I v. Unocal Corp.*, No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), vacated, *en banc reh’g granted*, 2003 WL 359787 (9th Cir. 2003).

25. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (per curiam) (Edwards, J. concurring) (tracing the history of the ATCA).

jurisdictional statute and a cause of action.<sup>26</sup> The Act provides federal courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>27</sup> Its origins are shrouded in mystery—no one seems to know why it was enacted or “whence it came.”<sup>28</sup> What we do know, at least since the Second Circuit’s decision in *Filartiga v. Pena-Irala*,<sup>29</sup> is that it not only provides a forum for international matters involving ambassadors and violations of safe conducts, but it also provides a United States forum for the vindication of fundamental human rights recognized under international law.<sup>30</sup>

*Filartiga* involved a claim of torture perpetrated by a former Paraguayan police official against one of his countrymen. The Second Circuit held that the allegations against the former Paraguayan official constituted a tort “in violation of the law of nations” sufficient to sustain jurisdiction in federal court for the family members of the Paraguayan victim.<sup>31</sup> The court recognized that the law of nations was an evolving concept rather than a fixed notion set by those who enacted the ATCA in the Judiciary Act of 1789.<sup>32</sup>

Congress gave the Second Circuit’s interpretation of the ATCA its stamp of approval in 1991 when it passed the Torture Victim Protection Act (TVPA).<sup>33</sup> Though not superceding the ATCA, the TVPA specifically provided for a United States cause of action for torture and extrajudicial killing in violation of the law of nations. Some of the actions that have been found to constitute a violation of the law of nations<sup>34</sup> are summary execution or murder,<sup>35</sup> the causing of the disappearance of an individual,<sup>36</sup>

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26. *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*; *Marcos-Manotoc v. Traj*, 508 U.S. 972 (1993).

27. See 28 U.S.C. § 1350, *supra* note 23.

28. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (opinion of Friendly, J.).

29. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

30. *Id.*

31. *Id.* at 887.

32. *Id.* at 881.

33. 28 U.S.C. § 1350, *supra* note 23.

34. The Restatement of the Foreign Relations Law of the United States provides that the following definition for the meaning of “law of nations:” “A state violates international law if, as a matter of policy, it practices, encourages, or condones

(a) genocide,

(b) slavery or slave trade,

(c) the murder or causing the disappearance of individuals,

(d) prolonged arbitrary detention,

(e) systematic racial discrimination, or

(f) a consistent pattern of gross violations of internationally recognized human rights.”

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (1986).

35. See, e.g., *Kardic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *reh’g granted on other grounds*, 694 F. Supp.

slavery,<sup>37</sup> genocide,<sup>38</sup> and prolonged, arbitrary detentions.<sup>39</sup> Recently the District Court in New York also found that ethnic cleansing may constitute a violation under the ATCA.<sup>40</sup>

### III. CORPORATE LIABILITY FOR HUMAN RIGHTS ABUSES ABROAD

From the very beginning, when the landmark decision in *Filartiga* opened the door to domestic suits against foreign government officials for human rights abuses occurring abroad, there has been some question regarding whether private individuals or entities may also be held liable for torts in violation of the law of nations.<sup>41</sup> It had been generally understood that only sovereigns were subjects of international law and that only they had duties under the law of nations: "Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens."<sup>42</sup> Courts have therefore generally held that non-state actors may not be subject to ATCA liability unless they acted under official authority or under color of state authority.<sup>43</sup>

There is an exception to the state action requirement under the ATCA. This exception applies in cases where a private entity engages in actions, which under international law, individual responsibility would attach, such as in the cases of piracy, slave trade, genocide, war crimes,<sup>44</sup> and now, as set out in *Unocal*,<sup>45</sup> discussed below, forced labor.<sup>46</sup> In addition, while certain acts, such as torture, rape, and murder, in isolation may require state action in order for ATCA liability to attach, when these acts

707 (N.D. Cal. 1988).

36. See, e.g., *id.*

37. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

38. *Kardic*, 70 F.3d 232.

39. See, e.g., *Forti*, 672 F. Supp. 1531.

40. *Presbyterian Church of Sudan*, 244 F. Supp.2d 289.

41. See *Tel-Oren*, 726 F.2d at 782; *Kardic*, 70 F.3d at 244-45 (leaving open whether the ATCA applies *only* to state actors or also to non-state actors).

42. *Tel-Oren*, 726 F.2d at 817 (Bork, J. concurring).

43. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d at 1472.

44. *Kadic*, 70 F.3d at 238-44.

45. *Tel-Oren*, 726 F.2d at 782.

46. *Unocal*, *supra* note 24, at \*9-\*10.

are “committed in pursuit of genocide or war crimes”<sup>47</sup> or when they are “in furtherance of forced labor” or slavery,<sup>48</sup> no state action is required. In such cases, a private individual or entity may be held liable directly or may be liable for “aiding and abetting” a state actor.

#### IV. UNOCAL—HOLDING U.S. COMPANIES ACCOUNTABLE

Only recently has the ATCA been used as a basis for a suit against private corporations for human rights abuses occurring abroad. The most significant of the cases is *Doe I v. Unocal*. In *Unocal*, villagers of the Tenasserim region of Myanmar (formerly known as Burma) claimed that Unocal was liable for acts of torture, rape, forced labor, and displacement committed by the military of Myanmar in connection with a pipeline construction project that Unocal was working on and for which the Myanmar government was providing security and building infrastructure. The district court granted summary judgment in favor of Unocal on plaintiffs’ ATCA claim. The district court came to its decision based on the fact that Plaintiffs could not show that Unocal engaged in state action and that Unocal controlled the Myanmar military with respect to the claims of murder, torture, and rape.<sup>49</sup> The district court also stated that plaintiffs failed to show that Unocal “actively participated” in the forced labor of Plaintiffs.<sup>50</sup> Plaintiffs appealed to the Ninth Circuit Court of Appeals.

In its *de novo* review of the district court’s decision, the Ninth Circuit ruled that plaintiffs did not have to prove state action with respect to their claims of forced labor because the court found that forced labor is a variant of slavery,<sup>51</sup> for which international law recognizes individual responsibility.<sup>52</sup> Since the court found the allegations of rape and murder were committed in furtherance of forced labor, individual liability attached to these claims.<sup>53</sup>

The court relied on decisions of the international tribunals for the former Yugoslavia and Rwanda to articulate a standard by which private parties might be held responsible for aiding or abetting a foreign government’s commission of human rights abuses abroad that violate the law of nations. Drawing on international criminal law, the court found that two elements must exist: 1) the *actus reus*, which is providing

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47. *Kardic*, 70 F.3d at 244.

48. *Unocal*, *supra* note 24, at \*15.

49. *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1306–07 (C.D. Cal. 2000).

50. *Id.* at 1310.

51. *Unocal*, *supra* note 24, at \*10.

52. *Id.*

53. *Id.* at \*13, \*15 (leaving open the question of whether liability should also be imposed for “moral support which has the required substantial effect to another day”).

“knowing practical assistance [or] encouragement . . . which has a substantial effect on the perpetration of the crime,”<sup>54</sup> and 2) the requisite *mens rea*, i.e., actual or constructive knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime.<sup>55</sup>

The Ninth Circuit found that when Unocal hired the military for security and help in specific construction projects along the pipeline, and when it shared with the military photos, surveys, and maps of the pipeline, it gave “knowing practical assistance” to the Myanmar military.<sup>56</sup> The court found that Unocal’s assistance had a “substantial effect on the perpetration of the crime” since the record indicated that the abuses would not have occurred in the same way or in the same place without Unocal’s hiring of the Myanmar military for security and to build infrastructure.<sup>57</sup> The court also noted the admission of a Unocal representative indicating that he was aware that Unocal’s hiring of the military may have “expanded and amplified” the military’s usual methods.<sup>58</sup>

With respect to the *mens rea* requirement, the court found that Unocal knew or should reasonably have known that its conduct in paying the military for security and building infrastructure would assist or encourage the Myanmar military to subject the plaintiffs to human rights abuses.<sup>59</sup> The court stated that it was not necessary for an accomplice to know the exact tortuous actions that a principal is going to take because, “if the accused is aware that one of a number of crimes will probably be committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor.”<sup>60</sup>

During the trial in *Unocal*, the district court found that Burma/Myanmar had a “well-known history” of human rights abuses, citing a report of a non-governmental organization. It also found that Unocal had been made aware of the human rights situation in Burma/Myanmar by its private consultants, its joint venturer in the project, its employees, and human rights organizations, including Amnesty International.<sup>61</sup> Specifically, the district court found that human rights organizations had met with Unocal executives and had provided the executives with a report on Myanmar’s

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54. *Id.* at \*15 (internal citations omitted).

55. *Id.*

56. *Id.* at \* 15–\*16.

57. *Id.* at \*14.

58. *Id.* at \*14 (emphasis omitted).

59. *Id.* at \*16.

60. *Id.* at \*17 (internal citations omitted).

61. *Id.* at \*4–\*5.

human rights abuses in connection with Unocal's pipeline project.<sup>62</sup> The U.S. Embassy in Myanmar also informed Unocal of the same.<sup>63</sup> The Ninth Circuit therefore held that there were genuine issues of material fact regarding whether Unocal's conduct subjected it to liability under the ATCA.<sup>64</sup> The Ninth Circuit's decision in *Unocal* has been reheard by the Ninth Circuit sitting *en banc* and, as of April 10, 2004, a decision on the matter is still pending.

*Unocal* is among the first in a wildfire of cases seeking to hold corporations accountable for knowingly practically assisting or encouraging human rights abuses abroad. A number of such cases have been filed in recent months. Most of these cases involve a private corporation's hiring of the host country's military to provide security on projects within the country, as in *Unocal*, or involve the use of the host country's military or police to keep unions out of a corporation's plant or facilities abroad.<sup>65</sup> Particularly egregious conduct is alleged in these cases, including extrajudicial killing, torture, and the use of death squads, with the corporation's management or facilities being directly implicated in the human rights abuses. Another strand of cases being filed are those alleging that private corporations that invested in apartheid-era South Africa are liable under the ATCA for the human rights abuses of the South African government.<sup>66</sup> Since these cases were only recently filed, it is not clear how the corporations investing in apartheid-era South Africa may have knowingly practically assisted the apartheid regime by investing in the country.

#### V. THE CASE OF CATERPILLAR CORPORATION SALES TO ISRAEL

In light of the precedent discussed above, is there a case to be made against Caterpillar Corporation for selling its D-9 bulldozers to Israel while Israel is allegedly using the same to facilitate and perpetuate its occupation over Palestinian land? Victims of Israel's use of the D-9 Caterpillar bulldozer must first be able to show that the torts they are alleging are torts in violation of the law of nations. They will have to show that either Caterpillar acted with official authority or with apparent

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62. *Id.* at \*5.

63. *Id.* at \*5-\*6.

64. *Id.* at \*15.

65. See Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. Rev. 563, 578-586 (2003) (citing cases filed in California, Florida, and Alabama).

66. James P. Barry & Robert J. Myer, *An Alien's Action for Tort: Potential Corporate Liability for Human Rights Abuses Abroad*, 21 A.C.C.A. Docket 23, 31-32 (June 2003) (citing eight cases pending in New York, Florida, New Jersey, and California).

authority in commission of the alleged proscribed acts, or, alternatively, argue that no state action is required because the acts alleged are of a type that requires no state action for liability to attach. Finally, the victims will have to prove that Caterpillar provided “knowing practical assistance or encouragement” which had a substantial effect on the perpetration of the violations of the law of nations and that it had actual or constructive knowledge that its actions would assist Israel in the commission of such violations.

#### *A. Torts in Violation of the Law of Nations and State Action*

Caterpillar D-9 bulldozers have allegedly been used in the Israeli invasion of Jenin and in other areas of the occupied territory to facilitate the movement of occupation forces, to level homes and other buildings,<sup>67</sup> and to construct a wall of separation in the occupied Palestinian territories.<sup>68</sup> These actions by Israel, recognized by the U.N. Security Council<sup>69</sup> and the international community<sup>70</sup> as the occupying power over the Palestinian territories, implicate the provisions contained in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Geneva Convention).<sup>71</sup> Such actions amount to breaches of the Geneva Convention and are considered by some international observers to constitute war crimes.<sup>72</sup> Furthermore, a settlement policy such as

67. See *Dugard Report*, *supra* note 2, at 13–14.

68. See *id.* at 6–8.

69. See S.C. Res. 1322, U.N. SCOR, 55th Sess., 4205th mtg., U.N. Doc. S/Res/1322 (2000) (“Call[ing] upon Israel, the occupying power, to abide scrupulously by its legal obligations and its responsibilities under the Fourth Geneva Convention . . .”); S.C. Res. 681, U.N. SCOR, 45th Sess., 2970th mtg., U.N. Doc. S/Res/681 (1990) (“Urg[ing] the Government of Israel to accept the de jure applicability of the Geneva Convention. . . .”); see also S.C. Res. 465, U.N. SCOR, 35th Sess., 2203d mtg., U.N. Doc. S/Res/465 (1980) (“Affirming once more that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12, August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem”).

70. See Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 97–99 (2003).

71. Protection of War Victims: Civilian Persons, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter *Geneva Convention*].

72. See e.g., Human Rights Watch, *supra* note 7 (calling Israel's destruction of large swathes of the Jenin Refugee Camp purportedly conducted for security reasons “war crimes”); AMNESTY INT'L, ISRAEL AND THE OCCUPIED TERRITORIES SHIELDED FROM SCRUTINY: IDF OPERATIONS IN JENIN AND NABLUS (2002) (finding Israel guilty of war crimes during incursions in Jenin and Nablus where property wantonly destroyed), available at <http://web.amnesty.org/library/index/ENGMDE151432002>.

Israel is following is considered by some observers to be a war crime.<sup>73</sup>

In light of reports of NGO's and human rights organizations finding Israel guilty of human rights abuses, a court in an ATCA action may find that those abuses amount to war crimes. In an action against Caterpillar, plaintiffs' attorneys may allege that Caterpillar, in selling equipment to Israel for use in the commission of such human rights abuses, has knowingly aided and abetted Israel. In this way, plaintiffs' attorneys may argue that Caterpillar has violated the laws of nations as set forth in the ATCA. Since these allegations against Caterpillar concern actions that may amount to war crimes, no state action is necessary and plaintiffs' attorneys are not required to prove that Caterpillar acted under actual or apparent authority of Israel.

### *B. Proving the Elements of the Case*

To show the element of "knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime," plaintiffs must provide evidence that Caterpillar, knowing the purpose for which the Israeli government was planning to put Caterpillar's bulldozers, sold the bulldozers to Israel and continued to do so over a number of years while Caterpillar was informed by numerous human rights organizations, NGOs, the media, and individuals of the harm being committed with its equipment. It would significantly bolster plaintiffs' claim if some evidence was submitted that the bulldozers sent to Israel were made to Israeli specifications for specific use in home demolition activities or for use in destruction of agricultural land. If the bulldozers were specially outfitted for Israeli purposes in the type of terrain existing in the occupied territories or if Caterpillar Corporation provided Israel with some technical assistance or training on how to use the Caterpillar for these particular purposes, plaintiffs' attorneys may be able to prove that Caterpillar gave Israel "knowing practical assistance" or "encouragement" for the human rights abuses. Specifically, victims should determine whether, with Technion's recent announcement that it would be outfitting Caterpillar's D-9 with remote controls and machine guns, Caterpillar in any way facilitated the changes to be made by Israel to its bulldozers by altering its design for the purposes of the outfitting. In any case, the fact that Israel will be outfitting their Caterpillar bulldozers as stated arguably puts Caterpillar Corporation on notice that some of its equipment may be used for allegedly illegitimate purposes.

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73. OSCAR M. UHLER, ET. AL., COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 596 (Jean S. Pictet ed., 1958) (stating that the policy of settlement as such in humanitarian law is a war crime).

Plaintiffs' attorneys may show that Caterpillar's assistance or encouragement has a substantial effect on the perpetration of the crime by pointing to the fact that Israel's settlement policy is arguably driven by the clearing of the Palestinian territories of Palestinian homes, buildings, and the means of the population's subsistence.<sup>74</sup> Caterpillar bulldozers, plaintiffs' attorneys may show, play an integral role in this function by destroying Palestinian homes.<sup>75</sup>

Furthermore, it may not be very difficult to prove that Caterpillar had actual or constructive knowledge of the use to which its bulldozers have been put. As in *Unocal*, plaintiffs' attorneys may point to the numerous reports published by the UN Commission on Human Rights, human rights organizations, and the U.S. State Department, finding Israel in violation of human rights for its destruction of Palestinian property and its displacement of the Palestinian population.<sup>76</sup> Plaintiffs' attorneys may also argue that Caterpillar had actual notice of Israel's human rights abuses committed with Caterpillar equipment when human rights organizations and activists went to company offices to confront board members in the U.S. and sent letters setting forth Israel's alleged misuse of Caterpillar bulldozers.<sup>77</sup>

VI. POLICY REASONS WHY LIABILITY SHOULD BE EXTENDED TO  
CORPORATIONS WHO KNOWINGLY SELL EQUIPMENT  
USED FOR THE PURPOSE OF COMMITTING  
HUMAN RIGHTS VIOLATIONS

Many oppose extending the ATCA to corporations operating in foreign countries where human rights abuses are prevalent or well known. These critics argue that corporations will have a difficult time figuring out what conduct on their part might subject them to liability under the ATCA and that it is unfair to subject corporations to liability simply for doing business in a country that may be engaging in human rights

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74. B'tselem, *Land Expropriation & Settlements*, available at <http://www.btselem.org/English/Settlements/Index.asp>.

75. Human Rights Watch, *Caterpillar: Stop Enabling Home Demolitions, Letter to Chair and CEO of Caterpillar, Inc.* (October 29, 2004), available at <http://hrw.org/english/docs/2004/11/02/isrlpa9590.htm> (hereinafter Letter).

76. *Unocal*, *supra* note 24, at \*15 ("... Unocal knew or should reasonably have known that its conduct—including the payments and the instructions where to provide security and build infrastructure—would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor").

77. Letter, *supra* note 75.

abuses.<sup>78</sup> These critics also argue that the threat of liability with the potentially large damage awards will discourage corporations from investing in or possibly doing business with foreign countries.<sup>79</sup>

These arguments against expansion of the ATCA are largely overstated. Thus far, the majority of ATCA claims brought against corporations for human rights abuses have concerned egregious conduct in violation of the law of nations with direct corporate assistance or encouragement. The standard established by *Unocal* for holding private entities accountable for human rights abuses is not novel; it is an accomplice liability standard comparable to the one that exists in the domestic tort context. Take for example the following situation: A man walks into a sporting goods store and tells the salesperson that he would like to buy a rifle and ammunition. The salesperson knows the man. The man is a regular customer and has bought rifles and ammunition many times before over the years. The salesperson also knows that the man is a serial killer. The salesperson knows this because of widespread news reports and discussions he has had with law enforcement officials and customers. The man is not in jail, however, because of a “technicality.” Every rifle the man has ever bought from the sporting goods store has been used by the serial killer in commission of one of his crimes. If the salesperson goes ahead and sells the man another rifle that the man uses in the commission of another killing, would the family of the man’s victim have a valid wrongful death claim against the sporting goods store? Generally, the answer is yes because it is reasonably foreseeable that the man will commit another murder with the rifle.<sup>80</sup> Should it not be the same in the case of a corporation that sells its equipment to countries that it knows—from reports of the media, the State Department, non-governmental organizations, and human rights groups—plan to use the equipment in the commission of human rights violations?

Assuming Caterpillar has knowingly participated in or encouraged human rights abuses against Palestinians, to hold Caterpillar accountable would not be equivalent to holding a corporation liable for human rights abuses simply because a corporation invested in a country or because a corporation put its product in the stream of commerce. In the Caterpillar case, Caterpillar has allegedly directly facilitated and financially benefited from Israel’s alleged human rights abuses by selling its equipment to Israel for the commission of abuses and Caterpillar knows or should

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78. See generally Collingsworth, *supra* note 65.

79. No Safe Haven, *The Attack on ATCA*, available at <http://www.nosafehaven.org/attack.html>.

80. AM. L. (THIRD) OF PRODUCTS LIABILITY § 106:1 (West Supp. 2002) (“... [A] seller of a firearm must have known or had reason to know that the purchaser was reasonably likely to cause harm in order to be held liable”).

know this. In the case of corporations that merely invest in a country that is a known human rights abuser or corporations that simply put their products in the stream of commerce, a corporation will have only indirectly benefited from the regime's policies and will likely not have knowingly participated in or encouraged the human rights abuses at issue. By requiring that victims of human rights abuses prove both a direct benefit to the corporation from the human rights abuses and its knowing participation or encouragement, other corporations that have simply invested in a country with a poor human rights record will not be at risk for liability. Thus, foreign investment will not be deterred.

What will have been achieved by holding Caterpillar Corporation accountable for human rights abuses committed by Israel? First and foremost, it will deter Caterpillar and other corporations from selling equipment to countries that it knows plan to use the equipment to commit human rights abuses. This may seriously hinder countries, at least until they find another willing supplier, from committing certain human rights abuses. The threat of large damage awards under the ATCA will make it imprudent for a corporation to disregard reports that a country is using the corporation's equipment to commit human rights abuses. Second, holding the benefiting corporations accountable may push the human rights abusing country to change its conduct because of the international attention and opprobrium resulting from the litigation against the corporation. The country will not want to discourage other corporations from doing business with it. Third, for many plaintiffs suffering from human rights violations in countries with a history of such violations, compensation from benefiting corporations that have knowingly participated in or encouraged the abuse may be the only avenue for victims to obtain some relief. The ATCA provides these persons with an opportunity for relief and validation of their claims that have been recognized by the international community, but have yet to be resolved.

## VII. CONCLUSION

Companies that materially benefit from the commission of human rights abuses and knowingly participate or encourage these abuses by continuing to sell their equipment to countries that misuse such may have to be prepared to pay the price. The Ninth Circuit's decision in *Unocal*, though pending *en banc* review, gives some indication that federal courts may be willing to entertain such claims.

We all know the saying “buyer beware.” Now sellers of equipment used to commit human rights abuses would be wise to “beware” as well.