No. 05-36210
Decided September 17, 2007
Before Circuit Judges Arthur L. Alarcon, Michael Daly Hawkins and Kim McLane Wardlaw

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CYNTHIA CORRIE, on their own behalf and as Personal Representatives of Rachel Corrie and her next of kin, including her siblings; CRAIG CORRIE, on their own behalf and as Personal Representatives of Rachel Corrie and her next of kin, including her siblings, *et al*.
Plaintiffs-Appellants

vs.

CATERPILLAR, INC., a Foreign Corporation,
Defendant-Appellee

On Appeal from the United States District Court
Western District of Washington, Tacoma Division
Case No. CV-05192-FDB
The Honorable Frank D. Burgess, Judge Presiding

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

This case should be reheard en banc because the Panel's Opinion 1) is based on the premise that the political question doctrine is jurisdictional rather than prudential, but that issue never was briefed or argued and the Panel's conclusion is inconsistent with Supreme Court precedent and another Circuit's ruling; 2) is based on factual statements that are not in the record and Plaintiffs were not given the opportunity to challenge the factual contentions relied upon; and 3) broadens the political question doctrine in conflict with other opinions and would preclude many cases that courts have already found justiciable.

Because the en banc Court will soon be deciding a case that will likely have direct bearing on this case, *Sarei v. Rio Tinto,* 487 F.3d 1193 (9th Cir. 2007) (*vacated pending reh'g en banc*, 2007 U.S. App. LEXIS 19751 (9th Cir. Aug. 20, 2007)(oral argument scheduled October 11, 2007)), Plaintiffs respectfully suggest that the Panel vacate its decision pending the en banc decision in *Sarei*.

I. THE POLITICAL QUESTION DOCTRINE IS PRUDENTIAL, NOT JURISDICTIONAL.

This Court's decision to affirm the District Court's dismissal rested on its finding that the political question doctrine is jurisdictional rather than prudential. Opinion at 12494. Having found that the political question doctrine was jurisdictional, the Court looked beyond the facts alleged in Plaintiffs' Complaint to

decide that financing provided by the U.S. Government through the U.S. Foreign Military Financing Program (FMF) rendered Plaintiffs' claims a political question. Opinion at 12499-502.

Without briefing or argument on the question, the Court decided for the first time in this Circuit that the political question doctrine is jurisdictional. Because of the enormous implications of this conclusion, the Court should vacate its decision and rehear this issue after full briefing by the parties. Caterpillar, having brought a Rule 12(b)(6) motion (SER 22:1), only asserted that the political question doctrine was jurisdictional in a footnote of its appellate brief. CB:49, n.26. An argument raised solely in a footnote is improper and should not be considered. *See, e.g., United States v. Restrepo,* 986 F.2d 1462, 1463 (2d Cir. 1993).

The quintessential political question doctrine case *Baker v. Carr* strongly suggests that the political question doctrine is not jurisdictional. 369 U.S. 186, 211 (1962). *Baker* found that the "distinction" between dismissing on the grounds of lack of jurisdiction and on grounds of nonjusticiability "is significant." *Id.* at 196. *Baker* described a dismissal for lack of subject matter jurisdiction as one in which "the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act". *Id.*

"In the instance of lack of jurisdiction the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, §2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute." *Baker,* 369 U.S. at 198. However, "[u]nlike the other justiciability doctrines [i.e., standing, ripeness, and mootness], the political question doctrine is not derived from Article III's limitation of judicial power to 'cases' and 'controversies.'" Erwin Chemerinsky, *Federal Jurisdiction* §2.6, at 153 (5th ed. 2007). The political question doctrine is neither based on Article III's requirement of a "case or controversy," nor on a statute.

The political question doctrine is not a jurisdictional mandate, but a prudential doctrine. A "failure to state a justiciable cause of action" results where "the matter is cognizable and facts are alleged which establish infringement of appellants' rights…, [but] the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment." *Baker,* 369 U.S. at 196. The Court in *Baker* clearly held that it had subject matter jurisdiction under Article III, §2 of the Constitution and under 28 U.S.C. §1343, a jurisdictional statute, *id.,* before it proceeded to address the political question justiciability doctrine. *Id.* at 208. "The political question doctrine is … derive[d] in large part from prudential concerns about the respect we owe the political departments." *Nixon v. United*

States, 506 U.S. 224, 253 (1993)(Souter, J., concurring)(internal citations omitted)(citing *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979)(Powell, J., concurring in judgment).

Justiciability is a matter of a "failure to state a justiciable cause of action." *Baker,* 369 U.S. at 196. As a prudential doctrine, the political question doctrine is not properly addressed as a jurisdictional issue under Rule 12(b)(1), but under Rule 12(b)(6), in which case the court cannot look outside the pleadings unless it converts the motion to a Rule 56 motion and provides all parties with time for discovery. *See, e.g., Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981).

The authority cited by this Court is not to the contrary. Although *Schlesinger v. Reservists Comm. to Stop the War* noted in dicta that the political question doctrine is embodied in the concept of justiciability which expresses a jurisdictional limitation upon the courts, neither it nor the case on which it relied applied the political question doctrine; they both addressed standing. 418 U.S. 208, 215 (1974)(citing *Flast v. Cohen,* 392 U.S. 83, 95 (1968)). The Court's reliance on the assertion in *No GWEN Alliance of Lane County, Inc. v. Aldridge* that "the presence of a political question precludes a federal court, under [A]rticle III of the Constitution, from hearing or deciding the case presented," was also misplaced. Opinion at 12496 (citing 855 F.2d 1380, 1382 (9th Cir. 1988)). The assertion

depends on what the clause "under [A]rticle III of the Constitution" modifies, and could merely be a truism that courts hear cases pursuant to their Article III powers.

Moreover, *767 Third Ave. Assocs. v. Consulate Gen. of the Socialist Fed. Republic of Yugo*., 218 F.3d 152 (2d Cir. 2000), does not hold that the political question doctrine is jurisdictional. Although it noted that the political question doctrine is "essentially a *constitutional* limitation on the courts," (*id.* at 164)(emphasis added), it made clear that the question of justiciability should not be conflated with that of jurisdiction. *Id.* at 163, n.10 (citing *Baker*, 369 U.S. at 198 ("the distinction between the two grounds is significant")).

Indeed, the Second Circuit has clearly found that the political question doctrine is prudential. *See, e.g., Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995)(political question doctrine is a "nonjurisdictional, prudential doctrine[]"); *see also, Whiteman v. Dorotheum GmbH & Co KG,* 431 F.3d 57, 69 (2d Cir. 2005)(applying "the prudential justiciability doctrine known as the 'political question' doctrine"); *Can v. United States*, 14 F.3d 160, 162 (2d Cir. 1994)(dismissing on political question grounds as a threshold matter without reaching challenge to subject matter jurisdiction).

The Panel thus rushed to decide a question that this Court has identified as important and unresolved without the opportunity for briefing or oral argument. *See Arakaki v. Lingle,* 423 F.3d 954 (9th Cir. 2005), *vacated on other grounds,*

Lingle v. Arakaki, 126 S. Ct. 2859 (2006)(it is unclear "whether dismissal on political question grounds is jurisdictional or prudential in nature"). *Sarei v. Rio Tinto Plc*, discussed the disagreement among courts and commentators regarding whether the doctrine is jurisdictional or prudential. 221 F. Supp. 2d 1116, 1193, n.271 (C.D. Cal. 2002). This question very well may be resolved by the en banc Court in *Sarei*, and therefore Plaintiffs respectfully suggest that the Panel vacate its decision pending the en banc decision. If *Sarei* does not resolve the question, then this Court should schedule briefing and argument on this important, unresolved issue.

II. THE RECORD IS INCOMPLETE AND DOES NOT SUPPORT THE COURT'S FINDINGS.

The Panel's conclusion that the case poses a political question is based on its conclusion that all the sales of Caterpillar bulldozers were funded by the United States government. But the record does not demonstrate that all bulldozers were purchased with U.S. funds. Even if the political question doctrine is jurisdictional, the Court should not have decided the key facts without the opportunity to have had a hearing on them.

A. That All Bulldozers Sold To Israel Are FMF Financed Is Not On The Record.

The record supports a finding that at least some of the Caterpillar bulldozers potentially involved in the violations underlying the case were approved for

funding through the FMF; it does not support, however, the Court's conclusion that *every* Caterpillar bulldozer sold to the Israel Defense Forces (IDF) was so funded. Opinion at 12491, 12495. Moreover, there is nothing in the record that suggests that the IDF is required to pay for the bulldozers through the FMF program.

The Court stated that "there is undisputed evidence in the record that the United States government has approved and financed *all* the contracts between Israel and Caterpillar dating back to at least 1990, and that Caterpillar does not sell products to the government of Israel that are not approved by the U.S. government."[1] Opinion at 12491 (emphasis added). Without the benefit of discovery, it is not known whether some bulldozers were paid for with non-FMF monies. Additionally, Plaintiffs alleged that D10s were also used in home demolitions, but Caterpillar's evidence related only to D9s. ER-15:¶¶41, 42.

Plaintiffs specifically raised the issue and sought discovery to determine which bulldozers were at issue. Appellant's Reply Brief, p.25. *See also* Appellant's Response to Motion by the United States For Leave to File Amicus Brief Out of Time, p.3; Plaintiffs' Opposition to Defendants Motion to Seek Views of the State Department, p.2.

[1] There is no evidence that Caterpillar is a "defense contractor," as the Court refers to it, nor what that term even means. Caterpillar does not show up on any list of U.S. Defense contractors.

The Court relies on Frank Weinberg's Declaration (ASER:48) and on factual information contained in the U.S. Amicus Brief, stating it would "credit the government's uncontradicted representation on appeal that it pays for all Caterpillar bulldozer's sold to the IDF." Opinion at 12492, n.3. This statement is inaccurate and unfair to Plaintiffs.

Plaintiffs have never deposed Weinberg or had an opportunity to receive documents that support his declaration, which attached only one approval letter. Additionally, Weinberg only states "I believe" that all sales of D9 bulldozers since at least 1990 received the same or similar U.S. governmental approvals "pursuant to the programs in effect at the time of the sale" without offering specifics on each of the programs. ASER-48:4¶5.

Moreover, the record contains contradictions regarding whether an export license is needed, and who is to acquire it. While Weinberg claimed Israel arranges for export licenses under the AECA (*id*., ¶4), the approval letter states that it is *the supplier* (Caterpillar) who is responsible for obtaining export licenses as required. Similarly, the DSCA [Defense Security Cooperation Agency] Guidelines state that Contractors (i.e., Caterpillar) must provide copies of any and all export licenses related to the purchase agreement or provide written documentation that such licenses are not required. DCSA Guidelines, ¶12(C), *available at* http://www.dsca.osd.mil/DSCA_memoranda/fmf_dcc_2005/Guidlines2005%203.p

df. The Acting Assistant Secretary of Legislative Affairs, Matthew Reynolds, indicates that no export license was required for these D9 bulldozers. ASER-56:4. Thus, whether an export license is required is disputed and Weinberg's understanding regarding who is to acquire the license under the FMF is wrong – that should give the Court pause in taking the factual matters asserted in his declaration as true and accurate.

As to the U.S. Amicus Brief's contentions,[2] there is no way for Plaintiffs to know the basis for its claim that FMF financing was used to finance *all* of the Caterpillar bulldozers "at issue" that the IDF purchased – or to challenge it. Courts "have required that the party asserting jurisdiction be permitted discovery of facts demonstrating jurisdiction, at least where the facts are peculiarly within the knowledge of the opposing party." *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).

Given that the fact that all such sales were paid for by the United States was "a decisive factor" (Opinion at 12499), the Court should withdraw its decision and remand to the district court for discovery on whether FMF money paid for the bulldozers at issue here.

[2] Plaintiffs noted that an amicus brief is not to raise any new issues of fact, and if the Court was going to allow it, Plaintiffs should have the opportunity to contest facts asserted therein. Appellants' Opp. To Motion to File Amicus Brief, p.3.

B. It Is An Error To Presume That Financing Under The FMF Reflects A Policy Decision On Behalf Of The United States.

Even if one assumes that the bulldozers at issue in this case were paid for through the FMF program, the degree to which reimbursing the IDF for Caterpillars with FMF reflects a United States' foreign policy decision is simply unclear. There is no evidence in the record about how the FMF program works, including the review process or the level of scrutiny given to payments. There is no evidence of whether the approval was routine and/or ministerial, or whether there was a reasoned decision to continue funding bulldozers for foreign policy reasons. Discovery is also required to determine which departments or agencies, if any, were tasked with ensuring that products sold under the FMF were used in compliance with the terms of the programs, and whether such due diligence was carried out, all information that the Court will likely want to consider in deciding if a policy decision is implicated in this case.

What is clear from the DSCA Guidelines is that "[d]irect commercial contracts (DCCs) are contracts to which the U.S. Government (USG) is not a party." DSCA Guidelines, p.1. It also is uncontroverted that FMF funding for DCC sales is not approved prior to the sale; money is paid after the sale. The Court overstated its finding that the bulldozers are "military equipment the United States government provided and continues to provide." Opinion at 12502. The United States does not "provide" the equipment – Caterpillar does.

Furthermore, it is not known what knowledge the approving agency or individuals therein had about how the bulldozers were used, i.e., to commit demolitions of civilian homes contrary to international law. The only DSCA letter in the record is signed by a John Rowe on behalf of one John Mosely, a deputy director of the DSCA. ASER-48:6-7. There is no evidence in the record regarding who John Rowe is, let alone what knowledge he had when approving funding for that particular contract– if in fact it was even he who did so. Finally, there is no evidence in the record regarding Congress's knowledge that FMF money was being used to pay for bulldozers used to unlawfully demolish civilian homes.

III. IMPLEMENTATION OF A POLICY IS NOT ITSELF AN EXPRESSION OF FOREIGN POLICY.

The Court identified the U.S. foreign policy determination at issue to be that "Israel should purchase Caterpillar bulldozers." Opinion at 12501. This finding confused U.S. foreign policy with the implementation of foreign policy. The U.S. government asserted that it made a foreign policy determination to extend FMF aid to Israel and "to encourage equipment manufacturers like Caterpillar to sell its goods to foreign states receiving such FMF funds." USB:14-15. This general statement, even if accepted as the U.S. foreign policy at issue, is a far-cry from the very specific and affirmative policy identified by the Court - that Israel "should purchase" Caterpillar bulldozers. Any decision to finance Israel's purchase of bulldozers from Caterpillar, regardless of how ministerial or considered, simply

implemented U.S. foreign policy and was not itself foreign policy. The Court's finding violates the fundamental tenet of *Baker* that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

Adjudication of whether particular direct commercial sales violated the law does not require this Court to pass judgment on the FMF program or the AECA, and certainly does not challenge the provision of military aid to Israel, as the Court erroneously concluded. Opinion at 12499, 12501. In *Northrop Corp. v. McDonnell Douglas Corp,* this Court held that government involvement in the sale of F-18's to Canada, including approval of the sale and authorization to export F-18 technology to other countries, did not convert an action between private defense contractors in a regulated industry into a political question. 705 F.2d 1030, 1047 (9th Cir. 1983); *see also DKT Memorial Fund v. Agency for International Development*, 810 F.2d 1236 (D.C. Cir. 1987)(challenge to implementation does not require examination of the political or social wisdom of the policy and is not a political question). This Court distinguished cases brought *against government officials* that "*directly* challenged the propriety of decisions made by the President and Congress." *Northrop,* 705 F.2d at 1047, n.24 (emphasis added).

Challenges to the implementation of foreign policy are not political questions, and the Government cannot transform an implementation decision "into

foreign policy simply by affixing the label 'foreign policy.'" *Planned Parenthood Federation, Inc. v. Agency for International Development,* 838 F.2d 649, 656 (2d Cir. 1988)(citing *Baker*, 369 U.S. at 217)(noting "the impossibility of resolution by any semantic cataloguing"). *Planned Parenthood* held that a clause included by a U.S. agency in grant applications prohibiting pro-abortion positions by applicants was merely implementation of the foreign policy, and therefore plaintiff's challenge to it was justiciable. *Id.*

This Court's reliance on *Dickson v. Ford,* 521 F.2d 234 (5th Cir. 1975), which found a taxpayer's suit against the President challenging the constitutionality of foreign aid to Israel nonjusticiable is misplaced. Opinion at 12500. *Lamont v. Woods* held that administration of a policy in granting funds to foreign religious schools was not a nonjusticiable political question, emphasizing that the "critical distinction between policy and implementation also provides a solid basis for distinguishing this case from *Dickson*," in which the challenge "was to the foreign policy itself." 948 F.2d 825, 833 (2d Cir. 1991). Plaintiffs do not challenge foreign aid to Israel – even if the United States has paid for the bulldozers at issue, Plaintiffs' claims, at most, implicate decisions implementing U.S. foreign policy.[3] *See Population Institute v. McPherson*, 797 F.2d 1062, 1069

[3] This Court similarly misplaced reliance on *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), which rejected Congressional members' war powers complaint

(D.C. Cir. 1986)(finding the challenge to Congressional withholding of funds allocated to the United Nations Fund because it devotes some money to programs in China justiciable, noting that it "need not consider the situation in China" even though disposition of the issue would impact foreign relations).

In *EEOC v. Peabody W. Coal Co*., this Court found that the EEOC's challenge to employment preferences in leases entered into by the defendant was not barred by the political question doctrine even though the leases had been approved by the U.S. Department of Interior. 400 F.3d 774, 784-85 (9th Cir. 2005); *see also Kahawaiolaa v. Norton,* 386 F.3d 1271, 1276 (9th Cir. 2004). Congress' plenary authority and the Executive's broad delegation over Indian affairs (as well as specific approval of leases) no more rendered plaintiffs' claims non-justiciable than the political branches' power over foreign affairs should in this case, or Executive approval of sales.

The first *Baker* factor is not inextricable from this case simply because foreign relations may be implicated. *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.,* 177 F.3d 1142 (9th Cir. 1999) does not stand for the proposition that all claims implicating foreign relations are constitutionally committed to the political branches, but only the narrower issue of recognition of a foreign sovereign, which is one of only four areas of foreign policy that the Supreme Court

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against the President for failing to report, and seeking withdrawal of all Armed Forces and aid from El Salvador.

has found to pose a political question, none of which applies here. Erwin Chemerinsky, *Federal Jurisdiction* §2.6.4, at 161-163 (5th ed. 2007).

Koohi v. United States might have been deemed non-justiciable had the Court found that plaintiffs' claims would conflict with the U.S. foreign policy to fire on Iranian vessels to protect Kuwaiti tankers against attacks. 976 F.2d 1328, 1330 (9th Cir. 1992). Instead, the Court found claims for the attack during an authorized military operation were justiciable. *Id.* at 1332. *Ramirez de Arellano v. Weinberger* held that the government's construction and operation of a military base on private property in Honduras was not a political question. 745 F.2d 1500 (D.C. Cir. 1984). Under this Court's decision, plaintiffs' claims could have easily been cast as challenging the U.S. foreign policy of having a military base in Honduras, or of using plaintiff's property for that base. Instead the court determined that the issue was not the lawfulness of the U.S. military presence abroad but rather property rights to the land being used by the military, which was "paradigmatic…for resolution by the Judiciary." *Ramirez* at 1512; *see Stuart v. United States*, 813 F.2d 243, 247 (9th Cir. 1987)(doctrine of judicial review commits the task of interpreting statutes primarily to the courts).

Even assuming that a direct challenge to the U.S. decision to finance the sales would be non-justiciable, Plaintiffs' claims against Caterpillar still would be. This Court relied on *Atl. Tele-Network v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d

126 (D.D.C. 2003), in which the plaintiff sued an international financial organization and two U.S. officials who controlled the organization's lending activity to prevent it from loaning Guyana funds to build a telecommunications system that would violate plaintiff's contract with Guyana. 251 F. Supp. 2d at 128. Plaintiff's claims against Guyana for breaching its contract by building the competing system was *not* dismissed on political question grounds, even though the challenge to the government loan *funding* the construction was. *Id.* at 131.

If the Court's reasoning stands, it could immunize any private party from liability under any law, for any act related to a transaction with any entity that receives aid from the U.S. Had Plaintiffs alleged that a design defect caused the deaths of Plaintiffs, U.S. funding would not preclude Caterpillar from being liable. Even assuming that U.S. foreign policy *is* that Israel should buy Caterpillar bulldozers, it is *not* that Israel should buy *defective* bulldozers, *nor* that Israel should buy bulldozers *to use for war crimes*. Although it may have "political" ramifications, whether Caterpillar is liable for selling bulldozers it knew would be used for war crimes is no more a "political question" (as opposed to a legal question) than would be the issue of whether it sold defective bulldozers.

Furthermore, if in deciding Plaintiff's claims this Court were called upon to "implicitly decid[e] the propriety of the United States' decision to pay for the bulldozers which allegedly killed plaintiffs' family members" (Opinion at 12499),

such a determination would fall squarely within the mandate of the court. As this Court explained in *EEOC v. Peabody W. Coal Co*., "[w]e regularly review the actions of federal agencies to determine whether they comport with applicable law." 400 F.3d 774, 784 (9th Cir. 2005). *See also Japan Whaling Ass'n v. American Cetacean Society,* 478 U.S. 221, 230 (1986)(political question doctrine does not bar challenge to Secretary of Commerce's action when decision requires "applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented").

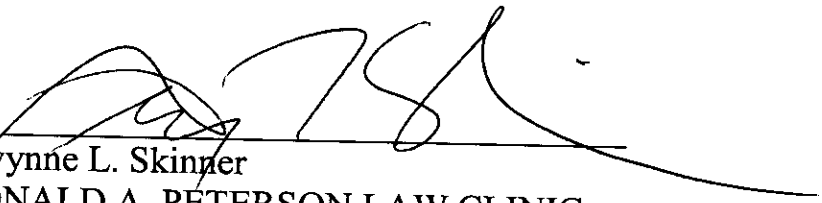
U.S. courts have often adjudicated damage claims arising in the context of U.S. military operations. *See e.g., The Paquete Habana*, 175 U.S. 677 (1900)(reviewing the seizure of two Spanish ships by U.S. forces during Spanish American War); *No GWEN Alliance*, 855 F.2d at 1384-85 (lawsuit challenging development of defense installation for failure to discuss environmental impacts is justiciable); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp.2d 7, 53 (E.D.N.Y. 2005) *appeal docketed*, No. 05-1953-CV (2nd Cir. Sept. 30, 2005)(political question did not bar claims against U.S. corporations that manufactured and supplied herbicides to the U.S. and South Vietnam governments and that directly implicated military decisions); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005)(no political question for torture and war crimes claims against U.S. military contractors).

Courts have also refused to dismiss on political question grounds even when the claims arise during ongoing wars. *See, e.g., Ibrahim*, 391 F. Supp. 2d at 17; (Iraq); *Kadić,* 70 F.3d at 249-250 (former Yugoslavia). Courts have also heard ATS claims where the litigation had the potential to embarrass the U.S. and its allies. *See Linder v. Portocarrero,* 963 F.2d 332, 337 (11th Cir. 1992)(killing of a civilian by contras justiciable since it "challenges neither the legitimacy of the United States foreign policy toward the contras, nor does it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war"). U.S. courts have been willing to adjudicate claims involving foreign military decisions, and this is consistent with ATS jurisprudence, as claims for crimes against humanity and war crimes –recognized under that statute – often occur in the context of some sort of military operation.

CONCLUSION

For each of the foregoing reasons this case merits rehearing and en banc review.

Dated: October 9, 2007

By 

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I declare under the laws for the United States and the State of New York that the foregoing is true and correct to the best of my knowledge.

DATED this 9th day of October 2007, at New York, New York.

Claire Dailey