No. _____

In The Supreme Court of the United States

LUNGISILE NTSEBEZA; DOROTHY MOLEFI; TOZAMILE BOTHA; MNCEKELELI HENYN SIMANGENLOKO; SAMUEL ZOYISLILE MALI; MSITHELI WELLINGTON NONYUKELA; MPUMELELO CILIBE; WILLIAM DANIEL PETERS; JAMES MICHAEL TAMBOER; NONKULULEKO SYLVIA NGCAKA, Individually and on Behalf of her Deceased Son; NOTHINI BETTY DYONASHE, Individually and on Behalf of Her Deceased Son; MIRRIAM MZAMO, Individually and on Behalf of Her Deceased Son,

Petitioners,

v.

FORD MOTOR COMPANY; INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015) ("*Balintulo II*") at App-A1, the Second Circuit ignored the majority opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"). Instead, the panel followed a restrictive view of jurisdiction under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, articulated in Justice Alito's concurrence, *Kiobel II*, 133 S. Ct. at 1670, which requires international law violations to occur wholly within the United States. The panel also created a specific intent *mens rea* requirement for ATS aiding and abetting claims. In the instant case, where no other forum exists, these tests foreclosed ATS claims against U.S. nationals who committed wrongful acts on U.S. soil that aided and abetted violations abroad. For decades, Respondents International Business Machines Corporation ("IBM") and Ford Motor Company ("Ford") intentionally and knowingly designed, sold, and serviced customized technology and specialized vehicles that facilitated violations of the law of nations. The panel below committed three errors that place it in conflict with decisions of this Court and numerous other circuits.

The questions presented are:

1. Whether the *mens rea* element of aiding and abetting liability under the ATS is specific intent requiring the aider and abettor to share the purpose of the principal, as the Second and Fourth

QUESTIONS PRESENTED – Continued

Circuits have found, or whether the *mens rea* is intent (or purpose) to facilitate with knowledge of the result, as established by the Ninth and Eleventh Circuits and customary international law.

2. Whether aiding and abetting from the United States by U.S. nationals is sufficient to establish jurisdiction under *Kiobel II*, or whether violations must wholly occur inside the United States, as articulated in Justice Alito's concurrence.

3. Whether corporations are immune from tort liability under the ATS, as the Second Circuit alone has held in conflict with six other circuits and this Court's reasoning in *Kiobel II*.

PARTIES TO THE PROCEEDINGS

The Petitioners, and Plaintiffs-Appellants below, are black South African citizens suing for violations of international law. The Respondents, and Defendants-Appellees below, are International Business Machines Corporation and Ford Motor Company.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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INTRODUCTION

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

This Court has held that the Alien Tort Statute, 28 U.S.C. § 1350, establishes jurisdiction for violations of the law of nations, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), where "claims touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application," *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) ("*Kiobel II*"). This Court should grant review of the Second Circuit's decision in *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015) ("*Balintulo II*") to correct three errors below:

First, the Second Circuit, along with the Fourth Circuit, now requires a specific intent *mens rea* standard for aiding and abetting that is inconsistent with domestic and international law and in direct conflict with the Ninth and Eleventh Circuits.

Second, departing from this Court's *Kiobel II* majority opinion and decisions of the Fourth and Ninth Circuits, the Second Circuit adopted Justice Alito's concurrence to interpret *Kiobel II*'s "touch and concern" test to apply only to violations occurring wholly within the United States. Furthermore, dismissing Petitioners' claims where U.S. nationals committed tortious acts in the United States defeats the purpose of the ATS, which is to provide redress

for law of nations violations. The Respondents, two U.S. corporations, are not subject to jurisdiction in the forum where the harm occurred. There is no indication that *Kiobel II* intended to create such a gap in legal responsibility.

Third, in conflict with the reasoning in *Kiobel II* as well as six other circuits, the decision below affirmed that corporations in the Second Circuit cannot be held liable for torts under the ATS. The Second Circuit recently recognized its isolation on corporate liability but deferred to *en banc* or Supreme Court review to correct the error. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 156-57 (2d Cir. 2015). The instant case, against two corporate defendants, is a proper vehicle to address this issue.

OPINIONS BELOW

The opinion of the Court of Appeals (App-A) is reported at 796 F.3d 160 (2d Cir. 2015). The Court of Appeals' order denying Petitioners' timely request for rehearing and for rehearing *en banc* (App-D) was entered on September 14, 2015. The relevant opinion of the District Court (App-B) is reported at 56 F.Supp.3d 331 (S.D.N.Y. 2014).

JURISDICTION

Petitioners seek review of a final decision of the Court of Appeals entered on July 27, 2015. A timely petition for rehearing and for rehearing *en banc* was denied on September 14, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of 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.

STATEMENT

A. Statement of Facts

In the United States, Respondents IBM and Ford repeatedly acted to aid and abet international law violations by facilitating denationalization and violent suppression, including extrajudicial killings, of black South Africans living under the apartheid regime. In the United States, IBM and Ford purposely designed, sold, and serviced customized technology and vehicles for the South African government that they knew in advance would be used to racially segregate and systematically oppress black South Africans.

Through their actions, and decades-long support for violations associated with apartheid, IBM and Ford purposefully facilitated violations of the law of nations. *See generally* App-E, Compl., ¶¶66-95, 122-61.

Petitioners are black South Africans who suffered harms as a result of the substantial assistance provided by IBM and Ford. *Id.* at ¶¶25-38. Since 2009, the South African government has supported jurisdiction in U.S. courts over this case. *See* Letter from Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, Republic of South Africa, to Hon. Shira A. Scheindlin, Southern District of New York (Sep. 1, 2009) at App-F (stating that South African government "is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law."). The United States is the only forum where IBM and Ford, both U.S. corporations, can be held accountable for their U.S.-based conduct that aided and abetted violations of the law of nations in apartheid South Africa.[1]

For decades, IBM and Ford had actual and specific knowledge of how the South African regime used specialized technology and vehicles to commit violations of international law. IBM and Ford repeatedly received reports and complaints to their U.S. headquarters about selling such technology and vehicles. App-E, Compl., ¶¶76, 86, 127-32. United Nations

[1] Neither IBM nor Ford participated in the South African Truth and Reconciliation Commission. App-E, Compl., ¶46.

("UN") and U.S. government sanctions restricting sales of vehicles to security forces and technology to the apartheid regime made clear how such sales contributed to violence and oppression against the black population. *Id.* at ¶¶8-9, 17-19, 51-55, 80, 136.

Despite this actual knowledge that their products were used to denationalize and suppress black South Africans, for years, IBM and Ford deliberately chose to specially design, sell, and service these products that contributed to unlawful acts. From 1973 to 1994, IBM and Ford made repeated, high-level decisions in the United States to provide expertise, customized U.S. technology, and specialized vehicles to the apartheid regime that facilitated violations of the law of nations against black South Africans. *Id.* at ¶¶7, 15, 72-73, 77-78, 80-84, 136, 138-42.

To maximize profits, they intentionally assisted the unlawful conduct committed by the South African government. In the United States, IBM developed technology and products to provide race-based identity documents that enabled the government to forcibly segregate black South Africans, restrict their movement, and strip them of their South African citizenship. *Id.* at ¶¶15, 126-32, 135-43, 147-52. In the United States, Ford specially designed vehicles for the South African security forces that were customized and outfitted to more effectively suppress and commit violence against black South Africans. *Id.* at ¶¶7, 69, 74, 83-85.

IBM and Ford were so intent on continuing their sales to the security forces and apartheid regime that

they vigorously opposed sanctions against South Africa. *Id.* at ¶¶82-83, 138-39. Indeed, even after the U.S. government and UN specifically banned the sale of vehicles and computer technology to the apartheid regime, IBM and Ford continued to provide the specialized technology, products, and assistance the sanctions prohibited. *Id.* at ¶¶8, 17, 80, 82-84, 86, 132-40, 142. IBM and Ford circumvented sanctions by creating new companies that they used to continue providing U.S.-created technology and assistance while concealing their conduct from shareholders and the U.S. government. *Id.* at ¶¶77-78, 82-83, 132-34, 138-40.

IBM's deliberate actions in the United States directly assisted the South African government in forcing black South Africans into Bantustans and stripping away their citizenship. *Id.* at ¶¶59, 130-32, 140-43, 149-50. IBM provided technical knowledge and equipment that was not available in South Africa. *Id.* at ¶¶131, 141-42. IBM bid on and secured a contract whose very purpose was to denationalize black South Africans, and then created the identity document system for the Bophuthatswana Bantustan to achieve this outcome. *Id.* at ¶¶135, 147-53. In the United States, IBM developed the hardware and software for this identity document system. *Id*. at ¶152. IBM transferred that system to the Bophuthatswana government and trained government employees to use IBM machines and programs to produce identity documents. *Id.* The task of rapidly denationalizing and moving millions required computer technology. *Id.* at ¶¶142, 150. As a result of IBM's U.S.-based actions,

Petitioners were stripped of their South African citizenship, leading to their forced removal from South Africa. *Id.* at ¶¶149, 154-59.

For example, one Petitioner, Chief Shole, and his villagers were relocated from their homes in a fertile area in South Africa and forcibly removed to an arid and undeveloped area in Bophuthatswana near the border with Botswana. *Id.* at ¶154. Chief Shole was denationalized and forced to acquire Bophuthatswana citizenship. *Id.* His identity document, developed by IBM was necessary to access basic services in Bophuthatswana, including pensions, schooling, health clinics, bank accounts and loans, government jobs, and permits to build homes or open businesses. *Id.* As a result of his denationalization, Chief Shole suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship, including the right to reside in his home. *Id.*

In the United States, Ford made repeated decisions regarding its South African product line, product design, vehicle manufacturing, vehicle shipment, and approval of vehicle elements. *Id.* at ¶¶9, 67, 69, 74, 77-78, 83, 87, 96. Ford designed, manufactured, and sold customized vehicles for specific use by the South African security forces. *Id.* at ¶¶74, 84-85. Between 1973 and 1977, Ford sold hundreds of cars and trucks directly to the South African Ministry of Defense and the South African police. *Id.* at ¶84. Ford modified these vehicles to be faster and stronger than other Ford models and outfitted them according to the apartheid government's specifications. *Id.*

The security forces used Ford's specialized vehicles, including large military trucks and sedans with powerful engines, to monitor black South Africans' activities, collect intelligence, suppress government opposition, and terrorize the black community through violent attacks that killed men, women, and children. *Id.* at ¶¶86-95. For instance, Ford vehicles provided substantial assistance to the apartheid security forces in Soweto as they violently suppressed the student-led Soweto Uprising on June 16, 1976, to protest mandatory Afrikaans language instruction in schools. *Id*. at ¶86. Women and children were shot and killed, including Hector Zolile Pieterson, the twelve-year-old son of Petitioner Mantoa Dorothy Molefi. *Id.*

B. Procedural History

This is a petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit dated July 27, 2015. *Balintulo II*, 796 F.3d at 160 at App-A. This decision affirmed the District Court's order, relying on Justice Alito's *Kiobel II* concurrence to deny leave to amend. *See In re S. Afr. Apartheid Litig.*, 56 F.Supp.3d 331, 336-37 (S.D.N.Y. 2014) at App-B. The District Court found that *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013) ("*Balintulo I*"), "requires plaintiffs to plead 'relevant conduct within the United States' that itself 'gives rise to a violation of customary international law' – in other words, the position adopted by Justice Alito." 56 F.Supp.3d at 336-37.

Although these proceedings began as over a dozen distinct cases, this petition is brought only on behalf of *Ntsebeza* Plaintiffs, whose case was consolidated for pre-trial proceedings with the *Khulumani/ Balintulo* Plaintiffs. *See* First Amended Complaint, *Ntsebeza v. Daimler AG*, No. 02 MDL No. 1499 (S.D.N.Y. Oct. 27, 2008); First Amended Complaint, *Khulumani v. Barclays Nat'l Bank Ltd.*, No. 02 MDL No. 1499 (S.D.N.Y. Oct. 24, 2008). In 2004, the District Court granted Defendants' first motion to dismiss. *In re S. Afr. Apartheid Litig.*, 346 F.Supp.2d 538, 549-54 (S.D.N.Y. 2004). Plaintiffs appealed, and the Second Circuit reversed, holding that "a plaintiff may plead a theory of aiding and abetting liability under the ATS." *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007).

After remand, Plaintiffs amended their complaint in 2008. Following subsequent motions to dismiss, the District Court granted in part and denied in part Defendants' motion. *In re S. Afr. Apartheid Litig.*, 617 F.Supp.2d 228, 296 (S.D.N.Y. 2009).

Defendants' subsequent appeal was stayed until this Court's *Kiobel II* decision. In August 2013, the Second Circuit issued a decision on the appeal, denying Defendants' petition for a writ of mandamus and sending the case back to the District Court. *Balintulo I*, 727 F.3d at 192.

Defendants then moved the District Court to dismiss Plaintiffs' claims, while Plaintiffs requested leave to amend their complaints to meet the

requirements of *Kiobel II*. Following briefing on the question of corporate liability under the ATS after *Kiobel II*, the District Court found that *Kiobel II* and *Bauman v. Daimler*, 134 S. Ct. 746 (2014), implicitly overruled the Second Circuit's holding regarding corporate liability in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"). *In re S. Afr. Apartheid Litig.*, 15 F.Supp.3d 454, 465 (S.D.N.Y. 2014) at App-C.

The District Court then permitted Plaintiffs to move to amend their complaint. *Id.*; *see also* Second Amended Complaint, *Ntsebeza v. Ford Motor Co.*, No. 02 MDL No. 1499 (S.D.N.Y. Aug. 8, 2014) at App-E. Although the District Court acknowledged that the proposed complaint filed in 2014 was "substantially more detailed and specific" than the 2008 complaint, it denied leave to amend on grounds of futility under *Balintulo I*, which established Justice Alito's concurrence in *Kiobel II* as the law of the Circuit. 56 F.Supp.3d at 336-37.

In *Balintulo II*, a panel of the Second Circuit affirmed the District Court's decision. 796 F.3d at 160. Plaintiffs now seek review of this decision.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S RULING, REQUIRING THAT AIDERS AND ABETTORS SHARE THE MOTIVE AND PURPOSE OF THE PRINCIPAL, SQUARELY CONFLICTS WITH OTHER CIRCUITS AND IGNORES ESTABLISHED LAW.

The decision below creates a clear circuit split regarding the proper *mens rea* for aiding and abetting liability under the ATS. The Second Circuit adopted a standard that requires defendants to share a purpose as well as motive with the principal. *Balintulo II*, 796 F.3d at 170. *Balintulo II* applied the same specific intent standard articulated by the Fourth Circuit in *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 400 (4th Cir. 2011). This standard conflicts with the Eleventh Circuit rule, *see Doe v. Drummond Co., Inc.*, 782 F.3d 576, 604 (11th Cir. 2015) (requiring knowledge *mens rea* standard); *see also Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005), as well as the Ninth Circuit's analysis in *Doe v. Nestle*, 766 F.3d 1013, 1026 (9th Cir. 2014). This circuit split demands the Supreme Court's attention.

Whether the standard is derived from federal common law or international law,[2] this Court should correct lower court rulings that require specific intent and motive to establish aiding and abetting liability.

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[2] The circuits have split on the source of law that should determine the standard. *See* n.4 *infra*.

Both federal common law and international law firmly reject the specific intent standard. Similarly, the law clearly distinguishes between motive and intent; to establish accessorial liability one need only establish intent and not motive.

Permitting the Second Circuit's rule to stand would defeat the purpose of the ATS to provide redress for law of nations violations. Here, where no other forum exists to bring a case, U.S. corporations have been shielded from liability for universally condemned conduct by the strict *mens rea* standard. The panel below found that IBM's conduct within the United States satisfied its stringent "touch and concern" test, but then dismissed Petitioners' claims because IBM lacked specific intent. *See Balintulo II*, 796 F.3d at 169-70. In effect, this rule creates a stricter standard for civil liability than criminal liability. While industrialists could be criminally liable at Nuremberg and genocidaires could be criminally liable at the International Criminal Court ("ICC"), both would be immune from civil ATS liability in the Second Circuit. Such a result is incompatible with the Statute's purpose, and this Court should grant certiorari to correct the error.

A. Review Is Necessary to Resolve the Circuit Split on the *Mens Rea* Standard for Aiding and Abetting.

This Court should grant review to resolve the circuit split on the *mens rea* standard for aiding and

abetting under the ATS. At the heart of this split is the distinction between two forms of "intent": (1) intent to facilitate a violation, and (2) intent to achieve the end result (or specific intent).[3] The Second and Fourth Circuits have required specific intent, while the Ninth and Eleventh Circuits have rejected this heightened standard in favor of knowledge or intent to facilitate with knowledge of the end result.[4] *Compare Balintulo II*, 796 F.3d at 170 (adopting specific intent); *Aziz*, 658 F.3d at 400 (same) *with Nestle*, 766 F.3d at 1023 (rejecting specific intent); *Drummond*, 782 F.3d at 604 (same). In addition to adopting a specific intent requirement, the panel below added a further element to the *mens rea*:

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[3] Further complicating matters is the fact that different circuits have used the "purpose of facilitating" language from article 25(3)(c) of the Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90, to describe both forms of intent. *Compare Balintulo II*, 796 F.3d at 170 (defining "purpose" as specific intent); *Aziz*, 658 F.3d at 400 (same) *with Nestle*, 766 F.3d at 1024 (not equating "purpose" with specific intent).

[4] Petitioners disagree with the Second Circuit that international law is the source of law to determine aiding and abetting liability under the ATS, but if international law is relied upon to define the *mens rea*, courts should apply it faithfully. *Sosa*, 542 U.S. at 725. The circuits are split on the source of law to determine liability: the Second, Fourth, and Ninth Circuits have looked to international law, while the Eleventh Circuit has looked to federal common law. *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (looking to international law); *Aziz*, 658 F.3d at 398 (same); *Nestle*, 766 F.3d at 1023 (same) *with Drummond*, 782 F.3d at 608 (looking to federal common law).

shared motive with the principal.[5] This motive requirement directly conflicts with the Ninth Circuit. *Compare Balintulo II*, 796 F.3d at 170 *with Nestle*, 766 F.3d at 1025. The circuit split has caused confusion and cannot be reconciled without guidance from this Court.

Looking to federal common law, the Eleventh Circuit found liability for aiding and abetting when "defendants [give] knowing substantial assistance to the individuals committing the wrongful act." *Drummond*, 782 F.3d at 604; *see also Cabello*, 402 F.3d at 1158.

While the Ninth Circuit has yet formally to adopt a *mens rea* standard for aiding and abetting, it also made clear that "specific intent" is not required. *See Nestle*, 766 F.3d at 1024. In *Nestle*, the panel looked to international law to establish the requisite *mens rea*. *Id.* at 1023-24. The Ninth Circuit recognized that international tribunals, from Nuremberg to the present, have adopted a knowledge standard, but that the Second and Fourth Circuits have demanded a higher threshold. *See id.* at 1023-24. In analyzing the "purpose of facilitating" standard, the Ninth Circuit found claims to be actionable when defendants "purposefully" facilitated violations of international law

[5] Motive and intent are distinct legal concepts. "While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial." Intent, BLACK'S LAW DICTIONARY (10th ed. 2014).

with knowledge of the result. *Id.* at 1024. The court recognized that defendants acted "with the purpose of obtaining the cheapest cocoa possible," not with the specific intent of advancing child slavery. *Id.* The court also distinguished between motive and intent. *See id.* at 1025-26 ("[D]efendants did not have the subjective motive to harm children. . . . [T]he defendants sought a legitimate goal, profit, through illegitimate means, purposefully supporting child slavery.").

In contrast, the Fourth Circuit imposed liability only where aiders and abettors possess "specific intent." *See Aziz*, 658 F.3d at 400 ("adopting the specific intent mens rea standard for accessorial liability" and dismissing claims against company that provided mustard gas to Iraqi government because it had only knowledge and not specific intent to kill civilians). As described below, *see* Part I.B.1 *infra*, *Aziz*'s requirement that the aider and abettor share the principal's specific intent is clearly inconsistent with international law, including the Rome Statute and the Nuremberg conviction of Zyklon-B gas manufacturers based on their knowledge of its use.

The Second Circuit, like the Fourth Circuit, required that accomplices act with specific intent to achieve the end result. *Balintulo II*, 796 F.3d at 170. Both circuits purport to be applying the standard set forth in the Rome Statute but, as explained below, that standard does not include a specific intent requirement. *See* Part I.B.1 *infra*. The Second Circuit went even further and also required that accomplices share the principal's motive, preventing Petitioners'

claims from proceeding because IBM did not act with the "purpose . . . to denationalize black South Africans and further the aims of a brutal regime." *Balintulo II*, 796 F.3d at 170. The panel below thus required IBM to possess the specific intent of "denationalizing black South Africans" and the motive of "furthering the aims of a brutal regime." *Id*.

The Second Circuit decision demands review to correct this legal error and resolve the circuit split, ensuring that ATS claims are actionable against defendants that knowingly facilitate international law violations.

B. This Court Should Grant Certiorari to Correct Lower Courts' Erroneous Holdings, Under Both Domestic and International Law, that Aiding and Abetting Requires Specific Intent and Motive.

1. Specific Intent Is Not Required to Establish Aiding and Abetting Liability.

The Second and Fourth Circuits departed from established accessorial liability standards by adopting a specific intent requirement. *Balintulo II*, 796 F.3d at 170; *Aziz*, 658 F.3d at 400. Federal common law requires knowledge rather than specific intent for aiding and abetting. RESTATEMENT (SECOND) OF TORTS § 876 (1979). The same standard is recognized in international law. *See Prosecutor v. Charles Blé Goudé*,

Case No. ICC-02/11-02/11, Confirmation of Charges, ¶170 (Dec. 11, 2014).

In *Cabello*, the Eleventh Circuit looked to federal common law and relied on *Halberstam v. Welch*, 705 F.2d 472, 476 (D.C. Cir. 1983), to hold a defendant liable for aiding and abetting under the ATS when "he *knew* that his actions would assist in the illegal or wrongful activity at the time he provided the assistance." 402 F.3d at 1158 (emphasis added). *See also Drummond*, 782 F.3d at 608-09, 608 n.44 (affirming knowledge standard adopted in *Cabello*). For state and federal tort claims, a defendant is liable for "harm resulting to a third person from the tortious conduct of another" if he "*knows* that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement." RESTATEMENT (SECOND) OF TORTS § 876 (1979) (emphasis added); *accord Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 95 (5th Cir. 1975); *Halberstam*, 705 F.2d at 476. The domestic law *mens rea* standard directly conflicts with the Second Circuit's heightened standard in *Balintulo II*.

International law similarly does not impose a specific intent standard for aiding and abetting. Dating to Nuremberg, international tribunals have applied a *mens rea* of knowledge,[6] imposing criminal

[6] *See, e.g.*, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgment, ¶1635 (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 23, 2014) (Nuremberg trials considered: "(i) the degree of each defendant's contribution to the commission of the crimes

(Continued on following page)

sanctions on individuals and corporate actors who chose to assist in the Holocaust with knowledge of the end result. In case after case, and in contrast to the Second Circuit, these tribunals never required specific intent.

The Nuremberg Military Tribunal convicted two corporate officials who sold Zyklon-B to the Nazis, finding that the defendants acted "knowingly." *The Zyklon B Case: Trial of Bruno Tesch and Two Others*, 1 L. Rep. of Tr. of War Crim. 94 (1947). In *United States v. Flick et al.* [Trial No. 5], the International Military Tribunal convicted two industrialists in part because they contributed financial support to the S.S. with knowledge of the crimes the S.S. was committing. 6 Tr. War Crim. before Nuernberg Mil. Trib. 1187, 1216-23 (1947).[7] In both convictions, the defendants had knowledge but did not share the intent of the principal. *Id.* at 1222. In contrast, in *United States v. Krauch*, I.G. Farben executives were acquitted because they honestly believed that the poison gas they manufactured was used to delouse prisoners

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. . . ; and (ii) the *knowledge* that each defendant had") (emphasis added).

[7] The Tribunal stated explicitly: "It is noteworthy that the defendants were not charged with planning, preparation, initiation, or waging a war of aggression or *with conspiring or co-operating with anyone to that end*." *Flick*, 6 Tr. War Crim. at 1191 (emphasis added). The Tribunal continued, "the defendants . . . were private citizens engaged as businessmen in the heavy industry of Germany." *Id.* IBM and Ford were just such businesses.

and were unaware of the "criminal purposes to which this substance was being put." 8 Tr. War Crim. before Nuernberg Mil. Trib. 1081, 1168-69 (1948).

A specific intent requirement also contradicts the jurisprudence of contemporary international tribunals. *See, e.g.*, *Nestle*, 766 F.3d at 1023 ("[The] knowledge standard has also been embraced by contemporary international criminal tribunals. The International Criminal Tribunals for Rwanda and the former Yugoslavia have consistently applied a knowledge standard," and, "after conducting an extensive review of customary international law, the Appeals Chamber of the Special Court for Sierra Leone recently affirmed this knowledge standard."); Brief of David J. Scheffer as Amicus Curiae Supporting Appellants at 3-14, *Balintulo II*, 796 F.3d 160 (2d Cir. 2013) (No. 14-4014). As the International Criminal Tribunal for the former Yugoslavia ("ICTY") has explained, "[t]he requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator." *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, ¶127 (Int'l Crim. Trib. for the Former Yugoslavia, May 9, 2007). Likewise, the Special Court for Sierra Leone has concluded that "an accused's knowledge of the consequence of his acts or conduct – that is, an accused's 'knowing participation' in the crimes – is a culpable *mens rea* standard for individual criminal liability." *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, ¶483 (Special Court for Sierra Leone, Sep. 26, 2013).

Similarly, the Rome Statute, which the Second Circuit relied upon for its specific intent standard, establishes no such requirement for aiding and abetting.[8] *See* Brief of David J. Scheffer at 3-14. In December 2014, the ICC's Pre-Trial Chamber interpreted the Rome Statute's aiding and abetting *mens rea* provision under article 25(3)(c), which uses the language "purpose of facilitating," to impose liability where a defendant acted intentionally with knowledge of the result. *See Blé Goudé*, Case No. ICC-02/11-02/11, ¶170 (defendant's "activities were intentional and were performed for the purpose of facilitating the commission of the crimes. In addition, they were performed in the knowledge that the crimes were

[8] In *Khulumani*, Judge Katzmann adopted the "purpose of facilitating" standard, as distinct from a knowledge standard. 504 F.3d at 277 (Katzmann, J., concurring). Judge Katzmann recognized that the Rome Statute "has yet to be construed by the International Criminal Court," *id.* at 275-76, and invited future courts to revisit his analysis, *see id.* at 277. In 2014, the ICC resolved the issue in *Blé Goudé*, interpreting "purpose of facilitating" to be consistent with customary international law, which does not require specific intent. *See* Case No. ICC-02/11-02/11, ¶170.

Citing *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), Judge Katzmann noted that "[t]here are occasions when . . . intent could be inferred" from conduct. *Khulumani*, 504 F.3d at 276, n.11. In *Direct Sales*, this Court held that the sale of restricted, potentially harmful goods, combined with other factors, was sufficient to prove requisite intent for conspiracy, implying that a shared intent with the principal is not required. 319 U.S. at 711-13. *Balintulo II* far exceeds this "purpose of facilitating" standard.

committed as part of a widespread and systematic attack against the civilian population.").[9]

The Second and Fourth Circuits' adoption of a specific intent standard is thus contrary to international law as well as domestic standards for aiding and abetting, and flouts the precedents of this Court as well as holdings of sister circuits.

2. Intent Must Not Be Conflated with Motive.

Motive is uniformly understood to be distinct from the question of intent, even in cases of genocide, the gravest crime under international criminal law. To require that an aider and abettor share the principal's motive as an element of the *mens rea* for civil liability, as the Second Circuit did below, is a clear error requiring correction. *See Balintulo II*, 796 F.3d at 170 (requiring pleadings show IBM's "purpose" included "aim of furthering a brutal regime.").[10]

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[9] Article 25(3)(c) of the Rome Statute defines aiding and abetting liability as "purpose of facilitating the commission" of a crime. In contrast, article 25(3)(d) defines joint criminal enterprise liability as "a group of persons acting with a common purpose."

[10] In *Rosemond v. United States*, this Court also recognized that there is no requirement that the aider and abettor share the principal's motive. 134 S. Ct. 1240, 1250 (2014) ("The law does not, nor should it, care whether he participates with a happy heart."). The panel below made the very error that Justice Alito warned against in *Rosemond*. It confused motive with

(Continued on following page)

"Intent" is defined as "[t]he state of mind accompanying an act, esp[ecially] a forbidden act." Intent, BLACK'S LAW DICTIONARY (10th ed. 2014). It is distinct from motive, which is the "inducement to do some act," whereas "intent is the . . . determination to do it." *Id.* In particular, "[w]hen the intent to do an act that violates the law exists, motive becomes immaterial." *Id.* International case law recognizes the same distinction between intent and motive, as well as the fact that motive is not necessary to establish liability. *See* Kai Ambos, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I: FOUNDATIONS AND GENERAL PART (2013) at 268.[11]

Decisions from international tribunals affirm this distinction between intent and motive. In *Blagojević and Jokić*, for example, Defendant Jokić argued that his actions in burying the bodies were plausibly done

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intent and conflated the defendant's *mens rea* with its will or desire. As Justice Alito explained, even if a defendant's "*motive* in aiding a criminal venture is to avoid some greater evil," he may still have the "*intent* that the venture succeed." *Id.* at 1255. Even if Jean Valjean "stole a loaf of bread to feed his starving family, he certainly intended to commit theft." *Id.*

[11] *See also* U.N. Commission of Experts Established Pursuant to Security Council Resolution 780, Rep., transmitted by letter dated May 24, 1994 from the Secretary General to the President of the Security Council, ¶97, U.N. Doc. S/1994/674 (May 27, 1994); U.N. Commission of Experts Established Pursuant to Security Council Resolution 934, Rep., transmitted by letter dated Dec. 9, 1994 from the Secretary General to the President of the Security Council, ¶159, U.N. Doc. S/1994/1405 (Dec. 9, 1994).

in the interest of public health and safety. The ICTY Appeals Chamber rejected Jokić's defense, noting that even if he was concerned about public heath, that only goes "to the issue of motive," which is "immaterial for the purposes of assessing an accused's intent and criminal responsibility." Case No. IT-02-60-A, ¶202 (citing *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, ¶106 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 28, 2005)).[12] Whatever his motivations, the underlying fact that Jokić's actions contributed to the "murder campaign" and that he knew his actions were assisting with that campaign were sufficient to convict him of aiding and abetting. Similarly, whatever IBM and Ford's intentions, the underlying fact that their actions contributed to the denationalization campaign, extrajudicial killing, and violence associated with apartheid, and that they knew their actions were assisting with these harms, makes them liable for aiding and abetting a violation of international law.

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[12] *See also Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, ¶161 (June 1, 2001) (noting that "criminal intent (mens rea) must not be confused with motive" and that, "in respect of genocide, personal motive does not exclude criminal responsibility"); *Prosecutor v. Duško Tadic*, Case No. IT-94-1-A, ¶¶270, 272 (Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999); *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, ¶109 (Int'l Crim. Trib. for the Former Yugoslavia, Sep. 27, 2007); *Prosecutor v. Gotan Jelisic*, Case No. IT-95-10-A, ¶¶49, 71 (Int'l Crim. Trib. for the Former Yugoslavia, July 4, 2001).

The Second Circuit's requirement that defendants act with illicit motive to be liable for aiding and abetting contradicts established domestic and international standards, and must be corrected by this Court.

C. This Court Should Grant Certiorari to Permit Aiding and Abetting Claims Under the ATS Where U.S. Actors Commit Law of Nations Violations on U.S. Soil and No Other Forum Exists to Adjudicate These Claims.

The Second and Fourth Circuits' strict specific intent standard allows U.S. actors to commit law of nations violations on U.S. soil without liability. This defeats the purpose of the ATS, which is to ensure that those responsible for such abuse are held civilly liable.

Had the Second Circuit applied accepted standards for aiding and abetting liability, IBM and Ford would have been held responsible for their actions. The well-recognized aiding and abetting standard has two elements: (1) knowledge of the end result and, with such knowledge, (2) an intentional or "purposeful" act by the defendant to facilitate the end result. *See* Part I.B *supra*.

The allegations against IBM clearly meet both elements. First, IBM knew that South Africa was establishing homelands, including Bophuthatswana,

to denationalize black South Africans.[13] App-E, Compl., ¶¶56-59, 132, 135-36, 139-40, 147-48. IBM also knew that the homeland governments were creating new identity documents that were essential to strip black South Africans of their citizenship and relegate them to the homelands.[14] *Id*. U.S. and UN sanctions clearly indicated that computer technology was particularly important to South Africa's efforts to permanently separate the races.[15] *Id.* at ¶¶64, 136-42.

Second, with actual and constructive knowledge of the resulting harm of denationalization, IBM in the United States took deliberate actions to facilitate the violation. *Id.* at ¶¶137-42, 150-52. IBM bid on contracts to create new identity documents that would

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[13] The lower court acknowledged that Petitioners allege that IBM:

> (1) [D]esigned specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans; (2) bid on, and executed, contracts in South Africa with unlawful purposes such as "denationalization" of black South Africans; and (3) provided training, support, and expertise to the South African government in using IBM's specialized technologies.

Balintulo II, 796 F.3d at 165.

[14] For example, in 1976, IBM's Vice Chair testified to the U.S. Congress that IBM executives understood that the end use of the passbook system was to denationalize black South Africans. App-E, Compl., ¶132.

[15] Lobbying against and subsequently violating sanctions may also demonstrate purpose. *See Nestle*, 766 F.3d at 1025.

denationalize the black population. *Id.* at ¶¶129, 143. After winning the bid to create and implement the identity document system for Bophuthatswana, IBM provided specialized hardware, software, and training that facilitated the ongoing denationalization process for years. *Id.* at ¶¶131, 146-52. Thus, IBM met both elements of aiding and abetting.[16]

The fatal flaw in the Second and Fourth Circuits' holdings is that they added two elements for establishing aiding and abetting liability. Beyond (1) knowledge and (2) deliberate action, they required that a defendant (3) share the principal's purpose, meaning specific intent, and (4) share the principal's motive. The Second Circuit mistakenly concluded that IBM did not aid and abet because there was no

[16] Similarly, Petitioners also pled the two elements necessary to establish Ford's aiding and abetting liability. Ford knew that the South African government was using vehicles to violate the law of nations. App-E, Compl., ¶¶62, 79-95. The UN Security Council and U.S. government repeatedly banned the sale of vehicles to the apartheid regime and security forces. *Id.* at ¶¶54-55, 80. With this knowledge, Ford in the United States chose to specially design, manufacture, and sell vehicles to the apartheid regime. *Id.* at ¶¶67-78, 81-83. These vehicles were not simply placed in the stream of commerce; they were customized and outfitted specifically for the apartheid security forces. *Id.* at ¶¶84-86, 120-21. The apartheid regime gave Ford its specifications for the vehicles and Ford approved all modification requests from its headquarters in Detroit. *Id.* at ¶84. At the apartheid government's request, for example, Ford gave these vehicles faster engines and approved paint details with government insignia. *Id.*

evidence that "IBM's purpose was to denationalize black South Africans and further the aims of a brutal regime." *Balintulo II*, 796 F.3d at 170.[17] *See also Aziz*, 658 F.3d at 400 (requiring defendants to intend that mustard gas be used against civilians).

If left to stand, the Second and Fourth Circuits' decisions will protect U.S.-based aiders and abettors of international law violations from liability. The Second and Fourth Circuits' rulings implicitly rejected the standard set at Nuremberg, by which industrialists who knew that Zyklon-B would be used to commit genocide, and deliberately decided to sell it to the Nazis, were convicted. Unlike the Second and Fourth Circuits, the Nuremberg courts did not require that the defendants intend their products to be used against civilians, or that they share the genocidal motives of the Nazis. Rather, like the Ninth and Eleventh Circuits, the Nuremberg tribunals found knowledge plus a deliberate action sufficient to convict.[18] *See The Zyklon B Case*, 1 L. Rep. of Tr. of War Crim. 94.

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[17] When IBM and Ford provided substantial assistance to the apartheid government – knowing in advance that their technology and vehicles would be used to denationalize and suppress black South Africans – they acted with the *intent* to facilitate the harm. It is no defense that their ultimate *motive* was profit. *See Nestle*, 766 F.3d at 1025.

[18] The Second Circuit's suggestion that technology used to denationalize and forcibly transfer people was "*innocuous* population data," *Balintulo II*, 727 F.3d at 170 (emphasis added), simply ignores the context. Tattoos may provide "population data," but in the context of Nazi Germany were not "innocuous."

The Second Circuit's standard is thus so restrictive that it is now easier to convict individuals of international crimes before the ICC than to find individuals civilly liable under the ATS for the same acts. Indeed, perpetrators convicted at Nuremburg would not be civilly liable under the ATS for aiding and abetting Nazi war crimes. If left uncorrected, the Second Circuit's decision will undermine the purposes of the ATS as articulated by this Court in *Sosa* and by the Second Circuit itself in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

II. THE SECOND CIRCUIT MISAPPLIED THIS COURT'S "TOUCH AND CONCERN" STANDARD BY ADOPTING THE ALITO CONCURRENCE RATHER THAN THE *KIOBEL II* MAJORITY POSITION, AND THE CIRCUITS ARE SPLIT OVER *KIOBEL II*'S PROPER INTERPRETATION.

The Second Circuit disregarded the majority opinion in *Kiobel II* and instead adopted Justice Alito's concurrence, which limits viable ATS causes of action to violations that occur wholly inside the United States. *Balintulo II*, 796 F.3d at 166-67.[19] The

[19] Even applying Justice Alito's proposed test, the facts of the instant case should have satisfied the more stringent "relevant conduct" standard. Unlike the complaint in *Kiobel II*, where all "relevant conduct" took place abroad, here Respondents' domestic conduct violated international law.

Eleventh Circuit has similarly required that a violation occur entirely on U.S. soil. *See Cardona v. Chiquita Brands Int'l, Inc*., 760 F.3d 1185, 1191 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015). Review is necessary to correct this clear error and bring the Second Circuit in line with this Court's precedent.

The *Kiobel II* majority did not adopt a bright-line rule. Accordingly, the Fourth and Ninth Circuits have considered multiple factors to determine whether ATS claims "touch and concern" the United States. *See Al Shimari v. CACI Premier Tech., Inc*., 758 F.3d 516, 527 (4th Cir. 2014) (reviewing multiple factors to establish whether claims "touch and concern" the United States); *Mujica v. AirScan Inc*., 771 F.3d 580, 596 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp*., 136 S. Ct. 690 (2015) (same); *Drummond*, 782 F.3d at 592 (same). Only this Court can resolve the circuit split over the proper application of *Kiobel II*'s "touch and concern" standard.

A. Review Is Needed to Resolve the Circuit Split Over the Application of the "Touch and Concern" Standard and to Prevent the Adoption of Justice Alito's Concurrence, Which Was Not Endorsed by the *Kiobel II* Majority.

The circuits are split on the application of the presumption against extraterritoriality announced in *Kiobel II*. Some appellate courts have adopted Justice Alito's concurrence, while others have evaluated

multiple factors to assess whether claims touch and concern the United States. This Court should grant review to clarify the contours of *Kiobel II*'s presumption against extraterritoriality and provide guidance to the lower courts.

In *Kiobel II*, this Court did not elaborate on the elements of the "touch and concern" inquiry, leaving lower courts to determine its parameters. *See, e.g.*, *Mujica*, 771 F.3d at 594; *Drummond*, 782 F.3d at 585-86; *Al Shimari*, 758 F.3d at 527. Justice Kennedy, who joined the *Kiobel II* majority, wrote separately to support the Court's cautious, incremental approach, noting that other circumstances might require different "reasoning" than the majority opinion and "further elaboration and explanation" of the presumption against extraterritoriality. *Kiobel II*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Justice Breyer's concurrence similarly recognized that the majority opinion left room for more substantial cases to proceed under the ATS. *Id.* at 1671 (Breyer, J., concurring). Justice Alito also stated that the Court's "formulation obviously leaves much unanswered." *Id.* at 1670 (Alito, J., concurring).

The four circuits that have interpreted *Kiobel II* have pursued inconsistent and conflicting approaches to determine when "claims touch and concern U.S. territory with sufficient force to displace the presumption against extraterritoriality." 133 S. Ct. at 1669. Circuit courts adopting Justice Alito's concurrence have established a bright-line rule and additionally focused their "relevant conduct" inquiry on

actions occurring in the same place where the plaintiff suffered harm. *See, e.g.*, *Cardona*, 760 F.3d at 1191 (adopting Justice Alito's concurrence and dismissing claims where torture did not occur on U.S. soil). In *Balintulo II*, the Second Circuit defined "relevant conduct" as the "*same* conduct" that violates the law of nations, thereby embracing Justice Alito's requirement that the tort occur on U.S. soil. *See Balintulo II*, 796 F.3d at 166-67 (citing *Mastafa v. Chevron Corp*., 770 F.3d 170, 183 (2d Cir. 2014)); *see also In re S. Afr. Apartheid Litig.*, 56 F.Supp.3d at 336-37 (noting "the position adopted by Justice Alito" had become law of the Second Circuit).[20]

In contrast, both the Fourth and Ninth Circuits followed the *Kiobel II* majority by analyzing entire "claims" rather than simply the place of the harm; these circuits have examined multiple factors to assess whether there is a cause of action that "touches and concerns" the United States.

For example, in *Al Shimari*, the Fourth Circuit "note[d] that the Court broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with

[20] Joined only by Justice Thomas, Justice Alito advocated for a more restrictive rule that the majority did not embrace. *See Kiobel II*, 133 S. Ct. at 1670 (Alito, J., concurring). Therefore, "relevant conduct" and the "touch and concern" test in the majority opinion must have meaning beyond this concurrence. *But see Balintulo I*, 727 F.3d at 191 n.26 (asserting *Kiobel II* majority did not reject standard of Justice Alito's concurrence).

sufficient force, suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." 758 F.3d at 527. The *Al Shimari* court interpreted the "touch and concern" standard to require it to "consider[ ] a broader range of facts than the location where the plaintiffs actually sustained their injuries." *Id.* at 529. These facts included defendants' nationality, existence of contracts created in the United States, a relationship with the U.S. government, oversight and management of employees from the United States, attempts to conceal law of nations violations, and compelling national interests. *See id.* at 530-31.

The Ninth Circuit similarly noted the importance of analyzing multiple factors for the "touch and concern" test, especially emphasizing the role of U.S. citizenship. *Mujica*, 771 F.3d at 594 ("It may well be, therefore, that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States.").[21] This approach directly conflicts with the Second Circuit, which interpreted *Kiobel II*

[21] From its inception, the ATS was understood to cover violations of international law committed by U.S. citizens, whether at home or abroad. *See, e.g.*, E. de Vattel, LAW OF NATIONS, 163 (§ 76) (explaining that "[the sovereign] ought not to suffer his subjects to molest the subjects of other states.").

to make U.S. citizenship "irrelevant." *See Balintulo I*, 727 F.3d at 193.

Even within circuits, decisions reflect the state of confusion over the application of *Kiobel II*. In *Drummond*, the Eleventh Circuit noted, "Two recent decisions of this court . . . impose jurisdictional constraints that are not required by the Court's holding in *Kiobel*, but they also leave unanswered a considerable number of questions as to this circuit's interpretation and application of *Kiobel's* operative language." 782 F.3d at 582-83 (analyzing *Baloco v. Drummond Co.*, 767 F.3d 1229 (11th Cir. 2014) ("*Baloco II*") and *Cardona*, 760 F.3d 1185). However, *Drummond* aligned itself more with the approach articulated in *Al Shimari*: "[W]hen considering claims that the defendants aided and abetted or conspired with the perpetrators who committed the underlying violation, the domestic or extraterritorial location of all conduct in support of those claims is relevant to the jurisdictional inquiry." 782 F.3d at 597-98. Panels in the Eleventh Circuit are also divided on whether U.S. citizenship is relevant to the "touch and concern" test. *Compare Drummond*, 782 F.3d at 595 (finding U.S. citizenship to be relevant), *with Cardona*, 760 F.3d at 1189 (finding no difference between U.S. citizenship and "mere corporate presence," which was insufficient in *Kiobel II*).

Given this split over the contours of the *Kiobel II* test, this Court should grant review to provide guidance to the lower courts. The Court should clarify whether "relevant conduct" includes aiding and

abetting that takes place in the United States, and should elaborate on the relevance of U.S. nationality and citizenship to the "touch and concern" inquiry. Justice Kennedy expected that future ATS cases not covered by the reasoning or holding of *Kiobel II* would require this Court to revisit the meaning of "touch and concern." The current case, involving U.S. nationals that committed wrongful acts inside the United States, presents a proper vehicle to answer such questions.

B. The Second Circuit's Adoption of Justice Alito's Concurrence, Along with Its Specific Intent Requirement, Permits U.S. Nationals Committing Wrongs in the United States to Escape Liability, in Contravention of the Purpose of the ATS.

Along with the heightened *mens rea* requirement, *see* Part I *supra*, the Second Circuit's adoption of Justice Alito's concurrence and the panel's focus on the location of Petitioners' harm means that wrongful acts of U.S. nationals taking place on U.S. soil will not be subject to liability. *Kiobel II*'s concern that diplomatic strife might arise from the adjudication of conduct in the territory of another sovereign, 133 S. Ct. at 1666, is not present here. The U.S. national corporations are headquartered in the United States, and there is no other forum to address their wrongful acts. This Court should make clear that *Kiobel II* does not shield U.S. corporations from liability for torts

committed in the United States that facilitate law of nations violations.

The circuit courts applying Justice Alito's concurrence have fixated on the location of the harm and the wrongful acts that are in close physical proximity to the harm. This mistaken focus on the location of harm has led to the absurd result that even those criminally liable for their U.S.-based actions are not subject to civil liability under the ATS. *See Cardona*, 760 F.3d at 1192 (dismissing ATS claims after Chiquita pled guilty to aiding and abetting terrorists from within the United States because the torture and extrajudicial killing occurred abroad).

In the instant case, the Second Circuit focused primarily on the resulting harms in South Africa, rather than Respondents' U.S.-based actions, especially with regard to Ford.[22] Combined with the heightened

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[22] The focus on the locus of harm rather than actions in the United States is particularly glaring with regard to claims against Ford. Concerning Ford's conduct in South Africa, the panel found facts establishing only "general corporate supervision," which does not "pierce [the] corporate veil," and concluded that claims based on vicarious liability were not viable. *Balintulo II*, 796 F.3d at 168. But Petitioners' claims are not based on Ford's "vicarious" liability for the conduct of its South African subsidiaries, but rather Ford's U.S.-based conduct, including repeated decisions to develop and sell specialized vehicles to South African security forces.

Ford in fact decided to sell and modify specialized vehicles for the apartheid government from its U.S. headquarters. App-E, Compl., ¶¶67, 69, 74. Ford facilities in South Africa simply assembled vehicles from kits. *Id.* at ¶¶74, 77, 78B. The plans for

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mens rea requirement, *see* Part I *supra*, this emphasis on the location of the harm led to no liability for wrongs committed in the United States. The panel conceded that IBM "design[ed] particular technologies in the United States to facilitate racial separation [which] would appear to be both 'specific and domestic' conduct that would satisfy the first prong of our two step analysis." *Balintulo II*, 796 F.3d at 169. This allegation alone establishes that IBM contributed a component crucial to implementing apartheid's racial segregation, and thus met the *actus reus* for a violation of the law of nations within the United States. Yet the Second Circuit held the claim was barred because IBM did not have the requisite *mens rea* of purpose to denationalize. *Id. See also* Part I *supra* (discussing error associated with establishing specific intent *mens rea* standard).

Along with this heightened *mens rea* requirement, the focus on the place of harm to assess relevant conduct has led to a glaring gap in legal responsibility for wrongful acts taking place in the United States. *Kiobel II* involved a foreign company, foreign harms, and foreign plaintiffs. No wrongful act occurred in the United States, and alternative forums could adjudicate the claims against the foreign entities. In the

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and modifications of the design and manufacture of specialized vehicles for the South African security forces, as well as managing the transportation of vehicle parts, were approved by Ford in Detroit. *Id.* at ¶74.

instant case, Respondents committed wrongful acts in the United States, and no alternate forum exists to adjudicate wrongs committed by these U.S. corporations. *Kiobel II*'s majority gave no indication that, in these circumstances, such acts should be immune from suit under the ATS.

III. THE SECOND CIRCUIT STANDS ALONE IN HOLDING THAT CORPORATIONS ARE IMMUNE FROM LIABILITY UNDER THE ATS, IN CONFLICT WITH ALL SISTER CIRCUITS AND THIS COURT'S REASONING IN *KIOBEL II*.

The Second Circuit's holding in *Kiobel I*, affirmed in *Balintulo II*, stands alone amongst all circuits to have considered the issue of corporate liability under the ATS. In its recent *In re Arab Bank* decision, the Second Circuit recognized its isolation, noting that "*Kiobel I* now appears to swim alone against the tide." 808 F.3d at 151. The court observed that "*Kiobel II* suggests a reading of the ATS that is at best 'inconsistent' with *Kiobel I*'s core holding," *id.* at 157, but decided to "leave it to either an en banc sitting of this Court or an eventual Supreme Court review to overrule *Kiobel I* if, indeed, it is no longer viable," *id*. This Court should take up the Second Circuit's invitation and grant certiorari to bring that court in line with *Kiobel II*, and all other circuits, in holding that corporations can be subject to liability under the ATS.

In *Kiobel II*, this Court recognized that "mere corporate presence" alone is insufficient to overcome

the presumption against extraterritoriality or to permit a court to exercise personal jurisdiction over an ATS case. 133 S. Ct. at 1669. *See also Bauman*, 134 S. Ct. at 761-63. As the Second Circuit itself observed, "[i]ndeed, if corporate liability under the ATS were not possible as a general matter, the Supreme Court's statement about 'mere corporate presence' would seem meaningless." *In re Arab Bank*, 808 F.3d at 155.

The Seventh, Ninth, Eleventh, and D.C. Circuits have each independently concluded that corporate liability exists. *See Nestle*, 766 F.3d at 1022; *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed.Appx. 7 (D.C. Cir. 2013); *Drummond*, 782 F.3d at 584. *See also Al Shimari*, 758 F.3d at 530; *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999).

Review is warranted to resolve this conflict among the appellate courts regarding corporate liability under the ATS. Given the Second Circuit's clear departure from *Kiobel II* and all other circuits, this Court should grant review on this important and recurring issue to ensure dismissals are not based upon an erroneous holding that corporations are not liable under the ATS.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for writ of certiorari and provide the lower courts guidance on: the standard for aiding and abetting under the ATS; the criteria for determining when an ATS claim touches and concerns the United States; and the liability of corporations under the ATS.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2014

Nos. 14-4104(L), 14-3589, 14-3607, 14-4129, 14-4130, 14-4131, 14-4132, 14-4135, 14-4136, 14-4137, 14-4138, 14-4139

SAKWE BALINTULO, as personal representative of SABA BALINTULO, et al.,
Plaintiffs-Appellants,

v.

FORD MOTOR CO., INTERNATIONAL BUSINESS MACHINES CORP.,
Defendants-Movants.

On Appeal from the United States District Court for the Southern District of New York

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ARGUED: JUNE 24, 2015
DECIDED: JULY 27, 2015

Before: CABRANES, HALL, and LIVINGSTON, *Circuit Judges*.

This appeal presents the question of whether plaintiffs, victims of South African apartheid, have

plausibly alleged relevant conduct committed within the United States that is sufficient to rebut the Alien Tort Statute's presumption against extraterritoriality.

We hold that they have not.

Accordingly, we **AFFIRM** the August 28, 2014 order of the United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*).

PAUL L. HOFFMAN (Diane E. Sammons, Nagel Rice, LLP, Roseland, NJ; Michael D. Hausfeld, Kristen M. Ward, Hausfeld, Washington, DC, *on the brief*), Schonbrun, Desimone, Seplow, Harris & Hoffman LLP, Venice, CA, *for Plaintiffs-Appellants*.

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JOSÉ A. CABRANES, *Circuit Judge*:

This appeal presents the question of whether plaintiffs, victims of South African apartheid, have plausibly alleged relevant conduct committed within the United States that is sufficient to rebut the Alien Tort Statute's presumption against extraterritoriality.

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BACKGROUND

Nearly a decade and a half ago, plaintiffs filed suit under the Alien Tort Statute ("ATS")[1] against various corporations[2] for allegedly aiding and abetting crimes

[1] The ATS states in full: "The district courts shall have original jurisdiction of 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." 28 U.S.C. § 1350.

[2] Among the original defendants in this case were dozens of corporations, including many prominent multinational companies. Over time, however, the District Court granted many of these defendants' motions to dismiss, *see, e.g.*, *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 455 (S.D.N.Y. 2014), and plaintiffs dropped their claims against many others in their subsequent amended complaints, *see, e.g.*, *Balintulo v. Daimler AG*, 727 F.3d 174, 183 (2d Cir. 2013) ("*Balintulo I*"). Accordingly, the number of defendants has been whittled down to two: Ford Motor Co. ("Ford") and International Business Machines Corp. ("IBM").

proscribed by "the law of nations" (also called "customary international law")[3] committed during apartheid by the South African government against South Africans within South Africa's sovereign territory.

The long and complicated procedural history of this consolidated case involves rulings from all three levels of the federal judiciary.[4] As relevant here, the District Court, on April 8, 2009, held that plaintiffs may proceed against defendants Ford and IBM (the "Companies") on an agency theory of liability for apartheid era crimes allegedly committed by their subsidiaries. Thereafter, the Companies sought a writ of mandamus in this Court. On September 17, 2010, while this case remained pending, we held, in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"), that the

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[3] *See, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 176 (2d Cir. 2014) (equating violations of the law of nations with violations of customary international law); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n.2 (2d Cir. 2003) ("In the context of the [ATS], we have consistently used the term 'customary international law' as a synonym for the term the 'law of nations.' "); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, *J.*, dissenting in part) (using the two terms interchangeably when noting that " 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe").

[4] The factual and procedural history of the case – and the various separate cases that were consolidated to form the current action – is summarized in *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 241-45 (S.D.N.Y. 2009), *Balintulo I*, 727 F.3d at 182-85, *In re South African Apartheid Litig.*, 15 F. Supp. 3d at 455-57, and *In re South African Apartheid Litig.*, 56 F. Supp. 3d 331, 332-36 (S.D.N.Y. 2014).

ATS does not confer jurisdiction over claims pursuant to customary international law against corporations.[5] The Supreme Court granted certiorari and, on April 17, 2013, affirmed our judgment, while explicitly declining to reach the corporate liability question ("*Kiobel II*").[6] Instead, the Court held that "the presumption against extraterritoriality applies to claims under the ATS"[7] and thus the statute cannot be applied "to conduct in the territory of another sovereign."[8]

Two days after the Supreme Court released its ruling in *Kiobel II*, we requested supplemental briefing from the parties on the impact of that decision on the present case. Thereafter, on August 21, 2013, in *Balintulo v. Daimler AG*, 727 F.3d 174, 188 (2d Cir. 2013) ("*Balintulo I*"), we denied the Companies' request for a writ of mandamus and remanded to the District Court where the Companies would be able to "seek the dismissal of all of the plaintiffs' claims, and prevail, prior to discovery, through a motion for judgment on the pleadings." In so doing, we rejected plaintiffs' theory of vicarious liability for the Companies based on actions taken within South Africa by their South African subsidiaries and concluded that *Kiobel II* "forecloses the plaintiffs' claims because the

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[5] 621 F.3d 111 (2d Cir. 2010).

[6] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

[7] *Id.* at 1669.

[8] *Balintulo I*, 727 F.3d at 188.

plaintiffs have failed to allege that any relevant conduct occurred in the United States."[9]

On remand, the Companies moved for a judgment in their favor. The District Court ordered the Companies to brief the question of whether corporations can be held liable under the ATS following *Kiobel II*. On April 17, 2014, the District Court held that the Supreme Court in *Kiobel II*, which, as noted earlier, expressly declined to address the question of corporate liability under customary international law, had nonetheless overruled the holding of *Kiobel I* and thus altered the law of the Circuit in that respect.[10] The District Court also permitted plaintiffs to move to amend their complaints in order to allege facts sufficient to overcome the ATS's presumption against extraterritoriality.[11] After plaintiffs submitted their proposed amended complaints, the District Court held that the proposed amendments were futile because the "relevant conduct" alleged "all occurred abroad" and because plaintiffs' theory of liability was foreclosed by this Court's decision in *Balintulo I*.[12]

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[9] *Id.* at 189.

[10] *In re S. African Apartheid Litig.*, 15 F. Supp. 3d at 460.

[11] *Id.* at 465.

[12] *In re South African Apartheid Litig.*, 56 F. Supp. 3d at 338.

DISCUSSION

We generally review a district court's decision to permit or deny leave to amend a complaint for abuse of discretion, "keeping in mind that leave to amend should be freely granted when justice so requires."[13] However, when denial of leave to file a revised pleading is based on a legal interpretation, such as futility, a reviewing court conducts a *de novo* review.[14] A proposed amendment to a complaint is futile when it "could not withstand a motion to dismiss."[15] In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[16] And while a court must accept all of the allegations contained in a complaint as true, "that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[17]

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[13] *Pangburn v. Culbertson*, 200 F.3d 65, 70 (2d Cir. 1999) (internal quotation marks omitted).

[14] *Hutchison v. Deutsche Bank Sec., Inc.*, 647 F.3d 479, 490 (2d Cir. 2011).

[15] *Lucente v. IBM Corp.*, 310 F.3d 243, 258 (2d Cir. 2002).

[16] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[17] *Mastafa*, 770 F.3d at 177.

I. The ATS Claims

On appeal, plaintiffs claim that they have alleged extensive new facts demonstrating that the Companies' U.S.-based actions constituted unlawful aiding and abetting of crimes in violation of the law of nations. They allege that the Companies' "specialized product development, sales of such tailored products, and provision of expertise and training" were aimed at facilitating abuses committed in South Africa.[18] Specifically, plaintiffs allege that defendant Ford (1) provided specialized vehicles to the South African police and security forces to enable these forces to enforce apartheid,[19] and (2) shared information with the South African regime about anti-apartheid and union activists, thereby facilitating the suppression of anti-apartheid activity.[20] As for IBM, plaintiffs claim that the company (1) designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans;[21] (2) bid on, and executed, contracts in South Africa with unlawful purposes such as "denationalization"[22]

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[18] Appellants' Br. 3.

[19] *Id.* at 15-21.

[20] *Id.* at 21-23.

[21] *Id.* at 12-13.

[22] By "denationalization," plaintiffs refer to the "stripp[ing] of . . . South African nationality and/or citizenship by South African security forces during the period from 1960 to 1994." J.A. 403.

of black South Africans;[23] and (3) provided training, support, and expertise to the South African government in using IBM's specialized technologies.[24]

In turn, the Companies assert that the District Court properly denied plaintiffs' motion for leave to amend their complaints because (1) plaintiffs cannot satisfy the ATS's territoriality and *mens rea* requirements; (2) corporations cannot be sued under the ATS; and (3) there is no aiding and abetting liability under the ATS.

II. Jurisdiction Under the ATS

Our inquiry begins by assessing whether the ATS grants us jurisdiction over plaintiffs' action. The Alien Tort Statute contains numerous jurisdictional predicates, each of which must be satisfied before a court may properly assume jurisdiction over an ATS claim.[25] Thus, at the outset, a court must assure itself that: "(1) the complaint pleads a violation of the law of nations; (2) the presumption against the extraterritorial application of the ATS, announced by the Supreme Court in *Kiobel* [*II*], does not bar the claim; (3) customary international law recognizes [the asserted] liability [of a] defendant; and (4) the theory of liability alleged by plaintiffs (*i.e.*, aiding and

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[23] Appellants' Br. 11-12.

[24] *Id.* at 13.

[25] *Mastafa*, 770 F.3d at 179.

abetting, conspiracy) is recognized by customary international law [or 'the law of nations'].'"[26] And while a defect in any of these jurisdictional predicates would be fatal to a plaintiff's claims, courts retain discretion regarding the order and manner in which they undertake these inquiries.[27]

Here, we begin by addressing the question of whether plaintiffs, in their proposed amended complaints, allege sufficient conduct to displace the ATS's presumption against extraterritoriality. Because we agree with the District Court's conclusion that they do not, we need not address the other jurisdictional predicates.[28]

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[26] *Id.* (internal citations omitted).

[27] *Id.*

[28] Though we dispose of plaintiffs' claims on other jurisdictional grounds, we note that plaintiffs fail to surmount another obstacle as well: they cannot establish jurisdiction under the ATS for claims against corporations. As previously discussed, the Supreme Court's decision in *Kiobel II* explicitly did not reach the corporate liability issue and did not modify the precedent of this Circuit that "corporate liability is not recognized as a 'specific, universal, and obligatory norm' . . . [and] is not a rule of customary international law that we may apply under the ATS." *Kiobel I*, 621 F.3d at 145 (internal citation omitted).

We need not delve deeply into the corporate liability question here to note the obvious error of the District Court in its holding that the Supreme Court in *Kiobel II* overturned our Court's holding in *Kiobel I*. *See In re South African Apartheid Litig.*, 15 F.Supp.3d 454, 460-61 (S.D.N.Y. 2014). There is no authority for the proposition that when the Supreme Court affirms a judgment on a different ground than an appellate court it thereby overturns the holding that the Supreme Court

(Continued on following page)

A. ATS and the Presumption Against Extraterritoriality

As noted above, the Supreme Court in *Kiobel II* made clear that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign nation other than the United States.[29] The Court explained that it was dismissing the plaintiffs' claims because "all the relevant conduct took place outside the United States."[30] The wholly extraterritorial nature of the *Kiobel* plaintiffs' claims was "a dispositive fact" for the *Kiobel II* Court and so it had no reason to explore how courts should proceed where, as here, some of the "relevant conduct" occurred in the United States.[31]

In *Mastafa v. Chevron Corporation*, we applied the Supreme Court's rulings in *Morrison v. National Australia Bank Limited*[32] and *Kiobel II* to clarify that the "focus" of the ATS inquiry is on the nature and location of the conduct constituting the alleged offenses under the law of nations.[33] Accordingly, to

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has chosen not to address. To hold otherwise would undermine basic principles of *stare decisis* and institutional regularity.

[29] 133 S. Ct. at 1669.

[30] *Id.* at 1669.

[31] *Balintulo I*, 727 F.3d at 191.

[32] 561 U.S. 247 (2010) (after determining that the presumption against extraterritoriality applied to the Securities Exchange Act of 1934, the Court then determined which "territorial event[s]" or "relationship[s]" were the "focus" of the Act).

[33] *Mastafa*, 770 F.3d at 185-86.

determine whether specific claims can be brought under the ATS, a court must isolate the "relevant conduct" of a defendant – conduct that is alleged to be either a direct violation of the law of nations or the aiding and abetting of another's violation of the law of nations – in a complaint and then conduct a two-step jurisdictional analysis.

Step one is a determination of whether that "relevant conduct" sufficiently "touches and concerns" the United States so as to displace the presumption against extraterritoriality. Step two is a determination of whether that *same* conduct states a claim for a violation of the law of nations or aiding and abetting another's violation of the law of nations.[34]

In order to satisfy the second step of this analysis, a plaintiff stating a claim under an aiding and abetting theory must demonstrate that the defendant "'(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.'"[35] The *mens rea* standard for accessorial liability in ATS actions is

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[34] *Id.* at 186.

[35] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (quoting and adopting the reasoning of Judge Katzmann's concurrence in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007), which laid out the standard for a plaintiff to plead a theory of aiding and abetting liability under the ATS).

"purpose rather than knowledge alone."[36] Knowledge of or complicity in the perpetration of a crime – without evidence that a defendant purposefully facilitated the commission of that crime – is thus insufficient to establish a claim of aiding and abetting liability under the ATS.[37]

B. Analysis of Plaintiffs' Complaints

Turning to the complaints in the instant case, plaintiffs assert that the following conduct by defendant Ford is sufficient to displace the ATS's presumption against extraterritoriality: (1) Ford provided specialized vehicles to the South African security forces that enabled these forces to violently suppress opposition to apartheid;[38] and (2) Ford was responsible for aiding and abetting the suppression of its own workforce in South Africa.[39]

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[36] *Id.* at 259.

[37] *Mastafa*, 770 F.3d at 192 ("Accordingly, the defendant's 'complicity' in the government's abuses in *Presbyterian Church*, without more, was insufficient to establish a claim of aiding and abetting or conspiracy under the ATS."); *Presbyterian Church*, 582 F.3d at 263 ("It is therefore not enough for plaintiffs to establish Talisman's complicity in depopulating areas in or around the Heglig and Unity camps: plaintiffs must establish that Talisman acted with the purpose to assist the Government's violations of customary international law.").

[38] Appellants' Br. 36; *see also* J.A. 507, 513-17, 551.

[39] Appellants' Br. 37 n.16; *see also* J.A. 521-22.

As for IBM, plaintiffs allege that (1) IBM employees trained employees of the South African government on how to use their hardware and software to create identity documents – "the very means by which black South Africans were deprived of their South African nationality";[40] (2) IBM bid on contracts in South Africa with unlawful purposes such as denationalizing black South Africans;[41] and (3) IBM designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans.[42]

In *Balintulo I*, we reasoned that the Companies' alleged domestic conduct lacked a clear nexus to the human rights abuses occurring in South Africa.[43] Here too, plaintiffs' amended pleadings do not establish federal jurisdiction under the ATS because they do not plausibly allege that the Companies themselves engaged in any "relevant conduct" within the United States to overcome the presumption against extraterritorial application of the ATS.

1. Allegations Against Ford

Beginning with the allegations against Ford, plaintiffs only allege "relevant conduct" that occurred in South Africa, thus failing to satisfy step one of

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[40] Appellants' Br. 35; *see also* J.A. 547.

[41] Appellants' Br. 34; *see also* J.A. 528, 534, 544, 546-48.

[42] Appellants' Br. 34-35; *see also* J.A. 535, 546-47.

[43] 727 F.3d at 192.

Mastafa's two-step jurisdictional analysis.[44] It was Ford's subsidiary in South Africa, not Ford, that is alleged to have assembled and sold the specialized vehicles to South Africa's government, with parts shipped principally from Canada and the United Kingdom – not from the United States.[45] Similarly, it was Ford's South African subsidiary, not Ford, that allegedly provided information to the apartheid government about anti-apartheid activists in South Africa.[46] Although plaintiffs repeatedly allege – no less than six times in their proposed amended complaint[47] – that Ford controlled their South African subsidiary, we have previously rejected a vicarious liability theory based on allegations materially identical to those asserted here.[48]

Plaintiffs contend that their amended pleadings demonstrate that the Companies controlled their South African subsidiaries from the United States

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[44] *See Mastafa*, 770 F.3d at 186.

[45] J.A. 506-07, 514.

[46] J.A. at 519-21.

[47] J.A. at 455-68.

[48] *Balintulo I*, 727 F.3d at 192 (holding that because the complaint alleged only actions taken within South Africa by defendants' South African subsidiaries and because these "putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law – that is, because the asserted violation[s] of the law of nations occurr[ed] outside the United States – the defendants cannot be *vicariously liable* for that conduct under the ATS" (internal quotation marks and citation omitted)).

such that they could be found directly – and not just vicariously – liable for their subsidiaries' conduct under the ATS. But holding Ford to be directly responsible for the actions of its South African subsidiary, as plaintiffs would have us do, would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities.[49] While courts occasionally "pierce the corporate veil" and ignore a subsidiary's separate legal status, they will do so only in extraordinary circumstances, such as where the corporate parent excessively dominates its "subsidiary in such a way as to make it a 'mere instrumentality' of the parent."[50]

Here, plaintiffs present no plausible allegations – indeed, they present no allegations – that would form any basis for us to "pierce [Ford's] corporate veil."[51] The complaints do not suggest that Ford's control over its subsidiaries differed from that of most companies headquartered in the United States with subsidiaries abroad. Allegations of general corporate supervision are insufficient to rebut the presumption against territoriality and establish aiding and abetting liability under the ATS.

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[49] *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993) ("Generally speaking, a parent corporation and its subsidiary are regarded as legally distinct entities.").

[50] *New York State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 224 (2d Cir. 2014).

[51] *Id.*

2. Allegations Against IBM

Plaintiffs' first allegation against IBM also fails because the "relevant conduct" all occurred within South Africa and so they cannot satisfy step one of *Mastafa*'s two-step jurisdictional analysis.[52] Just as in the case of Ford, it is IBM's South African subsidiary – not IBM – that is alleged to have trained South African government employees to use IBM hardware and software to create identity materials.[53] These allegations cannot rebut the presumption against extraterritoriality as they do not sufficiently "tie[ ] the relevant human rights violations to actions taken within the United States."[54]

Plaintiffs' second allegation against IBM – that the company bid on contracts meant to further the denationalization of South African blacks – falls short of alleging a violation of the law of nations for a simple reason: IBM did not win the contract for the only bid specifically alleged to have been made by IBM, rather than IBM's South African subsidiary.[55] Indeed, even according to plaintiffs, another company, ICL, won the passbooks contract over IBM.[56] It is simply not a violation of the law of nations to bid on, and lose, a contract that arguably would help a

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[52] *See Mastafa*, 770 F.3d at 186.

[53] J.A. 547; *see also* J.A. 446.

[54] *Balintulo I*, 727 F.3d at 192.

[55] J.A. 528.

[56] J.A. at 169-70, 258.

sovereign government perpetrate an asserted violation of the law of nations.

Plaintiffs final allegation against IBM, on the other hand, appears to "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality. Their proposed amended complaint reads, in relevant part, as follows:

> In the United States, IBM developed both the hardware and the software – both a machine and a program – to create the Bophuthatswana ID. Once IBM had developed the system, it was transferred to the Bophuthatswana government for implementation.[57]

Identity documents, like those allegedly created by IBM and transferred to the Bophuthatswana government, were an essential component of the system of racial separation in South Africa.[58] And so, designing

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[57] J.A. at 546.

[58] Appellant's Br. 8-9. Bophuthatswana was a Bantustan, a territory set aside by the South African government for particular ethnic groups. *Id.* Given the outcome of our analysis, we need not reach the question of whether plaintiffs' allegations regarding racial separation systems in South Africa constitute a violation of the law of nations. *Cf. Mastafa*, 770 F.3d at 181 (undertaking that analysis in the context of crimes allegedly committed by the Saddam Hussein regime). Of course, whether a violation of the law of nations has indeed occurred is an independent jurisdictional predicate, *see* infra n.27 and accompanying text, and one inextricably intertwined with the extraterritoriality analysis that we conduct here.

particular technologies in the United States that would facilitate South African racial separation would appear to be both "specific and domestic"[59] conduct that would satisfy the first of the two steps of our jurisdictional analysis.[60] Accordingly, if this allegation is able to also satisfy the second prong of our extraterritoriality inquiry – that is, if such conduct aided and abetted a violation of the law of nations – the presumption against extraterritoriality would be displaced and we would be able to establish jurisdiction for this particular claim under the ATS.

Upon an initial review of the "relevant conduct" in the complaint, however, we conclude that plaintiffs' claim against IBM does not meet the *mens rea* requirement for aiding and abetting liability established by our Court. While the complaint must "support [ ] an inference that [IBM] acted with the 'purpose' to advance [South Africa's] human rights abuses,"[61] it plausibly alleges, at most, that the company acted with knowledge that its acts might facilitate the South African government's apartheid policies. But, as we noted earlier, mere knowledge

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[59] *Mastafa*, 770 F.3d at 191.

[60] *See* supra II.A.; *see also Mastafa*, 770 F.3d at 191 (finding multiple domestic purchases and financing transactions by one defendant and numerous domestic payments and "financing arrangements" by another defendant to be sufficiently "specific and domestic" to satisfy the first prong of the jurisdictional analysis).

[61] *Presbyterian Church*, 582 F.3d at 260.

without proof of purpose is insufficient to make out the proper *mens rea* for aiding and abetting liability.[62]

Moreover, where the language in the complaint seems to suggest that IBM acted purposefully,[63] "it does so in conclusory terms and fails to establish even a baseline degree of plausibility of plaintiffs' claims."[64] A complaint will not "suffice if it tenders naked assertions devoid of further factual enhancement."[65] Indeed, plaintiffs do not – and cannot – plausibly allege that by developing hardware and software to collect innocuous population data, IBM's purpose was to denationalize black South Africans and further the aims of a brutal regime.[66] This absence of a connection between IBM's "relevant conduct" and the alleged

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[62] *See Mastafa*, 770 F.3d at 192-94.

[63] *See, e.g.*, J.A. 534.

[64] *Mastafa*, 770 F.3d at 194.

[65] *Iqbal*, 556 U.S. at 678 (quotation marks, brackets, and citation omitted).

[66] *See Mastafa*, 770 F.3d at 194 ("Plaintiffs never elaborate upon [a similarly conclusory] assertion in any way that establishes the plausibility of a large international corporation intending – and taking deliberate steps with the purpose of assisting – the Saddam Hussein regime's torture and abuse of Iraqi persons."); *see also Kiobel*, 621 F.3d at 192 (Leval, *J.*, concurring in the judgment) ("[The complaint] pleads also in conclusory form that the Nigerian military's campaign of violence against the [victim-plaintiffs] was 'instigated, planned, facilitated, conspired and cooperated in' by [defendant corporation]. Such pleadings are merely a conclusory accusation of violation of a legal standard and do not withstand the test of *Twombly* and *Iqbal*.").

human rights abuses of the South African government means that plaintiffs, even if allowed to amend their complaint, will be unable to state a valid ATS claim against IBM.

Accordingly, because plaintiffs fail plausibly to plead that any U.S.-based conduct on the part of either Ford or IBM aided and abetted South Africa's asserted violations of the law of nations, their claims cannot form the basis of our jurisdiction under the ATS. We therefore affirm the District Court's denial of plaintiffs' motion for leave to file an amended complaint because the proposed amendments are futile as a matter of law.

CONCLUSION

To summarize, we hold that:

(1) Knowledge of or complicity in the perpetration of a crime under the law of nations (customary international law) – absent evidence that a defendant purposefully facilitated the commission of that crime – is insufficient to establish a claim of aiding and abetting liability under the ATS.

(2) It is not a violation of the law of nations to bid on, and lose, a contract that arguably would help a sovereign government perpetrate an asserted violation of the law of nations.

(3) Allegations of general corporate supervision are insufficient to rebut the presumption

against extraterritoriality and establish aiding and abetting liability under the ATS.

(4) Here, plaintiffs' amended pleadings do not establish federal jurisdiction under the ATS because they do not plausibly allege that the Companies themselves engaged in any "relevant conduct" within the United States to overcome the presumption against extraterritorial application of the ATS.

a. Holding Ford to be directly responsible for the actions of its South African subsidiary, as plaintiffs would have us do, ignores well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities.

b. Plaintiffs have plausibly alleged some specific, domestic conduct in the complaint – namely, that IBM designed particular technologies in the United States that facilitated South African apartheid. This conduct satisfies the first prong of our extraterritoriality analysis as it "touches and concerns" the United States.

c. Plaintiffs' complaint against IBM fails on the second prong of the required jurisdictional analysis: it does not plausibly allege that IBM's conduct purposefully aided and abetted South Africa's alleged violations of customary international law.

d. Accordingly, the alleged conduct cannot state a claim for aiding and abetting liability under the ATS and cannot form the basis for our jurisdiction.

(5) Because we decide the case on the basis of the presumption against extraterritoriality, we need not address whether plaintiffs' complaint satisfies the ATS's other jurisdictional predicates, including whether the complaint pleads a violation of the law of nations; whether customary international law recognizes the asserted liability of the Companies; and whether the theory of liability alleged by plaintiffs is recognized by customary international law.

For the reasons set forth above, we **AFFIRM** the August 28, 2014 order of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOUTH AFRICAN APARTHEID LITIGATION	**OPINION AND ORDER** (Filed Aug. 28, 2014)
This Document Relates to:	**02 MDL 1499 (SAS)**
LUNGISILE NTSEBEZA, *et al.*, **Plaintiffs,** **- against -** **FORD MOTOR COMPANY, and INTERNATIONAL BUSINESS MACHINES CORPORATION,** **Defendants.**	**02 Civ. 4712 (SAS)** **02 Civ. 6218 (SAS)** **03 Civ. 1024 (SAS)**
SAKEWE BALINTULO, *et al.*, **Plaintiffs,** **- against -** **FORD MOTOR COMPANY, and INTERNATIONAL BUSINESS MACHINES CORPORATION,** **Defendants.**	**03 Civ. 4524 (SAS)**

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

This case arises out of allegations that various corporations aided and abetted violations of customary international law committed by the South African apartheid regime. The remaining plaintiffs are members of two putative classes of black South Africans who were victims of apartheid-era violence and discrimination. Plaintiffs seek relief under the Alien Tort Statute ("ATS"), which confers federal 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.[1] The remaining defendants – Ford Motor Company ("Ford") and International Business Machines Corporation ("IBM") – are American corporations accused of aiding and abetting violations of the ATS by manufacturing military vehicles and computers for South African security forces. Plaintiffs move for leave to amend their complaints. For the following reasons, plaintiffs' motion is DENIED.

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[1] 128 U.S.C. § 1350.

II. BACKGROUND[2]

A. Procedural History

On April 8, 2009, I granted several defendants' motions to dismiss, but ruled that plaintiffs may proceed against Ford and IBM, as well as Rheinmettal AG and Daimler AG (the "April 8 Opinion and Order"). On August 14, 2009, defendants sought a writ of mandamus in the United States Court of Appeals for the Second Circuit to obtain interlocutory review of certain issues in the April 8 Opinion and Order.

On September 17, 2010, while this case remained pending, a split panel of the Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.* that the ATS does not confer jurisdiction over claims against corporations, and dismissed the ATS claims of Nigerian nationals who alleged that various corporations aided and abetted customary international law violations in Nigeria ("*Kiobel I*).[3] The Second Circuit's decision in

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[2] The complicated factual and procedural history of this litigation, which started with more than a dozen distinct cases of which two (the *Balintulo* case, and the *Ntsebeza* case, consisting of three consolidated actions) still remain, is summarized at length in *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 241-45 (S.D.N.Y. 2009), *Balintulo v. Daimler AG*, 727 F.3d 174, 182-85 (2d Cir. 2013), and *In re South African Apartheid Litig.*, No. 02 MDL 1499, 2014 WL 1569423, at *1-3 (Apr. 17, 2014). The following discussion is limited to the facts pertinent to this motion

[3] *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148 (2d Cir. 2010) ("*Kiobel I*") (Cabranes, J. and Jacobs, C.J.) (Leval,

(Continued on following page)

this case was stayed pending the resolution of *Kiobel* in the Supreme Court. On April 17, 2013, after two rounds of briefing and oral argument, the Supreme Court affirmed the judgment of dismissal in *Kiobel* without addressing the issue of corporate liability ("*Kiobel II*"). Rather, the Supreme Court held that the "presumption against extraterritoriality applies to claims under the ATS" and bars actions "for violations of the law of nations occurring outside the United States."[4]

On April 19, 2013, two days after *Kiobel II*, the Second Circuit directed the parties in this case to provide supplemental briefing on the impact of the Supreme Court's decision. On August 21, 2013, the court denied defendants' request for a writ of mandamus and remanded to the district court. The court stated that"[t]he opinion of the Supreme Court in *Kiobel* [*II*] plainly bar[red] common-law suits like this one, alleging violations of customary international law based solely on conduct occurring abroad."[5] Applying the Supreme Court's holding in *Kiobel II*, the Second Circuit concluded that the ATS does not "recognize causes of action based solely on conduct occurring within the territory of another sovereign,"

J. concurring in the judgment of the court to dismiss the complaint but filing separate opinion accepting corporate liability under the ATS).

[4] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2012) ("*Kiobel II*").

[5] *Balintulo*, 727 F.3d at 182.

and that plaintiffs' suit should be dismissed "[b]ecause the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law."[6] On November 7, 2013, the court denied plaintiffs' petition for panel rehearing and rehearing en banc.

Following denial of en banc review, defendants asked this Court to enter judgment in their favor based on the Second Circuit's directive, and based on their view that there is no corporate liability for ATS claims based on the Second Circuit decision in *Kiobel I*. Plaintiffs sought leave to amend their complaints, arguing that the Second Circuit's decision in *Balintulo* was based on complaints drafted before *Kiobel II* and that plaintiffs are entitled to an opportunity to allege additional facts that might show that some of the alleged wrongful conduct "'touch[es] and concern[s]'" the United States with "'sufficient force'" to overcome the presumption against extraterritorial application of the ATS.[7] Plaintiffs also maintained that corporations are proper defendants because the Supreme Court implicitly overturned the Second Circuit's decision in *Kiobel I* finding no corporate liability under the ATS.

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[6] *Id.* at 192.

[7] 11/26/13 Letter from Diane E. Sammons, counsel for plaintiffs to the Court, at 2 (quoting *Kiobel*, 133 S. Ct. at 1669).

On December 26, 2013, I dismissed the remaining foreign defendants – Rheinmettal AG and Daimler AG – because "plaintiffs have failed to show that they could plausibly plead that the[ir] actions . . . touch and concern the United States with sufficient force to rebut the presumption against the extraterritorial reach of the ATS."[8] I also ordered the remaining parties to fully brief the question of whether corporations can be held liable under the ATS following the Supreme Court's decision in *Kiobel II*. On April 17, 2014, I held that because the Supreme Court implicitly overruled the Second Circuit's decision in *Kiobel I*, the question of corporate liability remained open in the Second Circuit,[9] and concluded that actions under the ATS can be brought against corporations.[10] I permitted plaintiffs to move for leave to amend against the remaining American defendants, in which they would have to plead "that those defendants engaged in actions that 'touch and concern' the United

[8] *In re South African Apartheid Litig.*, No. 02 MDL 1499, 2013 WL 6813877, at *2 (Dec. 26, 2013).

[9] *See In re South African Apartheid Litig.*, 2014 WL 1569423, at *5 (citing *Licci ex rel. Licci v. Lebanese Canadian Bank SAL*, 732 F.3d 161, 174 (2d Cir. 2013) and *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014) (Pooler, J., concurring)).

[10] *See id.* at *8-9 (citing *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017-19 (7th Cir. 2011)).

States with sufficient force to overcome the presumption against the extraterritorial reach of the ATS."[11]

B. Factual History[12]

1. Allegations Against IBM

IBM is a United States corporation headquartered in New York.[13] IBM South Africa was a wholly

[11] *Id.* at *9. Plaintiffs were also permitted to allege new facts showing "that those defendants acted not only with knowledge but with the purpose to aid and abet the South African regime's tortious conduct." *Id.* This heightened *mens rea* requirement for aiding and abetting liability under the ATS was established by *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). Because plaintiffs have failed to show that they could plausibly plead facts to overcome the presumption against extraterritoriality, I will not address whether the proposed amended complaint meets the extraordinarily high *Talisman Energy* standard.

[12] For purposes of this section, I will discuss only the facts underlying plaintiffs' aiding and abetting claims against Ford and IBM. I will not discuss, in detail, the general history of the apartheid regime or the primary violations alleged by plaintiffs, as these facts are fully laid out in previous opinions. The facts are drawn from Plaintiffs' Memorandum of Law in Support of the Motion for Leave to File Amended Complaints ("Pl. Mem.") and the proposed amended complaints ("Prop. Balintulo Compl." and "Prop. Ntsebeza Compl."). Well-pleaded factual allegations are presumed true for the purposes of this motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, allegations in the proposed amended complaints that consist of conclusory statements or threadbare recitals of causes of action are not entitled to the presumption of truth. *See Kirkendall v. Halliburton*, 707 F.3d 173, 175 n.1 (2d Cir. 2013).

[13] *See* Prop. Balintulo Compl. ¶ 136 and Prop. Ntsebeza Compl. ¶ 122.

owned subsidiary of IBM.[14] Plaintiffs allege that IBM, through its South African subsidiary, "intentionally developed and provided computer technology, systems, software, training, and support to purposefully facilitate and enable the apartheid government's control of the majority black population, including the physical separation of the races."[15] For example, IBM's South African subsidiary "purposely pursued contracts that supported the implementation of apartheid, including the 'Book of Life' and the Bantustan identity documents."[16]

Nevertheless, plaintiffs allege that "[a]t all relevant times, the code of business conduct, standards, and values for IBM directors, executive officers, and employees globally were set by IBM in the United States."[17] "IBM in the United States made key decisions about operations in South Africa, including

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[14] *See* Prop. Balintulo Compl. ¶ 135 and Prop. Ntsebeza Compl. ¶ 125.

[15] Prop. Ntsebeza Compl. ¶ 135. *Accord* Prop. Balintulo Compl. ¶ 171.

[16] Pl. Mem. at 14. The "Book of Life" was a mandatory passbook that "contained assorted information including racial classification, name, sex, date of birth, residence, photograph, marital status, driver license number, dates of travel . . . , place of work or study, and finger prints." *Id.* at 16. Bantustans were "independent" territories created in order to strip black South Africans of their citizenship, "impos[ing] new identity documents and passports on those who were denationalized." *Id.* at 14. *Accord* Prop. Balintulo Compl. ¶¶ 171-201 and Prop. Ntsebeza Compl. ¶¶ 139-160.

[17] Pl. Mem. at 6.

investments, policy, management, bids and contracts, hardware and software products and customization, as well as services and maintenance."[18] "IBM did not have research and development or manufacturing facilities in South Africa. Rather, IBM, in the United States, conducted the research and development for the hardware and software that supported the apartheid systems."[19]

Plaintiffs further allege that "[i]n the United States, IBM opposed shareholder resolutions related to divestment and advocated for a sanctions regime that would allow it to support the South African government's implementation and enforcement of apartheid, thereby interfering with U.S. foreign policy."[20] "IBM repeatedly misled the U.S. government and its own shareholders about the true nature of its activities in South Africa to circumvent domestic criticism."[21] Finally, "[a]lthough IBM formally withdrew from South Africa in 1987, it intentionally continued its support for apartheid and denationalization" by selling its South African subsidiary to another company, who in essence, continued to operate as an alter ego, and to use products with IBM's patents.[22] In sum, plaintiffs allege that "IBM pursued

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[18] Prop. Ntsebeza Compl. ¶ 127.

[19] *Id*. ¶ 131.

[20] Pl. Mem. at 8-9.

[21] *Id.* at 10

[22] Pl. Mem. at 17-18.

business in South Africa in a manner directly contrary to the intent of the U.S. embargo and sanctions regime, as well as international law."[23]

2. Allegations Against Ford

"Ford is an American multinational automaker incorporated in the United States and based in Dearborn, Michigan."[24] "Ford Motor Company of South Africa Ltd ("Ford South Africa"). . . . was a wholly owned subsidiary of Ford Motor Company of Canada, Ltd. ("Ford Canada"), which was itself 76% owned by Ford."[25] "In 1985, Ford merged a subsidiary of Ford Canada with Amcar Motor Holdings, a unit of the Anglo American Corporation, to form the South African Motor Corporation ("SAMCOR"). After the merger, Ford had a 42% stake in SAMCOR."[26] Two years later, Ford sold its share in SAMCOR but "allowed SAMCOR to continue 'to use its trade name and . . . provided parts, vehicles, and management assistance."[27]

Ford, through Ford South Africa and SAMCOR, "had a long record of strategic vehicle and parts sales to the South African security forces during apartheid.

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[23] Prop. Ntsebeza Compl. ¶ 139.

[24] *Id.* ¶ 66.

[25] Pl. Mem. at 18.

[26] *Id.* at 18-19.

[27] *Id.* at 19. In 2000, Ford purchased a majority stakehold in SAMCOR, and renamed it Ford of South Africa. *See id.*

Ford's vehicles were used by the South African security forces to patrol African townships, homelands, and other areas, as well as to arrest, detain, and assault suspected dissidents, violators of pass laws, and other civilians."[28] "Despite [United States] prohibitions [on the sale of cars to South African security forces in 1978], Ford continued to supply vehicles . . . on the basis that the vehicles did not contain parts or technical data of U.S. origin.[29] Plaintiffs further allege that Ford sold "specialized" vehicles that "were more powerful than . . . other cars, and . . . were only made for the security forces."[30] Additionally, plaintiffs claim that "South African police and military regularly visited and entered the [South African] plants" and that "[e]mployees in the South African plants were disciplined . . . for anti-apartheid activities outside of work."[31]

Plaintiffs allege that Ford made "key decisions about investments, policy, and operations in South Africa" in the United States, even after "the tightening of U.S. trade sanctions in February 1978."[32]

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[28] Prop. Balintulo Compl. ¶ 251. For example, "[b]etween 1973 and 1977, Ford sold 128 cars and 683 trucks directly to the South African Ministry of Defense and 646 cars and 1,473 trucks to the South African police." Prop. Ntsebeza Compl. ¶ 84(B).

[29] Prop. Balintulo Compl. ¶ 258.

[30] Prop. Ntsebeza Compl. ¶ 84(F).

[31] Pl. Mem. at 24-25.

[32] *Id.* at 20. Plaintiffs allege certain specific examples, such as the transfer of management personnel between Ford offices in the United States, Europe, Canada, Asia and South Africa,

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"Ford's U.S. headquarters controlled its major global policies, which applied to South Africa, including employment policies, ethical business policies, and codes of conduct."[33] "Ford, in the United States, decided to and did oppose efforts in the United States and South Africa that would end sales to the South African Security forces, because doing otherwise might have harmed Ford's business interests."[34] "Ford sought to comply only with the technical letter of U.S. regulations but purposefully shifted supply chains outside the United States [to Canada and England, specifically] to circumvent their intent and deliberately support the apartheid government."[35]

III. APPLICABLE LAW

A. Leave to Amend

Whether to permit a plaintiff to amend a complaint is a matter " 'within the sound discretion of the

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infusion of capital into the South African subsidiary, United States design and development of products eventually sold in South Africa, maintenance of records on South African employees, and involvement in labor relations and negotiations with foreign plants. *See, e.g.*, Prop. Ntsebeza Compl. ¶¶ 71-76.

[33] Prop. Ntsebeza Compl. ¶ 75. For example, Ford "adopted the Sullivan Principles regarding operations in South Africa and claimed that it would implement the principles of non-segregation and equality of wages in its South African operations." *Id.* ¶ 73(B).

[34] *Id.*¶ 82.

[35] Pl. Mem. at 21.

district court.'"[36] Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires."[37] Leave to amend should be denied, however, where the proposed amendment would be futile.[38]

B. Presumption Against Extraterritorial Application of the ATS

The Supreme Court's decision in *Kiobel II* drastically limits the viability of ATS claims based on conduct occurring abroad. The Court concluded that "the presumption against extraterritoriality applies to claims under the ATS, [ ] that nothing in the statute rebuts that presumption[,] and [that the] petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred."[39] The Court justified its decision to affirm the Second Circuit's judgment by noting that "all the

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[36] *Franconero v. UMG Recordings*, Inc., 542 Fed. App'x 14, 17 (2d Cir. 2013) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)).

[37] Fed. R. Civ. P. 15(a).

[38] *See TechnoMarine SA v. Giftports, Inc.,* ___ F.3d ___, 2014 WL 3408570, at *9 (2d Cir. July 14, 2014) ("A plaintiff need not be given leave to amend if it fails to specify . . . how amendment would cure the pleading deficiencies in its complaint."). *See also Hayden v. County of Nassau*, 180 F.3d 42, 53-54 (2d Cir. 1999) ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied.").

[39] *Kiobel II*, 133 S. Ct. at 1669.

relevant conduct [in *Kiobel*] took place outside the United States."[40] However, the Court left open the possibility that certain "claims [may] touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" of the ATS.[41]

The operative terms in this discussion – "relevant conduct," "touch and concern," and "sufficient force" – are left undefined by the majority opinion, except a clarification that "it would reach too far to say that mere corporate presence suffices."[42] Two concurring opinions – one by Justice Alito, joined by Justice Thomas, and one by Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan – offer competing views. Under Justice Alito's view, the presumption against extraterritorial application can be rebutted *only* if conduct within the United States is itself "sufficient to violate an international law norm."[43] Under Justice Breyer's view, the presumption can be rebutted if "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest."[44]

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1670 (Alito, J., concurring).

[44] *Id.* at 1674 (Breyer, J., concurring).

The Second Circuit's opinion in *this* case – *Balintulo v. Daimler* – was the first court of appeals case to interpret these important terms. The court explicitly rejected Justice Breyer's formulation.[45] First, it concluded that "corporate citizenship" in the United States is an "irrelevant factual distinction[ ]," when "all of the relevant conduct occurred abroad."[46] Second, it concluded that "the compelling American interests in supporting the struggle against apartheid in South Africa" equally "miss the mark" because the presumption against extraterritoriality is a question of statutory interpretation, not judicial weighing of national interests.[47]

Finally, the court rejected plaintiffs' argument that defendants' control over its foreign subsidiaries or its "affirmative steps in this country to circumvent the sanctions regime," including "continu[ing] to supply the South African government with their products, notwithstanding various legal restrictions against trade with South Africa," are sufficient to tie[ ] the relevant human rights violations to actions taken within the United States."[48] The court concluded that such allegations could only make out a claim of "vicarious liability of the defendant corporations based on the actions taken *within* South Africa *by*

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[45] *See Balintulo*, 727 F.3d at 189.

[46] *Id.* at 190.

[47] *Id.* at 192.

[48] *Id.*

their South African subsidiaries" and "[d]efendants *cannot be vicariously liable* for that conduct under the ATS."[49] Thus, "the ATS does not . . . recognize causes of action based solely on conduct occurring within the territory of another sovereign . . . and does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign."[50] In sum, *Balintulo* requires plaintiffs to plead "relevant conduct within the United States" that itself "give rise to a violation of customary international law" – in other words, the position adopted by Justice Alito.[51]

IV. DISCUSSION

Despite plaintiffs' tenacious effort to revive this litigation, the bar set by the Supreme Court in *Kiobel II*, and raised by the Second Circuit in *Balintulo*, is too high to overcome. Defendants argue, and plaintiffs cannot plausibly deny, that while the newly proposed allegations are substantially more detailed and specific, the *theories* of the American corporations' liability are "essentially the same as those in plaintiffs' existing complaints."[52]

Plaintiffs argue that "the two U.S. corporations were integral to the creation, maintenance, and

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[49] *Id.* (emphasis added).

[50] *Id.*

[51] *Id.*

[52] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Leave to Amend Their Complaints, at 12.

enforcement of the apartheid regime – and its attendant international law violations" because "[c]ritical policy-level decisions were made in the United States, and the provision of expertise, management, technology, and equipment essential to the alleged abuses came from the United States."[53] Although now supported with detailed facts, this theory of liability was already rejected by the Second Circuit in *Balintulo* as establishing vicarious liability at most, and therefore being insufficient to overcome *Kiobel II*'s presumption against extraterritoriality. The *Balintulo* court also rejected plaintiffs' effort to tie the international law violations to the "affirmative steps" defendants "took . . . in this country to circumvent the sanctions regime."[54]

Plaintiffs urge this Court to reject *Balintulo* and follow a recent Fourth Circuit case, *Al-Shimari v. CACI Premier Technology, Inc.*[55] In *Al-Shimari*, the Fourth Circuit concluded that plaintiffs' claims against an American private military contractor for abuse and torture during their detention at Abu Ghraib "touched and concerned" the territory of the United States with sufficient force to rebut the presumption. The Fourth Circuit reached that conclusion

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[53] Plaintiffs' Reply Memorandum of Law in Support of Their Motion for Leave to Amend, at 3-5.

[54] *Balintulo*, 727 F.3d at 192 ("None of these [allegations] ties the relevant human rights violations to actions taken within the United States.").

[55] ___ F.3d ___, 2014 WL 2922840 (4th Cir. June 30, 2014).

because plaintiffs' allegations involved "the performance of a contract executed by a United States corporation with the United States government," "acts of torture committed by United States citizens who were employed by an American corporation. . . . at a military facility operated by United States government personnel," and "attempt[s] to 'cover up' the misconduct" by the contractors' managers located in the United States.[56] "In addition, the employees who allegedly participated in the acts of torture were hired . . . in the United States . . . and were required to obtain security clearances from the United States Department of Defense."[57]

Even apart from my obligation to follow *Balintulo* as controlling law in the Circuit and as the law of the case, the facts in *Al-Shimari* are clearly different than the facts in this case and involve much greater contact with the United States government, military, citizens, and territory. Here, any alleged violation of international law norms was inflicted by the South African subsidiaries over whom the American defendant corporations may have exercised authority and control. While corporations are typically liable in tort for the actions of their putative agents, the underlying tort must itself be actionable. However, plaintiffs have no valid cause of action against the South African subsidiaries under *Kiobel*

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[56] *Id.* at *9-10.

[57] *Id.* at *10.

II because all of the subsidiaries' conduct undisputedly occurred abroad. Thus, even the *Al-Shimari* court implicitly accepted *Balintulo*'s conclusion that ATS jurisdiction does not extend "to claims involving foreign conduct by [foreign] subsidiaries of American corporations."[58]

That these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow *Kiobel II* and *Balintulo*, no matter what my personal view of the law may be. Even if accepted as true, the "relevant conduct" alleged in plaintiffs' proposed amended complaints all occurred abroad. Thus, under the law of the Supreme Court and of the Second Circuit, the claims do not touch and concern the territory of the United States "with sufficient force to displace the presumption against extraterritorial application," and would not survive a motion to dismiss.[59]

V. CONCLUSION

For these reasons, plaintiffs' motion for leave to amend their complaints is DENIED. All remaining claims against Ford and IBM are DISMISSED with prejudice. The Clerk of the Court is directed to close this motion and these cases.

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[58] *Id.* ("The[ ] ties to the territory of the United States [in this case] are far greater than those considered recently by the Second Circuit in *Balintulo v. Daimler AG*.").

[59] *Kiobel II*, 133 S. Ct. at 1669.

SO ORDERED:

/s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
August 28, 2014

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOUTH AFRICAN APARTHEID LITIGATION	**OPINION AND ORDER** (Filed Apr. 17, 2014)
	02 MDL 1499 (SAS)
This Document Relates to:	
LUNGISILE NTSEBEZA, *et al.*, **Plaintiffs,** **- against -** **FORD MOTOR COMPANY, and INTERNATIONAL BUSINESS MACHINES CORPORATION,** **Defendants.**	**02 Civ. 4712 (SAS)** **02 Civ. 6218 (SAS)** **03 Civ. 1024 (SAS)**
SAKEWE BALINTULO, *et al.*, **Plaintiffs,** **- against -** **FORD MOTOR COMPANY, and INTERNATIONAL BUSINESS MACHINES CORPORATION,** **Defendants.**	**03 Civ. 4524 (SAS)**

SHIRA A. SCHEINDLIN, U.S.D.J.:

"*Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for shockingly egregious violations of universally recognized principles of international law.*" – Judge Judith W. Rogers, D.C. Circuit[1]

"*It is neither surprising nor significant that corporate liability hasn't figured in prosecutions of war criminals and other violators of customary international law. That doesn't mean that corporations are exempt from that law.*" – Judge Richard Posner, Seventh Circuit[2]

I. INTRODUCTION

This case arises out of allegations that various corporations aided and abetted violations of customary international law committed by the South African apartheid regime.[3] The remaining plaintiffs are members

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[1] *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013) (quotations omitted).

[2] *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011).

[3] The lengthy and complicated factual and procedural history of this action, which started with more than a dozen

(Continued on following page)

of two putative classes of black South Africans who were victims of apartheid-era violence and discrimination. Plaintiffs seek relief under the Alien Tort Statute ("ATS"), which confers federal 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."[4] The remaining defendants – Ford Motor Company ("Ford") and International Business Machines Corporation ("IBM") – are American corporations accused of aiding and abetting violations of the ATS by manufacturing military vehicles and computers for South African security forces.

II. BACKGROUND

On April 8, 2009, I granted several defendants' motions to dismiss, but ruled that plaintiffs may proceed against the other defendants named above, as well as Rheimattal AG and Daimler AG (the "April 8 Opinion and Order"). On August 14, 2009, defendants sought a writ of mandamus in the United States Court of Appeals for the Second Circuit to obtain interlocutory review of certain issues in the April 8 Opinion and Order.

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distinct cases of which two still remain, is summarized in *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 241-45 (S.D.N.Y. 2009) and *Balintulo v. Daimler AG*, 727 F.3d 174, 182-85 (2d Cir. 2013).

[4] 28 U.S.C. § 1350.

On September 17, 2010, while the Second Circuit's decision in this case was pending, another panel of the Second Circuit issued a split decision in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"). In the majority opinion written by Judge Jose Cabranes, the court held that the ATS does not confer jurisdiction over claims against corporations, and dismissed the ATS claims of Nigerian nationals who alleged that various corporations aided and abetted customary law violations in Nigeria.[5]

On February 28, 2012, the United States Supreme Court granted certiorari on the question of corporate liability under the ATS and heard oral arguments.[6] After oral arguments, the Court directed the parties to file supplemental briefing on a second question – "whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring" outside the United States.[7] On October 1, 2012, the Court heard oral arguments again. On April 17, 2013, the Supreme Court issued an opinion affirming the Second Circuit's judgment ("*Kiobel II*"). However, it decided the case "based on . . . the second question"

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[5] *See* 621 F.3d 111, 148 (2d Cir. 2010) ("*Kiobel I*") (Cabranes, J. and Jacobs, C.J.) (Leval, J. concurring in the judgment of the court to dismiss the complaint but filing separate opinion accepting corporate liability under the ATS).

[6] *See* 132 S. Ct. 472 (2011).

[7] 132 S. Ct. 1738 (2012).

and ruled that the "presumption against extraterritoriality applies to claims under the ATS."[8] The Court did not address the issue of corporate liability under the ATS.

The present case remained unresolved in the Second Circuit while the Supreme Court's decision in *Kiobel II* was pending. On April 19, 2013, two days after *Kiobel II*, the Second Circuit directed the parties in this case to provide supplemental briefing on the impact of the Supreme Court's decision. On August 21, 2013, the court denied defendants' request for a writ of mandamus and remanded to the district court. The court stated that because "[t]he opinion of the Supreme Court in *Kiobel* [*II*] plainly bar[red] common-law suits like this one, alleging violations of customary international law based solely on conduct occurring abroad, . . . defendants will be able to obtain . . . dismissal of all claims . . . through a motion for judgment on the pleadings."[9] On November 7, 2013, the court denied plaintiffs' petition for panel rehearing and rehearing en banc.

Following denial of en banc review, the parties submitted several letters to this court.[10] Defendants asked the court to enter judgment in their favor

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[8] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2012) ("*Kiobel II*").

[9] *Balintulo*, 727 F.3d at 182.

[10] These letters are summarized in *In re South African Apartheid Litig.*, No. 02 MDL 1499, 2013 WL 6813877, at *1-2 (Dec. 26, 2013).

based on the Second Circuit's directive, and based on their view that there is no corporate liability for ATS claims in the Second Circuit after *Kiobel I*. Plaintiffs sought leave to amend their complaint, arguing that the Second Circuit's decision was based on a complaint drafted before *Kiobel II* and that plaintiffs are entitled to an opportunity to allege additional facts that might show that some of the alleged wrongful conduct "'touch[es] and concern[s]'" the United States with "'sufficient force'" to overcome the presumption against extraterritorial application of the ATS.[11] Plaintiffs also maintained that corporations are proper defendants because the Supreme Court's decision in *Kiobel II* implicitly overturned the Second Circuit's decision in *Kiobel I* finding no corporate liability under the ATS.[12]

On December 26, 2013, I dismissed the remaining foreign defendants – Rheimattal AG and Daimler AG – because "plaintiffs have failed to show that they could plausibly plead that the[ir] actions . . . touch and concern the United States with sufficient force to rebut the presumption against the extraterritorial reach of the ATS."[13] I ordered the remaining parties to fully brief the question of whether corporations can be held liable under the ATS following the Supreme

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[11] 11/26/13 Letter from Diane E. Sammons, counsel for plaintiffs to the Court, at 2 (quoting *Kiobel II*, 133 S. Ct. at 1669).

[12] *See id.* at 1-2.

[13] *Id.* at 2.

Court's decision in *Kiobel II*.[14] That issue is the subject of this Opinion and Order.

III. DISCUSSION

A. The Question of Corporate Liability for ATS Claims Remains Open in the Second Circuit

The Supreme Court did not reach the issue of corporate liability in *Kiobel II*. The parties strongly disagree about whether *Kiobel I* remains binding law. Plaintiffs argue that the Supreme Court's decision in *Kiobel II* "directly conflicts" with and "casts serious doubts on the viability" of *Kiobel I*.[15] Plaintiffs maintain that "in reaching the merits issue of extraterritoriality . . . the Supreme Court took subject matter jurisdiction over the corporate defendant . . . which disregarded and contradicted the core holding of *Kiobel I*."[16] Plaintiffs further contend that *Kiobel II* "elucidates its intention to allow claims against corporations to proceed" by stating in dicta that "mere corporate presence" cannot suffice to overcome the presumption against extraterritoriality, suggesting that corporations *can* be liable under the ATS

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[14] *See Id*.

[15] 1/24/14 Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for an Order Finding Corporate Liability Under the Alien Tort Statute ("Pl. Mem."), at 5.

[16] *Id.*

upon a showing sufficient to overcome the presumption against extraterritoriality.[17]

Defendants disagree with plaintiffs' argument that the Supreme Court decided extraterritoriality as a merits question. In sum, defendants contend that "[t]he Supreme Court's express refusal to reach [the] issue [of corporate liability] cannot cast doubt on the lower court's ruling on that issue."[18] Rather, "the Court's decision to affirm on alternative grounds leaves the unaddressed holding intact."[19]

1. *Kiobel II*

Although the Supreme Court initially granted certiorari and heard oral argument on the issue of corporate liability, *Kiobel II* makes no mention of the issue. Rather, the Court "conclude[d] that the presumption against extraterritor[ial] [application of American laws] applies to claims under the ATS" and is not rebutted by the text, history or purposes of the statute.[20] The Court ruled that the presumption against extraterritorial application is so weighty that

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[17] 2/28/14 Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Motion for an Order Finding Corporate Liability Under the Alien Tort Statute, at 5.

[18] 2/14/14 Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for an Order Finding Corporate Liability Under the Alien Tort Statute ("Def. Opp."), at 7.

[19] *Id.*

[20] *See Kiobel II*, 133 S. Ct. at 1669.

"even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace [it]."[21] The Court clarified that because "[c]orporations are often present in many countries, . . . it would reach too far to say that mere corporate presence suffices" to overcome the presumption.[22]

2. Subsequent Case Law

a. Supreme Court

On January 14, 2014, the Supreme Court issued an opinion in *Daimler AG v. Bauman*, an ATS case arising from allegations that Daimler "collaborated with state security forces to kidnap, detain, torture, and kill" plaintiffs or plaintiffs' families during Argentina's "Dirty War" of the late 1970s and early 1980s.[23] The Court concluded that Daimler's contacts with California were insufficient to subject it to personal jurisdiction under California's long-arm statute, because a corporation's "'affiliations with the State' must be 'so continuous and systematic' as to render [it] essentially at home in the forum State."[24] While *Daimler* noted that plaintiffs' ATS claims were

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[21] *Id*.

[22] *Id*.

[23] 134 S. Ct. 746, 751 (2014).

[24] *Id.* at 761 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (other quotations omitted)).

"infirm" in light *of Kiobel II*'s holding on extraterritoriality, the Court made no reference to corporate liability, despite addressing the question of personal jurisdiction over a corporation in an ATS case.[25]

b. Second Circuit

The Second Circuit has addressed *Kiobel II*'s impact on corporate liability under the ATS on two occasions. On October 18, 2013, Judge Robert Sack noted in *Licci ex rel. Licci v. Lebanese Canadian Bank SAL* that the court had anticipated "'affirm[ing] the dismissal of [plaintiffs'] ATS claims' based on our conclusion in *Kiobel* [*I*] that the ATS does not provide subject matter jurisdiction over corporate defendants for violations of customary international law."[26] However, because the Supreme Court "affirmed *[Kiobel]* . . . on different grounds. . . . [and] did not directly address the question of corporate liability under the ATS," the *Licci* court instead remanded to "the district court to address this issue in the first instance."[27]

On February 10, 2014, the Second Circuit issued a decision in *Chowdhury v. Worldtel Bangladesh Holding, Ltd.* dismissing plaintiffs' ATS claims against

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[25] *Id.* at 763.

[26] 732 F.3d 161, 174 (2d Cir. 2013) (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank SAL*, 673 F. 3d 50, 73 (2d Cir. 2012)).

[27] *Id.*

the defendant corporation because "the claims alleged . . . involve[d] conduct that took place entirely in Bangladesh."[28] In footnote 6 of the majority opinion written by Judge Cabranes, the author of *Kiobel I*, the court remarked that "[p]laintiff's claims under the ATS . . . encounter a second obstacle [because] the Supreme Court's decision in *Kiobel* did not disturb the precedent of this Circuit that corporate liability is not . . . currently actionable under the ATS.[29] But in footnote 2 of the concurring opinion, Judge Rosemary Pooler clarified that footnote 6 "is not pertinent to our decision and thus is dicta."[30] Judge Pooler further noted that "[a]t least one sister circuit has determined that, by not passing on the question of corporate liability and by making reference to 'mere corporate presence' in its opinion, the Supreme Court established definitively the possibility of corporate liability under the ATS."[31]

c. Other Federal Courts

Prior to *Kiobel II*, the Seventh, Ninth, Eleventh and D.C. Circuits had each held that corporations can

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[28] No. 09-4483, 2014 WL 503037, at *12 (2d Cir. Feb. 10, 2014).

[29] *Id.* at *5, n. 6 (citations omitted).

[30] *Id.* at *10, n. 2 (Pooler, J., concurring).

[31] *Id.* (citing *Doe I v. Nestle U.S.A., Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013)).

be found liable under the ATS.[32] Three of the four courts of appeal reached their decision *after Kiobel I*, and each vigorously disagreed with its reasoning. As Judge Pooler noted in *Chowdhury*, the Ninth Circuit, the only court of appeals to explicitly address the issue of corporate liability under the ATS after *Kiobel II*, again concluded "that corporations can face liability for claims brought under the Alien Tort Statute."[33] The court cited *Kiobel II*, noting that the Supreme Court "suggest[ed] in dicta that corporations may be liable under the ATS so long as [the] presumption against extraterritorial application is overcome."[34]

Two other district courts have recently weighed in on this issue. On August 28, 2013, before the Second Circuit's decisions in *Licci* and *Chowdhury*, a court in the Southern District of New York dismissed plaintiffs' ATS claims against a Ukrainian bank, citing *Kiobel I* as binding law.[35] In that case, the court rejected plaintiffs' argument that "because the Supreme Court did not expressly foreclose corporate liability, their ATS claim against [the] bank may proceed."[36] On February 24, 2014, a court in the

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[32] *See Flomo*, 643 F.3d at 1021; *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 764-65 (9th Cir. 2011) (en banc), *vacated on other grounds*, 133 S.Ct. 1995 (2013); *Exxon*, 654 F.3d at 57; *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

[33] *Nestle*, 738 F.3d at 1049.

[34] *Id.*

[35] *See Tymoshenko v. Firtash*, No. 11 Civ. 2794, 2013 WL 4564646, at *3 (S.D.N.Y. Aug. 28, 2013).

[36] *Id*.

District of Maryland noted that it "harbors doubt that corporations are immune under the ATS [following *Kiobel II*]" but "refrain[ed] from addressing the issue" because there were other grounds for dismissal.[37]

3. Impact of Intervening Case Law

Lower courts are bound by Second Circuit precedent "unless it is expressly or implicitly overruled" by the Supreme Court or an en banc panel of the Second Circuit.[38] Courts have interpreted this to mean that a decision of the Second Circuit is binding "'unless it has been called into question by an intervening Supreme Court decision or by one of [the Second Circuit] sitting *in banc*'" or "'unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court, or [the Second Circuit] court *in banc*.'"[39]

The Supreme Court's opinions in *Kiobel II* and *Daimler* directly undermine the central holding of

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[37] *Du Daobin v. Cisco Systems, Inc.*, No. 11 Civ. 1538, 2014 WL 769095, at *8 (D. Md. Feb. 24, 2014).

[38] *World Wrestling Entm't. Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 499 (S.D.N.Y. 2006). The "law of the case" doctrine is not at issue here because the Second Circuit's August 21, 2013 order made no reference to corporate liability. Instead, it concluded that after *Kiobel II*, "claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Balintulo*, 727 F.3d at 189.

[39] *United States v. Agrawal*, 726 F3d 235, 269 (2d Cir. 2013) (quoting *United States v. Santiago*, 268 F.3d 151, 154 (2d Cir. 2001) and *In re Sokolowski*, 205 F.3d 532, 535 (2d Cir. 2000)).

Kiobel I – that corporations cannot be held liable for claims brought under the ATS. The opinions explicitly recognize that corporate presence alone is insufficient to overcome the presumption against extraterritoriality or to permit a court to exercise personal jurisdiction over a defendant in an ATS case, respectively. By necessity, that recognition implies that corporate presence *plus* additional factors can suffice under either holding.

The standards laid out in *Kiobel* and *Daimler* for overcoming the presumption against territoriality and exercising personal jurisdiction under a long-arm statute are stringent. They may be difficult to meet in all but the most extraordinary cases.[40] But the Supreme Court has now written two opinions contemplating that certain factors in combination with corporate presence could overcome the presumption against extraterritoriality or permit a court to exercise personal jurisdiction over a foreign corporation in an ATS case. This language makes no sense if a corporation is immune from ATS suits as a matter of

[40] "'The presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.'" *Kiobel II*, 133 S. Ct. at 1670 (Alito, J., concurring) (quoting *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010)) (emphasis in original). Justice Alito further proposed that a defendant's domestic conduct must itself "violate an international law norm" in order to overcome the presumption against extraterritoriality.

law. The Supreme Court's opinions in *Kiobel II* and *Daimler* cannot be squared with *Kiobel I*'s rationale.

The Second Circuit panel in *Licci* and Judge Pooler's concurrence in *Chowdhury* recognized the possibility that *Kiobel II* has left the issue of corporate liability open in the Second Circuit. Defendants argue that the *Licci* court remanded the question of corporate liability "because the issue had not been briefed on appeal, and because dismissing the ATS claim would not have disposed of the case . . . since other non-ATS claims would remain."[41] But *Kiobel I* is clear and unambiguous as to the question of corporate liability. If the *Licci* panel found *Kiobel I* binding, it would have resolved the question immediately without further briefing. The argument that the Second Circuit would remand issues governed by controlling law because other non-ATS claims remained defies logic. The court's decision in *Licci* only makes sense if that panel no longer considered *Kiobel I* to be binding law.[42]

While the district court in *Tymoshenko* treated *Kiobel I* as binding law, that decision was reached before *Licci* and before Judge Pooler's concurrence in *Chowdhury* suggested that the Supreme Court has

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[41] Def. Mem. at 13.

[42] The issue has yet to be remanded to the district court because plaintiffs' motions to sever claims against one of the defendants, and for en banc reconsideration of the Second Circuit's holding on an unrelated choice of law question, remain pending in the Second Circuit.

embraced corporate liability under the ATS. The Ninth Circuit reached the same conclusion in *Doe I v. Nestle*.[43] For these reasons, I conclude that corporate liability for claims brought under the ATS is an open question in the Second Circuit and I will address the issue in the first instance.

B. Corporations Are Liable Under the ATS

In my April 8 Opinion and Order, I concluded that "corporations are liable in the same manner as

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[43] Plaintiffs have also argued that because the Supreme Court considered extraterritoriality a merits issue in *Morrison*, it must have considered extraterritoriality a merits issue in *Kiobel II* as well. Therefore, the Court must have accepted jurisdiction over the corporate defendants in order to reach the merits question of extraterritoriality. *See* Pl. Mem. at 8-11. But the complex statutory scheme at issue in *Morrison* – the Securities Exchange Act of 1934 – is entirely different from the ATS, which merely confers federal jurisdiction over certain tort claims committed in violation of "the law of nations" or a "treaty of the United States." Nothing in *Morrison* suggests that the Supreme Court intended extraterritoriality to be a merits question in every statutory scheme, especially for statutes like the ATS which the Court has repeatedly characterized as "strictly jurisdictional." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004). Further, *Kiobel II* affirmed, though on alternate grounds, the Second Circuit's judgment that federal courts had no subject-matter jurisdiction over the ATS claim. This is strong evidence that the Supreme Court considered extraterritoriality to be a jurisdictional issue under the ATS. But because I conclude that corporate liability under the ATS remains an open question in this Circuit for other reasons, I need not determine whether extraterritoriality is a merits issue for purposes of the ATS.

natural persons for torts in violation of the law of nations" based on the fact that "[o]n at least nine separate occasions, the Second Circuit has addressed AT[S] cases against corporations without ever hinting – much less holding – that such cases are barred."[44]

Nonetheless, and despite the unbroken line of controlling precedent, the Second Circuit reached the opposite conclusion just eighteen months later in *Kiobel I*. But *Kiobel I* is a stark outlier. It is the only opinion by a federal court of appeals, before and after *Kiobel II*, to determine that there is no corporate liability under the ATS. As discussed above, *Kiobel II* either implicitly accepts corporate liability under the ATS or, at the very least, undercuts *Kiobel I*'s rationale and reopens the question in this Circuit. For the following reasons, I find that corporations may be held liable for claims brought under the ATS.

The ATS, enacted as part of the Judiciary Act of 1789, confers federal 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." "[B]y its terms [the ATS] does not distinguish among classes of defendants."[45]

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[44] *In re South African Apartheid Litig.*, 617 F. Supp. 2d at 254 (citations omitted).

[45] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). As plaintiffs stress, "other sections of the First Judiciary Act . . . did restrict the universe of defendants." Pl. Mem. at 14 (citing An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (limiting

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In *Sosa v. Alvarez-Machain*, the Supreme Court set forth the standard by which federal courts should analyze whether to exercise jurisdiction over a potential claim under the ATS:

> [F]ederal 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 [the ATS] was enacted. . . . 'Actionable violations of international law must be of a norm that is specific, universal, and obligatory.' And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[46]

In *Kiobel I*, the Second Circuit concluded that because the ATS "does not specify who is liable . . . for a 'violation of the law of nations,' it leaves the question of the nature and scope of liability – who is liable for what – to customary international law."[47] The

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defendants to "consuls or vice-consuls")). Courts have noted that the Judiciary Act read as a whole "evidences that the First Congress knew how to limit, or deny altogether, subject matter jurisdiction over a class of claims " *Exxon*, 654 F.3d at 46.

[46] *Sosa*, 542 U.S. at 732-33 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

[47] *Kiobel I*, 621 F.3d 111, 133 (2010).

court concluded that because no corporation has ever been held liable, in either a civil or criminal case, for violations of international norms, customary international law "has not to date recognized liability for corporations that violate its norms."[48] Thus, the court held that the scope of liability under the ATS does not encompass corporations "for now, and for the foreseeable future."[49]

But *Kiobel I* misses a key "distinction between a principle of [a] law . . . and the means of enforcing it."[50] Courts look to customary international law to determine whether the alleged conduct violates a definite and universal international norm necessary to sustain an ATS action after *Sosa*. However, the question of *who* can be held liable for a violation of a norm requires a determination of the means of enforcement – or the remedy – for that violation, rather than the substantive obligations established by the norm. This is an issue governed by federal common law. "By way of example, in legal parlance one does not refer to the tort of 'corporate battery' as a cause of action. The cause of action is battery; agency law determines whether a principal will pay damages for the battery committed by the principal's agent."[51] In other words, "[i]nternational law imposes

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[48] *Id.* at 125.

[49] *Id.* at 149.

[50] *Flomo*, 643 F.3d at 1019.

[51] *Exxon*, 654 F.3d at 41.

substantive obligations and the individual nations decide how to enforce them," including whether, for example, to hold a corporation responsible for the conduct of its agents.[52]

The majority in *Kiobel I* relies heavily on footnote 20 of the Supreme Court's opinion in *Sosa* as support for its conclusion that the Supreme Court intended the issue of corporate liability to be determined by customary international law. But that reliance is misplaced. Footnote 20 states in full:

> A related consideration [to determining whether there is a viable cause of action under the ATS] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. *Compare Tel – Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).[53]

At first glance, footnote 20 appears to suggest that corporate or individual liability is a substantive element of an international norm. But the citations in

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[52] *Flomo*, 643 F.3d at 1020.

[53] *Sosa*, 542 U.S. at 733, n.20.

footnote 20 make clear that the Supreme Court is referring to the possibility that customary international law may consider some norms to be actionable only when violated by the state, as opposed to private actors. As Judge Pierre Leval noted in his concurring opinion in *Kiobel I*, "the *Sosa* footnote refers to the concern . . . that some forms of noxious conduct are violations of the law of nations when done by or on behalf of a State, but not when done by a private actor independently of a state. . . ."[54] "Far from implying that natural persons and corporations are treated *differently* for purposes of civil liability under the ATS, the intended inference of the footnote is that they are treated *identically.*"[55]

"*Sosa* instructs that the *substantive content* of the common law causes of action that courts recognize in ATS cases must have its source in customary international law."[56] Whether conduct requires state action in order to violate the law of nations is one such substantive question to be determined by customary international law under *Sosa.* But customary international law only establishes norms of conduct, not the available *remedies* for violations of those norms in domestic courts.[57] By passing the ATS, Congress

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[54] *Kiobel I*, 621 F.3d at 165 (Leval, J., concurring).

[55] *Id.* (emphasis in original).

[56] *Exxon*, 654 F.3d at 41 (emphasis added).

[57] *See id.* at 42 ("The fact that the law of nations provides no private right of action to sue corporations addresses the wrong question and does not demonstrate that corporations are

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created an action in tort for violations of the law of nations. A federal court deciding a case under the ATS must decide whether corporations are liable for the tortious conduct of their agents "by reference to federal common law" governing tort remedies.[58]

The answer to that question is obvious. "[B]y 1789, corporate liability in tort was an accepted principle of tort law in the United States."[59] "Domestic law [continues to] abide[ ] no distinction between corporate and individual tort liability, and this rule is just as clear in the ATS context as in any other."[60] "[I]n the United States the liability of a corporation for torts committed by its employees in the course of their employment is strict"[61] Even the *Kiobel I* majority admits that "corporations are generally liable in tort under our domestic law."[62]

Defendants concede that "corporations often are subject to tort liability under positive law and state common law," but argue that "they are not subject to liability in the federal common law context[s] most

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immune from liability under the ATS. There is no right to sue under the law of nations; no right to sue natural persons, juridical entities, or states. There is no right to sue under the law of nations; no right to sue natural persons, juridical entities, or states.")

[58] *Id.* at 41.

[59] *Id.* at 47 (collecting sources).

[60] *Sarei*, 671 F.3d at 771 (Reinhardt, J., concurring).

[61] *Flomo*, 643 F.3d at 1020.

[62] *Kiobel I*, 621 F.3d at 117.

analogous to implied ATS actions," such as actions brought under *Bivens v. Six Unknown Fed. Narcotics Agents*[63] to redress constitutional violations by federal agents, or actions brought under the Torture Victim Protection Act of 1991 ("TVPA").[64] Neither analogy is persuasive.

First, the Supreme Court held in *Correctional Services Corp. v. Malesko* that corporations are not subject to *Bivens* liability because the core purpose of *Bivens* is to *deter individual officers* from committing constitutional violations.[65] There is no evidence of such a purpose in the text or history of the ATS.

Second, the text and history of the TVPA are relevant but do not support defendants' position. The TVPA creates an express cause of action under the ATS against "*an individual* who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture [or extra-judicial killing] shall, in a civil action, be liable for damages. . . ."[66] While the Supreme Court did not affirm that "individual" refers only to natural persons until 2012, the text of the TVPA demonstrates an intent to so limit the universe of defendants.[67] Yet

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[63] 403 U.S. 388 (1971).

[64] Def. Opp. at 16-19.

[65] *See* 534 U.S. 61, 70 (2001).

[66] 28 U.S.C. § 1350, note § 2(a) (emphasis added).

[67] *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012). The Supreme Court's opinion was largely a textual analysis.

Congress made no effort to "amend the ATS to preclude corporate liability when it enacted the TVPA's clear restriction to natural person defendants" in 1992, or at any time in the two decades since.[68] Defendants correctly note that this results in an odd outcome – aliens are "allowed to sue U.S. corporations for alleged acts of torture under the ATS, while U.S. citizens [cannot] sue foreign or U.S. corporations under either statute for the exact same conduct."[69] This may well be an "inexplicable and indefensible policy result," but it is a result created by Congress, not the courts.[70]

Nothing in the text, history or purposes of the ATS indicates that corporations are immune from liability on the basis of federal common law. However, even if the majority in *Kiobel I* correctly held that the source of corporate liability must be found in customary international law, the court's conclusion that customary international law does not recognize such liability is factually and legally incorrect.

As Judge Richard Posner of the Seventh Circuit noted, "the factual premise of the majority opinion in *Kiobel* [*I*]" – that no corporation has ever been held liable in a civil or criminal case for violations of

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[68] *Sarei*, 671 F. 3d at 785 (McKeown, J., concurring in part and dissenting in part).

[69] Def. Opp. at 18-19.

[70] *Id.* at 19.

customary international law norms – "is incorrect."[71] "At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort . . . and did so on the authority of customary international law."[72] The Allied Control Council found that one of these corporations, I.G. Farben, "'knowingly and prominently engaged in building up and maintaining the German war potential,' and [the Control Council] ordered the seizure of all [of I.G. Farben's] assets and that some of them be made 'available for reparations.'"[73]

Even if there have been few civil or criminal cases against corporations for violations of international norms since then, the conclusion that there is no norm establishing corporate liability for violations such as genocide or torture does not follow.[74] "No principle of domestic or international law supports the . . . conclusion that the norms enforceable through

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[71] *Flomo*, 643 F.3d at 1017.

[72] *Id.* (citing Control Council Law No. 2, "Providing for the Termination and Liquidation of the Nazi Organizations," Oct. 10, 1945, reprinted in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 131 (1945); Control Council Law No. 9, "Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof," Nov. 30, 1945, reprinted in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, www.loc.govirr/frd/Military.Law/enactments-home.html (visited June 24, 2011)).

[73] *Id.* (quoting Control Council Law No. 9).

[74] *See id.* at 1017-18.

the ATS – such as the prohibition by international law of genocide, slavery, war crimes, piracy etc. – apply only to natural persons and not to corporations."[75] "[T]he implication that an actor may avoid liability merely by incorporating is inconsistent with the universal and absolute nature of the" prohibitions established by international norms.[76] "There is always a first time for litigation to enforce a norm; there has to be."[77]

There could be many reasons for the lack of actions against corporations brought before international tribunals. By way of analogy, there are many criminal statutes under which corporations are rarely, if ever, prosecuted.[78] This does not mean that corporations do not fall within the scope of liability. Similarly, "[t]hat an international tribunal has not yet held a corporation criminally liable does not mean that an international tribunal could not or would not hold a corporation criminally liable under customary

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[75] *Kiobel I*, 621 F.3d at 153 (Leval J., concurring).

[76] *Sarei*, 671 F.3d at 760.

[77] *Flomo*, 643 F.3d at 1017.

[78] *See, e.g.*, David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Md. L. Rev. 1295 (2013) (discussing lack of corporate prosecutions for work-place accidents and deaths); Pamela H. Bucy, *Why Punish? Trends in Corporate Criminal Prosecutions*, 44 Am Crim. L. Rev. 1287 (2007) (discussing increased use of deferred and non-prosecution agreements and civil fines as a response to perception that corporate indictments are "overkill").

international law."[79] Enforcement history does not govern the scope of liability. "International law admits to corporate liability, as does domestic law."[80]

IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion for an order finding that corporations may be held liable under the ATS is GRANTED. Plaintiffs may move for leave to file an amended complaint against the remaining American defendants. In that motion plaintiffs must make a preliminary showing that they can plausibly plead that those defendants engaged in actions that "touch and concern" the United States with sufficient force to overcome the presumption against the extraterritorial reach of the ATS, and that those defendants acted not only with knowledge but with the purpose to aid and abet the South African regime's tortious conduct as alleged in these complaints.

Plaintiffs' motion and supporting papers must be served no later than May 15, 2014, defendants' response shall be served by June 12, 2014, and plaintiffs' reply shall be served by June 26, 2014. The Clerk of the Court is directed to close this motion (Dkt. Nos. 263 and 264).

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[79] *Sarei*, 671 F.3d at 761.

[80] *Id.* at 784 (McKeown, J., concurring in part and dissenting in part).

SO ORDERED:

/s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
April 17, 2014

– Appearances –

For Plaintiffs Ntsebeza *et al.*:

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of September, two thousand fifteen.

SAKWE BALINTULO, as personal representative of SABA BALINTULO, et al., *Plaintiffs-Appellants,* v. FORD MOTOR CO., INTERNATIONAL BUSINESS MACHINES CORP., *Defendants-Movants.*	**ORDER** Docket Nos: 14-4104 (Lead), 14-3589, 14-3607, 14-4129, 14-4130, 14-4131, 14-4132, 14-4135, 14-4136, 14-4137, 14-4138, 14-4139

Appellants, the Ntzebesa Plaintiffs, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The Balintulo Plaintiffs also joined the petition by letter dated August 12, 2015. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
/s/ Catherine O'Hagan Wolfe, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOUTH AFRICAN APARTHEID LITIGATION	
THIS DOCUMENT RELATES TO:	
TOZAMILE BOTHA; SOLLY BOKABA; MPUMELELO CILIBE; NOTHINI BETTY DYONASHE (as personal representative of VUYANI ADONIS); THOMAS MOGOSHANE; MANTOA DOROTHY MOLEFI (as personal representative of HECTOR ZOLILE PIETERSON); MPELE MARIA MOSIANE; MIRRIAM MZAMO (as personal representative for BUBELE MZAMO); NONKUKULEKO SYLVIA NGCAKA (as personal representative of THEMBEKILE NBCAKA); MARGARET PETERS (as personal representative of WILLIAM DANIEL PETERS); HANS LANGFORD PHIRI; PEDRONICA KEIKANTSEMANG	**MDL No. 02-md-1499 (JES)** **CLASS ACTIONS** **Civ. No. 03-cv-1024 (JES)** **Civ. No. 02-cv-6218 (JES)** **Civ. No. 02-cv-4712 (JES)** **NTSEBEZA AND DIGWAMAJE SECOND CONSOLIDATED AMENDED COMPLAINT** **JURY TRIAL DEMANDED**

SEPHERI; LEKOSE SHOLE; MNCEKELELI HENYN SIMANGENTLOKO,

Plaintiffs,

v.

FORD MOTOR COMPANY and INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendants.

Plaintiffs, by and through their attorneys, bring this action on behalf of themselves and all others similarly situated. Plaintiffs hereby allege, on information and belief, as follows:

INTRODUCTION

1. Plaintiffs bring this class action to vindicate violations of the law of nations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, on behalf of themselves and black South Africans[1] (and their heirs and beneficiaries) who, during the period from 1973 to 1994, suffered injuries as a result of Defendants' violations of the law of nations by their complicity in

[1] The term black is used throughout, as it was during apartheid, to refer to black Africans as well non-white individuals.

specific abuses alleged herein committed by South African state officials, employees, or agents.

2. Apartheid was an institutionalized regime of racial segregation and systematic oppression implemented in South Africa for the purpose of depriving the black population of basic rights and securing the white minority's hold on power over the country's government and wealth. The international community universally condemned the apartheid system in South Africa and the systematic discrimination, brutality, and violence against blacks that characterized the apartheid state and constituted violations of international law at all times material to the allegations in this complaint.

3. Apartheid, itself a crime against humanity, was enforced by means of international crimes and other violations of the law of nations, including prolonged arbitrary detention, forced exile, forced relocation, revocation of citizenship, forced and exploited black labor, extrajudicial killings, torture, and other cruel treatment of opponents. Black workers were denied access to certain classes of jobs, deprived of the right to organize and protest their conditions, and paid lower wages. Physical separation of the races was also an essential aspect of the apartheid system. The black population was geographically isolated into homelands (or Bantustans) and other enclaves separate from whites, where they lacked access to fertile land, employment opportunities, and basic services such as education and healthcare.

4. This elaborate system would not have been possible without the active and on-going collaboration of private actors, including Defendants, in every sector of society. The apartheid system, supported by many corporations, including Defendants, systematically and intentionally discriminated and facilitated violent acts against black South Africans, including anti-apartheid leaders and Plaintiffs, in violation of international law. While apartheid's survival was dependent on the participation, resources, products, and expertise of foreign corporations, Plaintiffs' claims are based solely on substantial assistance, such as the creation of a specifically customized ID system, provided by Defendants that was purposefully aimed at enabling unlawful activity, such as denationalization.

5. Defendants Ford Motor Company (Ford) and International Business Machines Corporation (IBM) (collectively Defendants) are U.S. corporations that, through their conduct in the United States, provided direct support to the South African government during apartheid and/or were purposefully complicit in the human rights violations committed by the apartheid government and security forces. Defendants, from the United States, also directed and controlled their subsidiaries, acting on their behalf, to provide such support. Defendants did not merely do business in apartheid South Africa or simply place their products into the stream of commerce. Rather, Defendants in the United States directly and purposefully provided substantial and/or practical

assistance to and/or acted in concert with the South African government and security forces, including police, military, intelligence, and Special Branch personnel, all of whom were integral parts of the apartheid security state. Defendants produced the very products that enabled the apartheid government to run and maintain the apartheid system and to oppress, control, suppress, intimidate, denationalize, and otherwise violate the rights of black South Africans. Through such unlawful assistance, which emanated from Defendants' decisions in the United States, Defendants violated the human rights of Plaintiffs and other similarly situated South Africans, and intentionally provided the South African government with the tools necessary to maintain the separation of the race and the exploitation of blacks.

6. The claims contained herein touch and concern the United States because, as detailed below, the two Defendant U.S. corporations were integral to the implementation, maintenance, and enforcement of the apartheid regime and its attendant international law violations. Defendants, through policies and decisions made in the United States, directed and controlled the sale of specialized vehicles to the South African security forces to suppress the black population, as well as the creation and maintenance of an identity card system to denationalize the black population. Defendants took actions in the United States to circumvent U.S. and United Nations (UN) sanctions as well as clear U.S. congressional opposition to apartheid. Defendants also attempted to conceal

these actions, misleading the U.S. government as well as shareholders about the true nature of their activities in South Africa to minimize domestic criticism. These were not the acts of renegade foreign subsidiaries: to the extent that some acts occurred in South Africa, Defendants' agents were acting within the scope of their agencies. These were high profile, sensitive matters requiring approval, direction, and supervision at the highest levels, by the U.S. parent corporations' upper management and boards.

A. Defendant Ford

7. Ford actively facilitated the implementation of apartheid by purposefully and knowingly manufacturing vehicles, including specialized vehicles, in whole or in part, specifically for sale to the apartheid state, including the security forces and the Special Branch. South African security forces used Ford vehicles to suppress opposition to the apartheid system and to inflict widespread violence associated with the intimidation and control of anti-apartheid protests protected under international law. The government's violent suppression inflicted grievous injuries against Plaintiffs and the classes they represent, including the extrajudicial killings of numerous civilians. Ford intentionally and knowingly facilitated and enabled the commission of these crimes by providing the vehicles that substantially assisted to the repression. *See, e.g.*, paras. 78-95.

8. UN Security Council and U.S. sanctions targeted the supply of vehicles to the South African security forces, recognizing the importance of such equipment in the government's effort to suppress and control the black population. In contravention of the principles of international law and the sanctions that recognized the importance of such vehicles to carrying out violence against the black population, Ford continued to manufacture vehicles, including specialized ones, specifically for sale to the apartheid state and its security forces. *See, e.g.*, paras. 72-73, 77-78, 80-83. In flouting international law and sanctions, Ford chose to embrace the goals and purposes of the security forces by making sales in this context, which Ford also believed would advance its economic and other short-term and long-term interests in South Africa. In so doing, the sale of Ford vehicles intentionally enabled, aided, and abetted the security forces to more effectively oppress the black population and implement apartheid. *See, e.g.*, paras. 72-73, 77-78, 80-121.

9. From the United States, Ford made the key decision to continue to sell vehicles to the South African security forces. Ford also made the major decisions regarding product line, design, and manufacture of vehicles for the South African security forces, including arranging for the shipment of unassembled vehicle kits to South Africa, determining the types of products sold, and approving all design elements, including those which were specialized for use by the security forces. As part of its oversight

from the United States, Ford also directly appointed the head of operations in South Africa throughout the relevant time period. His pay scale and bonus for international service and other benefits were determined by policy set in the United States. *See, e.g.*, paras. 67-78.

10. Ford also actively retaliated against employees, including Plaintiffs and the classes they represent, who participated in community organizations and unions that opposed apartheid or expressed anti-apartheid views. Ford, in collaboration with the South African security forces, subjected Plaintiffs and the classes they represent to dismissal, arrest, intimidation, detention, and torture. These violations were viewed as being necessary to advance Ford's short and long-term interests in South Africa. *See, e.g.*, paras. 82, 95-120.

11. Ford's U.S. headquarters was closely and directly involved in employment relations in South Africa, including conducting detailed investigations and oversight of strikes, shut downs, and any major personnel problems. Ford's U.S. control was also reflected in its asserted ability to impose the Sullivan Principles of nondiscrimination on Ford operations in South Africa. The Sullivan Principles were adopted because of international and U.S. condemnation of the discrimination and oppression facing black South African workers. While affirming the Sullivan Principles on paper, however, Ford embraced an employment relations system in which its South African managers provided South African security officials

with information on workers involved in anti-apartheid activities, which led to violations of their rights. Ford in the United States also maintained files on specific individual union leaders in South Africa and was involved in specific employment decisions related to these individuals. *See, e.g.*, paras. 75-76, 96-121.

12. Ford's corporate headquarters and board members were closely involved in oversight and monitoring of activities and operations in South Africa. Ford in the United States was so active in South Africa that the Ford's U.S. department tasked with dealing with worldwide political issues focused as much as 85 percent of its time on South African operations, even though those operations constituted only a small percentage of Ford's overall business. Ford oversight from the United States was particularly important given controversy concerning U.S. investment during apartheid. *See, e.g.*, paras. 69-78.

13. Ford knowingly and intentionally facilitated the extrajudicial killings by the apartheid state of the sons of Plaintiffs Molefi, Ngcaka, Dyonashe, and Mzamo and others in the Plaintiff class who suffered the same fate.

14. Ford knowingly and intentionally facilitated the torture by South African security forces of Plaintiffs Botha and Peters and others in the Plaintiff class who suffered the same fate by identifying Plaintiffs and sharing information about their anti-apartheid activity, and directly caused the abuse suffered by

Plaintiff Cibile and others in the Plaintiff class who suffered the same fate within the Ford plants in South Africa.

B. Defendant IBM

15. IBM actively facilitated the implementation of apartheid by purposefully and knowingly producing race-based identity documents and sorting and storing information in databases used to strip Plaintiffs of their South African nationality and citizenship and force upon them citizenship in "independent" Bantustans. Bantustans were impoverished and isolated tribal areas created for the very purpose of isolating and suppressing the black population, as well as to restrict Plaintiffs' rights, including travel in, out, and within South Africa. The Bantustan system facilitated discrimination and the geographic separation of the races in South Africa on a massive scale, depriving blacks of their South African citizenship and associated rights, including participation in the South African economy. No foreign government ever accorded diplomatic recognition to any Bantustan. By supporting and implementing this fictitious administrative separation with the creation of the ID system, IBM purposefully provided an essential tool to institutionalize apartheid. IBM thus facilitated denationalization, including the loss of South African citizenship, the forced relocation of blacks to inhospitable areas, separation of families, and severe restrictions on food and medicine and educational and

employment opportunities, by improving the effectiveness and efficiency of race separation. *See, e.g.*, paras. 56-59, 135-61.

16. IBM's technology was also essential to maintaining and storing records related to the Book of Life, which was a critical piece of efficiently tracking the different races to better implement apartheid. Whether Plaintiffs lived in the Bantustans or South Africa, IBM's technology supported efforts to separate them by race. *See, e.g.*, paras. 140.B, 143-46.

17. UN Security Council and U.S. sanctions targeted computers and other technology sales and services to the South African government, recognizing how such technology contributed to the government's efforts control and separate the races. In contravention of the principles of international law and the recognized importance of such technology, IBM specifically developed, sold, leased, customized, and maintained critical computer systems for the South African and Bantustan governments to enable them to efficiently track and better separate the races and violate the fundamental rights of black South Africans, including members of the Plaintiff class. *See, e.g.*, paras. 133-61. IBM thus chose to embrace the goals of apartheid's racial separation efforts, including denationalization of blacks, when it provided substantial and targeted assistance in this context. In so doing, IBM intentionally enabled the South African and Bantustan governments to more effectively separate, denationalize, and oppress the black population and implement apartheid. *See, e.g.*, paras. 143-53.

18. IBM was a dominant industry player in South Africa at all relevant times. IBM and its U.S.-based activities, including systems support and product design and delivery, were essential to the successful creation and operation of the technology used to deprive the black South African population of its citizenship and enforce apartheid through the ID system. The South African government understood the substantial contribution that computer technology provided to apartheid and its implementation, and pushed for increased self-sufficiency in the late 1970s and 1980s as threats of sanctions mounted, so that the government would be able to continue to use the equipment that was essential for separating the population along racial lines. At all relevant times, however, IBM and its conscious support for the South African and Bantustan governments provided essential machinery and technology, originating in the United States, for the purpose of separating the races. *See, e.g.,* paras. 135-53. In flouting international law and sanctions, IBM chose to embrace the goals and purposes of racial separation, including denationalization as implemented through the Bantustan system, which IBM also believed would advance its economic and other short-term and long-term interests in South Africa.

19. IBM directed and controlled its South African activities from the United States. IBM tightly controlled and centralized its product research, design, and technology from the 1960s to 1980s, including its mainframe systems, which were at the

heart of most major computer operations during that period. At that time, computers required significant customization and major systems engineering support, and South Africa lacked the knowledge required to implement complex computer systems. *See, e.g.*, paras. 140-53.

20. Given the political sensitivities surrounding U.S. investment in South Africa, corporate officials at the highest levels of IBM in the United States were involved in oversight of activities in South Africa and the decisions to develop hardware and software, bid on contracts, lease, sell, and provide services.

21. The U.S.-based IBM support and decisions to purposefully supply specific technology and technical support to the South African and Bantustan governments was critical to those entities' ability to more effectively implement apartheid.

22. IBM knowingly and intentionally facilitated racial separation and the denationalization of Plaintiffs Mogoshane, Monsiane, Phiri, Sepheri, and Kgosi Shole, and the classes they represent, who were stripped of their South African nationality and citizenship, were restricted in their ability to travel in to, out of, and around South Africa, and were discriminated against by being forcibly geographically separated and segregated into Bantustans on the basis of race. The children of those who lost their citizenship also suffered by losing the right to seek work in urban areas of South Africa.

JURISDICTION AND VENUE

23. The Court has jurisdiction over this case under 28 U.S.C. § 1331 (Federal Question Jurisdiction) and 28 U.S.C. § 1350 (Alien Tort Statute). All of Plaintiffs' claims for relief arise under the law of nations.

24. Venue is proper under 28 U.S.C. § 1391(a) in this Court because the Defendant corporations, their subsidiaries, affiliates, alter egos, or agents are doing business in this district.

PARTIES

A. Plaintiffs

25. Plaintiff TOZAMILE BOTHA is a South African citizen and a resident of Centurion, South Africa. He worked for Ford's operation in Port Elizabeth from approximately 1978-1980 as a work-study technician. After he became Chairman of the Port Elizabeth Black Civic Organization (PEBCO), an anti-apartheid community organization, Ford intimidated and retaliated against him solely because of his anti-apartheid activities and views, thus actively participating in and assisting the state's repression of anti-apartheid movements. Botha was arrested, detained, questioned, and tortured by the South African security forces. Eventually, Botha was forced into exile. Ford closely monitored Botha and his situation from the United States and kept a file on him at U.S. headquarters that included communications about him sent from Ford in South Africa. At

Ford, Botha was subjected to apartheid practices within the Ford plant including segregation and exploitation of his labor as well as other discriminatory and humiliating treatment.

26. Plaintiff MPUMELELO CILIBE is a South African citizen and a resident of New Brighton near Port Elizabeth, South Africa. Despite his qualifications for a higher position, because of his race, he was forced to accept a position as a laborer to gain employment at Ford's operation in South Africa, where he worked from 1974-1984. During this period he was subjected to apartheid practices within the Ford plant including segregation and other blatantly discriminatory and humiliating treatment, including training less-qualified whites to be his superior and experiencing grossly inferior advancement opportunities and pay. As treasurer of a union with a strong anti-apartheid position, Cilibe was harassed and intimidated by Ford management and government forces.

27. Plaintiff MARGARET PETERS brings this claim as a personal representative and/or successor in interest for the estate of WILLIAM DANIEL PETERS. Peters was a South African citizen and a resident of Bethelsdorp near Port Elizabeth, South Africa. He worked as a material handler and later as a checker for Ford's operation from 1980-1985. As chairman of the National Automobile and Allied Workers Union (NAAWU), a union with anti-apartheid positions, Peters was arrested, interrogated, and tortured by the security forces, including the Special Branch, which pursued him based upon

information they had received from Ford regarding his anti-apartheid community and union activities. He was also subjected to segregation, humiliation and racial discrimination, and grossly unequal pay. He died in January 2010.

28. Plaintiff MANTOA DOROTHY MOLEFI brings a claim on behalf of herself and the estate of her deceased son, Hector Zolile Pieterson. Molefi is a South African citizen and a resident of Soweto, South Africa. On June 16, 1976, South African security forces shot and killed her son, a twelve-year-old schoolboy, during a protest led by schoolchildren against Afrikaans language instruction in schools. The provision of vehicles manufactured by Ford for the security forces provided substantial assistance to coordinate, monitor, gather intelligence, and conduct a violent campaign to suppress peaceful opposition to apartheid that facilitated the extrajudicial killing of Pieterson and many others.

29. Plaintiff NOTHINI BETTY DYONASHE brings a claim on behalf of herself and the estate of her deceased son, Vuyani Adonis. Dyonashe is a South African citizen and a resident of Duncan Village near East London, South Africa. In August 1985, South African security forces shot and killed her son, Vuyani Adonis. The thirteen-year-old schoolboy was making an unannounced visit to see his mother in Duncan Village from Chalumn, where he stayed with his grandmother and attended school. When he arrived from Chalumn, the home was locked, forcing him to remain outside in the street. During a patrol

in Duncan Village, security forces shot him without justification. The provision of vehicles manufactured by Ford for the security forces provided substantial assistance to coordinate, monitor, gather intelligence, and conduct a violent campaign against the community that facilitated the extrajudicial killing of Adonis and many others.

30. Plaintiff NONKULULEKO SYLVIA NGCAKA brings a claim on behalf of herself and the estate of her deceased son, Thembekile Ngcaka. She is a South African citizen and a resident of Duncan Village, South Africa. In August 1985, South African security forces shot her son, a nine-year-old schoolboy who was playing outside with friends. During a patrol in Duncan Village, security forces shot Ngcaka for no reason. After suffering from his wounds for approximately a year, he died from these injuries. The provision of vehicles manufactured by Ford for the security forces provided substantial assistance to coordinate, monitor, gather intelligence, and conduct a violent campaign against the community that facilitated the extrajudicial killing of Ngcaka and many others.

31. Plaintiff MIRRIAM MZAMO brings a claim on behalf of herself and the estate of her deceased son, Bubele Mzamo. She is a South African citizen and a resident of Duncan Village near East London, South Africa. In March 1986, South African security forces on patrol shot and killed her son, a fifteen-year-old schoolboy, while he was playing in the street. The provision of vehicles manufactured by Ford for the security forces provided substantial assistance to

coordinate, monitor, gather intelligence, and conduct a violent campaign against the community that facilitated the extrajudicial killing of Mzamo and many others.

32. Plaintiff MNCEKELELI HENYN SIMANGENTLOKO is a South African citizen and a resident of Jongilanga, Kuelerlig, South Africa. While participating in a peaceful march in East London to commemorate International Youth Year in May 1985, Simangentloko was shot in the arm by security forces, suffering a severe injury that prevented him from working for 23 years. The provision of vehicles manufactured by Ford for the security forces provided substantial assistance to coordinate, monitor, gather intelligence, and conduct a violent campaign against the community and suppress the peaceful protesters.

33. Plaintiff KGOSI (Chief) LEKOSE SHOLE is a South African citizen and a resident of Ramatlabama, South Africa. As part of the apartheid government's campaign to create Bantustans within South Africa, the fertile South African village in which he was chief – known as Botshoale, and composed of the three smaller villages of Ikopeleng, 600 Village, and Miga – was forcibly removed to Ramatlabama, an arid and undeveloped area in Bophutatswana near the border with Botswana. Bophuthatswana was one of the Bantustans that became an "independent country" inside South Africa in 1977. Kgosi Shole was stripped of his South African citizenship, which was replaced by Bophuthatswana citizenship. He was forced to acquire the

Bophuthatswana ID document also known as the Bophuthatswana Book of Life. The Bophuthatswana ID was necessary to access basic services in Bophuthatswana, including pensions, schooling, health clinics, bank accounts and loans, government jobs, and permits to build homes or open businesses. The Bophuthatswana ID and corresponding database of individuals was produced and maintained using IBM machines and software specifically designed to facilitate the government's illegal revocation of the citizenship of large numbers of black South African citizens. IBM, designed, sold, maintained, and/or leased the technology and helped maintain the system with training and service support. As a result of his loss of South African citizenship, Shole suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship, including the right to reside in his home.

34. Plaintiff SOLLY BOKABA is a South African citizen and a resident of Mafikeng, South Africa. As part of the apartheid government's campaign to create Bantustans within South Africa, his home village was incorporated into Bophuthatswana and Bokaba was stripped of his South African citizenship, which was replaced by Bophuthatswana citizenship. Bophuthatswana was one of the Bantustans that became an "independent country" inside South Africa in 1977. He was forced to acquire the Bophuthatswana ID in order to legitimize his existence in Bophuthatswana and access basic services, including education. The Bophuthatswana ID and corresponding

database of individuals was produced and maintained using IBM machines and software specifically designed to facilitate the government's illegal revocation of the citizenship of large numbers of black South African citizens. IBM designed, sold, maintained, and/or leased the technology and helped maintain the system with training and service support. As a result of his loss of citizenship, Bokaba suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

35. Plaintiff PEDRONICA KEIKANTSEMANG SEPHERI is a South African citizen and a resident of Delareyville, South Africa. As part of the apartheid government's campaign to create Bantustans within South Africa, her home village of Stella was forcibly removed to Atameleng, which was incorporated into Bophuthatswana after "independence" in 1977. Sepheri was stripped of her South African citizenship, which was replaced by Bophuthatswana citizenship. As a result of her village's removal, she was separated from her family, and made to live in an area remote from schools, employment, and other services. Sepheri was forced to acquire the Bophuthatswana ID, which was required to obtain basic services in Bophuthatswana, including buying a home, receiving a pension, registering a child in school, and accessing medical care. The Bophuthatswana ID and corresponding database of individuals was produced and maintained using IBM machines and software specifically designed to facilitate the government's illegal revocation of the citizenship of large numbers of black

South African citizens. IBM designed, sold, maintained, and/or leased the technology and helped maintain the system with training and training and service support. As a result of her of citizenship, Sepheri suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

36. Plaintiff HANS LANGFORD PHIRI is a South African citizen and a resident of Mafikeng, South Africa. As part of the apartheid government's campaign to create "independent countries" within South Africa, Phiri was stripped of his South African citizenship, which was replaced by Bophuthatswana citizenship. Bophuthatswana was one of the Bantustans that became an "independent country" inside South Africa in 1977. His South African ID was declared invalid, and he was assigned a Bophuthatswana ID. The Bophuthatswana ID and corresponding database of individuals was produced and maintained using IBM machines and software specifically designed to facilitate the government's illegal revocation of the citizenship of large numbers of black South African citizens. IBM designed, sold, maintained, and/or leased the technology and helped maintain the system with training and service support. As a result of his loss of citizenship, Phiri suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

37. Plaintiff MPELE MARIA MOSIANE is a South African citizen and a resident of the village of

Miga in Ramatalabama, South Africa. As part of the apartheid government's campaign to create Bantustans within South Africa, Mosiane was stripped of her South African citizenship, which was replaced by Bophuthatswana citizenship. Bophuthatswana was one of the Bantustans that became an "independent country" inside South Africa in 1977. Her South African ID was declared invalid, and she was assigned a Bophuthatswana ID. However, because Mosiane was Sotho rather than Tswana, she suffered additional deprivations, including not immediately being able to obtain a Bophuthatswana ID and services, which were intended for black South Africans of Tswana decent. The Bophuthatswana ID and corresponding database of individuals was produced and maintained using IBM machines and software specifically designed to facilitate the government's illegal revocation of the citizenship of large numbers of black South African citizens. IBM designed, sold, maintained, and/or leased the technology and helped maintain the system with training and service support. As a result of her loss of citizenship, Mosiane suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

38. Plaintiff THOMAS MOGOSHANE is a South African citizen and a resident of Ikopeleng village in Ramatlabama, South Africa. As part of the apartheid government's campaign to create Bantustans within South Africa, Mogoshane was stripped of his South African citizenship, which was replaced by

Bophuthatswana citizenship. Bophuthatswana was one of the Bantustans that became an "independent country" inside South Africa in 1977. Mogoshane was born and lived in Botshabelo (the Tswana name for Putfontein) until the village was forcibly removed to Ikopeleng in Bophuthatswana in 1977. For several years while living in Bophuthatswana, he continued to use his South African ID to work in the mines Sometime in the 1980s, he could no longer use his South African ID to work in the mines, and was required to get a Bophuthatswana ID to continue such work. His South African ID was declared invalid, and he was assigned a Bophuthatswana ID document, which he used to continue to work in the mines until the early 1990s. The Bophuthatswana ID and corresponding database of individuals was produced and maintained using IBM machines and software specifically designed to facilitate the government's illegal revocation of the citizenship of large numbers of black South African citizens. IBM designed, sold, maintained, and/or leased the technology and helped maintain the system with training and service support. As a result of his loss of citizenship, Mogoshane suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

B. Defendants

39. Defendant FORD MOTOR COMPANY (Ford) is an automobile company incorporated under the laws of Delaware with its headquarters at 1

American Road, Dearborn, Michigan. Ford does business in the United States and within this jurisdiction through subsidiaries, affiliates, and agents. At all relevant times to the facts alleged in this complaint, Ford operated in South Africa directly and controlled and directed its subsidiaries, affiliates, alter egos, and agents in South Africa, including Ford South Africa and South African Motor Corporation (SAMCOR).

40. Defendant INTERNATIONAL BUSINESS MACHINES CORPORATION (IBM) is an information technology company and manufacturer of computer systems, hardware, software, networking systems, hosting systems, and storage devices. It is incorporated under the laws of New York with its headquarters at 1 New Orchard Road, Armonk, New York. IBM does business in the United States and within this jurisdiction through subsidiaries, affiliates, alter egos, and agents. At all times relevant to the facts alleged in this complaint, IBM did business in South Africa, and controlled and directed its subsidiaries, affiliates, alter egos, and agents in South Africa, including IBM South Africa (Pty) Ltd and IBM South Africa Group Ltd.

GENERAL ALLEGATIONS

41. At all relevant times and as the more specific allegations below demonstrate, the Defendants' actions were part of a pattern and practice of systematic and widespread attacks and human rights violations

against the black population of South Africa during apartheid.

42. At all relevant times and as the more specific allegations below demonstrate, Defendants acted with the purpose to perpetrate human rights violations and with intent and knowledge that their actions, as alleged herein, provided practical assistance to the government of South Africa and its agents that had a substantial effect on the abuses alleged in this complaint.

43. The Defendants' actions described herein were inflicted under the color of law or official authority or in a conspiracy or a joint criminal enterprise with South African and Bantustan government officials. Defendants are responsible for Plaintiffs' injuries and the injuries of the Plaintiff classes because: (1) they were directly responsible for the alleged human rights violations by their own actions; (2) their agents committed these violations within the scope of their authority; (3) their co-conspirators or co-participants in joint criminal enterprises committed such violations; (4) they or their agents actively participated in such violations; and/or (5) they or their agents aided and abetted such violations. Defendants worked jointly with South African and Bantustan state officials, employees, and agents in perpetuating apartheid and in committing the violations alleged herein.

44. In particular, Defendants, by their actions over an extended period of time, became a significant

part of the apartheid system and the crimes perpetrated by this system. Defendants provided substantial practical assistance over many years, including assistance that violated or knowingly circumvented international law and sanctions regimes specifically applicable to the assistance they provided. Defendants knew that this assistance was perpetuating the apartheid crimes that the Plaintiffs suffered but purposefully continued this assistance because, by embracing the particular aspects of the apartheid system that their specialized products supported, they sought to advance their own economic and other interests, short-term and long-term, in South Africa. Thus, Defendants intentionally became critical cogs in the apartheid system, leading directly and substantially to the human rights violations suffered by the Plaintiffs.

45. As detailed below, the key decisions to enter into and continue their complicity with the apartheid government in facilitating the specific alleged abuses were taken by U.S. corporations in the United States. Ford in the United States approved the design of specialized vehicles for the South African security forces, directed the production of these vehicles and shipments to South Africa, and closely supervised the handling of major events involving South African employees. IBM in the United States developed the hardware and software used to produce identity documents and store information necessary to implement apartheid's separation of the races. Both Defendants were active in the United States to prevent

the imposition of U.S. sanctions on exports to South Africa and, when they failed to do so, Defendants then acted to undermine U.S. foreign policy and support apartheid by continuing their business activities.

46. The allegations brought herein address claims exclusively between private persons and corporations and do not involve claims against or on behalf of the government of South Africa. The government of South Africa expressly reserved such claims to the courts during the Truth and Reconciliation Commission (TRC) process. Indeed, the TRC Chairperson, Archbishop Desmond Tutu, and other members of the TRC have stated that:

> Litigation seeking individual compensation against multinational corporations for aiding and abetting the commission of gross human rights abuses during apartheid does not conflict, in any manner, with the policies of the South African government, or the goals of the South African people, as embodied in the TRC. To the contrary, such litigation is entirely consistent with these policies and with the findings of the TRC.

South Africa did not enact a general amnesty statute. No relief from civil or criminal liability was offered or granted to those who did not apply for or obtain amnesty from the TRC. Neither of the Defendants in this action sought or obtained an amnesty from the TRC.

47. At all relevant times and as the more specific allegations below demonstrate, Defendants maintained control over their subsidiaries and agents in South Africa, had knowledge of the human rights violations alleged herein, directed the subsidiaries and agents' involvement or complicity in these violations, and intended to facilitate the violations that occurred. In particular, Defendants maintained such control over the actions of subsidiaries in South Africa that they were agents of Defendants and/or joint enterprises. This control continued even after divestment, when the entities in South Africa providing products and services for the Defendants were still their agents and/or alter egos, and therefore it would be unfair to recognize their separate corporate existence vis-à-vis the claims made by Plaintiffs in this complaint.

48. As a direct and proximate result of Defendants' actions, Plaintiffs and those they represent suffered harm, including death, pain and suffering, loss of citizenship, personal injuries, lost wages and opportunities, and extreme emotional distress and mental anguish and other injuries.

49. Equitable tolling applies to Plaintiffs' claims not within the applicable statute of limitations because there was no practical, safe, or effective way for Plaintiffs to bring these claims without risk of retaliation by the apartheid state prior to 1994. In addition, Defendants' refusal to cooperate with the TRC and provide a full explanation of their connection to the violations alleged in this complaint tolls the

running of the statute of limitations with respect to Plaintiffs' claims.

50. There were and are no effective domestic remedies for Plaintiffs to exhaust in South Africa against these Defendants for these claims.

HISTORICAL CONTEXT

A. International Condemnation of the Apartheid System and Corporate Involvement

51. In 1950, shortly after the inception of the apartheid regime, the international community began to condemn the South African government and its policies as antithetical to the human rights and fundamental freedoms guaranteed by the UN Charter and international law. The UN and many of its members, including the United States, took joint and separate action against the apartheid system. This included restrictive arms embargoes as early as 1963 and various forms of economic sanctions.

52. Further condemnation came from the International Labour Organization (ILO) as early as 1953. That year, ILO's Ad Hoc Committee on Forced Labour described apartheid and its legislative system that created barriers for the black population as "a system of forced labor of significance to the national economy."

53. International condemnation grew in the wake of the Sharpeville Massacre of March 21, 1960, when police killed 69 unarmed individuals, including

women and children and those attempting to flee the scene. Several hundred were also injured.

54. International condemnation mounted through the 1970s and 1980s and increasingly restrictive sanctions were passed, including by the United States. For example, in 1970, UN Security Council Resolution 282 condemned apartheid and support for the South African security forces. The condemnation was affirmed repeatedly, including in 1977 with UN Security Resolution 418.

55. The United States supported these UN resolutions and passed its own specific sanctions in the 1970s and 1980s. For example, in 1977, the Carter administration announced new regulations on investment supporting the South African security forces. Similarly, in July 1985, the Export Administration Act enacted further sanctions, as did a Reagan administration executive order from September 1985. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, which tightened the sanctions regime even further.

B. Grand Apartheid: Geographic Separation of the Races

56. "Grand Apartheid" was a broad scheme designed to prevent black South Africans from accessing political rights and land by uprooting and forcibly relocating millions to make South Africa a white-majority nation. The South African state passed numerous laws to enact Grand Apartheid and to

legislate the widespread and permanent physical and geographic separation of the races.

57. The scheme culminated in four of the original ten tribal areas (or Bantustans) – Bophuthatswana, Ciskei, Transkei, and Venda – becoming "independent countries" within South Africa between 1976 and 1981. No country, other than South Africa, recognized these territories as independent states, viewing them as transparent attempts to deny black South Africans the benefits of citizenship.

58. Grand Apartheid and the apartheid government envisioned providing the most valuable lands – for agriculture, water, natural resources, employment opportunities, and developed urban centers – to the white population. Blacks assigned to a Bantustan lost their ability to continue to work and own property in South Africa. Blacks were assigned and sent to Bantustans that were largely isolated and infertile, and lacked the resources necessary to maintain self-sufficiency and economic vitality. Black population centers in the Bantustans also lacked sufficient infrastructure such as housing, roads, schools, and basic services.

59. A necessary feature of Grand Apartheid was a system of racial identity documents that enabled the apartheid regime to restrict and control the movement of black South Africans. Various pass documents were used to control the movement of black South Africans between the Bantustans and white South Africa. Blacks with invalid pass documents

were subject to arrest, imprisonment, and/or banishment to the Bantustan designated for their ethnic group.

C. Militarization of Apartheid in the 1970s and 1980s

60. The student-led Soweto Uprising on June 16, 1976, to protest mandatory Afrikaans language instruction in schools, was met with violent suppression by the security forces. Women and children were shot and killed. The violence precipitated a wave of demonstrations across South Africa opposing apartheid. During a six-month period, an estimated one thousand black South Africans were killed by security forces, and between ten and twenty thousand were arrested as demonstrations and boycotts touched urban areas throughout the country.

61. In response, beginning in the late 1970s, the South African government implemented the "Total Strategy" to coordinate repressive measures in all fields – military, psychological, economic, political, sociological, technological, diplomatic, ideological, and cultural. This strategy relied on extensive cooperation with the private sector, including Defendants, and led to widespread killings, detentions, and the suppression of any perceived dissent to the apartheid system.

62. The South African security forces were critical to the implementation of apartheid, whether carrying out violence or helping to enforce the separation of the races and Grand Apartheid and the Total

Strategy. The security forces included the South African Defence Forces, the South African Police, and the Special Branch, among others. The Special Branch was a notorious, well-financed, and violent unit that played an important role in the South African security forces, exercising broad discretion and power to gather information and intelligence on anti-apartheid activities and leaders, and reporting to senior government officials. The Special Branch was regularly active in townships collecting and coordinating information and monitoring the activities of the black population, including during protests, funerals, crackdowns, and other gatherings.

63. The TRC recognized that "business played a central role in helping to design and implement apartheid policies." Apartheid depended on the active support and assistance of the corporate sector, which in turn benefitted greatly because the system provided a perpetual supply of cheap black labor. By destroying economic opportunities for blacks and by separating them from their families, Grand Apartheid made blacks dependent on white employers. Moreover, corporations seeking to exploit black workers could rely on the state and its security apparatus to silence protests by workers and their representatives and punish and ban protestors.

64. The South African government recognized the strategic importance of some industries – including the technology and motor vehicle industries – as well as the substantial contributions these industries were making to achieve the government's vision of

apartheid, including Grand Apartheid, and to carry out oppression of the black population, including the Total Strategy. The UN and U.S. sanctions regimes also identified the critical role of computers and vehicles in apartheid and rights violations. *See, e.g.*, paras. 54-55, 80, 136. Recognizing its dependency on foreign corporations to maintain the apartheid system, and fearing the tightening of sanctions in the late 1970s and 1980s, the South African government initiated self-sufficiency efforts to develop local industry for computers and automobiles. Nonetheless, throughout this time, foreign industry and technology remained essential to the apartheid state.

65. Despite international condemnation of the significant contribution made by multinational corporations to apartheid and its associated human rights abuses, both Defendants provided essential assistance to the South African state, knowing and intending that such assistance would facilitate the violation of the human rights of black South Africans.

DEFENDANT FORD'S PARTICIPATION IN APARTHEID

A. Ford Directed and Controlled Activities in South Africa from the United States

66. Ford is an American multinational automaker incorporated in the United States and based in Dearborn, Michigan, near Detroit, whose Michigan headquarters at all relevant times has directed the

operations of its subsidiaries globally. A single vice-president from Ford's headquarters headed the entire global automotive that covered all automotive operations outside the United States.

67. At all relevant times, Ford vehicles, product lines, and components were developed and produced wherever it was in the interests of Ford to do so, as directed from U.S. headquarters. At all relevant times, Ford, from its U.S. headquarters, directed which product lines would be sold in each of its foreign locations.

68. Beginning in the mid-1970s, Ford expanded its centralized control and monitoring with an Office of Corporate Strategy and Analysis. Ford centralized administration and data processing and had a centralized Order Processing Network.

69. At all relevant times, Ford in the United States made key decisions about operations in South Africa, including investments, policy, management (including the hiring of the managing director), product lines, product design, and parts procurement and supplies.

70. Like other U.S.-based multinationals, Ford exercised rigid control over South African subsidiaries and operations.

71. Ford's senior management personnel, including those in South Africa, who were transferred from England, the United States, or Canada, carried with them the same pensions and seniority although

they received additional compensation when they worked abroad. For example:

A. Ford directly selected the head of operations in South Africa throughout the relevant time period.

B. As the head of operations was involved in "international service" for the company, the salary and benefits were set and dictated by employment policies made by Ford in the United States.

C. Management personnel were transferred from one part of Ford to another. Such transfers involved significant reviews and sign offs by Ford in the United States, which controlled the process. For example, the general manger of Ford South Africa was chosen and sent from other Ford operations and went on to other jobs in Ford outside South Africa. Similarly, Lewis Booth, the general manager of SAMCOR, started in 1978 with Ford in Europe, went to Dearborn, Michigan from 1993 to 1996, then to SAMCOR, subsequently became president of Asia Pacific and Africa Operations for Ford as of January 1,2000, and was subsequently chosen by Ford for other high-level executive positions in Ford both in Europe and the United States.

D. The assignment by Ford headquarters of general managers of foreign subsidiaries, including those in South Africa, was part of the development of rising Ford executives, which was controlled by Ford in the United States. Ford identified "high potential" executives

for such international development assignments, and then closely monitored, evaluated, and reviewed their performance in managing the foreign subsidiary.

72. Similarly, Ford oversaw all major investment and restructuring decisions in South Africa. For example:

A. In 1985, Ford negotiated the sale of its South African interests to Amcar Motor Holding, the automobile operations of Anglo American Corporation. The resulting entity was called South African Motor Corporation (SAMCOR). As a result of the merger, Ford became a minority owner of the new company, with roughly a 42% interest. However, at all relevant times, SAMCOR acted as an agent and/or alter ego of Ford.

B. Despite the tightening of U.S. trade sanctions in February 1978, Ford in the United States still announced a "large infusion[ ] of capital into its South African subsidiary. Ford injected $8 million for upkeep and retooling."

73. Both Ford South Africa and later, SAMCOR, carried out the business activities of Ford and were directed by Ford headquarters. For example:

A. In filings with the U.S. government, such as Ford Motor Co. (1989) Form 10-K 1989, Ford acknowledged that it operated in South Africa though SAMCOR.

B. Ford adopted the Sullivan Principles regarding operations in South Africa and claimed that it would implement the principles of non-segregation and equality of wages in its South African operations.

C. In a July 1979 meeting with a religious task force on apartheid, William Broderick, the Vice President for international and government affairs for Ford in the United States, implicitly acknowledged direction from headquarters for its activities in South Africa in explaining why Ford continued to operate in South Africa.

D. Ford regularly sent U.S. delegations to South African facilities and provided experts to work on new installations there.

E. Ford also sent employees to deal with human resource issues and to establish human resource programs such as "Zero Defects."

74. From the United States, Ford orchestrated and tightly controlled product lines for Ford operations in South Africa. Product lines, design, and key product decisions ranged from which parts to put into cars, to where Ford sourced the parts. For example:

A. During the relevant period, Ford's operations in South Africa focused on assembling vehicles rather than manufacturing parts. South Africa was a Complete Knock Down (CKD) and Semi-Knock Down (SKD) region, meaning that Ford's U.S. headquarters would direct that parts be manufactured in other regions

and sent to South Africa unassembled or semi-assembled.

B. Indeed, the plants in South Africa did not contain the more costly manufacturing facilities necessary to produce parts. As a CKD and SKD region, Ford operations in South Africa were thus dependent on parts shipments from elsewhere and the decisions made in the United States.

C. Like civilian vehicles, the vehicles supplied to the security forces were products assembled from Ford kits produced outside of South Africa.

D. Special modifications to vehicles sold to the security forces had to be approved by Ford in the United States. Such modifications altered the approved product plan and required approval by Ford headquarters.

75. Ford acknowledged that it was able to and did impose policies on its operations globally, including in South Africa. In addition to claims about its implementation of the Sullivan Principles, Ford's U.S. headquarters controlled its major global policies, which applied to South Africa, including employment policies, ethical business policies, and codes of conduct. For example:

A. Ford headquarters regularly communicated with its operations in South Africa. Management in South Africa had to report to Ford headquarters in the United States daily, weekly, and monthly in writing on forms

regarding production and other operations, through processes developed by Ford in the United States. There were also regular conference calls as part of South Africa's reporting to the United States.

B. Ford headquarters kept files on South African employees. For example, Plaintiff Botha, a former Ford employee, who was banned in South Africa for antiapartheid and union activities, was taken by an American Ford lawyer to Ford headquarters in Michigan and interviewed over two days. She showed him a letter from Ford South Africa to Ford headquarters referring to Botha, which read, "[v]ery intelligent, hard working, if he could be on our side." Although she only showed Botha one letter, Ford had a file on him in the United States that included other documents.

C. Ford was also directly involved in labor relations and negotiations, with U.S. headquarters providing counsel and oversight and, if necessary, taking charge. For example, during the so-called Black December or Black Christmas strike, black workers approached Ford in the United States through Andrew Young. As a result of decisions and actions taken in the United States, the South Africa subsidiary paid some money or a stipend to those involved in the strike.

76. Ford closely monitored and oversaw activities related to its South African operations through regular reports, investigations, and the involvement

of U.S.-based management for major incidents. For example:

A. Ford's U.S. headquarters had a department that dealt with political issues emanating from its worldwide activities. Although only one percent of Ford's global foreign investment was in South Africa, that department spent 85 percent of its time on South African issues, reflecting the high degree of involvement of U.S. management in Ford operation in South Africa.

B. Ford would send executives from the United States at least twice a year to conduct cross-functional audits on all aspects of its South African operations.

C. Ford also had a process to further audit and investigate employment practices, particularly if there were problems, such as complaints, a death, an injury, a lawsuit, or a press report. The problems associated with employment relations in South Africa would have triggered an investigation. Under such circumstances, Ford engaged in an investigatory process called a "root cause analysis," also known as "8Ds," which was a review asking multiple questions and producing a written report for Ford in the United States.

D. In the case of a major employment problem, such as a strike, Ford, from the United States, would closely monitor, guide and/or oversee the situation, including, at times, by involving U.S.-based management.

77. Even after announcing its "divestment" from South Africa, Ford, through SAMCOR, continued to control the manufacture of vehicles for South Africa and their shipment and assembly there, and also continued to supply CKD kits. In particular, while Ford agreed to sell its interest in SAMCOR in 1987, it continued to supply SAMCOR with vehicles, components, management and technical assistance, and continued to license the Ford trademark to SAMCOR. Ford transferred 57% of its stake to local employees and the remaining 43% of its stake to Anglo American Corporation. Ford also transferred tens of millions from the payment it received from the sale directly to SAMCOR. Thus, Ford effectively continued to exercise control over the actions and decisions of its agent and/or alter ego in South Africa, SAMCOR.

78. Although SAMCOR was formally independent, it remained an alter ego and/or agent of Ford. For example:

A. The general manager of Ford South Africa, Lewis Booth, became the head of SAMCOR. He joined Ford Motor Company in 1978 and served in a series of senior level management positions including President of Asia Pacific and Africa Operations from January 2000 to April 2002. He remained a Ford employee.

B. Ford agreed that SAMCOR, a formally separate company, would use its trade name and that Ford would provide SAMCOR with CKD

kits, parts, vehicles, managerial assistance, and capital derived from Ford's sale of its interests.

C. The one notable change in Ford's South Africa operation was the names and stamps that appeared on boxes.

D. When apartheid ended, Ford stepped back into the place it claimed to have left.

E. In 2001, SAMCOR again became a wholly owned subsidiary of Ford. Ford announced that it would operate the subsidiary in substantially the same manner as prior to the transaction and that it would not decrease the staffing level, the type of business performed, or the way in which SAMCOR's business operated in South Africa.

B. Ford Intentionally Decided to Continue Supplying Vehicles to South Africa's Security Forces and thus Purposefully Facilitated Violence against Black South Africans, in Contravention of International Law, U.S. Policy, and Regulations

79. Ford was not merely a passive investor in South Africa but rather intentionally provided vehicles to support specific unlawful violence against black South Africans, including Plaintiffs and those similarly situated. Ford purposefully provided such support knowing that vehicles sales to the security forces were critically linked to the enforcement of apartheid and violence against black South Africans.

80. At least as early as the 1960s, international and U.S. sanctions regimes had made clear that vehicles provided to South African security forces played a central role in advancing apartheid, including by making a substantial contribution to the violent oppression of the black South African population. For example:

A. In 1963, UN Security Council Resolution 181 called on states to stop the sale and shipment of arms, ammunition, and military vehicles to South Africa.

B. In 1970, UN Security Council Resolution 282 condemned South Africa's continuing disregard for international law and reaffirmed a policy of withholding the supply of all vehicles and equipment to South African armed forces and paramilitary organizations.

C. In 1971, the U.S. Department of Commerce enacted regulations stating: "In conformity with the United Nations Security Council Resolution of 1963, the United States has imposed an embargo on shipments to the Republic of South Africa of arms, munitions, military equipment, and materials for their manufacture and maintenance."

D. In 1977, UN Security Council Resolution 418 mandated that all States should "cease forthwith any provision to South Africa of arms and related materiél of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and

spare parts of the aforementioned, and shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned." The resolution further called upon States to "review all existing contractual arrangements with and licenses granted to South Africa relating to the manufacture and maintenance of arms, ammunition of all types and military equipment and vehicles, with a view to terminating them."

E. Following the passage of that mandatory UN arms embargo, the Carter administration announced new curbs on U.S. sales to South Africa in furtherance of the administration's policies "supporting human rights."

F. The 1978 U.S. sanctions regime was created to eliminate "gray areas" and ensure that American supplies were not flowing to vehicles used by, or increasing the "operational capacity of," the South African security forces.

G. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, which also prohibited the export of vehicles for the use of South Africa government entities associated with apartheid.

81. Despite sanctions and the international consensus and condemnation of supplying vehicles to South African security forces, Ford made policy, management, investment, sales, and operational

decisions that purposefully supported sales to the security forces and police.

82. Ford, in the United States, decided to and did oppose efforts in the United States and South Africa that would end sales to the South African security forces, because doing otherwise might have harmed Ford's business interests, in particular its future relationship with the South African government. For example:

A. Ford continued to provide the South Africa security forces with vehicles despite the 1978 Commerce Department regulations prohibiting the sale of any U.S. commodity to the South African police or military.

B. Ford's decision to continue to sell to the South African security forces was aimed at the long-term potential for profit on its substantial existing investment, with a desire to wait for the development of, and be included in, the black South African market, as well as the equally undeveloped and substantial potential for export to other African nations.

C. Even if Ford's sales to the security forces did not represent a large proportion of the company's overall sales, Ford and the South African government recognized the importance of this business. Ford sought to preserve long-term and friendly relations with the government, and Ford believed the government's perception of whether the company was willing to cooperate in vehicle sales was important enough to continue in the face of

criticism even though the actual volume of sales did not provide that much income for the company.

D. Ford management opposed the adoption of more restrictive sanctions in the United States, as well as shareholder efforts to restrict investment and sales to South Africa.

83. Ford intentionally supported the apartheid security forces and their goals when it directed its global operations to circumvent U.S. sanctions in order to continue sales to South Africa, enabling violent suppression of blacks in South Africa. In so doing, Ford demonstrated that it fully embraced the purpose of the security forces to oppress the black population. For example:

A. Ford's actions contravened the intent of U.S. policy and regulations, and undermined U.S. foreign policy. As one Ford board member noted, in dissenting from Ford's literal interpretation of the 1979 sanctions: "[A]ny Ford Motor Co. vehicles sold to the South African military or police necessarily include some element of U.S. technology if not material. Thus such sales even by a subsidiary constitute a violation of both the spirit and intent of the policy of the U.S. Department of Commerce."

B. As the acting director of Southern African Affairs at the State Department noted in 1978, when offering his opinion about automobile company sales in South Africa: "Such sales have the effect of lessening the impact of

what U.S. policy seeks to accomplish – keeping essential goods and services from the South African military and police."

C. Ford South Africa assembled Ford kits that included parts shipped from Ford Canada and Ford England. Ford in the United States controlled and directed such shipments that undermined the U.S. sanctions regime banning the supply of U.S.-made parts to South Africa.

D. Ford deliberated over sales decisions and offered rationalizations for the decision to continue sales to South Africa. For example, Ford officials stated publically that the loss of security forces contracts would lead to layoffs of South African employees.

E. Ford's misleading divestment efforts surrounding the creation of SAMCOR and a nominal change in ownership further revealed Ford's intention to continue to facilitate South Africa's violent imposition of apartheid and to undermine U.S. sanctions and foreign policy. *See, e.g.*, paras. 76-77.

84. Ford's sales played a vital role in manufacturing and supplying vehicles for the South African security forces, including specialized vehicles. For example:

A. By the late 1970s, of the ten auto companies in South Africa, only one was South African-owned. In 1978, Ford's sales in South Africa were estimated at $288 million and its investments were valued at $119 million. At

that time, with the automobile industry in a downturn and the South Africa government seeking ensure that automobile companies would be stable and profitable, Ford was of the best-capitalized car manufacturers, possessing the resources to wait out the downturn.

B. Ford's support to the South African government was significant: "[B]etween 1973 and 1977 [Ford] sold 128 cars and 683 trucks directly to the South African Ministry of Defense and 646 cars and 1,473 trucks to the South African police."

C. In its South African plants, Ford assembled specialized vehicles for security forces, including large military trucks and specialized sedans for the Special Branch. Ford's operations in South Africa also had paperwork identifying the vehicles as intended for security forces, some of which specifically identified the police or the security forces as the recipients. Some vehicles were painted in the plant to meet security forces' specifications.

D. Notably, into the 1980s, Ford sold vehicles that did not need to be "converted" by the apartheid government for security forces or police use but were already specialized before leaving the plant in South Africa.

E. Tags on vehicles being produced on the line in South Africa would indicate which vehicles were intended for the South African security forces.

F. The engines in some of these models were more powerful than in other cars, and they were only made for the security forces.

G. In particular, Ford built a limited number of XR6 model Cortinas known as "interceptors" that were sold almost exclusively to security forces. The XR6 was special because it had three Weber model double carburetors, as opposed to all other Cortinas that had only one double carburetor.

H. Ford would have had to approve such specialized design modifications and would have audited the specially-designed product as part of its normal bi-yearly audit process.

85. Ford's vehicles sold to the security forces were of critical importance to the South African government. Ford as well as the government understood that such vehicles, including specialized ones, substantially contributed to apartheid and its violence and that U.S. corporations should in no way act to increase the operational capacity of the South African security forces. For example:

A. In the words of a U.S. official discussing the purposes of the 1978 embargo, vehicles for the security forces were "the instruments most directly concerned with the enforcement of apartheid."

B. UN and U.S. sanctions both targeted vehicles directly. *See, e.g.*, para. 80.

C. Because of their strategic importance, some industries were designated as National Key

Points, and as such, there was a particularly close relationship between these corporations and South African security forces. Ford, as an automobile manufacturer, would have been designated a National Key Point.

D. High-ranking officials from the security forces, sometimes in uniform, visited Ford plants on a regular basis, consulted with Ford management, and inspected the vehicles.

E. Boxes of parts including nuts, bolts, and carburetors to be used in the specialized vehicles would arrive from overseas and receive expedited treatment to get them to the plant.

86. At all relevant times, Ford understood that its products would be used to violently suppress blacks and opponents of apartheid, including Plaintiffs and the classes they represent. For example, Ford employees, including Plaintiff Peters, raised concerns with Ford management about Ford's production of security forces' vehicles because they saw these vehicles in black communities on a regular basis. On more than one occasion, Ford managers in South Africa retaliated against black employees who questioned Ford's involvement with the South African security forces by, inter alia, shortening the work shifts of these employees.

87. Ford vehicles provided substantial assistance to the apartheid security forces in Soweto. The student-led Soweto Uprising on June 16, 1976, to protest mandatory Afrikaans language instruction in in schools, led to violent suppression by the security

forces. Women and children were shot and killed, including Hector Zolile Pieterson, the twelve-year-old son of Plaintiff Mantoa Dorothy Molefi. Ford vehicles were used as part of the security force patrols in Soweto in the 1970s.

88. Ford vehicles were active in other security force operations across South Africa. In August 1985, the funeral of Mrs. Victoria Mxenge, a human rights attorney whose husband was a slain human rights lawyer, precipitated confrontations in Duncan Village. The security forces' violent response to anti-apartheid unrest lasted through the month of August and became known as the Duncan Village Massacre. During that time, security forces shot and killed at least nineteen Duncan Village residents, and injured many more. Ford vehicles were critical to the coordination, monitoring of gatherings, collecting intelligence and information to advance the crackdown and violence in Duncan Village. Many victims were children, including the sons of Plaintiffs Ngcaka, Dyonashe, and Mzamo.

89. At times during the massacre, entrances to the Duncan Village township were sealed off and security forces in vehicles manufactured by Ford patrolled the area.

90. At a mass burial service for victims of the massacre held later in August, security forces once again opened fire on attendees resulting in additional injuries and deaths. Security forces continued to perpetrate violence against Duncan Village residents

at least through 1986. Security forces relied on vehicles manufactured by Ford for coordination, monitoring the black population's activities, gathering information, and transportation throughout this time period.

91. In August 1985, Plaintiff Ngcaka's nine-year-old son, Thembekile Ngcaka, and his friends were playing with small toys outside his home in Duncan Village. Security forces shot Ngcaka and his friends as they drove past them in heavily armored military vehicles. Ngcaka suffered numerous wounds to his stomach. Though he survived the initial shooting, Ngcaka never fully recovered, and died approximately one year later from his wounds.

92. During the same month, Plaintiff Dyonashe's thirteen-year-old son, Vuyani Adonis, arrived unexpectedly in Duncan Village at his mothers' home to obtain school supplies. At that time, armored military vehicles, manned by South African soldiers, were patrolling the village. Security forces shot Adonis multiple times, and he staggered into a neighbor's house and collapsed. He died shortly thereafter from his wounds.

93. In March 1986, Plaintiff Mzamo's fifteen-year-old son, Bubele Mzamo, was playing in the street in Duncan Village when he was shot and killed by South African security forces. He was shot by security forces in military vehicles on patrol.

94. Others in Duncan Village were shot while attempting to assist and transport the injured to obtain medical care.

95. The Langa Massacre occurred in Uitenhage, near Port Elizabeth, on March 21, 1985. A group of people from the area peacefully assembled that morning to march to a funeral. The police blocked the road in the center of Uitenhage with armored vehicles and ordered the crowd to disperse. When the crowd did not immediately respond, the police opened fire, fatally shooting 36 and injuring many others. The TRC later conducted an investigation of the event and concluded that the South African Police "resorted to grossly excessive means to achieve this, using unjustified deadly force, and that they are accountable for the gross human rights violations." Security forces active at this time relied on vehicles manufactured by Defendant Ford for coordination, monitoring activities, intelligence gathering, transport, and protection.

C. Ford Collaborated with the South African Government to Purposefully Suppress Anti-Apartheid Activities

96. Ford worked in deliberate cooperation with the South African security forces to repress anti-apartheid and union activists. Ford denied black employees full freedom to assemble and worked with security forces to enable harassment and assault

of Ford's black employees, as well as to limit and prevent union organizing and anti-apartheid activities. Employees in Ford's South African plants were disciplined by Ford for anti-apartheid activities that took place outside of work, and employees active in workplace organizing were tracked and picked up by the South African security forces, questioned about their activities based on information supplied by Ford, and tortured and imprisoned.

97. Ford understood well the discriminatory purposes of apartheid, which was the focus of international condemnation. *See, e.g.*, paras. 11, 54, 80. For example:

A. UN and U.S. sanctions highlighted the discriminatory aims of apartheid.

B. Ford adopted the Sullivan Principles because it was fully aware of the discrimination and oppression of anti-apartheid activists.

C. Shareholder resolutions and activism in the United States also focused on apartheid and its discriminatory effects.

98. While Ford made public statements espousing commitment to the Sullivan Principles, in practice Ford management's actions and decisions demonstrated intent to support the repression of anti-apartheid activists and to cooperate with security forces to purposefully achieve these goals. For example:

A. Ford wanted to maintain good relations with the South African government because it

viewed such relations as important to its long-term business and profit. *See, e.g.*, para. 82.

B. Ford benefited from government targeting of blacks who supported unions and anti-apartheid activities, because such repression suppressed workplace dissent. Ford also benefited from depressed wages for blacks within the apartheid system, as these low wages increased the profit margin for its subsidiary's operation.

C. Ford knowingly and purposely created a management system that permitted and indeed encouraged cooperation with South African security forces by hiring and employing managers who were important figures in the apartheid state, and who it knew shared information with security forces to target black Ford employees. Some of these senior managers, including individuals who were at relevant times the head of human resources and the head of industrial relations, were members of the Broederbond. The Broederbond ("association of brothers"), an elite and powerful Afrikaner organization in South Africa, was dedicated to preserving permanent white supremacy, and in particular Afrikaner dominance, in South Africa. The Broederbond espoused an ideology of radical racism that demanded the exclusion of blacks from white South Africa.

99. Ford management closely collaborated with South African security forces to suppress anti-apartheid activities. For example:

A. Ford management provided information on anti-apartheid activities at Ford to South African security forces, which led to Ford employees being tracked, harassed, monitored, arrested, detained, and tortured. When interrogating black Ford employees, security forces regularly quoted statements made by these employees to Ford management, sometimes verbatim.

B. Ford knew when its black employees had been interrogated, even when that information was not public.

C. South African security forces regularly visited and entered Ford plants.

D. Security forces, including the Special Branch, coordinated their suppression of anti-apartheid labor and political activities with key senior management personnel within Ford. Coordination was particularly close between the human resource managers and/or senior security personnel at the plants and the apartheid state's security forces.

E. Human resource managers and senior security personnel at Ford included former or active security forces officers and/or members of the Broederbond.

100. Ford in the United States was specifically informed about this close collaboration with the South

African security forces and the resulting harms. For example:

A. Black Ford workers in South Africa complained to Ford in the United States that management included members of the Broederbond. Ford workers knew of specific managers who were members of the Broederbond. Ford in the United States was informed through Andrew Young and Jesse Jackson, both of whom visited South Africa. Black Ford workers also provided some information in writing to Ford in the United States about the Ford collaboration with security forces and the Broederbond.

B. Ford's practice, developed in the United States, was to investigate and, when necessary, control its employment policies and practices in South Africa in the event of controversies such as strikes, work shut downs, or safety complaints. *See, e.g.*, paras. 75-76.

101. As described below, Ford's close collaboration with the security forces led to violations of the rights of anti-apartheid leaders, including Plaintiffs and the classes they represent. These individuals experienced torture, cruel, inhuman, and degrading treatment, and deprivation of other rights associated with apartheid.

102. In October 1979, Plaintiff Botha became Chairman of the Port Elizabeth Black Civic Organization (PEBCO), an organization he helped launch.

PEBCO was an anti-apartheid community organization seeking to improve the living conditions of township residents in and around Port Elizabeth. PEBCO received widespread media attention throughout South Africa at the time of its creation, as a result of which Plaintiff Botha was frequently referred to and quoted in newspapers throughout the country.

103. Shortly after PEBCO was launched, a white supervisor in a Ford plant called Plaintiff Botha into his office. The supervisor was holding a newspaper and stated that he, as well as the white management and other white employees at the plant, were unhappy at the publicity about Botha's work with PEBCO. The supervisor told Plaintiff Botha that, despite having a good work record, he was too political and could either continue working at Ford or go and serve his community by working with PEBCO. When Botha refused to cease working with PEBCO, he was dismissed from his job at Ford.

104. Only after hundreds of workers at Ford went on strike to demand Botha's reinstatement was he allowed to return to work. During the strike over Botha's dismissal, several employees established a new committee to deal with labor issues, believing that registered unions had collaborated with Ford management. In this strike, as in similar incidents, Ford personnel from the United States provided oversight and were involved in the resolution of the issues.

105. Plaintiff Botha and others formed this committee, which later became known as the Metal and Allied Component Workers Union of South Africa (MACWUSA). Plaintiff Botha was Chair of MACWUSA's Executive Board. Plaintiff Cilibe became treasurer of MACWUSA shortly after its formation.

106. Ford management took action to suppress the multiracial union and its activities. Upon its founding, a senior manager in human resources who was also a member of the Broederbond declared that Ford would not recognize MACWUSA as a multiracial union that was in line with the principles of the ANC.

107. Ford management continued to deny black employees full freedom to assemble and promoted the apartheid regime. Managers called in the South African security forces to harass and assault black employees and to limit and prevent union organizing, especially of unions seen as anti-apartheid.

108. Ford's ongoing discriminatory policies prompted another strike in 1979. Workers demanded that Ford comply with the Sullivan Principles. Ford had committed itself to the Sullivan Principles, which included guarantees of racial equality, equal pay for equal work, and the removal of job reservations, but Ford had flagrantly breached those principles.

109. On the same evening that Ford settled the strike, Plaintiff Botha was arrested and detained by the South African security forces. The security forces interrogated Botha about the strike at Ford and

about who was behind the strike. During his detention, he was subjected to torture, including sleep deprivation, and other physical and mental abuse.

110. Upon his release following several months of detention and abuse, the South African government placed Botha under a banning order, preventing him from working, attending university, meeting with more than one person at any time, or leaving the house between 6pm and 6am or on weekends or public holidays. As a result of these restrictions imposed upon him by the banning order, Botha was driven into exile in Lesotho.

111. There were other strikes at Ford's South Africa plants in the early to mid-1980s to protest discrimination by Ford. Security forces were called to Ford plants on some occasions. During at least one strike, security forces set vicious dogs on the workers. Other employees who participated in the 1979 strikes, as well as later strikes, were harassed at home, arrested, detained, and questioned about PEBCO or anti-apartheid activities.

112. Union meetings were monitored by members of the Special Branch and/or other security forces, as well as by informants who were in some instances Ford employees in South Africa. After meetings, security forces would arrive at the homes of union members, including Plaintiff Cilibe, to question them about union and strike activities. For example, the officers who interrogated Cilibe in his home made

clear that they knew Cilibe worked at Ford in an effort to intimidate him.

113. Plaintiff Peters became the Chairman of NAAWU at Ford in the early 1980s. On occasion, Plaintiff Peters would travel because of his duties as a union representative. Ford managers in South Africa received notice of his travel in advance and collaborated with the Special Branch, including by informing the Special Branch of Peters' travel plans. As a result, the Special Branch detained Plaintiff Peters to question him about these union activities.

114. During interrogations, the security forces attempted to intimidate and pressure Plaintiff Peters, as Chairman of NAAWU, to intervene with workers in order to prevent and end strikes. When he refused to do so, he was threatened and tortured. When security forces interrogated Plaintiff Peters about his union activities, they regularly quoted statements he had made to Ford management in meetings he attended as part of his union responsibilities, sometimes verbatim. This reflected the ongoing close cooperation between Ford management and the South African government and security forces in suppressing black political activity of any kind.

115. On at least two occasions, Plaintiff Peters was subjected to a form of torture known as "the helicopter": his hands were handcuffed to his ankles, a broomstick was inserted between the wrists and ankles, and he was spun around violently. Some of his torturers were the same Special Branch officials he

saw regularly inside the Ford plant speaking with Ford management. During interrogations at the Special Branch office, Plaintiff Peters observed, on occasion, the head of Ford security inside the building.

116. Ford managers who were members of the Broederbond flaunted their comprehensive insider knowledge of upcoming security forces' activities and collaboration with security officers. At least one Ford manager who was a member of the Broederbond was informed, as part of his Ford responsibilities, about Plaintiff Peters' union travels.

117. The head of Ford security in South Africa often rode through black communities with Special Branch officers in Ford company vehicles as well as Special Branch cars. Some of these officers, who were regularly inside the Ford plants speaking with Ford management, were involved in the torture and arbitrary detention of union leaders, including Plaintiffs Peters. Ford thus facilitated the torture and arbitrary detention of its own workers.

118. On at least two occasions, Plaintiff Peters was interrogated on Ford premises with Ford management's cooperation. In addition to members of the Special Branch, sometimes Ford managers interrogated Peters during these sessions. Several human resources and industrial relations members of management participating in these joint Ford-Special Branch interrogations were also members of the Broederbond.

119. Special Branch officers worked with Ford management to coordinate efforts to intimidate workers not to get involved in political or union activities. For example, on one occasion a union leader's brother who worked at Ford had been interrogated and detained overnight, and he was brought to a plant the following morning. Accompanied by Special Branch into the plant, he was paraded in handcuffs to deter workers from involvement in political or union activities.

120. Members of the class, including Plaintiff Peters, were arrested, detained, and tortured by South African security forces as a result of information provided to the security forces by Ford and its management. Ford employees also knew when black employees had been interrogated, even when that information was not public.

121. Along with Plaintiff Botha, other politically active workers with good employment records were dismissed in the early 1980s by Ford. Some lost their work permits and had to return to a Bantustan as a result. Even those who were not tortured or driven into exile during the 1979 strikes were severely discriminated against in their employment because of their union and anti-apartheid activities.

DEFENDANT IBM'S PARTICIPATION IN APARTHEID

A. IBM Directed and Controlled Activities in South Africa from the United States

122. At all relevant times, IBM was a centralized corporation incorporated in the United States and headquartered in Armonk, New York. The major activities of IBM and its subsidiaries were directed from U.S. headquarters. IBM's Board of Directors, which meets in the United States, was responsible for supervising the company's overall affairs.

123. IBM oversaw all its overseas business from New York.

124. IBM in the United States set, at all relevant times, the code of business conduct, standards, and values for IBM directors, executive officers, and employees globally, which provided personnel policies for employees throughout the company, including in South Africa.

125. IBM South Africa (Pty) Ltd. was incorporated in 1952 in South Africa as a subsidiary of IBM. IBM had particularly close control and involvement in activities in South Africa because of the sensitivity to U.S. investment during apartheid.

126. IBM's complicity in institutionalizing, implementing, and perpetuating apartheid, including separation of the races and denationalization in South Africa and the Bantustans including Bophuthatswana, was directed from the United States.

127. At all relevant times, IBM in the United States made key decisions about operations in South Africa, including investments, policy, management, bids and contracts, hardware and software products and customization, as well as services and maintenance.

128. IBM, from the United States, controlled the top management personnel of its operations in South Africa. For example:

A. IBM in the United States selected and trained individuals to be employed in its South African subsidiary.

B. The head of IBM in South Africa frequently reported and answered to IBM in New York.

129. IBM, from the United States, controlled major investments and restructuring as well as bids on government contracts. For example:

A. Decisions about bids for major projects were handled in the United States and decisions were made on a case-by-case basis depending on the specific application in question.

B. IBM bid on the 1965 South African contract to produce the South African passbook but the contract was awarded to another company.

C. In 1985, Chairman Akers explained IBM's continued support for apartheid: "If we elect to leave it will be a business decision."

D. In 1986, IBM announced its intention to sell its South African holdings, although it would continue to license and distribute its products in the country. See, e.g., paras. 133-34.

130. IBM's own public statements indicate that decisions about its South African operations, including business with institutions involved in implementing apartheid and denationalization, were made in the United States. For example:

A. IBM acknowledged that its U.S. headquarters controlled and directed its South African policy by adopting the Sullivan Principles.

B. IBM's Vice Chair stated to the U.S. Congress in 1976 that IBM knew about all end uses of its products.

131. IBM tightly controlled the use of its technology in South Africa, including which hardware and software it provided to the government. IBM was also closely involved in customizing systems and providing ongoing systems support for its products. For example:

A. Thomas Watson, Jr., then IBM's Chairman, stated in a 1967 interview, "[T]echnology forces us to operate in a centralized manner We have a centralized technology."

B. Customization and software development for the systems in South Africa relied on IBM's U.S. support and expertise. IBM did not have research and development or manufacturing facilities in South Africa. Rather, IBM, in the

United States, conducted the research and development for the hardware and software that supported the apartheid system.

C. The major breakthroughs for the System/360 mainframe (and subsequent mainframe generations such as the System/370), which was at the core of computer systems in South Africa, were made and developed in the United States and/or orchestrated by IBM's headquarters.

D. IBM's research and development was so U.S.-focused that in its 1987 annual report to its stockholders, IBM stated that a third of its worldwide profits were earned by its U.S. operations. However, on its federal tax return for that year, IBM treated so much of its research and development expenses as U.S.-related that it reported almost no U.S. earnings – despite $25 billion in U.S. sales that year. As a result, IBM's federal income taxes for 1987 were virtually nonexistent. Thus, the 1989 federal tax return indicates that development and research for IBM's products used in South Africa occurred in the United States.

E. From the 1960s to the 1980s, systems engineering was particularly time-consuming, and this was a major part of the service that IBM provided. Expertise and ongoing support lay in the United States, and systems technicians relied on the expertise in the United States throughout this time period. Communication was facilitated by a worldwide

network that IBM created for internal communication so that thousands of computers could communicate, and IBM could provide systems service and maintenance to its customers, including those in South Africa.

132. IBM closely monitored its operations, activities, and the use of its technology in South African. For example:

A. Senior management officials from the United States, including the head of IBM, made regular visits to South Africa to ensure that their policies and practices were followed.

B. IBM informed its shareholders that, in 1972, its corporate Executive Committee visited South Africa in order to understand the situation there.

C. IBM executives understood that the passbook system was discriminatory. According to Gilbert Jones, IBM's Vice Chair and Chair of the IBM World Trade Corporation: "Sir, I don't want to stand up and defend the passbook system because, like you, I feel the passbook system is definitely a sign of the way they treat whites much better than they do colored, Asians, and blacks."

D. Chairman Frank Cary noted at IBM's 1977 annual meeting: "I have said time and again that we have investigated each instance brought to our attention where there was any reason to believe IBM computers might be used for repressive purposes, and we have found no such use." In all public statements

during the apartheid period, IBM management repeated the claim that they did not aid the imposition of apartheid but never claimed that IBM did not supply hardware, software, or technology to the South African and Bantustan governments. Indeed, at the same 1977 meeting, IBM confirmed that its machines stored the data of colored, Asian, and white South Africans.

E. IBM employees in South Africa could make complaints straight to New York, and IBM would get involved directly in the issues, including employment matters, going so far as to send management from the United States to investigate. U.S. interventions in such matters could lead to changes in South Africa.

133. In 1987, IBM "divested" from South Africa when it "sold" its South African subsidiary to Information Services Management Ltd. (ISM), a company created for the benefit of white South African IBM employees. Company spokespersons said this was done so that the newly independent company could fulfill IBM's existing contractual responsibilities in South Africa. Moreover, IBM stated that it would provide a loan allowing local investors to buy the subsidiary.

134. Although ISM was formally independent, it remained the alter ego and/or agent of IBM. IBM created the new company with its own funds for the purpose of continuing its business with the South African and Bantustan governments while claiming

that it was no longer doing business there. For example:

A. Jack Clarke, the same IBM employee who had been the general manager of IBM South Africa prior to the sale, ran the new entity.

B. The manuals, the staff, the office location, and the email addresses remained the same. Staff kept their IBM email addresses. Although employees had two email accounts – one ISM email and one IBM email – they would reach one destination whether someone sent to IBM or ISM. The individuals who ran the training programs in South Africa continued to come from IBM, including the people who would explain the mainframes.

C. Although IBM formally withdrew from South Africa, it intentionally continued its support for apartheid and denationalization. In particular, while IBM itself would no longer have assets, capital, or employees in South Africa, the new company signed multi-year contracts to import and sell IBM products, services, and technology.

D. In 1987, IBM's management defeated a shareholder resolution to prohibit sales to ISM. IBM Chairman Akers admitted that the volume of products IBM was shipping to South Africa remained about the same as before the ISM sale.

E. In 1987, Chairman Akers said that IBM had sold its assets in South Africa and claimed

that IBM's newly created representative no longer sold directly to the police or military.

F. Implicit in Akers' assertion is that, even after IBM's sale of assets to a newly created company, that company still followed U.S.-directed policies. This interpretation is consistent with the statement of the former head of IBM South Africa, who became head of the newly formed company:

> The former manager of IBM South Africa, Jack F. Clarke will be managing director of the new independent company. In full page advertisements in major South African papers, Clarke has gone out of his way to reassure IBM's South African customers that they will still be able to buy IBM computers and other products. "The new company will hold the sole franchise for IBM in South Africa, and has a supply and service contract with IBM. . . . There will be no change in the supply of IBM products," he wrote in a personally signed letter. Annual sales are estimated at over $200 million, the largest by far of any computer company in South Africa. IBM computers will continue to dominate the South African market.

G. IBM continued to sell all of its products, parts, and services through the new company and continued to be the top supplier of

computers to South Africa after the "divestiture." As one IBM dealer explained at the time, "Nothing has really changed except that IBM no longer has to account for its presence in South Africa."

H. After divestment, IBM ensured that its West German subsidiary and the Japanese company Hitachi could supply parts to service embargoed IBM equipment.

I. These sales and service arrangements violated the purpose of U.S government restrictions, since parts would be made under IBM patents registered in the United States and services were critical to the product. IBM intended – as it had for years – to continue to service South African agencies, contrary to the purpose of U.S. regulations.

J. IBM retained a buy-back option to the new company as a term of the sale.

K. In 1994, IBM "bought back" its majority interest in ISM.

L. At the time of the "buy-back," the ISM Managing Director had already been with IBM South Africa for 22 years in its various forms.

M. Thereafter, the company that had been known as ISM became IBM South Africa Group Ltd. and continued to be the exclusive representative of IBM in South Africa and to rely on IBM in the United States for technological support.

B. IBM Created and Produced Bophuthatswana Identity Documents to Purposefully Institutionalize and Facilitate Apartheid's Goals of Racial Separation and Denationalization

135. At all times relevant to Plaintiffs' allegations, IBM intentionally developed and provided computer technology, systems, software, training, and support to purposefully facilitate and enable the apartheid government's control of the majority black population, including the physical separation of the races into Bantustans. IBM sought specific contracts that would achieve these ends, executed those contracts in order to maintain its business in South Africa as well as to accomplish the goals of apartheid, and sought to prevent and circumvent sanctions regimes that would interfere with these ends. IBM actively created the system that institutionalized the complex apartheid system of Bantustans and population control organized by racial classification, which required sophisticated computer technology and knowledge of the kind provided by IBM both before and after it formally divested.

136. At least by the 1970s, the international and U.S. sanctions regimes had made clear that technology and computers provided to South African security forces played a critical role in advancing apartheid, including making a substantial contribution to the violent oppression of the black South African population and separating the races. For example:

A. In November 1977, the Carter administration announced new curbs affecting computer and technology sales to South Africa that prohibited the sale, direct or indirect, of any U.S. commodities or technical data to military or police entities in South Africa.

B. The 1978 U.S. sanctions regime was created to eliminate "gray areas," which was understood specifically to include specialized computer systems. The Carter administration put into place export controls in 1978 that prohibited the "export or re-exports of any commodity or technical data for delivery directly or indirectly to or use by or for military or police entities" in South Africa.

C. President Reagan also issued an executive order in September 1985 banning: "All exports of computers, computer software, or goods or technology intended to service computers to or for use by any of the following entities of the Government of South Africa: . . . (6) The administering authorities for the black passbook and similar controls; (7) Any apartheid enforcing agency; (8) Any local or regional government or 'homeland' entity which performs any function of any entity described in paragraphs (1) through (7)."

D. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, prohibiting the export of computers, software, and other technology for the use of South Africa government entities associated with apartheid and the extension of new loans or credit to such entities.

137. Despite sanctions and international condemnation of supplying technology to the South African security forces and government, as well as to the Bantustans, IBM made policy, management, investment, development, sales, and operational decisions that supported and facilitated sales, leases, and services to purposefully advance the goals of apartheid, in particular separation of the races.

138. IBM, in the United States, actively opposed efforts in the United States and South Africa to prevent it from supplying equipment and services out of concern for harm to IBM's business in the country, and in particular its relationship with the South African government. For example:

A. U.S. IBM executives asserted that sales to the South African government were necessary to maintain business there. Gilbert Jones, IBM's Vice Chair, stated in 1976 before the U.S. Congress: "But if you are going to go in South Africa, it is our feeling that you have to sell to the South African Government. If you don't sell to the South African Government, there is no way that your 1,400 employees are going to stay with you, No. 1. It is beyond me to believe that the South African Government is going to buy your computers and allow you to stay in South Africa if you don't deal with the government."

B. IBM's largest client in South Africa was the South African government, accounting for about one third of its sales there.

C. IBM specifically opposed the 1978 U.S. sanctions: "Senior U.S. officials from the home offices of IBM . . . and other multinationals registered their opposition to the ban and asked that it be lifted." After the adoption of these sanctions, IBM pushed for U.S. regulations that lacked enforcement and strove to interpret loopholes in the sanctions regime that did exist.

D. In the United States, IBM opposed shareholder resolutions starting in the 1970s related to divestment and advocated for a sanctions regime that would allow it to support the South African government's implementation and enforcement of apartheid, thereby interfering with U.S. foreign policy.

139. IBM pursued business in South Africa in a manner directly contrary to the intent of the U.S. embargo and sanctions regime, as well as international law. IBM directed IBM offices elsewhere in the world to continue to provide the same services, including those that facilitated denationalization and separation of the races. IBM engaged in subterfuges to disguise its violations of international law and sanctions so that it could continue to assist the apartheid regime and continue to profit from that collaboration. In so doing, it embraced the goals and purposes of the South African and Bantustan governments to advanced apartheid, including the separation of the races. For example:

A. IBM assured the South African government that its work in South Africa would continue,

including through provision of hardware, software, and technical support to implement denationalization through the Bantustan system. IBM continued sales to the apartheid government despite that fact that its operations supported unlawful behavior that the U.S. government sought to prevent.

B. After the U.S. Commerce Department banned the export of all U.S.-origin products to the South African security forces, IBM camouflaged its operations through deceptions arranged with affiliates in other countries and effectively circumvented the embargo by delivering parts and products to South African security forces that were produced outside the United States, and therefore not subject to the embargo.

C. IBM sought to help the apartheid structures "adjust to the threat posed by trade sanctions" and elude the goals of the embargo, including by making plans to switch to non-U.S. supply stocks and pledging to help the South African government overcome shortages of strategic goods by deceptive means.

D. The U.S. embassy in Pretoria cabled to the State Department, in October 1978, that, "Multinationals, including U.S. subsidiaries, are determined to undercut any sanctions action and have already made plans to camouflage their operation through subterfuges arranged with in other countries." By August 1979, the U.S. embassy acknowledged that U.S. multinationals had begun using

loopholes to undermine the goals of the embargo. As one U.S. official in South Africa cabled to the State Department, "It is our understanding that most U.S. firms have been able to continue sales by shifting to non-U.S. sources for components."

E. Enough of South Africa's supply chains remained intact to provide the apartheid state with continued access to computers, technology, machinery, and software.

F. IBM repeatedly misled the U.S. government and its own shareholders about its purposeful support for apartheid in order to circumvent domestic criticism.

G. On another occasion, IBM stated that it would continue to service computers in the South African Department of Defense. Jack Clarke, head of IBM South Africa, said that it would do so by using parts already in South Africa. IBM was therefore able to continue to support apartheid while giving the appearance of compliance with the embargo.

H. In another example of IBM's purposeful conduct supporting apartheid, IBM cooperated with Infoplan, a major South African government systems department designed to bypass sanctions, which worked directly with the security forces. IBM specifically provided Infoplan with codes and training that were necessary to change software, even when IBM knew sanctions were in place prohibiting work with the South African security forces.

140. IBM's many arguments defending its facilitation and maintenance of apartheid systems and structures were misleading and evinced the purposeful nature of its support. For example:

A. IBM asserted that South African government agencies used IBM computers only for "administration" and not for repressive use, thereby attempting to conceal the nature of the government it supported and the tasks it performed, such as denationalization of an entire ethnic group. However, when questioned about IBM's role in the expansion of the pass system, an IBM official replied, "We feel that the fact that it is being done with computers hasn't any appreciable overall effects on the apartheid situation. This pass system could be done in many other ways besides computers." Such statements ignored the essential nature of the computer systems and the dependency of South Africa and the Bantustan governments on IBM technology.

B. In a 1982 letter to the State Department, IBM admitted its machines were used for the national identity system maintained by South Africa's Interior Department. However, IBM officials in the United States maintained that the Interior Department installation for the Book of Life was not objectionable and did not contribute to apartheid because it did not cover the black population. This assertion was intended to obscure the fact that IBM's hardware and software played a key role in facilitating the very system of racial classification that made

apartheid possible. Moreover, the implication is clear that the origin of the technology, machinery, and programs was the United States.

141. IBM was a dominant industry leader and played a vital role in providing systems – both its hardware and software – to the South African and Bantustan governments. For example:

A. For a significant time period, IBM controlled nearly half the South African computer industry. IBM's export from the United States to South Africa of its technology, equipment, expertise, and training on how to use and maintain its technology was essential to apartheid.

B. Between 1960 and 1980, South Africa did not have an indigenous domestic computer industry and was dependent on outside sources for its critical computerized operations, including those related to racial separation and denationalization.

C. Computers and software required major ongoing systems support during the relevant time period. For example, serial numbers, coding, and customization were required for individual purchasers to make use of hardware. IBM played this role, providing ongoing services, maintenance contracts, and systems engineers, who knew IBM's hardware and software systems and filled the gaps that existed in South African industry.

D. Software and ongoing support was, along with hardware, a critical a part of IBM's business. IBM considered that continued support to be essential to its business model. As explained by Gilbert Jones, IBM's Vice Chair: "When you buy a computer – one of the major reasons you buy a computer is because of the service and IBM support that is behind that computer. So that our systems engineers and our sales representatives are dealing with our customers on a day-to-day basis."

E. IBM also helped troubleshoot system problems. If government officials could not handle a problem internally, they would contact IBM. IBM employees known as "operators" would be called in to help the government, for example with problems associated with the IBM operating system.

F. IBM provided training to government officials in South Africa and the Bantustans on IBM programming languages and proper use of IBM machines, which was essential to use the systems. IBM also provided trainings and courses in South Africa to data capturers and operators.

142. IBM systems, which helped institutionalize the separation of the races, were of critical importance to the South African and Bantustan governments. IBM and the governments understood that such machinery, technology, and technical support coming from the United States substantially

contributed to the goal of separating the races and denationalizing black South Africans. For example:

A. IBM's representative told investigators from the House Subcommittee on Africa in 1984, "South Africa really needs U.S. companies in certain industries, particularly high tech industries and computers."

B. Rep. Howard Berman, the sponsor of legislation to ban computer sales to South Africa, testified in 1985 that:

> Computers are essential to the South African government's pervasive control over every aspect of existence for every black individual. From the age of sixteen, all Africans must carry passbooks indicating where they have permission to live and work and whether they are allowed to live with their families. . . . Computers help in the collection, retrieval and use of this information. . . . As the South African economy and population grew, political leaders became concerned that a growing white manpower shortage would inhibit the implementation of apartheid. Computers have helped solve that problem. Moreover computers have enabled the South African government to strengthen its grip on the population and intensify apartheid enforcement over recent years. Pass law arrests doubled

> between 1980 and 1982. Political detentions have increased sharply. . . . Armed with more thorough and more readily available information on black residents, the government has accelerated forced removals of whole communities from so-called 'black-spots' – areas where black families have lived for generations, but which the government has declared 'white'.

C. A U.S. government cable noted that a lack of access to foreign technology could cripple South Africa. The incapacitation of a single computer would necessitate "having to find hundreds of bookkeepers who are not available on [the] labor market."

D. As of 1986, South Africa relied on imported mainframe computers. As a computer industry official in South Africa explained: "We're entirely dependent on the United States. The economy would grind to a halt without access to the computer technology of the West."

E. The reality of labor shortages to administer the apartheid system made dependency on foreign technology companies and IBM's U.S.-based decisions about its South African policy all the more important.

F. The South African government recognized the importance of the computer support as well. As one South African academic noted in 1978, "We are almost totally dependent on imports for our computer requirements. . . .

> Our utter vulnerability in this vital field is not generally appreciated by the public, but is causing grave concern in official circles and serious attention is being given to the matter." The government recognized the need to circumvent sanctions regimes and to develop more self-sufficiency over time.

G. IBM misrepresented that its equipment, software, and services were not essential or significant and that legitimate purposes overshadowed any risk of harm, even while IBM acknowledged that its equipment facilitated racial separation and denationalization. IBM's efforts to portray all its equipment as dual-use was deliberately misleading, as the company supplied hardware and software with the intent to violate international law and for the purpose of denationalizing black South Africans.

143. Although IBM was outbid for the contract to provide technology to produce the African passbook in 1965, IBM hardware served as the electronic memory bank for a large part of South Africa's national identity system. IBM supplied the South African government and provided essential technology for the Book of Life that, along with the passbook, facilitated the racial classifications and population tracking that made apartheid possible.

144. Pretoria's Interior Department ran its population registry, the so-called Book of Life, on two IBM mainframes that stored details on seven million citizens the government classifies as "coloureds,"

Asians, and whites. The Book of Life contained assorted information, including racial classification, name, sex, date of birth, residence, photograph, marital status, driver license number, dates of travel/exit from and/or return to the country, place of work or study, and finger prints. Give this amount of data, the power of IBM mainframes provided critical support.

145. The Book of Life, which had to be carried at all times, enabled authorities to identify individuals by race in order determine their rights with respect to movement, employment, and other status. The Group Areas Act, which controlled the movements of "coloureds" and Asians and allowed the government to suppress them, could not have been as effectively institutionalized without the Book of Life.

146. Beyond its support for the South African Book of Life, IBM played an essential role in the creation and maintenance of the Bantustan system, which worked in tandem with the South African pass system to separate the races.

147. The Bantustans represented the ultimate goal of apartheid: the creation of a white majority South Africa through denationalization of the black majority, who were forced to become citizens of "independent" homelands (Bantustans) comprising 13% of the undesirable rural land that had been a part of South Africa. The administrations of at least one Bantustan-Bophuthatswana – relied on IBM computers. IBM computers were also used by other Bantustans,

including but not limited to Transkei, Venda, KwaZulu, Gazankulu, and Lebowa.

148. Bophuthatswana was a designated Bantustan, an "independent" state created for the very purpose of excluding blacks from white South Africa under apartheid. It was accorded nominal independence, as a putatively sovereign state, in 1977.

149. Bophuthatswana established some of the indicia of statehood. Among these were the capacity to have "citizens," a designation forced upon black South Africans of the Tswana tribe as part of the exercise of denationalization that was the basis of Grand Apartheid. The Bophuthatswana government imposed identity documents and passports among the victims of denationalization in an effort to achieve the ultimate goal of Grand Apartheid.

150. For this purpose, the Bophuthatswana government used and was dependent upon IBM computers and systems – both hardware and software – including specifically for the production of the Bophuthatswana ID that was essential to institutionalizing the denationalization of black South Africans. For example:

A. Bophuthatswana government employees working with IBM computers and systems were trained in an IBM-specific programming language.

B. IBM ran training courses for government employees in Johannesburg and Bophuthatswana. These courses also covered the

IBM-specific programming language and the proper use of IBM machines. Programmers who attended these courses were government employees.

C. The critical role that IBM played in developing and maintaining the system was further indicated by that fact that IBM-trained individuals had more power within the government than university-trained individuals. Some IBM-trained individuals had fewer formal qualifications, but government officials in Bophuthatswana gave IBM-trained individuals larger and more important, complex, and challenging assignments.

D. Programs that government had at the time were not working well, which frustrated employees. IBM helped solve the limitations that government was facing. Some computer programs run by the Bophuthatswana government on IBM machines were developed and written in-house with the assistance of IBM employees.

E. When government employees encountered difficulty with their machines or with the programs, IBM employees would assist them in troubleshooting and repairing any problems. Government officials would call in IBM operators to help with the operating system for example.

151. In the late 1970s and 1980s, the Bophuthatswana government used IBM computers, which were upgraded regularly. For example, over the span

of a few years, the government used the System/3 Model 10 computer, which was upgraded to the Model 12 computer and then the Model 15. All these models that the government was using were IBM machines. The system was later upgraded to a System 38.

152. At least by 1978, IBM actively created and then oversaw the ongoing functioning of the hardware and software necessary to create the new ID book for Bophuthatswana. IBM wholly developed the sub-system to produce the ID book. Once IBM had developed the system, it was transferred to the Bophuthatswana government for implementation.

A. IBM wholly developed the sub-system used to create the Bophuthatswana ID book. The IBM system created to make the Bophuthatswana ID, which was developed around 1978, was viewed as an innovation. The ID book was seen as a crucial step towards Bophuthatswana's status as an independent country with its own ID book and citizens.

B. In the United States, IBM developed both the hardware and software – both a machine and a program – to create the Bophuthatswana ID. Once IBM had developed the system, it was transferred to the Bophuthatswana government for implementation.

C. The IBM project leader, who was a full-time IBM employee, was in constant contact with the Bophuthatswana official who was a government manager in the computer center and the government's project leader. The

IBM project leader would visit the government office. When IBM installed the system at the government's computer center, the IBM project leader was directly involved in showing the government project leader how the system worked.

D. IBM employees trained Bophuthatswana employees to use the IBM machine and program to produce ID documents. The IBM project leader directly trained government officials involved in data capture on the system. IBM was contacted when problems arose with the ID book system and IBM employees would attend to fix such problems.

E. After the initial development of the ID system, it was handed over to the Bophuthatswana Department of Internal Affairs, which was in charge of ID books. This transfer happened in the late 1970s or early 1980s.

F. Initially, Internal Affairs brought the government computer center information provided on application forms for IDs, data capturing would capture that information on the IBM machines, and ID books would be printed, produced, and bound.

G. Subsequently, Internal Affairs officials were trained to do their own data capturing and the system was then transferred to them. The IBM project leader was directly involved when the system was moved to Internal Affairs. The IBM project leader also trained new government officials from Internal Affairs to use the system.

H. At Internal Affairs, it was a stand-alone IBM machine that could produce the IDs, which was brought in by IBM and tested for implementation. The ID book project was both hardware and software – a program and a machine. Although the machine was capable of performing other tasks, it was specifically and exclusively used for ID books. Once the system was in place, the program would allow an individual to enter details from application forms and would then print the ID document. The books would then be bound and produced.

I. If there was a problem with the system, Internal Affairs would initially contact another government employee with computer training but most often, because the software source was with IBM, IBM would be called and they would fix the issue. IBM worked directly with the computer center at Internal Affairs on such issues. The government project leader had very little access to the source code and did very little maintenance.

J. The IDs produced for the Bophuthatswana government contained the name, sex, racial classification, ethnic origin, and residential address/postal address of the individual. Bophuthatswana residents were required to carry the IDs produced by the Bophuthatswana government with the active participation of IBM, and their South African IDs were no longer valid.

K. The system handled a large volume of information and data. Applications came from all regions of Bophuthatswana in huge boxes.

153. The legislation creating "independent" homelands was announced in 1970 but did not have significant effect until after 1976, when the new "states" were able to produce indicia of statehood like the IBM-produced Bophuthatswana ID.

154. Each of the Plaintiffs suffered as a result of the South African government's campaign to separate the races and create nominally "independent countries" within South Africa. Plaintiff Shole and his villagers were relocated from the fertile area in which he was chief and forcibly removed to Ramatlabama, an arid and undeveloped area in Bophutatswana near the border with Botswana. Plaintiff Shole was stripped of his South African citizenship, which was replaced by Bophuthatswana citizenship. He was forced to acquire the Bophuthatswana ID, which was necessary to access basic services in Bophuthatswana, including pensions, schooling, health clinics, bank accounts and loans, government jobs, and permits to build homes or open businesses. As a result of his loss of South African citizenship, Shole suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship, including the right to reside in his home.

155. Plaintiff Bokaba's home village was also incorporated into Bophuthatswana and Bokaba was stripped of his South African citizenship, which was

replaced by Bophuthatswana citizenship. Plaintiff Bokaba was forced to acquire the Bophuthatswana ID in order to legitimize his existence in Bophuthatswana and access basic services, including education. As a result of his loss of citizenship, Bokaba suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

156. Plaintiff Sepheri's home village of Stella was forcibly removed to Atameleng, which was incorporated into Bophuthatswana after "independence" in 1977. Plaintiff Sepheri was stripped of her South African citizenship, which was replaced by Bophuthatswana citizenship. As a result of her village's removal, she was separated from her family, and made to live in an area remote from schools, employment, and other services. Sepheri was forced to acquire the Bophuthatswana ID, which was required to obtain basic services in Bophuthatswana, including buying a home, receiving a pension, registering a child in school, and accessing medical care. As a result of her of citizenship, Sepheri suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

157. Plaintiff Mosiane was stripped of her South African citizenship, which was replaced by Bophuthatswana citizenship. Her South African ID was declared invalid, and she was assigned a Bophuthatswana ID. However, because Mosiane was Sotho rather than Tswana, she suffered additional deprivations, including not immediately being able to obtain a Bophuthatswana ID and associated services, which

were intended for black South Africans of Tswana decent. As a result of her loss of citizenship, Mosiane suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

158. Plaintiff Phiri was stripped of his South African citizenship, which was replaced by Bophuthatswana citizenship. Officials declared his South African ID invalid, and he was assigned a Bophuthatswana ID document. Black individuals, including Plaintiff Phiri, were told that they had to apply, or they would lose privileges, such as employment opportunities in Bophuthatswana. Many were forced to return their South African IDs when they applied for the new Bophuthatswana ID. Individuals feared punishment and retaliation, imprisonment, or the loss of existing employment if they did not acquire the new ID. Plaintiff Phiri lost the benefits of South African citizenship, including the right to live and work in his own country.

159. Plaintiff Mogoshane was stripped of his South African citizenship, which was replaced by Bophuthatswana citizenship. Plaintiff Mogoshane was born and lived in Botshabelo, a village that forcibly removed to Ikopeleng in Bophuthatswana in 1977. For several years while living in Bophuthatswana, he continued to use his South African ID to work in the mines. Sometime in the 1980s, he could no longer use his South African ID to work in the mines, and was required to get a Bophuthatswana ID to retain his employment. His South African ID was

declared invalid, and he was assigned a Bophuthatswana ID, which he used to continue to work in the mines until the early 1990s. As a result of his loss of citizenship, Mogoshane suffered a great indignity as well as the loss of the rights and benefits associated with South African citizenship.

160. IBM also actively participated in developing the bookkeeping and salary system used by the Bophuthatswana government for all employees, including the police and security.

161. Other Bantustan governments, including but not limited to Transkei, Venda, KwaZulu, Gazankulu, and Lebowa, also used IBM hardware and software.

DEFENDANTS' LIABILITY

A. Ford's Liability for Acts of Its Agents and Alter Egos

162. Ford South Africa and later SAMCOR were agents of Ford headquartered in the United States. For example:

A. The activities of the two companies were devoted to Ford. *See, e.g.*, paras. 66-78.

B. Ford and both South African companies publicly represented that the latter represented the former and was the only entity doing the business of the former in South Africa. *See, e.g.*, paras. 66-78.

C. The financing for the South African entities came from Ford. *See, e.g*., paras. 72, 77-78.

D. Further, Ford controlled all major decisions and specifically controlled the decision to provide specially adapted vehicles to the South African security forces as well as decisions related to suppression of anti-apartheid employees. *See, e.g.*, paras. 66-83.

E. The injuries suffered by Plaintiffs were within the scope of the agency, and included providing vehicles specially adapted for the security forces using violence to maintain apartheid, and cooperating with the security forces to repress anti-apartheid activities. *See, e.g.*, paras. 66-121.

F. SAMCOR was also the alter ego of Ford because it was created in bad faith for the purpose of obscuring Ford's continued facilitation of the South African apartheid and other government abuses. *See, e.g*., paras. 77-78.

B. IBM's Liability for Acts of Its Agents and Alter Egos

163. IBM South Africa and later ISM were agents of IBM headquartered in the United States. For example:

A. The activities of the two companies were devoted to IBM. *See, e.g*., paras. 122-34, 138-39.

B. IBM and both South African companies publicly represented that the later was the only

entity doing the business of the former in South Africa. *See, e.g.*, paras. 122-34.

C. The financing for the South African entities came from IBM. *See, e.g.*, paras. 129, 134.

D. IBM controlled all major decisions, including the decision to enter into an agreement with the South African and Bantustan governments to provide and maintain identity documents necessary to the implementation of Grand Apartheid. *See, e.g.*, paras. 122-34.

E. Further, the conduct that injured Plaintiffs was within the scope of the agency, and included denationalization in areas of poverty and isolation by knowingly and intentionally creating and maintaining the equipment that produced race-based identity documents and sorting and storing information in databases and training those who used the equipment to enforce race separation. *See, e.g.*, paras. 122-61.

C. Defendants' Liability for Aiding and Abetting

164. Ford is liable for aiding and abetting the South African government in extrajudicial killings and crimes against humanity in that, directly and/or through its agents and alter ego:

A. Ford provided substantial assistance with the purpose of facilitating the alleged offenses. *See, e.g.*, paras. 74, 78-121.

B. Ford did so knowing and intending that it assistance purposefully facilitated those offenses. *See, e.g.*, paras. 78-121.

165. IBM is liable for aiding and abetting the South African and Bantustan governments in the denationalization of Black South Africans in that, directly and/or through its agents and alter ego:

A. IBM provided substantial assistance with the purpose of facilitating the alleged offenses. *See, e.g.*, paras. 135-61.

B. IBM did so knowing and intending that it assistance purposefully facilitated those offenses. *See, e.g.*, paras. 135-61.

D. Defendants' Liability for Acts in Furtherance of the Conspiracy

166. Ford is liable for the extrajudicial killings, torture, and crimes against humanity as part of a conspiracy in that:

A. Ford agreed with the South African government to provide specially adapted vehicles to the security forces to be used in the violent imposition of apartheid. *See, e.g.*, paras. 74, 78.

B. Ford, through its agents and alter ego, provided specially adapted vehicles to the security forces to be used in the violent imposition of apartheid. *See, e.g.*, paras. 74, 78, 84-85.

C. Ford acted knowing and intending that it provision of these vehicles purposefully facilitated those offenses. *See, e.g*., paras. 79-86.

D. Ford, directly and/or through its agents and alter ego, agreed with the South African government to suppress anti-apartheid and union activity. *See, e.g*., paras. 96-121.

E. Ford, directly and/or through its agents and alter ego, did provide the South African government with information on anti-apartheid and union activities of its employees knowing that those employees would be subjected to torture and crimes against humanity. *See, e.g*., paras. 96-121.

F. Ford acted knowing and intending that it provision of this information purposefully facilitated the commission of those offenses. *See, e.g*., paras. 96-121.

167. IBM is liable for in the denationalization of black South Africans and crimes against humanity as part of a conspiracy with the South African and Bantustan governments in that:

A. IBM agreed with the South African and Bantustan governments to develop and provide equipment that produced race-based identity documents and sorted and stored information in databases and trained those who used the equipment to enforce denationalization and race separation. *See, e.g*., paras. 122-53.

B. IBM, directly and through its agents and alter ego, did develop and provide equipment that produced race-based identity documents and sorted and stored information in databases and trained those who used the equipment to enforce denationalization and race separation. *See, e.g.*, paras. 122-53.

C. IBM acted knowing and intending that it provision of this equipment and services purposefully facilitated those offenses. *See, e.g.*, paras. 122-53.

E. Defendants' Liability as Part of a Joint Criminal Enterprise

168. Ford is liable for the commission of the abuses alleged above in that Ford contributed as part of a group of entities, including the South African government, acting with a common purpose, to the commission of crimes against humanity, torture, and extrajudicial judicial killings.

A. Ford acted to further that purpose. *See, e.g.*, paras. 69-86, 96-101.

B. Ford did so with knowledge of the group's intention to commit these abuses. *See, e.g.*, paras. 69-86, 96-101.

169. IBM is liable for the commission of the abuses alleged above in that IBM contributed as part of a group of entities, including the South African and Bantustan governments, with the common purpose to

denationalize black South Africans and commit crimes against humanity.

A. IBM acted to further that purpose. *See, e.g.*, paras. 122-53.

B. IBM did so with knowledge of the group's intention to commit those abuses. *See, e.g.*, paras. 122-53.

CLASS ACTION ALLEGATIONS

170. This action is brought and may properly be maintained as a class action pursuant to the provisions of Fed. R. Civ. P. 23. Plaintiffs bring this class action as authorized by the Alien Tort Statute (ATS) on behalf of themselves and black South African citizens (and their heirs and beneficiaries) who during the period from 1973 to 1994 suffered injuries as a result of Defendants' violations of the law of nations by their complicity in such violations caused by South African state officials, employees, or agents. Excluded from the class are Defendants, any entity in which Defendants have a controlling interest, and any of Defendants' subsidiaries, affiliates, officers, directors, or the families of any such officers or directors.

171. Plaintiffs and class members were subjected to apartheid as a crime against humanity, tortured, extrajudicially killed, stripped of their South African nationality and/or citizenship, suppressed and retaliated against for expressing anti-apartheid sentiments or beliefs or for participating in anti-apartheid

organizations or movements, and suppressed and retaliated against for their union activities.

172. The classes for whose benefit this action is brought is so numerous that joinder of all class members is impracticable. Plaintiffs believe that there are many thousands of members of the classes, although the number and identities of individual class members are presently unknown and can be ascertained only through discovery.

173. There are questions of law and fact common to each class that predominate over any questions affecting only individual class members.

174. Among the questions of law and fact common to the classes are the following:

A. Whether Ford actively participated in extra-judicial killing of black South Africans, including those who opposed and/or protested against the South African apartheid state, or subjected them to other forms of physical violence;

B. Whether Ford actively participated in the torture of those who opposed or protested against the South African apartheid state or against working conditions as members of union organizations;

C. Whether Ford suppressed and retaliated against those who participated in anti-apartheid political movements or union activities or expressed similar views;

D. Whether IBM helped implement apartheid by facilitating or participating in the geographic separation of the races;

E. Whether IBM helped institutionalize and implement apartheid through denationalization; and

F. Whether these actions against the class members were committed by the apartheid state with the complicity of Defendants, either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise, or whether the actions were committed directly by the Defendants themselves, or whether each Defendant and the state acted as the agent of the other.

175. Plaintiffs' claims are typical of the claims of the other members of the class, since all such claims arise out of Defendants' actions in actively providing support for the specific violations alleged herein. Plaintiffs have no interest antagonistic to the interests of the other members of the class.

176. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel with extensive experience in the prosecution of human rights actions and class actions. Accordingly, Plaintiffs are adequate representatives of the class and will fairly and adequately protect the interests of the class.

177. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications, which would

establish incompatible standards of conduct for the Defendants in this action.

178. Plaintiffs anticipate that there will be no difficulty in the management of this litigation. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

179. Although most class members are located in South Africa, this will not hamper the ability to pursue this case as a class action since communication with class members can be made with the assistance of various attorneys and non-governmental organizations operating in South Africa.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(APARTHEID AS A CRIME AGAINST HUMANITY)

(AGAINST BOTH DEFENANTS)

180. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

181. All Plaintiffs, on behalf of themselves and the classes they represent, seek relief from crimes against humanity committed by the apartheid state with the complicity of Defendants, either directly and/or through their agents and alter egos, either by aiding and abetting or engaging in a conspiracy or

joint criminal enterprise with the South African and Bantustan governments, including Bophuthatswana.

182. The crimes against humanity for which Defendants are liable are intentional acts that were knowingly committed as part of widespread or systematic attacks directed against a civilian population.

183. The acts which form the basis of Defendants' liability for crimes against humanity include apartheid itself as well as murder, deportation or forcible transfer of population, revocation of nationality, imprisonment or other severe deprivation of physical liberty in violation of international law, torture, the persecution against any identifiable group or collectivity on political, racial, national, or ethnic grounds, and/or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

184. Each single act constitutes a crime against humanity because it was committed within the context of widespread or systematic attacks against a civilian population. In addition, apartheid itself has been long recognized as a crime against humanity.

185. Plaintiffs and the members of the class or classes they represent suffered injuries as a result of Defendants' actions.

186. The Defendants' actions were committed with knowing and callous disregard for Plaintiffs'

rights. As a result, Plaintiffs are entitled to an award of punitive damages against each Defendant.

SECOND CLAIM FOR RELIEF

(DENIAL OF THE RIGHT TO A NATIONALITY)

(AGAINST DEFENDANT IBM)

187. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

188. Plaintiffs Mogoshane, Monsiane, Phiri, Sepheri, and Shole, on behalf of themselves and the class they represent, seek relief from the denial of the right to a nationality committed against them by the apartheid state with the complicity of IBM acting either directly and/or through their agents and alter egos, and either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise. IBM conspired with state actors, including the South Africa and Bantustan governments, including Bophuthatswana.

189. Plaintiffs Mogoshane, Monsiane, Phiri, Sepheri, and Shole, and the class they represent were stripped of their South African nationality and citizenship, were restricted in their ability to travel in to, out of, and around South Africa, and were discriminated against by being forcibly geographically separated and segregated into homelands on the basis of race.

190. Plaintiffs Mogoshane, Monsiane, Phiri, Sepheri, and Shole, and the class they represent, suffered injuries as a result of IBM's actions.

191. IBM's actions were committed with knowing and callous disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against IBM.

THIRD CLAIM FOR RELIEF

(EXTRAJUDICIAL KILLING)

(AGAINST DEFENDANT FORD)

192. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

193. Plaintiffs Molefi, Ngcaka, Dyonashe, and Mzamo on behalf of themselves and their murdered sons, Hector Pieterson, Thembekile Ngcaka, Vuyani Adonis, and Bubele Mzamo, and the class they represent, seek relief from extrajudicial killings committed against them by the apartheid state with the intentional complicity of Ford acting either directly and/or through its agents and alter egos, and, either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise. Ford conspired with state actors, including South African security forces.

194. These Plaintiffs and the class they represent suffered injuries as a result of Ford's actions.

195. Ford's actions were committed with knowing and callous disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against Ford.

FOURTH CLAIM FOR RELIEF

(TORTURE)

(AGAINST DEFENDANT FORD)

196. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

197. Plaintiffs Botha and Peters, on behalf of themselves and the class they represent, seek relief from torture committed against them by the apartheid state with the intentional complicity of Ford, acting either directly and/or through their agents and alter egos, and either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise. Ford conspired with state actors, including South African security forces.

198. The tortures described herein were inflicted deliberately and intentionally for purposes that included, among others, punishing the victim or intimidating the victim or third persons.

199. Plaintiffs and the class they represent suffered severe mental and physical injuries as a result of Ford's actions.

200. Ford's actions were committed with knowing and callous disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against Ford.

FIFTH CLAIM FOR RELIEF

(CRUEL, INHUMAN OR DEGRADING TREATMENT)

(AGAINST BOTH DEFENDANTS)

201. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

202. All Plaintiffs and the class they represent suffered injuries as a result of Defendants' actions that constitute cruel, inhuman or degrading treatment (CIDT).

203. The acts described herein had the intent and the effect of grossly humiliating and debasing the Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and/or breaking their physical or moral resistance.

204. The acts described herein constitute CIDT committed against the Plaintiffs by the apartheid state with the complicity of the Defendants, acting either directly and/or through their agents and alter egos, and, either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise, or committed directly by the Defendants themselves. Each Defendant conspired with state actors, including the

South African and Bantustan governments and security forces.

205. All Plaintiffs and the class they represent suffered injuries as a result of Defendants' actions.

206. The Defendants' actions were committed with knowing and callous disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against each Defendant.

PRAYER FOR RELIEF

207. WHEREFORE, each and every Plaintiff prays for judgment against each Defendant as follows:

A. for compensatory damages, including general and special damages;

B. for punitive damages;

C. for disgorgement of profits;

D. for costs of suit, including attorneys fees; and

E. for such other and further relief as the Court deems appropriate.

JURY DEMAND

208. Plaintiffs hereby demand a jury trial on all issues so triable.

Dated: August 8, 2014

Respectfully submitted by,

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APPENDIX F

[SEAL]

MINISTER
JUSTICE AND CONSTITUTIONAL
DEVELOPMENT REPUBLIC OF SOUTH AFRICA

The Honourable Judge Shira A. Scheindlin
United States District Judge
United States District Court
Southern District of New York
United States Court House
500 Pearl Street
New York
New York
10007-1581
United States of America

Dear Judge Scheindlin

IN RE SOUTH AFRICAN APARTHEID LITIGATION (02 MDL 1499) – LUNGISILE NTSEBEZA et al; and KHULUMANI et al.

On the 8th April 2009, the United States District Court, Southern District of New York, per Shira A Scheindlin U.S.D.J. issued an opinion in part upholding the Plaintiffs motion and in part denying it. The court also dismissed the plaintiffs' motion to re-solicit the views of the Governments (of the Republic of South Africa and the United States of America).

In its conclusion the Court stated that "corporate defendants merely accused of doing business with the apartheid Government of South Africa have been dismissed. Claims that a corporation that aided and

abetted particular acts could be liable for the breadth of harms committed under apartheid have been rejected. What survives (in terms of claims) are much narrower cases that this Court hopes will move toward resolution after more than five years spent litigating motions to dismiss".

The remaining claims are based on aiding and abetting very serious crimes, such as torture, extrajudicial killing committed in violation of international law by the apartheid regime.

The Court in dismissing the claims based solely on the fact that corporations merely did business with the apartheid government also addressed some of the concerns which the Government of the Republic of South Africa had.

The apartheid issue and the role of business were canvassed by the Truth and Reconciliation Commission during its hearings. Its report and recommendations were acted upon by the Government of the Republic of South Africa in a manner it considered to be appropriate. The Government believes that it would not be prudent to continually have to re-state its position in response to all the motions filed in connection with these claims, pending the final adjudication by the District Court.

The Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York is now of the view that this Court is an

appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.

The Plaintiffs have, separately, indicated to the Government of the Republic of South Africa their desire to have the matter resolved outside of the court process generally with resolution in the Republic of South Africa if possible. The Government of the Republic of South Africa welcomes this development and would be willing to offer its counsel to the parties in pursuit of a settlement, if requested to do so by the parties.

Respectfully yours,

/s/ J. Radebe

JEFFREY THAMSANQA RADEBE, MP
MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

cc: Clerk United States Court of Appeals for the Second Circuit