14- 4104

United States Court of Appeals

for the

Second Circuit

Sakwe Balintulo, as personal representative of SABA BALINTULO, et al.

Plaintiff- Appellants

v.

(For Continuation of Caption See Following Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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FORD MOTOR CO., INTERNATIONAL BUSINESS MACHINES CORP.

Defendants- Movants,

GENERAL MOTORS CORP.

Defendant.

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, Lesiba Kekana, Dennis Vincent Frederi Brutus, Mark Fransch, Elsie Gishi, Thobile Sikani, Reuben Mphela, Catherine Mlangeni, Archington Madondo, Michael Mbele, Thulani Nunu, Mamosadi Mlangeni, Thandiwe Shezi, Sakwe Balintulo,

Plaintiffs-Appellants

Sigqibo Mpendulo, Nyameka Goniwe, Themba Mequbela, Andile Mfingwana, F. J. Dlevu, unlawfully detained and tortured during period 1964/4, Lwazi Pumelea Kubukeli, unlawfully forced to flee into exil in 1985, Frank Brown, P.J. Olai, Sylvia Brown, H. Durham, M.D., Wellington Baninzi Gamagu, Violations of Pass Laws, unlawful detention 198119983, torture subjected to discriminatory labor practices 1981, Hermina Digwamaje, Sakwe Balintulo Khulumani,

Plaintiffs,

Hans Langford Phiri,

ADR Provider- Appellant,

v.

Suzler AG, Daimler Chrysler North America Holding Corporation, Debeers Corporation, Schindler Holding AG, Novartis AG, Anglos-American Corporation, Banque Indo Suez, Credit Iyonnais, and Unknown officers and directors of Danu International., Standard Chartered Bank PLC, Citigroup AG, J.P. Morgan Securities Inc., as successor to Morgan Guaranty, Manufactures Hannover, Chemical Bank & Chase Manhattan Bank, Corporate Does, Commerzbank AG, Credit Suisse, Citigroup Inc., Deutsche Bank AG, UBS AG, Dresdner Bank AG, Unisys Corporation, Sperry Corporation, Burrough Corrporation, ICL, Ltd., John Doe Corporation, Amdahl Corp., Computer Companies, Ford Motor Company, Ford Motor

Company, Holcin, Ltd., Henry Blodget, Merrill Lynch & Co., Inc., Kirsetn Campbell, Kenneth M. Seymour, Justin Baldauf, Thomas Mazzucco, Virginia Syer Genereux, Sofia Ghachem, John Doe, Defendants 1through 10, Edward McCabe, Deepak Raj, Corporate Does, 1-100, their predecessors, successors and/or assigns, Oerlikon Contraves AG, Exxon Mobil Corporation, Oerlikon Buhrle AG, Shell Oil Company, Shell Petroleum, Inc., Royal Dutch Petroleum Co., Shell Transport & Trading Company, PLC, National Westminster Bank PLC, Minnesota Mining and Manufacturing Company/ 3M Company, Fujitsu Ltd., Barclays National Bank Ltd., Daimler AG, General Motors Corporation, International Business Machines Corporation, Union Bank of Switzerland AG,

Defendants-Appellees,

Rheinmatall Group AG, Barclays Bank PLC,

Defendants.

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INTRODUCTION

This appeal is controlled by this Court's recent decision in *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), a decision unavailable to the District Court when it dismissed Plaintiffs' claims and denied leave to amend their complaints. Under *Mastafa*, the Second Amended Complaints meet this Court's requirements to displace the presumption against extraterritoriality established under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"). The Second Amended Complaints also fully satisfy this Court's requirements for pleading aiding and abetting liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Accepting Plaintiffs' new, detailed allegations as true, as is required in this procedural posture, the District Court's judgment should be reversed.

This matter is on appeal from an order dismissing Plaintiffs' ATS claims. Following this Court's decision in *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013), and the Supreme Court's decision in *Kiobel II*, the court below denied leave to amend, concluding that the "plaintiffs have no valid cause of action against the South African subsidiaries under *Kiobel II* because all of the subsidiaries' conduct undisputedly occurred abroad." Aug. 28, 2014 Order at SA019. The court below, however, misread the legal standard established by *Balintulo*, which it understood to adopt Justice Alito's concurrence in *Kiobel II*. Neither *Balintulo* nor *Kiobel II*,

however, forecloses claims against U.S. parent corporations based on theories of direct liability that focus on a defendant's conduct in the United States, such as aiding and abetting or conspiracy.[1] In foreclosing aiding and abetting liability, the lower court erred as a matter of law in analyzing Plaintiffs' new allegations.

Mastafa explicitly recognizes claims for aiding and abetting under the ATS. 770 F.3d at 171. The lower court, however, disregarded Plaintiffs' aiding and abetting claims based on Defendants' own conduct in the United States, instead focusing solely on the harms in South Africa. Although the harm to Plaintiffs in fact did occur in South Africa, aiding and abetting conduct by Defendants also took place in the United States. *Mastafa* demonstrates that the proper inquiry regarding Defendants' aiding and abetting as well as the presumption against extraterritoriality involves an intensive fact-based analysis of Defendants' *own* unlawful conduct in the United States that facilitated or enabled the harm abroad.

Here, Plaintiffs have alleged extensive new facts indicating Defendants' U.S.-based actions constituted unlawful aiding and abetting and advanced law of nations violations. The facts demonstrate the claims touch and concern the United States and are far more than the "mere corporate presence" that led to dismissal in *Kiobel II*. 133 S. Ct. at 1669. Consistent with the Supreme Court's decisions in

[1] *See Balintulo*, 727 F.3d at 192 & n.28 (noting distinction between cases of vicarious liability and cases of direct theories of liability in which alleged wrongs can be traced to parent through its own actions, personnel, and management, and where "the parent is directly a participant in the wrong complained of").

Kiobel II and *Daimler v. Bauman*, 134 S. Ct. 746 (2014), the fact that Defendants are corporations rather than natural persons also does not preclude their liability. Defendants committed unlawful activities in the United States aimed at purposefully facilitating violations of the law of nations, and those actions substantially assisted the realization and completion of the abuses committed in South Africa.

Plaintiffs' claims are concerned with Defendants' specialized product development, sales of such tailored products, and provision of expertise and training aimed at facilitating or enabling the international law violations perpetrated against Plaintiffs. For years and even after sanctions prohibited sales of the restricted goods to identified South African authorities, Defendants intentionally and repeatedly provided the means to carry out the violations by placing their specialized products in the hands of the very abusers who had already been identified for using such methods to violate human rights. Such conduct compels the inference of unlawful purpose. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 n.11 (2d Cir. 2007) (discussing conviction of Tesch for selling gas that enabled Nazis to carry out crimes against humanity). The fact that the harms were inflicted by South African authorities in South Africa does not diminish the unlawful nature of the specific U.S.-based actions, decisions, and conduct that were intended to enable those very entities to commit human rights

violations. In light of the detailed new allegations that demonstrate extensive U.S.-based actions that aided and abetted violations of the law of nations, the case should be remanded and Plaintiffs should be given leave to amend their complaints.

STATEMENT OF JURISDICTION

This appeal is taken from the District Court's final decision dated August 28, 2014, dismissing the complaints in the two companion cases. Complaint, *Balintulo v. Ford Motor Co.*, No. 02 MDL No. 1499 (S.D.N.Y. Aug. 8, 2014) at A0391; Complaint, *Ntsebeza v. Ford Motor Co.*, No. 02 MDL No. 1499 (S.D.N.Y. Aug. 8, 2014) at A0478. The District Court had jurisdiction over Appellants' claims pursuant to 28 U.S.C. §§ 1331 and 1350. This Court has jurisdiction under 28 U.S.C. § 1291.

Defendants did not cross-appeal. Because the District Court entered a final order dismissing the complaints, Defendants' previous appeals through a writ of mandamus and the collateral order doctrine are moot.[2]

STATEMENT OF ISSUES

1. Did the District Court Err in Failing to Consider Defendants' Own U.S.-Based Activity, Including that Involving Aiding and Abetting, in Conducting its *Kiobel II* Analysis?

[2] Defendants' 2009 appeal sought interlocutory relief based on the collateral order doctrine. The Defendants' April 2014 writ of mandamus sought relief based on the *Balintulo* decision.

2. Did the District Court Err in Finding that Plaintiffs' Allegations Failed to Meet the Standards for Aiding and Abetting Liability in this Circuit?

3. In Failing to Apply the Proper Legal Standard in Its Analysis of the Presumption Against Extraterritoriality, Did the District Court Improperly Deny Plaintiffs Leave to Amend Their Complaints?

STATEMENT OF THE CASE

The two cases before this Court, consolidated for pre-trial proceedings, allege that Defendant corporations are liable for violations of customary international law. These proceedings began as over a dozen distinct cases, and only these two remain. *See* Complaint, *Khulumani v. Barclays Nat'l Bank Ltd.*, No. 02 MDL No. 1499 (S.D.N.Y. Oct. 24, 2008); Complaint, *Ntsebeza v. Daimler AG*, No. 02 MDL No. 1499 (S.D.N.Y. Oct. 27, 2008). In 2004, Judge Sprizzo granted Defendants' motion to dismiss. *In re S. Afr. Apartheid Litig.*, 346 F.Supp.2d 538, 549-55 (S.D.N.Y. 2004), *rev'd sub nom.*, *Khulumani*, 504 F.3d 254. Plaintiffs appealed, and this Court affirmed in part and reversed in part, holding that "a plaintiff may plead a theory of aiding and abetting liability under the ATS." *Id.* at 260.

After remand, Petitioners amended their complaints in 2008. Following subsequent motions to dismiss, the court below granted in part and denied in part Defendants' motions. *In re S. Afr. Apartheid Litig.*, 617 F.Supp.2d 228, 296 (S.D.N.Y. 2009). The remaining Defendants asked the lower court to certify

certain issues for immediate interlocutory appeal, but the court denied their motion. *In re S. Afr. Apartheid Litig.*, 624 F.Supp.2d 336, 339 (S.D.N.Y. 2009).

Defendants appealed, arguing that the political question doctrine provided grounds for immediate appeal through a writ of mandamus or the collateral order doctrine. *See* Brief of Appellants, No. 09-2778-CV (2d Cir. Aug. 14, 2009). Plaintiffs moved to dismiss for lack of appellate jurisdiction. This Court did not reach the jurisdictional issue but reconstituted itself as a merits panel. *See* Order Requesting Supplemental Merits Briefing, No. 09-2778-CV (2d Cir. Sept. 10, 2009). The appeal was stayed until the Supreme Court decided *Kiobel II,* after which this Court requested supplemental briefing on the impact of that ruling. In August 2013, this panel denied Defendants' petition for a writ of mandamus, stating that they were entitled to relief before the District Court under *Kiobel II* because "none of the[] paragraphs [in Plaintiffs' 2008 complaints] ties the relevant human rights violations to actions taken within the United States." *Balintulo*, 727 F.3d at 192. Plaintiffs' petition for rehearing was denied.

Defendants then moved the District Court to dismiss Plaintiffs' claims, while Plaintiffs requested an opportunity to amend their complaints since *Kiobel II* set a new requirement that did not exist when their 2008 complaints were filed. Following briefing on the question of whether corporate liability was permitted under the ATS after *Kiobel II*, the District Court found that the Supreme Court's

decisions in *Kiobel II* and *Daimler* implicitly overruled the Second Circuit's holding regarding corporate liability in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148 (2d Cir. 2010) ("*Kiobel I*"). *In re S. Afr. Apartheid Litig.*, 15 F.Supp.3d 454 (S.D.N.Y. 2014).

The District Court, Judge Shira A. Scheindlin presiding, then permitted Plaintiffs to move to amend their complaints. *Id.* at 465. Plaintiffs submitted proposed amended complaints. *See Balintulo* Compl. at A0391; *Ntsebeza* Compl. at A0478. The District Court acknowledged that these complaints were "substantially more detailed and specific" than the 2008 complaints, but denied leave to amend, finding the proposed amended complaints futile under *Balintulo*. Aug. 28, 2014 Order at SA019. Plaintiffs now appeal that decision.

STANDARD OF REVIEW

A decision denying leave to amend a complaint is reviewed *de novo* when "based on an interpretation of law." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012). The trial court's decision to deny Plaintiffs' motion to amend the complaints is based on erroneous legal interpretations of *Balintulo* that were subsequently clarified by *Mastafa*. Aug. 28, 2014 Order at SA019. Because the District Court erred in interpreting these tests, and applied them incorrectly, its decision should be reviewed *de novo*. As this Court examines the amended complaints, it should apply the standard used to

consider pre-trial motions to dismiss in which "[w]ell-pleaded factual allegations are presumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

STATEMENT OF FACTS

I. IBM, in the United States, Intentionally Formed and Executed a Plan to Enable the South African Government to Denationalize Black South Africans

IBM, in the United States, purposefully facilitated the institutionalization of Grand Apartheid, by providing essential technologies and support to the apartheid government authorities. *Balintulo* Compl. A0728, ¶134; *Ntsebeza* Compl. A0570, ¶15. IBM's U.S.-based conduct furthered the key goal of Grand Apartheid—to separate and suppress black South Africans and deny black South Africans of their nationality, citizenship, and other basic human privileges. *Balintulo* Compl. A0704, ¶45. To achieve the goals of racial separation and a majority white nation, the South African government created "independent" Bantustans (or homelands) designated for particular ethnic groups—thereby stripping blacks of their South African citizenship. *Ntsebeza* Compl. A0587, ¶59. The intended effect of these Bantustans was to suppress the black population, as well as to restrict their rights to live, work, and travel in, out, and within South Africa. *Id.*

Identity documents were essential to the system of racial separation. Black South Africans were made to carry such documents to enforce apartheid and control their movements, residence, and work opportunities. *Id.* IBM, acting in

the United States, intentionally provided critical technological assistance and support designed for the administration of Bantustans, such as Bophuthatswana, by creating identity documents that denationalized black South Africans. *Balintulo* Compl. A0738, ¶174; *Ntsebeza* Compl. A0629, ¶143.

A. IBM in the United States Controlled and Directed Policies and Operations in South Africa

Decisions concerning IBM's operations in South Africa during apartheid were made and implemented in the United States, including decisions to develop hardware and software, bid on contracts, lease, sell, and provide services to apartheid authorities. *Ntsebeza* Compl. A0627-29, ¶142. 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. *Id.* A0625, ¶140(A).

IBM was a highly centralized corporation, directed by U.S. headquarters. The nature of technology at the time required centralized control. As IBM's Chairman acknowledged in the late 1960s, "[T]echnology forces us to operate in a centralized manner. We have a centralized technology." *Id.* A0615, ¶131(A). This tight, U.S.-based control of the technology extended to decisions about customization, as well as ongoing support for both hardware and software, for South Africa. *Id*. IBM did not have research and development or manufacturing facilities in South Africa, and its operations in South Africa were highly dependent

on direction and control by IBM's headquarters and experts in the United States. *Id.* This dependence was so strong that, even after IBM's formal divestment from South Africa in the 1980s, operations there still relied on U.S. IBM's expertise to troubleshoot problems with products. *Id.* A0626, ¶141(C). IBM U.S. headquarters' tight control over South African operations extended beyond just technology and products to personnel policies for employees, as indicated when IBM headquarters mandated the adoption of the Sullivan Principles that supposedly put in place a policy of the equal treatment of employees regardless of their race. *Id.* A0615, ¶130(A).

In 1977, IBM's chairman claimed that IBM was monitoring and investigating all reports of IBM computers potentially used for "repressive purposes" in South Africa. *Id.* A0617, ¶132(D). In 1987, even though Chairman Akers said that IBM had sold its assets in South Africa, *id.* A0619, ¶134(E), the newly created company continued to act at the direction and under the control of IBM in the United States. The managing director of the new company asserted that "[t]here will be no change in the supply of IBM products." *Id*. ¶134(G). 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." *Id*. IBM management stated that, "IBM operations would continue as normal through the

creation of a locally owned company to handle IBM's business." *Balintulo* Compl. A0750, ¶224.

B. IBM Bid on and Executed Contracts Whose Only Purpose was to Implement Apartheid and Deprive Black South Africans of Their Citizenship

As early as 1965, IBM in the United States bid on contracts to create identity documents for black South Africans that would enable the government to enforce apartheid by helping to separate and control the races. *Ntsebeza* Compl. A0629, ¶143. Although ultimately outbid on the 1965 contract, IBM obtained a contract to provide the software and hardware for the electronic memory bank storing a large part of South Africa's national identity system, including the "book of life" which was an identity document required for all non-black racial groups. *Id.* The purpose of the bids and contracts was to better facilitate the racial classification system and population tracking that made apartheid possible. *Id.* A0614, ¶129.

By at least 1978, IBM in the United States specifically bid on and obtained the contract to create an entirely new identity book for at least one Bantustan, Bophuthatswana. *Id.* A0632, ¶152. IBM's contract was to develop the hardware and software system to produce the Bophuthatswana national identity book that would replace the South African identity book. *Id.* A0632, ¶¶152(A)–(B). IBM in the United States made critical decisions regarding the contract and its implementation and provided practical assistance to ensure effective use of its

product. *Id.* A0456, ¶152(B). Through its bid and contract, IBM, for an unlawful purpose, enabled the apartheid government to create the fiction of a separate and independent state to which black South Africans were relegated. *Id.*

C. IBM, in the United States, Provided the Necessary Customized Technology That Made the Denationalization of Black South Africans and the Separation of the Races Possible Because South Africa Lacked Capacity to Create Technology to Efficiently and Effectively Implement Apartheid

Between 1960 and 1980, South Africa had no indigenous domestic computer industry and was dependent on outside sources for computerized operations. "South Africa really needs U.S. companies in certain industries, particularly high tech industries and computers," IBM's representative told investigators from the House Subcommittee on Africa in 1984. *Id.* A0540, ¶141(B). With South Africa dependent on outside sources for its computerized operations, IBM, acting from the United States, provided expertise and technology that enabled the South African authorities to operate with much greater efficiency, including to denationalize millions of black South Africans. *Id.* A "lack of access to foreign technology could cripple South Africa, as [U.S. government] cable point[ed] out. *Id.* A0542, ¶142(C). The incapacitation of a single computer would necessitate 'having to find hundreds of bookkeepers who are not available on [the] labor market.'" *Id.*

After Bophuthatswana was accorded nominal independence in 1977, Bophuthatswana imposed "citizen" identity documents and passports on black South Africans of Tswana descent. *Id.* A0544, ¶149. IBM developed both the hardware and software for the entire system, transferred it to the Bophuthatswana government, and trained Bophuthatswana government employees to use the IBM machine and program to produce identity documents. *Id.* A0545, ¶150. IBM was contacted when problems arose with the identity book system and IBM employees would fix problems. *Id.* ¶150(D).

Thus, IBM assisted in the development of a system that not only denationalized black South Africans, but also resulted in other violations against black South Africans, including deprivation of property, education, and employment, division of families, restrictions on travel, and restrictions on political activities. *Id.* A0548–49, ¶154.

D. IBM Actively Deceived and Circumvented U.S. Authorities Regarding the Use of Its Technology, Reflecting its Intent to Facilitate Violations of the Law of Nations

IBM repeatedly misled the U.S. government and its own shareholders regarding its ongoing activities that supported unlawful rights violations in South Africa. Chairman Frank Cary noted at IBM's 1977 annual meeting in the United States: "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." *Id.* A0531, ¶132(D). However, at the very same meeting, IBM admitted that its machines stored the data of colored, Asian, and white South Africans, which enabled the unlawful separation of the races. *Id.* By 1978, IBM was also working to create Bophuthatswana identity documents aimed solely at denying black South Africans their South African citizenship. *Id.* A0545, ¶150.

As part of its scheme to deceive U.S. authorities and shareholders, IBM asserted that South African government agencies used IBM computers only for "administration" and not for repressive use. *Id.* A0539, ¶140(A). However, 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. *Id.* Although IBM asserted that its sales and services were purely "business" decisions, IBM intended the specific results that were international law violations when it entered into and implemented contracts designed to facilitate separation of the races and create identity documents for the denationalizing homeland system. *Id.* A0528, ¶129.

Throughout the 1970s and 1980s, IBM consistently and actively opposed divestment and any effective sanctions regime. *Id.* A0536–39, ¶¶138, 139. IBM in the United States continued to pursue *all* sales—whether they enabled lawful or unlawful activities—in South Africa, thwarting the U.S. government's policy in

South Africa. *Id.* A0537–39, ¶139. IBM in the United States sought to help the apartheid structures "adjust to the threat posed by trade sanctions" and elude the goals of the embargo, for example, 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. *Id.* A0538, ¶139(C). IBM arranged to leave enough of South Africa's supply conduits intact so as to insure that the Pretoria regime would have continued access to computers, communications gear, electronics, and security equipment. *Id.*[3] The effort to evade sanctions included providing support and services for specific contracts with unlawful purposes, such as those aimed at facilitating denationalization in Bophuthatswana. *Id.* A0544, ¶149.

II. Ford in the United States Developed and Executed a Plan to Sell Specialized Vehicles and Provide Ongoing Support that Facilitated the South African Government's Violations of the Law of Nations

From 1973 to 1994, Ford, acting in the United States, directly participated in and aided and abetted the South African governments' enforcement of apartheid, including the suppression the black population through extrajudicial killings and other violence. *Balintulo* Compl. A0454, ¶227; *Ntsebeza* Compl. A0481, ¶7. In

[3] IBM stated that it would continue to supply spare parts and service to any affected South African military or police computers as long as supplies lasted. *Ntsebeza* Compl. A0511, ¶80(D). IBM provided necessary codes and training to government departments to change software, even when sanctions prohibited work with the security forces. *Id.* A0538, ¶139(H).

order to protect its relationships with the apartheid regime and thus maintain its long-term investment, Ford in the United States made deliberate decisions to enable unlawful activities by the apartheid security forces. *Ntsebeza* Compl. A0513-14, ¶83. Specifically, Ford in the United States purposely sold specialized vehicles to the South African security forces that facilitated the commission of unlawful and violent repression of black South Africans, including of Plaintiffs' relatives, in townships like Soweto. *Id.* A0517, ¶87. Ford in the United States was also responsible for assistance by its managers that facilitated the abuse, including torture, of its employees who opposed apartheid. *Id.* A0519, ¶96. Over many years, employees identified by Ford management as anti-apartheid activists were arrested and tortured by the security forces as a result. *Id.* A0522, ¶101.

A. Ford in the United States Made the Key Decisions about its Policies, Products, and Operations in South Africa, including the Design and Sale of Specialized Vehicles to the Security Forces

During apartheid, Ford maintained "rigid control over South African subsidiaries and operations." *Id.* A0504, ¶70. In the United States, Ford 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." *Id.* A0506-07, ¶74. For example, special modifications to vehicles sold to

the security forces had to be approved by Ford in the United States because such modifications altered the approved product plan. *Id.* A0507, ¶74(D).

During the relevant period, Ford in South Africa did not manufacture the vehicles or their parts. *Id.* A0506, ¶74(A). Ford operations in South Africa focused on assembling vehicles. *Id.* South Africa was a Complete Knock Down (CKD) and Semi-Knock Down (SKD) region, meaning that Ford's U.S. headquarters would approve design and then direct that parts be manufactured in other regions and sent to South Africa unassembled or semi-assembled. *Id*. Indeed, Ford operations in South Africa were dependent on parts shipments from elsewhere and U.S. decisions regarding sales to the security forces. *Id.* A0506-07, ¶74(B). Even after Ford announced its "divestment" from South Africa, Ford, through South African Motor Corporation (SAMCOR), continued to direct the business activities and control the manufacture of vehicles for South Africa and their shipment and assembly there, and also continued to supply CKD kits. *Id.* A0509 ¶77.[4]

Ford in the United States also made critical decisions about other aspects of operations in South Africa, "including investments, policy, management (including the hiring of the managing director), . . . and parts procurement and supplies." *Id.*

[4] Ford South Africa's general manager, Lewis Booth, also became SAMCOR's head. *Id.* A0509, ¶78(A). "When apartheid ended, Ford stepped back into the place it claimed to have left. In 2001, SAMCOR again became a wholly owned subsidiary of Ford." *Id.* A0510, ¶¶78(D)–(E).

A0504, ¶69; *see also id*. A0482–83, A0503–05, ¶¶9, 66, 69, 71(A), 71(C).[5] Ford in the United States exercised substantial control over employee treatment in South Africa and the relationship of its management to the Apartheid government. *Id.* A0505-06, ¶73. To its shareholders and the U.S. government, Ford highlighted how it imposed on its South African subsidiaries the adoption of the Sullivan Principles, which purported to implement non-discriminatory practices; it also admitted it had the ability to stop its managers in South Africa from supporting apartheid and discriminating against black South Africans. *Id.* A0483, ¶11.

Ford was very focused on the sensitive politics of operating in South Africa. Ford's U.S. headquarters had a department that dealt with political issues emanating from its worldwide activities. *Id.* A0508, ¶76(A). 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. *Id.*

[5] Ford was in constant communication with its managers in South Africa, who "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." *Id.* A0507, ¶75(A). Ford also regularly sent U.S. delegations to South African facilities, provided expertise to work on new installations there, and conducted regular audits. *Id.* A0596, A0508 ¶¶73(D), 76, 76(B).

B. Ford in the United States Purposely and Consistently Facilitated Unlawful Repression by Selling Specialized Vehicles Despite International Sanctions Identifying the Sales as Critical to Advancing Rights Violations

By 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 by making a substantial contribution to the violent oppression of the black South African population." *Id.* A0515–16, ¶84(G). Although vehicle sales to the apartheid security forces were identified as unlawfully contributing to rights violations as early as the 1960s and repeatedly thereafter,[6] Ford in the United States was intent on continuing to supply such vehicles because Ford viewed the sale to security forces as important to its future relationship with the South African government, which affected its broader business interests. *Id.* A0512–13, ¶82. U.S. management vigorously opposed sanctions and efforts to restrict sales to South Africa. *Id.* A0513, ¶82(D).[7] After the imposition of tighter U.S. sanctions in 1978, in contradiction of their policy and purpose, Ford, in the United States,

[6] In 1970, "UN Security Council Resolution 282 . . . reaffirmed a policy of withholding the supply of all vehicles and equipment to South African armed forces and paramilitary organizations." *Id.* A0511, ¶80(B). The 1978 U.S. sanctions regime sought to ensure that American supplies were not flowing to vehicles used by, or increasing the 'operational capacity of,' the South African security forces." *Id.* A0512, ¶80(F).

[7] Ford was also informed that its products would be used to violently suppress blacks and opponents of apartheid by its employees. *Id.* A0517, ¶87.

continued to sell vehicles to the South African security forces for use in the violent repression of the black townships. *Id.* A0512, ¶82(A).[8]

Ford in the United States controlled and directed shipments, including from Canada and England, to undermine U.S. sanctions banning the supply of U.S.-made parts to South Africa. *Id.* A0514, ¶83(C). Even after Ford's announced divestment, the pattern continued: despite the appearance that SAMCOR operated independent of Ford in the U.S., "Ford effectively continued to exercise control over the [SAMCOR] actions and decisions." *Id.* A0509, ¶77. Indeed, Ford allowed SAMCOR to use its trade name and provided SAMCOR with the CKD kits, parts, vehicles, and managerial assistance, as before. *Id.* A0510, ¶78(B). In circumventing U.S. sanctions in order to continue selling vehicles to the apartheid security forces, Ford intentionally facilitated the violent suppression of black South Africans. *Id.* A0513–14, ¶83.

Ford specialized vehicles substantially contributed to Apartheid and its violence, such as extrajudicial killings, including those of Plaintiffs' relatives. *Id.* A0517–19, ¶¶87–95. Ford sold such vehicles, with the specialized parts already installed before leaving the plant, to the South African police and security forces,

[8] "As one Ford board member noted: '[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.'" *Id.* A0513–14, ¶83(A).

including the infamous Special Branch.[9] *Id.* A0515, ¶84(D). Ford's customized arsenal of vehicles included large military trucks and specialized vehicles for the Special Branch, which was critical to intelligence efforts and coordination of repressive efforts in black townships. *Id*. A0515, ¶84(C). The Special Branch models' engines "were more powerful than in other cars, and they were used only in vehicles made for the security forces." *Id.* A0515, ¶84(F). Once specially designed vehicles were assembled and delivered, South African security forces used them to enter the black townships, including Soweto in 1976 and Duncan Village in 1985, to violently suppress opposition and inflict grievous injuries against black South Africans, including Plaintiffs' relatives who were killed along with numerous other civilians. *Id.* A0517–18, ¶¶87–88.

C. Ford, from the United States, Cooperated with the South African Government Leading to the Torture of Its Black Union and Anti-Apartheid Workers in South Africa

Ford in the United States established operations in which its South African managers, who were closely linked with the apartheid regime, punished black union and anti-apartheid activists. *Id.* A0520, ¶98(C). Ford managers provided South African security forces with information on such workers, and assisted security forces in tracking and interrogating them, thereby facilitating violations of

[9] 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 and coordinate information and intelligence. *Id.* A0502, ¶62.

employees' rights. *Id.* A0483, A0507–08, A0519, A0624–25, ¶¶11, 75(B), 96, 109, 111, 115.[10] Employees were intimated and dismissed by Ford and arrested, detained, and tortured by South African security forces. *Id.* A0522, ¶101. Employees were also interrogated on Ford premises, and together with members of the Special Branch, Ford managers interrogated employees. *Id.* A0526, ¶118. Detroit's close communication with and oversight of its South African operations enabled it to control the details there, including through regular reports, investigations, and the involvement of U.S.-based management when major incidents arose involving human rights abuses. *Id.* A0508–09, ¶76.[11]

Despite Detroit having control over its operations in South Africa, and its knowledge of human rights violations, the abusive managers in South Africa were not removed. *Id.* A0525-26, ¶116. Rather, active retaliation against workers, including Plaintiffs, who resisted apartheid, continued. *Id.* Despite having the

[10] After Plaintiff Botha returned to South Africa from a trip to the United States, he helped settle a strike against Ford. Immediately after the settlement, Botha was arrested, detained, tortured and questioned by South African security forces about the Ford strike and who was behind it. *Id.* A0524, ¶109. Plaintiff Peters also experienced torture and observed the close relationship between Ford managers and the interrogators from the security forces. *Id.* A0525, ¶115.

[11] Ford in the United States was so closely involved that its headquarters maintained files on specific individual employee leaders in South Africa and was involved in specific decisions related to these individuals. *Id.* A0483, ¶11. For example, Ford in the United States held a detailed file on Plaintiff Botha. *Id.* A0507–08, ¶75(B).

ability to end the pattern of abuse, Ford in the United States did not take necessary steps to end such violence against its employees. *Id.* A0483, ¶10.

SUMMARY OF ARGUMENT

Plaintiffs' claims against IBM and Ford are controlled by Second Circuit precedent in *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), and Plaintiffs easily satisfy *Mastafa*'s fact-intensive test for overcoming the presumption against extraterritoriality and asserting aiding and abetting claims. These cases are not about lawful sales and activity on the open market or about the conduct of Defendants' subsidiaries. Instead, they are clear cases of aiding and abetting crimes. The proposed amended complaints, which must be taken as true at this stage of the proceedings, are tailored to encompass only such unlawful activity, including specific sales and support that directly advanced law of nations violations.

As required by the analysis of aiding and abetting in *Mastafa* and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), the complaints include detailed, new, specific factual allegations that IBM and Ford committed unlawful, tortious conduct *in* the United States by purposefully enabling South African security forces and other authorities in perpetrating human rights abuses in South Africa. For example, IBM, in the United States, bid on and developed specially designed products to denationalize

black South Africans, which on its face demonstrates an unlawful intent. IBM further demonstrated that unlawful purpose by providing instruction and support in the use of the specialized technology to the South African and homeland governments for use in denying South African citizenship. Similarly, Ford, in the United States, decided to design and sell specialized vehicles to South African security forces after the U.S. government and international community had specifically identified that such vehicles facilitated rights violations. Thus, sufficient conduct by Defendants establishing claims of aiding and abetting or conspiring to facilitate human rights' violations occurred in the United States.

These same U.S.-based aiding and abetting activities constitute "relevant conduct" that clearly "touch[es] and concern[s]" the United States, as required by *Kiobel II*, 133 S. Ct. at 1669. Plaintiffs' allegations are much more than the "mere corporate presence" that led to dismissal in *Kiobel II*. *Id.* at 1669. The claims against IBM and Ford are not based on the conduct of their subsidiaries. Rather, the grounds for liability are Defendants' *own* unlawful actions in the United States, distinct from any lawful business activities that IBM and Ford had with South Africa.

In dismissing Plaintiffs' claims based on *Balintulo*, the District Court misinterpreted the law in the Circuit regarding *Kiobel II*, specifically viewing Justice Alito's concurrence as controlling. Aug. 28, 2014 Order at SA014–15.

The lower court failed to recognize *Balintulo*'s distinction between vicarious liability for a subsidiary's violation abroad and direct theories of liability, including aiding and abetting and conspiracy claims for conduct in the United States that facilitated the harm to Plaintiffs that occurred extraterritoriality. 727 F.3d at 192 & n.28. *Mastafa*, which was unavailable to the District Court at the time of decision, makes clear the lower court's legal error—stating explicitly that *Kiobel II* allows claims to proceed if they plausibly state direct violations of international law *or* claims of aiding and abetting related to conduct occurring in the United States. 770 F.3d at 189.

The District Court correctly recognized that corporate liability is viable under the ATS. *See Apartheid Litig.*, 15 F.Supp.3d at 457–61 (citing *Licci* and recognizing Second Circuit had left open question of corporate liability in light of Supreme Court's reasoning in *Kiobel II* and *Daimler* that indicate *Kiobel I* is no longer good law). No subsequent Second Circuit cases, including *Mastafa,* change this conclusion on corporate liability. *See, e.g.*, *Mastafa*, 770 F.3d at 179 n.5; *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 746 F.3d 42, 56 n.2 (2d Cir. 2014).

In light of *Mastafa*, the District Court clearly misinterpreted the "touch and concern standard" and erred in failing to consider the U.S.-based activity relevant

to direct theories of liability. Thus, this case should be remanded and Plaintiffs should be given leave to amend their complaints.

ARGUMENT

Plaintiffs meet all jurisdictional predicates necessary for ATS jurisdiction. The proposed amended complaints plead violations of the law of nations as required under *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); plead theories of liability, including aiding and abetting, recognized by customary international law; *see Mastafa*, 770 F.3d at 181 (citing *Khulumani*, 504 F.3d at 260); *see also Talisman,* 582 F.3d at 259; allege claims that touch and concern the United States with sufficient force to displace the presumption against extraterritoriality; and plead corporate liability, *see Kiobel II*, 133 S. Ct. at 1669; *Apartheid Litig.*, 15 F.Supp.3d at 461-66; *see, e.g.*, *Flomo v. Firestone Nat'l Rubber Co.,* 643 F.3d 1013, 1021 (7th Cir. 2011). *See Mastafa*, 770 F.3d at 179.[12] Plaintiffs therefore satisfy all the jurisdictional predicates necessary for a court to assume jurisdiction. *Id.* at 179–87, 189–96.

In contrast to the 2008 complaints, which were filed before *Kiobel II* articulated the presumption against extraterritorial application of the ATS,

[12] The principles that inform application of the presumption—avoiding tensions with other countries, preventing judicial interference with foreign policy, and declining to make the United States a "uniquely hospitable forum" for human rights litigation, *Kiobel II*, 133 S. Ct. at 1668—all favor litigation of this case in the United States, particularly since the South African government has expressed support for the litigation. *Balintulo* Compl. A0417, ¶83.

Plaintiffs' proposed amended complaints plead new and non-conclusory facts that Defendants' extensive activity *within* the United States unlawfully facilitated the violations that occurred in South Africa. Under both *Kiobel II* and this Court's precedent, this U.S.-based conduct squarely displaces the presumption against extraterritoriality. In dismissing these complaints, the District Court erred by misinterpreting the legal standards for the ATS and misreading *Balintulo* to foreclose Plaintiffs' claims of aiding and abetting as relevant conduct that touches and concerns the United States. *Mastafa* elucidates this error by reaffirming that aiding and abetting is a valid theory of liability under the ATS and that such U.S.-based activity is also "relevant conduct" that touches and concerns the United States. Because Plaintiffs satisfy all of the jurisdictional predicates for the ATS, they should be granted leave to amend.

I. Plaintiffs' Proposed Amended Complaints Provide New, Extensive, and Specific Allegations that Show That Their ATS Claims "Touch and Concern" the Territory of the United States

The Defendants, in the United States, created and implemented plans to purposefully aid and abet violations of international law. Under *Mastafa*, such allegations against IBM and Ford clearly touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality. The new, detailed allegations of Defendants' unlawful activity go beyond attributing vicarious liability to a parent corporation for the

wrongdoings of their subsidiaries. Rather, in the United States, Defendants actively and continuously planned, approved, developed, implemented, and oversaw conduct to enable unlawful actions. In all instances, Defendants' actions constituted far more than the passive, "mere corporate presence" that led to dismissal in *Kiobel II*. *See* 133 S. Ct. at 1669; *see also Sikhs for Justice, Inc. v. Nath*, No. 14-1724-cv, 2014 WL 7232492, at *2 (2d Cir. Dec. 19, 2014); *Ellul v. Congregation of Christian Bros.*, No. 11-1682-CV, 2014 WL 6863587, at *5-7 (2d Cir. Dec. 8, 2014).

A. *Mastafa* Requires a Fact-Intensive Inquiry into U.S.-Based Conduct

Mastafa makes clear that the *Kiobel II* "touch and concern" test is a fact-intensive inquiry to a "particular case". *Mastafa*, 770 F.3d at 182–83, 185–87, 189–93; *see also Al Shimari v. Caci Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014).[13] *Kiobel II* established a presumption against extraterritoriality for

[13] This Court in *Mastafa* asserted that a defendant's U.S. citizenship or presence in the United States was irrelevant to the *Kiobel* jurisdictional analysis. 770 F.3d at 188–89. Plaintiffs respectfully disagree. Citizenship and presence should be factors as the Supreme Court has consistently held that both citizenship and presence—especially the location of a corporation's headquarters if it is the place where decisions are made—are central to considerations of subject matter jurisdiction. *See Daimler*, 134 F.3d at 760.

Regardless of whether citizenship is relevant, the allegations here still touch and concern the United States because they involve Defendants' support for violations of international law, including aiding and abetting, that occurred in the United States, including at Defendants' headquarters.

ATS claims by dismissing a case where "*all* the relevant conduct took place outside the United States." 133 S. Ct., at 1669 (emphasis added). The Court held, however, that some ATS "claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

Instead of imposing a categorical bar against all cases involving some foreign conduct, the Court "appeared to leave open a window for ATS actions that are based in part on extraterritorial conduct." *Mastafa*, 770 F.3d at 182. *Mastafa* interpreted *Kiobel II* to require that courts conduct a searching factual inquiry that focuses on a defendant's U.S. domestic conduct. *See* 770 F.3d at 183–85, 185–87, 189–93.[14] In cases where some alleged conduct occurred in the United States and some abroad, the "presumption against extraterritorial application is not "self-

[14] *Mastafa* asserts that *Kiobel II* incorporated a *Morrison* "focus" analysis, which 1) requires an "evaluation of the 'territorial event[s]' or 'relationship[s]' that were the focus of the ATS," *Mastafa*, 770 F.3d at 183 (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010)), and 2) "examin[es] the conduct alleged to constitute violations of the law of nations, and the location of that conduct," *id.* at 185.

Plaintiffs meet the "focus" test because their allegations show extensive relevant conduct by Defendants IBM and Ford, including aiding and abetting, that occurred in the United States. However, Plaintiffs contend that *Mastafa*'s "focus analysis" is mistaken. Rather, the Supreme Court drew only on the "principles" underlying the *Morrison* presumption to establish the presumption against extraterritoriality of the ATS. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) ("*Morrison* may be informative precedent for discerning the content of the touch and concern standard, but the opinion in *Kiobel II* did not incorporate *Morrison*'s focus test.").

evidently dispositive . . . as it was in *Kiobel*," and a court must therefore engage in "further analysis." *Mastafa*, 770 F.3d at 182 (internal citation omitted).

In conducting this "further analysis", a court must initially "isolate the 'relevant conduct' in a complaint." *Id.* at 186. The district court must then conduct a "two-step jurisdictional analysis of this conduct." *Id* at 185. The court must first determine whether the relevant conduct "sufficiently 'touches and concerns' the territory of the United States so as to displace the presumption against extraterritoriality." *Id.* at 186. Second, the court must make a preliminary determination about the plausibility of the allegations regarding relevant conduct. *Id*. ("This is done through a preliminary determination that the complaint adequately states a claim that the defendant violated the law of nations or aided and abetted another's violation of the law of nations."). Here, allegations of aiding and abetting in the United States are pertinent to both the "relevant conduct" inquiry under *Kiobel II* and to establishing a cause of action under *Talisman*.

B. Aiding and Abetting in the United States Sufficiently Touches and Concerns the United States

Mastafa explains that two situations can displace the *Kiobel II* presumption. 770 F.3d at 185. First, "a direct violation of the law of nations" committed within the United States can overcome the *Kiobel II* presumption. *Id.*[15] Alternatively,

[15] Justice Alito, joined only by Justice Thomas, understood that the majority opinion did not adopt his view and wrote separately to set out his narrower

Mastafa indicates that claims based on a Defendant's own actions in the United States that amount to aiding and abetting a principal's crime can displace the presumption. *Id*. (citing *Talisman*, 582 F.3d at 259). *Mastafa* thus concludes that "jurisdiction can only properly be asserted over conduct that is in fact a violation of customary international law or aiding and abetting a violation." *Id.* at 186. The allegations must also be plausible. *Id*.; *see* Part II *infra* (demonstrating facts alleging aiding and abetting are plausible and not conclusory).

Aiding and abetting is not only a theory of liability, but can also be viewed as an independent violation of international law, *see e.g.*, *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) ("[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another . . . ."); Rome Statute of the International Criminal Court ("Rome Statute") art. 7, 8, 25, 28, July 17, 1998, 2187 U.N.T.S. 90 (clarifying that parties can be independently held accountable for aiding and abetting). Here, where the allegations involve aiding and abetting in the United States, either analysis supports the conclusion that the relevant conduct sufficiently touches and concerns the United States.

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standard that the presumption is only rebutted when an international law violation occurs within the United States. *Kiobel II*, 133 S. Ct. at 1669–70 (Alito, J., concurring).

C. The District Court Should Have Determined Whether Plaintiffs' New Allegations Plausibly Alleged Aiding and Abetting Liability

In misinterpreting the law of this Circuit to adopt Justice Alito's concurrence in *Kiobel II*, the District Court made a clear legal error. Aug. 28, 2014 Order at SA016 (citing *Balintulo* and stating "In sum, *Balintulo* requires plaintiffs to plead 'relevant conduct within the United States' that itself 'give[s] rise to a violation of customary international law'—in other words, the position adopted by Justice Alito"). Although aiding and abetting under the ATS is well established in this Circuit, the District Court erred as a matter of law by considering only whether Defendants were "vicariously" liable for conduct by South African subsidiaries. Aug. 28, 2014 Order at SA012. *Mastafa* confirms that the pertinent inquiry, however, is more than the Alito standard and must include whether the new and specific facts of U.S.-based activity are plausible and constitute aiding and abetting, which implicate the Defendants' own conduct and not that of their subsidiaries. *See Mastafa*, 770 F.3d at 181, 185, 186.

Furthermore, the *Balintulo* and *Mastafa* analyses of these apartheid matters, which stem from the 2008 complaints, do not preclude a new analysis of the proposed amended complaints because both decisions analyzed 2008 facts rather than the substantial and detailed new allegations that were added in light of the required pleading standard established by *Kiobel II*. In *Mastafa*, this Court explained that *Balintulo* analyzed the prior, sparse allegations as only involving

"sales" and found the U.S.-based actions were limited to "steps in [the United States] to circumvent the sanctions regime." *Id.* at 185. *Mastafa* concluded, citing *Balintulo*, that these extremely limited facts did not sufficiently "tie[] the relevant human rights violations to actions taken within the United States" to overcome the presumption, because the allegations were "based solely on conduct occurring abroad." *Id.* *Balintulo* concluded that the 2008 complaints articulated a vicarious liability theory based solely on conduct occurring abroad. However *Balintulo,* citing *United States v. Bestfoods,* 524 U.S. 51, 64–65 (1998), distinguished direct "liability cases . . . from those in which the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management and the parent is directly a participant in the wrong complained of." 727 F.3d at 192 n.28. As neither *Balintulo* nor *Mastafa* analyzed the new allegations now at issue in this case, they are not dispositive here.

Instead, as set forth below, a direct liability theory is clearly presented in the proposed amended complaints with specific and detailed new facts alleging aiding and abetting based on Defendants' own U.S.-based conduct rather than that of its subsidiaries alone. *Mastafa* mandates further fact-intensive inquiry in such circumstances, clearly demonstrating the lower court's mistaken conclusion that Justice Alito's concurrence was controlling.

D. Plaintiffs Now Allege Extensive "Relevant Conduct" That "Touches and Concerns" the United States

The new complaints cure prior pleading deficiencies and the new allegations are sufficient to overcome the *Kiobel II* presumption against extraterritoriality. As set forth below, the complaints allege extensive and specific "relevant conduct" that plausibly state claims that Defendants, acting in the United States, purposefully aided and abetted international law violations. *See also* Part II *infra* (discussing plausible allegations of aiding and abetting).

1. IBM Conduct in the United States

IBM in the United States designed specific technologies, including the Bophuthatswana identity book, that were essential for racial separation under apartheid and the denationalization of black South Africans. *Ntsebeza* Compl. A0535, A0546–47, ¶¶135, 152(A)–(C). IBM in the United States closely controlled and directed its South African operations during apartheid. *See, e.g.*, *id.* A0528, A0530–31, ¶¶128, 132. IBM in the United States bid on contracts in South Africa with unlawful purposes such as denationalizing those in Bophuthatswana. *See, e.g.*, *id* at A0528, A0534, A0544, A0546–48, ¶¶129(B), 135, 146, 152. IBM in the United States also closely monitored and controlled the end use of its products in South Africa. *Id.* A0529–30, ¶¶130(B), 131, 132(A). IBM did not have research and development or manufacturing facilities in South Africa; rather, it developed its specialized technologies within the United States, under the

direction and control of its U.S. headquarters and operations. *See, e.g., id*. A0529, ¶¶130, 131(B)–(D). Given the absence of expertise and manufacturing facilities in South Africa, IBM's export of equipment, software, and support from the United States were essential to IBM's advancement of specific violations, such as denationalization. *Id.* A0529, A0540–43, ¶¶131(B), 141, 142. Indeed, IBM never denied that the technology and expertise it provided came from the United States. *See id.* A0529, ¶¶130(A), 131(A).

By 1978, IBM was actively engaged in creating the technology necessary to produce identity books for the Bophuthatswana government. *Id.* A0546–48, ¶152. IBM developed the entire system—including the hardware and software—that were used to create Bophuthatswana identity documents, the very means by which black South Africans were deprived of their South African nationality. *Id.* Once IBM developed this system, it was given to the Bophuthatswana government and IBM employees trained employees of the Bophuthatswana government on how to use their machines and software. *Id.* A0547, ¶152(D). IBM lobbied aggressively against divestment and sanctions for selling products to South Africa. *Id.* A0536–37, ¶138. IBM then continued to provide support and expertise, including through it internal network that allowed South Africans to directly consult U.S. experts even after divestment, when problems arose with the identity book system. *See, e.g.*, *id.* A0546–34, ¶152(A)–(I).

2. Ford Conduct in the United States

Ford in the United States repeatedly, over several decades, purposefully provided specialized vehicles to the South African police and security forces that were adapted to enable these forces to enter black townships and violently suppress opposition to apartheid. *See, e.g.*, *id.* A0507, A0513–17, A0551, ¶¶74(D), 83, 84, 85, 162(D). The crucial role these vehicles played in facilitating abuses of the black populations was clear as early as the 1960s from international and U.S. sanctions, *id.* A0510–12, ¶80, as well as direct complaints to Ford, including from its own employees in South Africa, *id.* at A0517, ¶86. Nonetheless, Ford in the United States decided to continue the sales and support production that directly facilitated such unlawful activities, even after divestment in the 1980s. *See, e.g.*, A0509, ¶77. Ford in the United States explicitly acknowledged that its support for the South African police and military was essential to its broader business interests in South Africa. *Balintulo* Compl. A0461, ¶255. In essence, Ford in the United States made the conscious decision to facilitate unlawful crimes so that it could maintain its relationships with the South African authorities to further its long-term lawful investments. *Ntsebeza* Compl. at A0598, ¶82.

Given the sensitivity of investment in South Africa during apartheid, Ford's U.S. headquarters closely controlled operations. *See, e.g.*, *Ntsebeza* Compl. A0506–08, ¶¶74, 76(A). Ford in South Africa did not manufacture the vehicles or

their parts. Rather, the plants in South Africa only assembled vehicles with parts made outside of South Africa. *Id.* A0506, ¶74(A)–(C). Ford in the United States made all major decisions regarding the product line, design, and manufacture of the vehicles, including their customization for the South African security forces. *Id.* at A0506–07, ¶74. Indeed, Ford's policies required customization of vehicle designs that departed from the product plan to be approved by its U.S. headquarters. *Id.* A0507, ¶74(D). Ford in the United States specially approved any of the vehicle modifications requested by the South African security forces. *Id.* A0516, ¶84(H). After the sanctions regime specifically prohibited sales of any vehicles to the South African military and police, Ford's headquarters directed parts to be manufactured in other regions and shipped to South Africa to be assembled. *Id.* at A0506, A0514, ¶¶74(A), 83(C).[16]

3. The Specific Facts Alleged Are Sufficient To Rebut the Presumption Against Extraterritoriality

The specific allegations that Defendants within the United States enabled and advanced violations of international law stand in stark contrast to the facts that

[16] Ford in the United States was also responsible for aiding and abetting the suppression of its own workforce in South Africa. Ford's U.S. headquarters kept files on anti-apartheid union leaders, was specifically informed about the close collaboration between its managers in South Africa and the South African security forces, and knew that Ford employees were tortured as a result. *Id.* A0521–22, ¶100, 101. Ford in the United States tightly controlled its South African operations. *Id.* A0507–09, A0522, ¶¶75, 76(C)–(D), 100(B). Detroit decided not to act to end violence and retaliation but, instead, retained these managers for years and allowed abuses to persist. *Id.* A0522, ¶100(A).

fell short in *Kiobel II* and other ATS cases like *Mastafa*. *Kiobel II* dismissed ATS claims against a foreign multinational corporation because both the Defendant and the alleged conduct had minimal ties to the United States. 133 S. Ct. at 1669. Here, Plaintiffs sufficiently alleged extensive conduct committed by U.S. corporations inside the United States. Such conduct was not merely incidental to violations of human rights, but rather directly furthered these violations.

Plaintiffs' allegations of domestic conduct are also more extensive and specific than the allegations that satisfied the first prong of this Court's extraterritoriality analysis in *Mastafa*. 770 F.3d at 191. Indeed, the facts here resemble those in *Krishanti v. Rajaratnam*, No. 2.09 Civ. 05395, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014), where, though the harm occurred abroad, the claims stem from U.S.-based actions by the Defendants.[17] As in *Mastafa*, defendants acting in the United States attempted to skirt the sanctions regimes. Such conduct in *Mastafa* "appear[ed] to 'touch and concern' the United States with sufficient force to displace the presumption." *Id.* at 190. In *Mastafa*, the Court

[17] *Mastafa* cites with approval *Krishanti v. Rajaratnam*, where the district court found subject matter jurisdiction over the ATS claims because, although the alleged effects of defendant's violations of the law of nations were felt exclusively in Sri Lanka, the claim was based entirely on "alleged actions that occurred within the United States" including defendant's hosting of meetings and fundraisers for a foreign terrorist organization in New Jersey, donating money to a U.S.-based group which was purposefully funneled to the terrorist organization, and creating corporations in the United States to further facilitate donations to the terrorist organization. 770 F.3d at 190 n.17 (citing *Krishanti*, 2014 WL 1669873, at *10).

found that "multiple domestic purchases and financing transactions" and "numerous New York-based payments and 'financing arrangements'" committed by the Defendants constituted "non-conclusory conduct that appears to 'touch[] and concern[]' the United States with sufficient force to displace the presumption against extraterritoriality and establish our jurisdiction under the ATS." *Id.* at 191. The proposed amended complaints go far beyond the *Mastafa* allegations—Ford and IBM made critical decisions in the United States to facilitate unlawful activity, controlled operations from the United States, and developed and sold products that were specially designed to facilitate the human rights violations alleged. Financing was only a small piece of IBM's and Ford's direct and close involvement in the schemes to continuously provide customized technology and specialized vehicles to the perpetrators over several decades.[18] *See supra* SOF Part I.D.1–2.

In *Mastafa*, this Court found that the complaint failed to satisfy the second prong of the jurisdictional analysis, which involved "a preliminary determination" regarding whether the aiding and abetting conduct was plausible. *Id.* at 191. *Mastafa* found that the complaint lacked factual allegations providing control over

[18] The court in *Mastafa* also found that Chevron and BNP's deliberate circumvention of a sanctions regime "appear[s] to 'touch and concern' the United States with sufficient force to displace the presumption" against extraterritorial application. 770 F.3d at 190. Similarly, IBM and Ford made the decision inside the United States to deliberately violate both U.S. and international sanctions in order to continue aiding and abetting the apartheid regime. *Ntsebeza* Compl. A0497, A0512, A0537–39, ¶¶45, 82(A), 139.

the unlawful scheme other than the conclusion that "much of the decisionmaking to participate in the [OFP] scheme" was made in the United States. *Id.* at 190. In comparison to *Mastafa*'s conclusory allegations, the facts here as set out below clearly allege extensive details of direct involvement and control by U.S. management in purposefully facilitating the harms in South Africa.

II. Plaintiffs Plausibly and Specifically State a Claim for Aiding and Abetting Violations of the Law of Nations

Defendants' U.S.-based conduct both "touches and concerns" the United States and plausibly states a claim that Defendants aided and abetted violations of the law of nations. Unlike the conclusory statements of purpose rejected in *Mastafa,* the amended complaints allege specific facts: that Defendants designed products specifically for the unlawful purpose; that only Defendants and not any subsidiary had the expertise and authority to make those adaptations; that Defendants were organized internally so that the decisions to specially design and sell products were made in the United States; and that Defendants themselves opposed sanctions and arranged for sales and service to continue in contradiction of those sanctions.

Under this Court's precedents, a defendant is liable for aiding and abetting a violation of international law when 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."

Talisman, 582 F.3d at 259 (citation omitted). Relying on Judge Katzmann's opinion in *Khulumani*, *Talisman* provides a two-part test for establishing the *actus reus* and *mens rea* for aiding and abetting under the ATS. 582 F.3d at 258. First, "the *actus reus* of aiding and abetting in international criminal law requires *practical assistance, encouragement, or moral support* which has a *substantial effect* on the perpetration of the crime." *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (emphasis added). Second, the *mens rea* for aiding and abetting imposes liability on individuals who *purposefully* aid and abet violations of international law. *Talisman*, 582 F.3d at 259. *Talisman* articulated this as a standard based on customary international law and Judge Katzmann's concurrence in *Khulumani*, *id.* at 258, thereby adopting Judge Katzmann's standard as the "law of this Circuit." 582 F.3d at 256.[19]

In *Khulumani*, Judge Katzmann identified two cases where purpose could be inferred from conduct. *Id.* at 277 n.11. In referencing *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), Judge Katzmann noted that, in some circumstances, this "intent could be inferred from . . . sales" of goods. *Id.* *Direct Sales* involved a

[19] While Plaintiffs meet the *Talisman* purpose standard, Plaintiffs reserve argument that the correct standard under international law is not purpose but, rather, knowledge, based on a long and continuous line of cases that articulate the latter standard for aiding and abetting. *See, e.g., In re Bruno Tesch (Zyklon B Case)*, 13 Int'l L. Rep. 250 (Br. Mil. Ct. Mar. 1-8, 1946); *U. S. v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1187, 1192 (1952); *Prosecutor v. Tadic*, Case No. IT–94–1–T, Trial Chamber Opinion and Judgement, ¶¶674, 692 (May 7, 1997).

drug manufacturer and wholesaler convicted of conspiracy to violate the Harrison Narcotic Act for selling large quantities of morphine sulfate to a doctor who then sold them illegally. *Id*. As Katzmann noted, "the Supreme Court held that the *sale of restricted goods* with an inherent capacity for harm, such as the opiates involved in that case, combined with other factors, may be sufficient to prove that the seller was engaged in a conspiracy with the buyer." *Khulumani*, 504 F.3d at 277 n 11 (emphasis added) (citing *Direct Sales Co.*, 319 U.S. at 711). The *mens rea* for conspiracy in *Direct Sales* was purpose, and the Supreme Court held that purpose was established when "the seller knows the buyer's intended illegal use" and "by the sale he intends to further, promote, and cooperate in it." 319 U.S. at 711.

Judge Katzmann's other example of what would suffice to indicate intent is the *Zyklon B* case, *Trial of Bruno Tesch and Two Others*, *in* 1 *Law Reports of War Criminals* 93 (William S. Hein & Co., Inc. 1997) (1946), where the principal defendant not only supplied prussic acid to the S.S. but undertook to "train" its members on how it could be used to kill human beings. *Khulumani*, 504 F.3d at 277 n.11.

The evidence from which purpose can be inferred is even stronger here because, unlike in the *Zyklon B* case or *Direct Sales*, the products sold by Defendants were not in the regular stream of commerce but were specifically prepared for the apartheid authorities to enable them to commit human rights

violations for which they were designed and sold. *See, e.g.*, *Ntsebeza* Compl.A0480–81, A0514–16, A0534, A0544–46, ¶¶5, 84, 85, 135, 146, 150, 152. Moreover, like *Zyklon B*, IBM instructed the wrongdoer regarding how to use the product to accomplish its unlawful purpose. *See, e.g.*, *id.* A0546, ¶¶152(D), 152(G).

Talisman, consistent with Judge Katzmann's concurrence, noted that "intent must often be demonstrated by the circumstances, and there may well be an ATS case in which a genuine issue of fact as to a defendant's intent to aid and abet the principal could be inferred . . . ." 582 F.3d at 264. Further, *Mastafa* held that "[t]he relevant inquiry at all times is whether plaintiffs' complaint 'supports an inference that [defendants] acted with the "purpose" to advance the Government's human rights abuses.'" 770 F.3d at 193 (quoting *Talisman*, 582 F.3d at 260). When the *Talisman* Court reviewed the defendants' conduct[20] presented on summary judgment, it concluded that the building activities were obviously "benign and constructive purposes for these projects, and (more to the point) there is no evidence that any of this was done for an improper purpose." *Talisman*, 582 F.3d at 262. Further, this Court concluded that the displacement of persons from the areas of defendant's exploration was not unlawful. *Id.* at 263.

[20] The alleged assistance included building airstrips, paying royalties to the government, and giving general logistical support to the Sudanese military. *Id*. at 261.

Here, unlike in *Talisman*, the products and services sold to the apartheid authorities had no "benign" purpose; rather, they were specially designed to maintain apartheid by and through force.[21] IBM and Ford's purpose in continuing to supply its products and services to advance apartheid can therefore be inferred from the unlawful nature of its actions. Not only does apartheid itself constitute a violation of the law of nations, *see Khulumani,* 504 F.3d at 273, but, at the relevant time, the act of selling customized vehicles and technology to the South African security forces was specifically banned by Congress and the international community.[22] *Talisman* did not disturb the rule of law proposed by Judge Katzmann. The "purpose" prong of aiding and abetting can be inferred from the fact that Defendants' products and services had an unlawful purpose. Indeed, as in *Zylcon B*, Defendants put "the means to commit the crime into the hands of those who actually carried it out," *id.* at 290, and the fact that they also sought to make money did not negate this *mens rea*. As *Direct Sales* indicates, the sale of restricted commodities, arising from their identified capacity for harm and from the very fact that they are restricted, makes a difference in the quantity of proof

[21] Further, unlike here, the conduct alleged against the defendant in *Talisman,* such as the construction of the airfield, were necessary to the operation of the defendant's own business.

[22] The improper sales of restricted items are comparable to the sales of narcotics in *Direct Sales* from which purpose can be inferred. *See Khulumani*, 504 F.3d at 277, n. 11.

required to show knowledge that the buyer will utilize the article unlawfully. 319 U.S. at 712. Both cases, which concern economic actors involved in otherwise lawful business, highlight that profit motives cannot obscure the inference of wrongful purpose.

Mastafa found that the allegations regarding the "purpose" prong of aiding and abetting against the defendants were conclusory and did not withstand the test of *Twombly* and *Iqbal*.[23] 770 F.3d at 193. The complaint in *Mastafa* failed to directly link the allegedly intentional conduct with the human rights abuses at the heart of the complaint. 770 F.3d 170 at 194. The assistance provided in *Mastafa* offered only general financial support to the illegitimate regime and did not directly facilitate the specific human rights violations. *Mastafa* also found that the complaint lacked factual allegations providing control over activities that facilitated the unlawful purpose. 770 F.3d at 190.

Importantly, the District Court in this case never considered the factual allegations from which Defendants' intent to aid and abet the principal could be inferred because it dismissed on the grounds that Plaintiffs' did not meet the

[23] In *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011), the complaint alleged only that defendant had "placed [the chemical at issue] into the stream of international commerce with the purpose of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq." *Id.* at 401; *see also Mastafa*, 770 F.3d at 193 n.24 (citing *Aziz*, 658 F.3d at 396, 401).

standard established by Justice Alito's concurrence.[24] The proposed amended complaints, however, do set forth "plausible" claims of aiding and abetting, which is the baseline that *Mastafa* requires for both exterritorial analysis and assessing whether Plaintiff's have adequately stated a claim. *See* 770 F.3d at 177.

A. Plaintiffs Plausibly and Specifically Allege that IBM Aided and Abetted the South African Government in Violating the Law of Nations

The new allegations in the proposed amended complaints plausibly and specifically support the inference that IBM acted with the purpose to facilitate the apartheid government's violations of the law of nations, including through the separation of the races and the denationalization of black South Africans. IBM's actions on behalf of the apartheid authorities had no benign purpose and were designed and implemented solely for that unlawful purpose.

1. IBM Aided and Abetted the South African Government with the Requisite *Mens Rea* of Purposefully Violating International Law

Taken together, the facts in the proposed amended complaints compel the inference that IBM assisted the South African authorities, including the Bophuthatswana government, for the purpose of violating international law. *See*

[24] "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" for aiding and abetting. Aug. 28, 2014 Order at SA006.

SOF Part I.A.–D. First, IBM bid on contracts whose very purpose was to denationalize and classify black South Africans based on race. *Ntsebeza* Compl. A0528, A0543, A0534, A0545–46, ¶¶129(B), 135, 150, 152(A). Once these contracts were obtained, IBM then customized its technology for the specific purpose of making the South African and Bantustan governments' implementation of apartheid more efficient. *Id.* A0534–35, A0546–48, ¶¶135, 136, 152. IBM trained government officials so that they could use IBM's technology more effectively to implement apartheid and provided additional support and expertise. *Id.* When the international community and United States adopted sanctions explicitly forbidding the sale of technology to the South African government, not only did IBM vigorously oppose such legislation, but also it undermined that legislation by continuing to provide goods and services that supported apartheid. *Id.* at A0537–39, ¶139. IBM even attempted to conceal its unlawful conduct by telling its shareholders and the U.S. government that it was not selling its products to the South African government or for unlawful purposes. *Id.* A0538, ¶139(F). When read in a light most favorable to the Plaintiffs, these facts support a "baseline degree of plausibility" that IBM assisted the South African government with the purpose of violating international law. *Mastafa*, 770 F.3d at 194.

2. IBM Gave Practical Assistance to the South African Government That Had the Substantial Effect of Enabling Apartheid

South Africa did not have the technology or the capacity to create the technology to efficiently and effectively implement Grand Apartheid and denationalize black South Africans. *Ntsebeza* Compl. A0541–43, ¶142. IBM customized the software and hardware that enabled the Bophuthatswana homeland government to issue identify cards that effectively deprived black South Africans of the their nationality and citizenship. *Id.* A0546–48, ¶¶152, 153. In addition to creating and selling the equipment, IBM provided the ongoing training and support necessary, such as troubleshooting software problems to use IBM's products to effectively and efficiently fulfill its unlawful contracts and facilitate apartheid. *See, e.g.*, *id.* A0547, ¶¶150(D), 150,(I). Likewise, IBM's provision of the technology for the "book of life" enabled the South African government to track racial assignments necessary to implement apartheid. *Id.* A0543, ¶¶143, 144.

B. Plaintiffs Plausibly and Specifically Allege that Ford Aided and Abetted the South African Government in Violating the Law of Nations.

The allegations in the proposed amended complaints compel the inference that Ford assisted the South African government for the purpose of violating international law. The inference of unlawful purpose should be drawn from: the agreement to design and produce vehicles adapted for use by the security forces to

violently enforce apartheid and its implementation of that agreement; Ford's opposition to and avoidance of sanctions and its sales of sanctioned items to the known perpetrators of human rights abuses; and, Ford's participation in identifying to the security forces anti-apartheid activists, cooperating in the their interrogation and ultimately their torture. *Id.* A0506–09, A0517, A0519, A0521–26, ¶¶74, 75C, 76, 86, 96, 99, 103, 109, 111, 114, 115, 116, 118.

1. Ford Aided and Abetted the South African Government with the Requisite *Mens Rea* of Purposefully Violating International Law

Ford made the decisions to provide vehicles specifically designed to facilitate the violent enforcement of apartheid. *See, e.g.*, *id.* A0482–83, ¶¶8, 9. Such vehicles were the subject of sanctions prohibiting their sales to the South African government because the international community and the United States viewed such vehicle sales as enabling unlawful activity. Nevertheless, Ford continued to ensure that its specially designed restricted products were sold to the security forces, even specifically and purposefully circumventing the sanctions regime and misrepresenting its support to the government and shareholders. *Id.* A0512–14, ¶¶81, 83. That purposeful decision to sell products that enable international law violations is analogous to the Tesch conviction and to *Direct Sales*.

Further, Ford went beyond passive acceptance of apartheid when it allowed managers to track employees who challenged apartheid and to cooperate with security forces in activities, leading to their interrogation and torture. *Id.* A0521, ¶99. Ford in the United States established operations in which its South African managers, who were closely tied to the apartheid regime, retaliated against black Ford employees who were union and anti-apartheid activists *Id.* A0520, ¶98(C); *see also id.* A0517, ¶86. Such individuals were subjected to torture by the South African security forces, as well as interrogation on Ford's premises. *Id.* A0522, A0526, ¶¶101, 118. Ford in the United States was so closely involved in oversight of its South African operations that its headquarters maintained files on specific employees. *Id.* A0483, ¶11; *see also id.* A0508–09, ¶¶75(C), 76.

Ford management's actions and decisions demonstrated consistent and ongoing support for the suppression of anti-apartheid activists as it willfully ignored and failed to stop the abuses that resulted from its managers' cooperation with security forces. *Id*. A0520–21, ¶98. Black Ford workers in South Africa complained, including in writing, to Ford in the United States about the harms resulting from the close collaboration of its managers with the South African security forces. *Id.* A0520–22, ¶¶98(C), 100. Despite Ford having control over its South African operations, managers in South Africa continued to retaliate for years against workers, including Plaintiffs, who resisted apartheid. *Id.* A0525-26, ¶116.

2. Ford Gave Practical Assistance to the South African Government That Had the Substantial Effect of Facilitating the Violent Suppression of Black South Africans

As a direct result of Ford's decisions in the United States to support violations of international law, it provided practical assistance to violators in South Africa by delivering customized vehicles to the South African government and empowering its managers to oppress its work force in South Africa. This assistance had a substantial effect on human rights violations in South Africa. "Ford's vehicles sold to the security forces were of critical importance to the South African government. Ford's customized arsenal of vehicles included "large military trucks and specialized sedans for the Special Branch." *Id.* A0515, ¶84I. Ford's own documents indicated that vehicles were specifically intended for the security forces. *Id*. Once these specially designed vehicles were assembled and delivered, South African security forces used them to enter the black townships to violently suppress opposition and inflict grievous injuries against black South Africans, including the extrajudicial killings of numerous civilians. *Id.* A0517–18, ¶¶87, 88, 91–93. For example, Ford vehicles provided substantial assistance to the apartheid security forces in Soweto when security forces violently suppressed the student-led Soweto Uprising on June 16, 1976. Women and children were shot and killed, including Hector Zolile Pieterson, the twelve-year-old son of Plaintiff Mantoa Dorothy Molefi." *Id.* A0517, ¶87. Ford vehicles were used in the assaults

on Duncan Village where plaintiffs' children, ages nine to sixteen, and others were killed. *Id.* at A0517–18, ¶¶88, 91–93. This was exactly the type of activity that the sanctions regimes were intended to prevent and why sales of such vehicles were identifying as contribution to repression of the black population.

III. UNDER THE ATS, CORPORATIONS CAN BE HELD LIABLE FOR VIOLATIONS OF INTERNATIONAL LAW

The Supreme Court's decisions in *Kiobel II* and *Daimler* implicitly rejected the rationale underlying the Second Circuit's decision in *Kiobel I*, thus leaving the question of corporate liability under the ATS unresolved in the Second Circuit. The principle of corporate liability is well-established under both international law and federal common law and is applicable to ATS claims.

A. Based on the Supreme Court's Decisions in *Kiobel II* and *Daimler* and the *Licci* Panel's Remand, *Kiobel I* Is Not Binding Law

The Supreme Court's analyses in *Kiobel II* and *Daimler,* both decided after *Kiobel I*, are inconsistent with the conclusion that there is no corporate liability under the ATS. In *Kiobel II*, the Court explained that "mere corporate presence" in the United States does not suffice to displace the presumption against extraterritoriality. 133 S. Ct. at 1669. In *Daimler*, the majority opinion analyzed the ATS claims in part by reference to the appropriate jurisdiction for a corporate entity consistent with "fair play and substantial justice" due process demands. *Daimler*, 134 S. Ct. at 763 (citations omitted). The rationale of both cases

indicates that an ATS claim against a corporate defendant will lie when there is more than "mere corporate presence" in the United States.

In *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, a case involving only corporate defendants, this Court recognized that *Kiobel II* changed the status of *Kiobel I*. *See* 732 F.3d 161, 174 (2d Cir. 2013).[25] The *Licci* panel reasoned that *Kiobel II* "affirmed [*Kiobel*] . . . on different grounds . . . [and] did not directly address the question of corporate liability under the ATS," thereby leaving that issue unresolved. 732 F.3d at 174. The *Licci* panel remanded to allow the district court to address the issue "in the first instance." *Id*.

Subsequent Circuit decisions have left the issue unresolved.[26] The *Mastafa* panel cited *Kiobel I* to explain that taking jurisdiction over ATS claims requires that customary international law recognize liability for the defendant. 770 F.3d at 179. However, the panel did not dismiss the ATS claims on corporate liability grounds, *id.* at 195–96, and explicitly noted that the panel had "no need" to address the argument on corporate liability, *id.* at 179 n.5. Judge Pooler, in *Chowdhury*,

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[25] *See United States v Agrawal*, 726 F.3d 235, 269 (2d Cir. 2013) (indicating Circuit decision is no longer binding when "its rationale is overruled, implicitly or expressly by the Supreme Court").

[26] In *Balintulo*, decided before *Licci,* the Court denied Defendants' petition for writ of mandamus and did not address the question of corporate liability. The Court held, "we need not wade into the merits of the defendants' various arguments, because we are not persuaded that mandamus is the only 'adequate means to attain the relief' that they desire . . . in light of the Supreme Court's holding in *Kiobel I*." *Balintulo*, 727 F.3d at 188 (internal citations omitted).

similarly made clear that the case did not resolve the question of corporate liability under the ATS. 746 F.3d at 56 n.2 (J. Pooler, concurring) (noting dismissal on grounds of extraterritoriality and "[a]s such, the [majority] assertion that *Kiobel* 'did not disturb the precedent of this Circuit' with respect to corporate liability, is not pertinent to our decision, and thus is dicta.") (internal citation omitted). *See also Sikhs*, 2014 WL 7232492, at *2–3 (stating Court had "no need to address" corporate liability issue, and concluding that mere corporate presence was insufficient to displace the *Kiobel II* presumption); *Ellul*, 2014 WL 6863587, at *5 (reasoning that U.S. corporate presence alone was insufficient to overcome the presumption against extraterritoriality and not referencing *Kiobel I*'s corporate liability holding).

All references to *Kiobel I* in the Second Circuit after *Kiobel II* thus lack precedential value and do not overrule the Supreme Court's decisions in *Kiobel II* and *Daimler* or alter the District Court's correct conclusion as to corporate liability. This Court has not answered the question raised by *Licci*. The court below correctly recognized that corporate liability was again an open question in the Circuit, and determined that such liability is viable under the ATS. *See Apartheid Litig.*, 15 F.Supp.3d at 460–61.

B. Corporations Are Liable For Violations of the Law of Nations Under the ATS

The District Court correctly recognized that corporate liability does exist

under the ATS. That the text of the ATS excludes no category of tortfeasor from liability underscores that the statute's history and purpose do not differentiate between natural and juridical defendants. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) ("[B]y its terms [the ATS] does not distinguish among classes of defendants."); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 47 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) ("The historical context . . . suggests no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e. corporations, to do so.").[27] Indeed, juridical entities, like corporations, have historically been subject to civil liability. Corporate liability, reflecting the evolution of ancient loss allocation principles in privately enforceable international law, is now a bedrock principle of every modern legal system. *See* Brief for the United States, *Kiobel II*, 2011 WL 6425363, at *22–31 (Dec. 21, 2011).

[27] The ATS' history indicates that a central purpose of the statute was to provide an impartial *federal* forum to adjudicate tort actions brought by aliens. *Sosa*, 542 U.S. at 719–20, 724, 739. Excluding corporations as permissible ATS defendants would, contrary to the drafters' intent, have the perverse effect of sending alien tort plaintiffs to state courts.

All other circuits to consider the issue of corporate liability, including those that have ruled since *Kiobel II,* have recognized corporate liability. *See, e.g.*, *Doe I v. Nestle*, 738 F.3d 1048, 1049 (9th Cir. 2013) ("In light of intervening developments in the law, we conclude that corporations can face liability for claims brought under the Alien Tort Statute") (citing dicta in *Kiobel II*); *Flomo*, 643 F.3d at 1021 (finding corporate liability under ATS); *Exxon Mobil Corp.*, 654 F.3d at 47 ("[B]y 1789, corporate liability in tort was an accepted principle of tort law in the United States."); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Thus, the District Court correctly concluded that *Kiobel I*'s corporate liability holding is a "stark outlier," *Apartheid Litig.*, 15 F.Supp.3d at 461, and the lower court's decision regarding corporate liability should be upheld.

IV. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND AS THEY MEET ALL OF THE REQUIREMENTS OF *KIOBEL II* AND *MASTAFA*

Plaintiffs' motion for leave to amend should be granted because the lower court improperly denied the motion based on an incorrect interpretation of the law. *Mastafa*, which was not available to the District Court when it denied leave to amend, made clear that ATS jurisdiction is available where plaintiffs plead aiding and abetting a violation of customary international law based on defendants' unlawful conduct that occurred in the United States. Because the District Court misinterpreted this legal standard, this Court should review the lower court's

decision *de novo*. *Panther Partners Inc.*, 681 F.3d at 119 (denial of leave to amend is reviewed *de novo* review when "based on an interpretation of law").

In assessing whether the presumption against extraterritoriality applies to these ATS claims in the proposed amended complaints, the Second Circuit should apply the same standard as it does for pre-trial motions to dismiss. "Well-pleaded factual allegations" are presumed true. *Ashcroft*, 556 U.S. at 679. If the amended complaint alleges additional facts or legal theories that would survive dismissal under Fed. R. Civ. P. 12(b), leave to amend should be granted. *See TechnoMarine SA v. Giftports, Inc*., 758 F.3d 493, 505 (2d Cir. 2014); *see also Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999).

Under Fed. R. Civ. P. 15(a)(2), Plaintiffs' motion for leave to amend should be granted "as justice so requires" because the proposed amended complaints meet all of requirements for ATS claims under *Kiobel II* and *Mastafa*. As the above sections indicate, amending the complaints would not be futile. Plaintiffs' proposed amended complaints contain sufficient non-conclusory allegations to overcome the presumption against extraterritoriality. *See* Part I, *supra*. The pleadings also include detailed and specific allegations of aiding and abetting and other forms of direct liability by the Defendants. *See* Part II, *supra*. Corporate liability is also available under the ATS. *See* Part III, *supra.* Finally, there are no

prudential grounds that justify dismissal of these cases. The trial court thus erred in denying Plaintiffs' motion to amend the complaints and should be reversed.

CONCLUSION

For the reasons stated above, the decision of the District Court should be overturned, and this Court should remand the case for further proceedings with instructions to grant Plaintiffs' leave to amend their complaints.

Dated: January 28, 2015

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CERTIFICATE OF COMPLIANCE

I Certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,816 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Times New Roman font.

/s/ Kristen M. Ward
Kristen M. Ward

SPECIAL APPENDIX

SPECIAL APPENDIX
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOUTH AFRICAN APARTHEID LITIGATION

This Document Relates to:

LUNGISILE NTSEBEZA, *et al.*,

Plaintiffs,

- against -

FORD MOTOR COMPANY, and INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendants.

SAKEWE BALINTULO, *et al.*,

Plaintiffs,

- against -

FORD MOTOR COMPANY, and INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendants.

OPINION AND ORDER

02 MDL 1499 (SAS)

02 Civ. 4712 (SAS)
02 Civ. 6218 (SAS)
03 Civ. 1024 (SAS)

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.

II. BACKGROUND[2]

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[1] 28 U.S.C. § 1350.

[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.

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 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

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

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," 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

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

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

[6] *Id.* at 192.

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.

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

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

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

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

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[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)).

[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.

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 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

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[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.

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

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

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 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

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[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.

[18] Prop. Ntsebeza Compl. ¶ 127.

[19] *Id.* ¶ 131.

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 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%

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20 Pl. Mem. at 8-9.

21 *Id.* at 10.

22 Pl. Mem. at 17-18.

23 Prop. Ntsebeza Compl. ¶ 139.

24 *Id.* ¶ 66.

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. 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

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[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.*

[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).

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] "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

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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, 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

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 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

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African operations." *Id.* ¶ 73(B).

[34] *Id.* ¶ 82.

[35] Pl. Mem. at 21.

[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).

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 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]

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[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.

[40] *Id.*

[41] *Id.*

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]

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

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42 *Id.*

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

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

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

"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* their South African subsidiaries" and "[d]efendants *cannot be vicariously liable* for that

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46 *Id.* at 190.

47 *Id.* at 192.

48 *Id.*

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

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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.

creation, maintenance, and 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

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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).

rebut the presumption. The Fourth Circuit reached that conclusion 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

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56 *Id.* at *9-10.

57 *Id.* at *10.

agents, the underlying tort must itself be actionable. However, plaintiffs have no valid cause of action against the South African subsidiaries under *Kiobel 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

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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.

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.

SO ORDERED:

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

Dated: New York, New York
August 28, 2014

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28 U.S.C.A. § 1350

§ 1350. Alien's action for tort

Currentness

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.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 934.)

Notes of Decisions (601)

28 U.S.C.A. § 1350, 28 USCA § 1350
Current through P.L. 113-234 approved 12-16-2014

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