

# 14- 4104

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United States Court of Appeals  
*for the*  
Second Circuit

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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

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**JOINT APPENDIX**  
**VOLUME 4 of 4 (A0687-0773)**

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FORD MOTOR CO., INTERNATIONAL BUSINESS MACHINES CORP.

Defendants- Movants,

GENERAL MOTORS CORP.

Defendant.

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Plaintiffs-Appellants

Siggibo 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 exile in 1985, Frank Brown, P.J. Olai, Sylvia Brown, H. Durham, M.D., Wellington Baninzi Gamagu, Violations of Pass Laws, unlawful detention 1981-19983, 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, Anglo-American Corporation, Banque Indo Suez, Credit Iyonais, 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 Corporation, 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,

Rheinmatal Group AG, Barclays Bank PLC,

Defendants.

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**New Document:**

[2014 Apartheid Amended  
Complaint](#)

86 pages (395 KB)  
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Used to display results.

**Old Document:**





[6-10-09 FINAL signed BALINTULO CORRECTED SECOND Amended  
Complaint - FOR FILING](#)

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[Get started: first change is on page 1.](#)

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-  indicates pages were moved.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

<p>SAKWE BALINTULO as personal representative of SABA BALINTULO, TONY BRUTUS as personal representative of DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH as personal representative of ANTON FRANSCH, ELSIE GISHI, LESIBA KEKANA, ARCHINGTON MADONDO as personal representative of MANDLA MADONDO, MPHONG ALFRED MASEMOLA, VIMBA WISEMAN MBELE as personal representative of MICHAEL MBELE, MAMOSADI CATHERINE MLANGENI, REUBEN MPHELA, THULANI NUNU, THANDIWE SHEZI, and THOBILE SIKANI,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>FORD MOTOR COMPANY AND INTERNATIONAL BUSINESS MACHINES CORPORATION,</p> <p style="text-align: center;">Defendants.</p>	<p>MDL No. 02-md-1499 (SAS) 02 Civ. 4712 (SAS) 02 Civ. 6218 (SAS) 02 Civ. 1024 (SAS) 03 Civ. 4524 (SAS)</p> <p><b>[PROPOSED] THIRD AMENDED COMPLAINT JURY TRIAL DEMANDED</b></p> <p><b>CLASS ACTION</b></p>
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Plaintiffs, on behalf of themselves and all other individuals similarly situated, for their

Third Amended Complaint state as follows:

**I. NATURE OF THE CASE**

1. Plaintiffs bring this class action under the Alien Tort Claims Act, 28 U.S.C. § 1350, against United States corporations that aided and abetted the South African security forces, as defined herein, for the specific purpose of facilitating and participating in a joint criminal enterprise in furtherance of the crimes of apartheid; extrajudicial killing; torture; prolonged unlawful detention; denationalization; and cruel, inhuman, and degrading treatment in

violation of international law. Class Plaintiffs are the personal representatives of victims, or were themselves direct victims, of the aforementioned crimes perpetrated by the security forces of the apartheid regime between 1960 and 1994.

2. Defendants are United States companies that provided not only practical assistance to the South African security forces, but also material, logistical, and other practical support in the form of specialized military vehicles, technology, and computer equipment, which purposely facilitated the commission of said crimes. Defendants collaborated with the security forces of South Africa's apartheid regime, resulting in the abuses that Plaintiffs suffered. In return, Defendants benefited from apartheid and, consequently, the violence and terror that was used to maintain and enforce it at the expense of Plaintiffs and the putative class members discussed herein.

3. Defendants are United States corporations which directed and controlled the operations of their subsidiaries and agents around the world and in South Africa, particularly by making critical decisions in the United States related to Plaintiffs' claims. Defendants intentionally and knowingly facilitated and enabled the commission of crimes in violation of customary international law by the apartheid security forces (including military and police) through sales and lease of technology and specialized vehicles, as well as with management, technical advice, maintenance, and expertise to enforce the human rights abuses of Apartheid. This practical assistance facilitated effective enforcement of apartheid, including denationalization and the torture and killings of certain Plaintiffs and Class Members.

4. Defendants knew that the actions of the South African security forces constituted violations of international norms toward Plaintiffs and the classes and violations of the United States interest in embargoing the trading of goods and services to the Apartheid Security forces,



but nevertheless acted to aid and abet the South African security forces with the purpose of facilitating those crimes. In fact, Defendants vigorously opposed United States efforts to prevent them from providing support and goods from the United States to Apartheid South Africa, and acted to circumvent United States sanctions.

5. Beginning in 1950, the world community and the United States condemned apartheid and the acts of violence and terror committed by the South African security forces to enforce and maintain apartheid as crimes in violation of fundamental, internationally-recognized human rights. The world community and the United States specifically identified the manufacturers of vehicles and the technology corporations that designed and supported the racial passbook systems, as closely connected to the South African security forces and their violent acts. Defendants' involvement violated international law and constituted purposeful participation in and/or aiding and abetting of the crimes of apartheid; extrajudicial killing; torture; prolonged unlawful detention; denationalization; and cruel, inhuman, and degrading treatment.

## II. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1350, the Alien Tort Claims Act ("ATCA"), and 28 U.S.C. § 1367 for any additional claims not otherwise covered by the ATCA.

7. This matter was originally brought in the Eastern District of New York, where venue was proper pursuant to 28 U.S.C. § 1391.

8. The matter was consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation and was transferred to the Southern District of New York.

### III. DEFINITIONS

9. Apartheid literally means “separateness.”<sup>1</sup> Apartheid is defined by the Rome Statute of the International Criminal Court as “inhumane acts . . . committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”<sup>2</sup> Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid defines apartheid as a system that includes murder; the infliction of serious bodily or mental harm; torture or cruel, inhuman, and degrading treatment; and the institution of measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of a country, in particular by denying the group or groups basic human rights or freedoms.<sup>3</sup> Apartheid is a variant of genocide.

10. “Apartheid regime” refers to the country of South Africa during the period 1948 to 1994, when that country was ruled by the National Party.

11. “Bantustan” refers to the barren, rural areas where Blacks were restricted or forcibly resettled. These areas were also called “homelands” or rural reserves. “Bantustan” comes from the word “Bantu,” an isiXhosa and isiZulu word that was co-opted during apartheid and used by some white South Africans as a derogatory term to refer to Black Africans.<sup>4</sup>

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<sup>1</sup> Robert Ross, *A Concise History of South Africa* 115 (Cambridge University Press: 1999).

<sup>2</sup> Rome Statute of the International Criminal Court, art. 7(1)(j), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 999.

<sup>3</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 U.N.T.S. 243, art. II.

<sup>4</sup> Kevin Danaher, *In Whose Interest? A Guide to U.S. – South Africa Relations* (Washington, DC: Institute for Policy Studies, 1985) at 107.

12. “Black” refers to all African, Indian, and “Coloured” South Africans unless otherwise indicated.
13. “Coloured” is used as a synonym for “mixed race.”
14. “Genocide” is defined, in part, as “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”<sup>5</sup>
15. “Plaintiffs” includes all named class representatives.
16. “SAP” refers to the South African Police.
17. “SADF” refers to the South African Defense Force.
18. “Security forces” includes the South African military, paramilitary, police, special operations, intelligence, anti-riot, and other security units.

#### IV. PARTIES

##### A. Plaintiffs

19. **Sakwe Balintulo** is the personal representative and brother of **Saba Balintulo**, who was murdered by the SAP on March 15, 1973. On that day, Mr. Balintulo and fifteen friends were walking in the road, when the SAP opened fire on them. Mr. Balintulo was first shot in the leg and then shot three more times in the torso. The gun shots killed Mr. Balintulo as well as his fifteen friends.

20. **Tony Brutus** is the personal representative and son of **Dennis Vincent Frederick Brutus** who was detained and shot by the SAP. The recipient of a doctoral degree and numerous honorary doctorates, in 1961, Dr. Brutus was banned from teaching, publishing poetry, and attending gatherings. In 1963, Dr. Brutus was arrested in Johannesburg while on his way to

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<sup>5</sup> Convention on the Prevention and Punishment of the Crime of Genocide Art. 2(c), Dec. 9, 1948, 78 U.N.T.S. 277.

attend a meeting of the South African Non-Racial Olympic Committee, of which he was president. The police transported him to a prison in a security vehicle. When released on bail, Dr. Brutus fled to Swaziland and Mozambique, was arrested by the Portuguese secret police, and was turned over to the SAP. In September 1963, Dr. Brutus attempted to escape but was shot through his back by the South African Secret Police. He was hospitalized in Fort Prison Hospital until December 1963. Dr. Brutus was sentenced to eighteen months hard labor in Leeuwkop Prison in January 1964, was transferred to Robben Island Prison in March 1965, and in July 1965 was placed under house arrest until July 1966. Additionally, Dr. Brutus was denied South African citizenship because of racial classification as a black person. Dr. Brutus, who served on the faculties of the University of Denver, Northwestern University, and the University of Pittsburgh, testified three times before United Nations (“UN”) committees on apartheid issues. Dr. Brutus passed away in December 2009.

21. **Mark Fransch** is the personal representative and brother of **Anton Fransch**, who was murdered by the SAP and the SADF in September 1989, when he was 20 years old. Mr. Fransch was a member of the African National Congress (“ANC”). SAP and SADF officers said that Mr. Fransch was a “dog” and that they would kill him. When Mr. Fransch was staying at a house on Church Street in Crawford, thirty to forty officers, some of whom arrived in a Casspir vehicle, repeatedly shot into the house, killing Mr. Fransch and leaving flesh and hair on the wall.

22. **Elsie Gishi** was shot by the SAP on December 26, 1976. On that day, as Ms. Gishi returned from work, she found a group of youths protesting in her township. There was a heavy police and military presence. The officers kicked in the door of her house and one soldier shot Ms. Gishi from a Casspir vehicle. Multiple bullets entered her back and remain lodged in

her chest and arms. One bullet lodged in her throat. Another bullet is lodged inside a bone in her left arm and, as a result, she can no longer lift her left arm and the entire left side of her body is lame. She can no longer bathe herself or do other washing. The three remaining bullets cause her respiratory dysfunction and kidney problems. Ms. Gishi is permanently disabled and continues to suffer as a result of the shooting. She is currently bedridden.

23. **Lesiba Kekana** was tear gassed during numerous student gatherings in 1985 and 1986. Mr. Kekana was unlawfully arrested by soldiers driving a Casspir vehicle. He was fingerprinted and detained without trial from June 1986 to February 1987. During his detention, he was tortured. Additionally, Mr. Kekana was denied South African citizenship because of racial classification as a black person. Mr. Kekana still suffers from the torture and abuse.

24. **Archington Madondo** is the personal representative and father of **Mandla Madondo**, who was murdered by the SADF on July 10, 1986. Mandla Madondo was sent by his father to buy some bread. While he was standing with friends outside the shop, he was shot to death by South African soldiers who were driving down the street in a Casspir vehicle. Mandla Madondo was just 16 years old when he died. His twin brother, Thamsanqa, was arrested shortly after Mandla's murder and was imprisoned for one year without a trial.

25. **Mpho Alfred Masemola** was arrested and detained without trial for two months in 1982 for not having a passbook. Between 1982 and 1984, Mr. Masemola was monitored and under 24-hour surveillance because of his involvement organizing boycotts and with a banned organization. Mr. Masemola was then imprisoned on Robben Island from August 11, 1985 to 1990. During his time in detention, Mr. Masemola was beaten so badly that his arm was broken and had to be in a plaster cast for one year. He was also hit with iron bars while in detention for passbook violations. Mr. Masemola was tear gassed at school, during riots, and in his prison

cell. Mr. Masemola spent one year in solitary confinement without treatment for his broken arm. The police also shot Mr. Masemola. He still has bullet fragments lodged in his head that cause severe headaches. The bullet fragments cannot be removed. Additionally, Mr. Masemola was denied South African citizenship because of racial classification as a black person. Mr. Masemola still suffers from the torture.

26. **Vimba Wiseman Mbele** is the personal representative of **Michael Mbele**, born on October 31, 1944, was politically active in a union as a shop steward and was also a United Democratic Front member. Mr. Mbele was arrested twice for passbook violations after moving from the Transkei region of South Africa to KwaZulu Natal in 1973 without appropriate authorization. Then, in 1986, the Special Security Police detained Mr. Mbele, transported him by a security vehicle to prison, and tortured him on account of his political activities. For three straight days police beat and shocked Mr. Mbele with electric pipes, then choked him with a rubber tire. As a result of his torture, Mr. Mbele lost his hearing. Mr. Mbele's suffering continued for eleven more months as police placed him in solitary confinement. Additionally, Mr. Mbele was denied South African citizenship because of racial classification as a black person. Mr. Mbele recently passed away.

27. **Mamosadi Catherine Mlangeni** was arrested, detained, and fined for not having a passbook on as many as eight different occasions. Each time, she would be transported to prison by a security vehicle, detained for a period of days, and forced to pay 200 rand to be released. There was never a trial for any of these violations. On many of these occasions Ms. Mlangeni was also beaten by the security forces. Ms. Mlangeni believes she was monitored. The police would stop her and say things that indicated they knew who she was. Sometimes, only a day after she was released from jail, the police would re-arrest her. Sometimes it was the

same police officers, while at other times it was their colleagues. Ms. Mlangeni was even stopped and told by the police that they were going to get her or her son, Bheki Mlangeni. In 1984 and again in 1986, Ms. Mlangeni was placed under house arrest for two to three months due to her son's status as an enemy of the state. Ms. Mlangeni was constantly harassed by police, who were trying to capture Bheki Mlangeni. The Security Branch came to her home once, asking for her son, then hit and kicked her and destroyed her property when she told them that Bheki Mlangeni was not there. Bheki Mlangeni was murdered in front of his family by a parcel bomb that was planted in the earphones of a walkman on February 15, 1991.

Additionally, Ms. Mlangeni was denied South African citizenship because of racial classification as a black person. Ms. Mlangeni still suffers from these abuses.

28. **Reuben Mphela** was detained and transported by security vehicle to a prison several times between 1976 and 1982 for failing to produce a passbook. On these occasions, the SAP came to arrest him at work. He was beaten, kicked, and made to jump like a frog. Mr. Mphela's family was traumatized by his imprisonment. He still suffers as the result of his injuries.

29. **Thulani Nunu** was shot by the SAP in 1985 when he was just six years old and living in the Nyanga Bush. It was night time and the SAP was raiding houses and shooting at youth with tear gas and live ammunition from Hippo military vehicles and vans. Panicked by the noise and the tear gas that filled his house, Mr. Nunu ran outside. The police fired at him from a Hippo vehicle and struck him in the head and hand. As a result of his injuries, Mr. Nunu lost 60% of the use of his hand. Because of his head wound, Mr. Nunu has permanent visual and hearing impairment. He still suffers from these injuries.

30. **Thandiwe Shezi** was tortured and raped by the Security Police. On September 8, 1988, the police stormed into Ms. Shezi's home and beat and strangled her in front of her daughter. They then took Ms. Shezi in a security vehicle to the Alexander Police Station where they tortured her further. She was handcuffed and a wet sack was tied over her head. She was then taken to a room where she was electrocuted for twenty minutes. Next she was raped repeatedly by four police officers. In addition to physical torture, the police also psychologically tortured Ms. Shezi. The police forced Ms. Shezi to watch as they smashed another prisoner's penis in a drawer. When the prisoner screamed out in pain they wanted Ms. Shezi to laugh. On one occasion, the police took Ms. Shezi outside, stripped her naked and tied her to a tree. They smeared her legs with butter, opened them wide, and threw ants all over her. The ants crawled into her vagina. On at least one occasion, while Ms. Shezi was being electrocuted, acid was poured over her head. Because of the torture, Ms. Shezi could not eat solid food for almost a month. Additionally, Ms. Shezi was denied South African citizenship because of racial classification as a black person. She still suffers from the physical and mental effects of the torture and sexual assault.

31. **Thobile Sikani** was repeatedly detained, tortured, and shot by the SAP. The police shot Mr. Sikani in 1983, while he was attending a funeral for four of his friends. Without warning, the SAP opened fire on the funeral procession. Mr. Sikani was carrying the coffin of one of his friends when he was shot in the back and the left leg by the SAP. In 1986, the SAP transported Mr. Sikani by a security vehicle and fingerprinted and detained him at the Bishop Lavis Police Station because he was chairperson of the ANC Youth League. The SAP officers beat Mr. Sikani for hours and placed his scrotum and testicles in a machine that caused excruciating pain and made Mr. Sikani pass out. The SAP transferred Mr. Sikani in a security



vehicle to other facilities where the torture continued. At Bellville-South Police Station, an SAP officer inserted needles under Mr. Sikani's finger nails to coerce Mr. Sikani into talking about the ANC, but Mr. Sikani refused. Mr. Sikani was then taken to the hospital and treated for his injuries. After his treatment, the SAP took him back to the Wynberg Police Station where he was detained for five months without trial. In 1987, Mr. Sikani was again detained at the Wynberg Police Station for two months and tortured. At one or more times during his detentions, Mr. Sikani was transported in a Casspir military vehicle. In 1988, Mr. Sikani was attending a welcome home rally for the ANC leadership when the police shot tear gas with a pumpgun into Mr. Sikani's face. Additionally, Mr. Sikani was denied South African citizenship because of racial classification as a black person. Mr. Sikani's stomach swelled up and he was rushed to the hospital. Mr. Sikani still suffers from the torture and abuse.

**B. Defendants**

32. Defendant **Ford Motor Company** ("Ford"), an international automobile giant, is organized and incorporated under the laws of Delaware. Headquartered in Dearborn, Michigan, Ford does business in New York State and has offices in New York State.

33. Defendant **International Business Machines Corporation** ("IBM") is a global leader in manufacturing computer systems, software, networking systems, storage devices, and microelectronics. IBM is headquartered in New York State and does business in New York State.

**V. CLASS ACTION ALLEGATIONS**

34. Class Plaintiffs bring this action pursuant to Rules 23(a), (b), and (c) of the Federal Rules of Civil Procedure. Plaintiffs seek certification of the following distinct classes:

- a. **Extrajudicial Killing Class:** All persons who are the surviving personal representatives—including parents, spouses, children, siblings, and dependents—of persons who were subject to extrajudicial killing by South African security

forces during the period from 1960 to 1994. Class representatives: Sakwe Balintulo, personal representative of Saba Balintulo; Mark Fransch, personal representative of Anton Fransch; and Archington Madondo, personal representative of Mandla Madono;

b. Torture Class: All persons who were themselves and/or who are the personal representatives of persons who were subject to torture and rape by South African security forces during the period from 1960 to 1994. Class representatives: Lesiba Kekana, Mpho Alfred Masemola, Vimba Wiseman Mbele personal representative of Michael Mbele, Mamosadi Catherine Mlangeni, Thandiwe Shezi, and Thobile Sikani;

c. Detention Class: All persons who were themselves and/or who are the personal representatives of persons who were subject to prolonged unlawful detention for pass violations or other alleged Apartheid offenses by South African security forces during the period from 1960 to 1994. Class representatives: Tony Brutus personal representative of Dennis Vincent Frederick Brutus, Lesiba Kekana, Mpho Alfred Masemola, Vimba Wiseman Mbele personal representative of Michael Mbele, Mamosadi Catherine Mlangeni, Thandiwe Shezi, and Thobile Sikani;

d. Cruel Treatment Class: All persons who were themselves and/or who are the personal representatives of persons who were subject to cruel, inhuman, and degrading treatment by South African security forces during the period from 1960 to 1994. Class representatives: Elsie Gishi, Lesiba Kekana, Mpho Alfred Masemola, Vimba Wiseman Mbele personal representative of Michael Mbele,

Mamosadi Catherine Mlangeni, Reuben Mphela, Thulani Nunu, Thandiwe Shezi,  
and Thobile Sikani;

e. Denationalization Class: All persons who were themselves and/or who are the personal representatives of persons who were stripped of their South African nationality and/or citizenship by South African security forces during the period from 1960 to 1994. Class Representatives: Tony Brutus personal representative of Dennis Vincent Frederick Brutus, Lesiba Kekana, Mpho Alfred Masemola, Vimba Wiseman Mbele personal representative of Michael Mbele, Mamosadi Catherine Mlangeni, Thandiwe Shezi, and Thobile Sikani.

35. The members of each of these classes are so numerous that joinder of all members is impractical. The exact number and identities of all class members is not currently known, but Plaintiffs believe that each proposed class numbers in the thousands. For example, according to the ANC, the South African security forces were responsible for over 12,000 civilian deaths and 20,000 civilian injuries in the period from 1990 to late 1993 alone.<sup>6</sup> Between 1960 and 1990, over 80,000 opponents of apartheid were detained for up to three years without trial, including approximately 10,000 women and at least 15,000 children under the age of 15.<sup>7</sup> A 1988 report noted:

Anti-apartheid and human rights groups, such as the Detainee Parents Support Committee (DPSC), have accused the security forces of widespread brutality, including torture of detainees, assaults, killings and rape, as well as, on occasion, the wanton destruction of property. More than 3,000 blacks reportedly have died in the violence of the last three

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<sup>6</sup> African National Congress First Submission to the Truth and Reconciliation Commission, Aug. 1996, at 25 [hereinafter *First Submission*].

<sup>7</sup> Kenneth Christie, *The South African Truth Commission* 21-22 (St. Martin's Press, Inc., 2000). Max Coleman (ed.), *A Crime Against Humanity: Analysing the Repression of the Apartheid State* xi-xii (Mayibube Books, 1998).

years, many of them in confrontations with the security forces. More than 20,000 political opponents of the white regime have been imprisoned, including several thousand children.<sup>8</sup>

36. There are questions of law and fact that are common to members of each distinct class or to members of all classes, including, but not limited to:

(a) whether and to what extent United States Defendants provided practical assistance to the South African security forces for the purpose of facilitating the crimes of apartheid;

(b) whether and to what extent United States Defendants purposefully substantially assisted the South African security forces in maintaining and enforcing apartheid through campaigns of violence and terror, including committing the crimes of extrajudicial killing; torture; prolonged unlawful detention; denationalization; and cruel, inhuman, and degrading treatment;

(c) whether and to what extent Defendants knew of the violence and terror perpetrated by the South African security forces, benefited from the system of apartheid and the crimes with and by which it was maintained and enforced, and continued to provide practical assistance for the purpose of facilitating the commission of those crimes;

(d) whether and to what extent Defendants aided and abetted or otherwise participated in or were liable for the crimes committed by the South African security forces;

(e) whether the system of apartheid enforced by the South African security forces is actionable under the Alien Tort Claims Act as a tort in violation of international law;

(f) whether the conduct of the South African security forces constituted extrajudicial killing, torture, prolonged unlawful detention, denationalization, and/or cruel, inhuman, and

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<sup>8</sup> Investor Responsibility Research Center, Inc., Social Issue Service, Proxy Issue Report, *Sales to Strategic Entities in South Africa* (Feb. 23, 1988), at G-10.

degrading treatment and is actionable under the Alien Tort Claims Act as a violation of international law;

(g) whether each plaintiff class is entitled to compensatory and/or punitive damages and/or equitable relief, and the proper measure thereof;

(h) whether these actions against the class members were committed by the apartheid state with the complicity of Defendants, either by aiding and abetting or purposely participating in a joint criminal enterprise; and

(i) whether and to what extent Plaintiffs' claims against U.S. corporations providing material assistance to South African security forces in contravention of U.S. foreign policy touch and concern the territory of the United States.

37. Plaintiffs' claims are typical of those of their respective class(es) in that they (and/or the decedents they represent) were civilians who suffered extrajudicial killing, torture, prolonged unlawful detention, denationalization, and/or cruel, inhuman, and degrading treatment by reason of the conduct of the South African security forces during the time period in which Defendants provided assistance to those forces.

38. Class Plaintiffs will fairly represent the interests of their respective class(es) because it is in their best interest to prosecute the claims alleged herein to obtain full compensation due to them for the conduct of which they complain. Class Plaintiffs have no interests that conflict with or are contrary to the interests of other class members.

39. Class Plaintiffs will adequately represent their respective class(es) in that they are represented by counsel with extensive experience in international human rights and class action litigation.

40. Pursuant to Fed. R. Civ. P. 23(b)(3), questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

41. In the alternative, certification of particular issues pursuant to Fed. R. Civ. P. 23(c)(4) is appropriate with respect to those issues identified in paragraph 36 and/or other significant common issues as resolution of these issues would significantly and materially advance this litigation, reduce the range of issues in dispute, and promote judicial economy.

## VI. BACKGROUND FACTS APPLICABLE TO ALL COUNTS

42. In 1948, the National Party won control of the South African government, using apartheid as its primary electoral platform.<sup>9</sup> The National Party then passed a series of laws to implement and institutionalize apartheid.

### A. Apartheid-Era Laws

43. Apartheid is a crime against humanity.<sup>10</sup> It is a system of “inhumane acts . . . committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”<sup>11</sup> It is a system that depends on systematic violence and acts of terror, including murder; the infliction of serious bodily or mental harm; torture; or cruel, inhuman, and

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<sup>9</sup> Steven Debroy, *South Africa: Under the Curse of Apartheid* 188, 191 (University Press of America, Inc., 1990).

<sup>10</sup> Rome Statute of the International Criminal Court, art. 7(1)(j), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 999.

<sup>11</sup> *Id.* at art. 7(2)(h).

degrading treatment; as well as institutional methods of disenfranchisement and segregation, for its maintenance and enforcement.<sup>12</sup>

44. Apartheid-era laws classified all South Africans according to one of four races—white, “Coloured,” Asiatic (Indian), and Native (African)<sup>13</sup>—and then designated specific residential and business areas for the sole use of particular racial groups. The majority of the land was reserved for whites. As a result, non-whites were forcibly removed from their homes.

45. The Bantu Authorities Act of 1951 provided for the establishment of separate rural areas or homelands called “Bantustans” for most Africans to live according to their often bureaucratically-imposed tribal identity.<sup>14</sup> “[T]he dilemma of Bantustan policy in the final analysis was one in which the contradiction of the apartheid attempt to confine black settlement to rural homelands along with the need to secure black, cheap labour power in the cities, created the repression, the hatred and the patterns which would lead to spiraling violence in later years.”<sup>15</sup>

46. The government required all Africans over the age of 16 to carry passbooks, which included their Population Registration identity card, their fingerprints, and pages for any history of government opposition, labor control, and employer signatures.<sup>16</sup> These regulations

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<sup>12</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 U.N.T.S. 243, art. II.

<sup>13</sup> Nigel Worden, *The Making of Modern South Africa, Third Edition* 108 (Blackwell Publishers Ltd., 2000).

<sup>14</sup> Christie, *supra* note 7, at 20.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 5 “Natives Act.”

were referred to as “pass laws.” Without the proper documentation, no African could legally enter or remain in an urban area.<sup>17</sup>

47. These laws restricted the freedom of movement of Africans so as to channel workers where employers need cheap labor, facilitated the policing of workers, allowed the “weeding out” of the unemployed and “troublemakers,” confined and barricaded the “surplus population” in the rural slums of the Bantustans, and stripped Plaintiffs and Class Members of their nationality and citizenship.<sup>18</sup>

48. The pass laws were an instrument of coercion and control dating to the prior century “to have a hold on the native whom we have brought to the mines ... a most excellent law ... which should enable us to have complete control of the Kaffirs.”<sup>19</sup>

49. In addition to controlling movement and access to urban areas, the apartheid laws zoned residential and business districts on a racial basis.<sup>20</sup> Amenities—including cinemas, restaurants, sports facilities, and public vehicles—were also officially segregated.

50. Job reservation laws excluded Africans from better paid, more skilled categories of work.<sup>21</sup> Master and Servant laws made it a crime—punishable by imprisonment—for Black

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<sup>17</sup> Bentley J. Anderson, *The Restoration of the South African Citizenship Act: An Exercise in Statutory Obfuscation*, 9 Conn. J. Int’l L. 295, 310.

<sup>18</sup> Robert Davies, Dan O’Meara and Siphon Dlamini, *The Struggle for South Africa* 171 (Zed Books, 1985).

<sup>19</sup> African National Congress Submission to Special Truth and Reconciliation Commission on the Role of Business, Nov. 1997, at 2 (quoting the President of the Chamber of Mines at the end of the last century) [hereinafter *Role of Business*]. “Kaffir” is a derogatory term for Africans.

<sup>20</sup> Davies, et al., *supra* note 18, at 172.

<sup>21</sup> *Id.* at 174; *see, e.g.* Native Building Workers Act (1951), Industrial Conciliation Act (1956).



workers to break an employment contract by, *inter alia*, desertion, insubordination, or refusing to carry out an employer's command.<sup>22</sup>

51. Laws banned relations between races.<sup>23</sup> The Immorality Amendment Act, barring intercourse between the races,<sup>24</sup> led to the jailing of over 6,000 people between 1950 and 1966.<sup>25</sup> The government also prohibited interracial marriages in 1949.

52. The apartheid government also enacted laws to suppress dissent. In 1956, the Riotous Assemblies Act was passed, granting the Minister of Justice wide powers to control public gatherings and to prohibit a gathering if he deemed that it posed a threat to the peace.<sup>26</sup> The Act further allowed the police to disperse with force any gathering that took place in violation of its prohibition.<sup>27</sup>

53. In 1960, the Prime Minister gained power under the Unlawful Organizations Act to ban the ANC and the Pan-Africanist Congress.<sup>28</sup> Other African organizations later were

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<sup>22</sup> *Role of Business, supra* note 19, at 2. The laws remained on the books until 1977.

<sup>23</sup> *See Worden, supra* note 13, at 107. An Amendment to the Prohibition of Mixed Marriages Act was passed in 1968 to make void any illegal marriage by a South African, even if it took place outside of South Africa.

<sup>24</sup> The ban on intercourse between whites and Africans already was in place prior to this Act, which extended the ban to all non-whites. The Act was further tightened in 1967. Brian Bunting, *The Rise of the South African Reich*, Chapter Nine: South Africa's Nuremberg Laws 21 (Penguin Africa Library, 1969).

<sup>25</sup> *Id.* at 3 (discussing statistics of Minister of Justice in Parliament).

<sup>26</sup> Other related legislation included the Internal Security Act of 1950, the Gatherings and Demonstrations Act of 1973, and the Dangerous Weapons Act of 1968. *See* Janine Rauch and David Storey, *Policing of Public Gatherings and Demonstrations in South Africa 1964-1994*.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> Bunting, *supra* note 24, at 14. The Unlawful Organizations Act also increased the fines and physical punishment under the Riotous Assemblies Act.

banned under the Affected Organizations Act<sup>29</sup> and the Internal Security Act, which also banned all political meetings during April 1, 1986 – March 31, 1987 as part of a State of Emergency.<sup>30</sup>

**B. The Violence and Terror of Apartheid**

54. “What was involved (in apartheid) was far more than simply the implementation of what the world regarded as a criminal policy. What was of even greater significance was the use of criminal means to defend apartheid. The massive powers given to the state to control people’s lives and deny them their basic rights were not enough. They were supplemented by every species of common law crime, including systematic and organized murder, fraud, kidnapping and torture.”<sup>31</sup>

55. “Some 16.5 million South Africans were criminalised and harassed under the pass laws . . . . Four million people were forcibly removed from their homes and land during the heyday of apartheid social engineering. Three hundred apartheid laws were put on the statute books to control and disadvantage black South Africans from the cradle to the grave.”<sup>32</sup>

56. Under the pass laws, failure to produce a passbook on demand was an arrestable offense regardless of how legally and how long one may have been living in an urban area. In 1976 alone, 250,000 Africans were arrested under the pass laws and related influx control laws, according to the Africa Fund.

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<sup>29</sup> David Webster and Maggie Friedman, *Repression and the State of Emergency: June 1987 – March 1989*. Glenn Moss and I. Obery (eds.), *State and Politics* 26-27 (Ravan Press Ltd., 1989).

<sup>30</sup> *Id.* at 163. For a list of banned organizations, see Webster and Friedman, *supra* note 29 at 26-27.

<sup>31</sup> This quote was taken from the foreword to the Idasa “Truth and Reconciliation in South Africa” 1994 conference proceedings. See Christie, *supra* note 7, at 15.

<sup>32</sup> Paul Connerton, *How Societies Remember* 1-4 (Cambridge University Press, 1989); see, e.g., Christie, *supra* note 7, at 13.

57. According to the apartheid government's own statistics, 2,419,675 people were arrested or prosecuted under the pass laws between 1974 and 1985.<sup>33</sup>

58. The emergence of rural resistance was met with banishment—62 individuals were removed from where they lived and relocated across the country to areas where they knew no one and were prevented from any kind of employment.

59. It has been estimated that 12 million Blacks were unlawfully arrested and convicted in summary trials between 1948 and 1985 for pass violations.<sup>34</sup>

60. Resistance to apartheid reached a turning point in 1960. On March 21, 1960, a crowd of between 7,000 and 20,000 gathered in Sharpeville to protest against the pass laws. The demonstrators marched to the municipal police station to turn in their pass books. The police opened fire on the crowd, using machine guns and automatic weapons. Sixty-nine people were killed and 186 wounded, many of them women and children and most shot in the back as they ran from the gunfire.<sup>35</sup>

61. That same day, police fired on a crowd of 10,000 demonstrators in Langa, killing two people and wounding 49 others.<sup>36</sup>

62. Following Sharpeville, the state called its first State of Emergency. In the three months following the March 1960 State of Emergency declaration, police detained over 10,000 people and arrested a further 10,000, primarily on the charges of pass violations.<sup>37</sup>

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<sup>33</sup> International Defense and Aid Fund for Southern Africa, *Apartheid: The Facts* 48-49 (1991).

<sup>34</sup> Kevin Hopkins, *Assessing The World's Response To Apartheid*, 10 U. Miami Int'l & Comp. L. Rev. 241, 247 (2001-2002).

<sup>35</sup> Christie, *supra* note 7, at 27-28; Steve Clark (ed.) *Nelson Mandela Speaks: Forging a Democratic, Nonracial South Africa* 275 (Pathfinder, 1993).

<sup>36</sup> *Id.*

<sup>37</sup> Webster and Friedman, *supra* note 29, at 141.

63. The ANC described the resistance that began in the 1970s as follows:

The early 1970s witnessed a slowdown in the economy and increased privations among the black population. Spontaneous as well as organized mass resistance began to surface for the first time in a decade. . . .

Faced with internal mass upsurge, the response of the regime was brute force: detention, closure of institutions, brutal suppression of demonstrations and strikes; and in 1976, cold-blooded shooting of unarmed pupils. The actions of the regime on 16 June 1976, and in the 18 months following this eruption, brought out in bold relief the determination of the apartheid regime to deny human rights at all costs.

Notes taken during a Cabinet meeting by Jimmy Kruger, at the time Minister of Police, reveal an extraordinary level of self-delusion, or the deliberate denial of reality in order to justify murder:

“10.8.76.

Unrest in Soweto still continues. The children of Soweto are well-trained. (...) The pupils/students have established student councils. The basic danger is a growing black consciousness, and the inability to prevent incidents, what with the military precision with which they act. The Minister proposes that this movement must be broken and thinks that police should perhaps act a bit more drastically and heavy-handedly which will entail more deaths.

Approved.

As the decade came to a close, there was an attempt on the part of the state to employ a new approach grounded in “total strategy”, an explicit commitment to mobilize military, economic, physical and psychological resources in defense of the existing order. It brought senior police, Defense Force and intelligence officers directly into the formulation and implementation of government policy, through the State Security Council and the National Security Management System....<sup>38</sup>

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<sup>38</sup> African National Congress document, *The National Party and the Anatomy of Repression in South Africa, 1984 – 1994* at 4.6 found at <http://www.anc.org.za/ancdocs/misc/trc04.html> (last visited Sept. 30, 2008)

64. In response to the Sharpeville massacre and the growing trend of government resistance, the SAP instituted Divisional Anti-Riot Units to deal with crowd control.<sup>39</sup> In 1975, the Divisional Anti-Riot Units gave way to new counter-insurgency units, dedicated to crowd and riot control.<sup>40</sup>

65. Before 1984, the SAP were primarily responsible for controlling the resistance. But as the unrest spread from the townships around Johannesburg to the rest of the country, SADF troops were deployed. In July 1985, a State of Emergency was declared in riot torn targeted areas.<sup>41</sup>

66. After 1985, the SADF, supplemented by the SAP, was deployed in most Black townships. The SADF was responsible for enforcing emergency regulations which included a ban on protest gatherings. The SADF was also deployed to force Black students who were boycotting classes back to school.<sup>42</sup>

67. On June 12, 1986, Minister of Law and Order Louis La Grange imposed yet another State of Emergency. By June 1987, 26,000 people had been detained, equaling the total detained under all previous emergencies and legislation for the past 26 years.<sup>43</sup>

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<sup>39</sup> Rauch and Storey, *supra* note 26. Furthermore, in 1964, the Defence Amendment Act provided for the SAP to call upon the Citizen Force and Commandos in the event the police needed support in suppression of civil unrest. As of 1967, all white 17-year olds would serve in the Citizen Force or Commandos.

<sup>40</sup> *Id.*

<sup>41</sup> Investor Responsibility Research Center Inc., *supra* note 5, at G-10.

<sup>42</sup> *Id.*

<sup>43</sup> Webster and Friedman, *supra* note 29, at 142.

68. In 1991, the Internal Stability Division, a division of the SAP mobilized to handle racial unrest, was introduced under the government of President Frederick William de Klerk. By the 1990s, a total of 72 riot units existed, 30 of them dedicated to the homelands.<sup>44</sup>

69. These special Internal Stability Division riot units used offensive tactics and heavy weaponry, such as batons, teargas, automatic weapons, shotguns, and handguns.<sup>45</sup> They relied heavily on armored vehicles for crowd control.<sup>46</sup> According to a report of the TRC, “the training and equipment of riot police, and the deployment ratios of these policemen relative to the size of the crowds that they confronted, were all based on the assumption that crowds would be controlled and dispersed through the use of force.”<sup>47</sup>

70. The riot units viewed the use of lethal force as an acceptable and routine means of crowd control, and were responsible for most of the apartheid-era killings.<sup>48</sup> “As the external environment in which they operated took on the character of a low-intensity civil war, their training, equipment, and methodology became increasingly militarized.”<sup>49</sup> The TRC report noted that the riot policing function “was in direct contrast to reforms being made to public order policing methods elsewhere in the democratic world at this time.”<sup>50</sup>

71. A panel of doctors from the National Medical and Dental Association who treated detainees after their release found that 83 percent of released detainees exhibited signs of

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<sup>44</sup> Rauch and Storey, *supra* note 27.

<sup>45</sup> Description of Weapons from CSV, *see* Rauch and Storey, *supra* note 27, at 15–17, Exhibit G.

<sup>46</sup> Rauch and Storey, *supra* note 27.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 4.

physical abuse, and 25 percent of the released detainees alleged sexual abuse. Of those examined (ranging in age from 14 to 45), 95 percent showed symptoms of post-traumatic stress disorder. Detention time ranged from 4 hours to 315 days.<sup>51</sup>

72. Evidence from court records and lawyers indicates that the practice of torture to secure admission of guilt was common.<sup>52</sup>

73. The torture of detainees was the result of training and indoctrination, not the work of aberrant individuals. Many women detainees suffered sexual abuse. The families and friends of detainees were frequently subjected to sustained harassment and surveillance.<sup>53</sup>

74. The violent, criminal acts committed by the apartheid regime were intended to cause death or serious bodily injury to civilians and the purpose of such acts was to intimidate and coerce the civilian population.

75. Systematic violence, including extrajudicial killing, torture, prolonged unlawful detention, denationalization, and cruel, inhuman, and degrading treatment, was an integral and indispensable element of apartheid employed by the security forces to maintain and enforce the system.

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<sup>51</sup> See Webster and Friedman, *supra* note 29, at 167-68. Webster further notes that the DPSC (Detainee Parents Support Commission, which was renamed the Human Rights Committee of South Africa in 1995), the organization that created these reports, distinguishes between police custody and detention. Detention referring to those people held under security or state of emergency legislation, while police custody refers to people held under criminal legislation even if the motive for custody ostensibly is for political arrest. *Id.* at 168.

<sup>52</sup> *Controls on Exports to South Africa: Hearings Before the Subcommittees on International Economic Policy and Trade and on Africa of the H. Comm. on Foreign Affairs, 97th Cong, 2d Sess. Feb. 9 and Dec. 2, 1982 at 21 (statement of Goler Teal Butcher on Behalf of the Lawyers' Committee for Civil Rights Under Law).*

<sup>53</sup> *First Submission, supra* note 6, at 2-3.

76. Between 1990 and the end of 1993, over 12,000 civilians were killed and at least 20,000 injured by the security forces of apartheid South Africa. Many of the victims were women and children. The numbers of assassinations of anti-apartheid leaders also increased, from 28 in 1990, to 60 in 1991 and 97 in 1993.<sup>54</sup>

77. In 1993, negotiations led to an agreement on the date for non-racial elections, and Nelson Mandela, as leader of the ANC, called for the lifting of economic sanctions.

78. Apartheid officially ended in 1994 with the first universal suffrage general election and the election of Nelson Mandela.

### **C. Truth and Reconciliation Commission Findings**

79. The South African TRC was set up by the Government of National Unity under the Promotion of National Unity and Reconciliation Act to assess and begin to heal the damage inflicted by apartheid. Led by Archbishop Desmond Tutu, the TRC had a multiracial staff of more than 60, which pursued its mandate through three committees: the Amnesty Committee, the Reparation and Rehabilitation (R&R) Committee, and the Human Rights Violations Committee. The TRC began its hearings on April 15, 1996 through 2002, although the Amnesty Committee continued to decide cases after that date. The Final Report was released in March 2003.

80. The TRC specifically found that “Certain businesses were involved in helping to design and implement apartheid policies. Other businesses benefited from cooperating with the security structures of the former state.”<sup>55</sup>

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<sup>54</sup> *Id.* at 25.

<sup>55</sup> Vol. 4, Ch. 2 of TRC “Institutional Hearing: Business and Labor,” Findings Arising out of Business Sector Hearings, ¶ 161.



81. The TRC also found that “Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule. This included involvement in the National Security Management System. Several businesses, in turn, benefited directly from their involvement in the complex web that constituted the military industry.”<sup>56</sup>

82. The TRC identified as participants in apartheid “businesses that made their money by engaging directly in activities that promoted state repression,”<sup>57</sup> such as companies that “provided armored vehicles to the police during the mid-1980s,”<sup>58</sup> as would companies in the armaments industry: “the moral case against the armaments industry is essentially that business willingly (and for profit) involved itself in manufacturing products that it knew would be used to facilitate human rights abuses. . . .”<sup>59</sup>

83. In September 2009, the South African Government sent a letter to the Honorable Judge Shira A. Scheindlin indicating that it does not object to the litigation of Plaintiffs’ claims against U.S. companies supplying goods and/or services to Apartheid security forces in U.S. courts.<sup>60</sup>

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<sup>56</sup> *Id.* at ¶ 166

<sup>57</sup> *Id.* at ¶ 26.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at ¶ 75.

<sup>60</sup> *See* Letter from J.T. Radebe, MP, Minister of Justice and Constitutional Development to U.S. District Ct. Judge Shira A. Scheindlin, Sept. 1, 2009.

**VII. UNITED STATES AND INTERNATIONAL ANTI-APARTHEID POLICIES PROVIDED DEFENDANTS WITH NOTICE AND KNOWLEDGE OF THE ACTIVITIES OF THE APARTHEID SECURITY FORCES**

84. Beginning in 1950, the world community and the United States condemned apartheid as a crime against humanity and instituted a variety of sanctions against South Africa. United Nations resolutions reflected this emerging consensus among civilized societies. Individual nations passed laws in response to the resolutions and in conformity with their objectives. Private and transnational organizations took similar steps to implement the objectives of the resolutions.

85. These actions over a span of 40 years explicitly placed businesses involved in the financial and economic support of the security forces' abuses of the apartheid government on notice that their involvement violated international law and constituted purposeful participation in a crime against humanity.

86. For example, in 1960, the U.N. Security Council issued a Resolution deploring "the situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa," and called upon South Africa to abandon apartheid.<sup>61</sup>

87. On November 6, 1962, the General Assembly called on member states to refrain from exporting arms and ammunition to South Africa, which would be used to increase "ruthlessness involving violence and bloodshed."<sup>62</sup>

88. Less than one year later, on August 7, 1963, the Security Council adopted Resolution 181 condemning the arms build-up in South Africa and calling on all States and their

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<sup>61</sup> S.C. Res. 134, U.N. Doc. S/RES/134 (Apr. 1, 1960).

<sup>62</sup> G.A. Res. 1761, U.N. Doc. A/Res/1761(XVII) (Nov. 6, 1962).

domestic corporations to “cease forthwith the sale and shipment of arms, ammunition of all types and military vehicles to South Africa.”<sup>63</sup>

89. In 1968, the General Assembly declared apartheid to be a crime against humanity:

*Reiterates* its condemnation of the policies of apartheid practiced by the Government of South Africa as a crime against humanity; ....

*Expresses its grave concern* over the ruthless persecution of opponents of apartheid under arbitrary laws . . . .<sup>64</sup>

90. The General Assembly specifically “condemn[ed]”

the main trading partners of South Africa, and the activities of those foreign financial and other interests, all of which, through their political, economic and military collaboration with the Government of South Africa and contrary to the relevant General Assembly and Security Council resolutions, are encouraging that Government to persist in its racial policies.<sup>65</sup>

91. In 1972, The Security Council passed a Resolution urging Member States to

observe the arms embargo against South Africa.<sup>66</sup>

92. The International Conference of Experts for the Support of Victims of

Colonialism and Apartheid in South Africa met in Oslo, Norway, in 1973. The Conference

adopted the following program of action:

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<sup>63</sup> The Security Council reaffirmed this Resolution in December 1963 and included all shipments of any materials that might be used to build arms or ammunition. The Resolution again was strengthened in July 1970. Security Council Resolution, *Question Relating to the Policies of Apartheid of the Government of the Republic of South Africa*, See S.C. Res. 181, U.N. Doc. S/RES/181 (Aug. 7, 1963); S.C. Res., 182 U.N. Doc. S/RES/182 (Dec. 4, 1963); S.C. Res. 282, U.N. Doc. S/RES/282 (July 23, 1970).

<sup>64</sup> G.A. Res. 2396, U.N. Doc. A/RES/2396 (XXIII) (Dec. 2, 1968).

<sup>65</sup> *Id.*

<sup>66</sup> S.C. Res. 311, U.N. Doc. S/RES/311 (Feb. 4, 1972). Also in 1972, the General Assembly declared that “the United Nations has a vital interest in securing the speedy elimination of apartheid.” See G.A. Res. 2923, U.N. Doc. A/RES/2923 E (XXVII) (Nov. 15, 1972).

(68) The international arms embargo should be fully implemented by all States, and the Security Council should expose those States which violate it, especially France, and secure their compliance. The Security Council should take further action to prevent the importation of arms from South Africa by other States. The Security Council should also examine all other forms of military co-operation with South Africa and take appropriate action.<sup>67</sup>

93. Following discussions relating to the Conference's findings, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>68</sup> The Convention declared apartheid a crime against humanity, and all participants in apartheid as criminals, whether they were organizations, institutions, or individuals. Article II of the Convention defined apartheid as:

[s]imilar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- a. Denial to a member or members of a racial group or groups of the right to life and liberty of person:
  1. By murder of members of a racial group or groups;
  2. By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  3. By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; . . .
- b. Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

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<sup>67</sup> The Programme of Action Adopted by the International Conference of Experts for the Support of Victims of Colonialism and Apartheid in South Africa (Oslo, April 9-14, 1973), G.A. Res. 9061, U.N. Doc. A/RES/9061 (May 7, 1973).

<sup>68</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 U.N.T.S. 243.

94. Article III of the Convention described who would be held responsible for committing the acts outlined in Article II.

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

- a. Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;
- b. *Directly abet, encourage or cooperate* in the commission of the crime of apartheid.<sup>69</sup>

95. Following the submission of the Preliminary Report of July 14, 1976, by the Special Rapporteur to the Special Committee against Apartheid, the General Assembly adopted a Resolution condemning “the collaboration of ... those foreign economic interests which maintain and/or continue to increase their collaboration with the racist regimes in southern Africa, especially in the economic, military and nuclear fields.”<sup>70</sup>

96. In 1976 and again in 1977, the Security Council by Resolution condemned apartheid and specifically the South African Government for “its resort to massive violence against and killings of the African people, including schoolchildren and students and others opposing racial discrimination.”<sup>71</sup> The Security Council demanded an end to the violence against and repression of Black people and to release all political prisoners.<sup>72</sup>

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<sup>69</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 U.N.T.S. 243, art. III (emphasis added).

<sup>70</sup> G.A. Res. 31/33, U.N. Doc. A/RES/31/33 (Nov. 30, 1976).

<sup>71</sup> S.C. Res. 392, U.N. Doc. S/RES/392 (June 19, 1976).

<sup>72</sup> S.C. Res. 417, U.N. Doc. S/RES/417 (Oct. 31, 1977).

97. In 1977, the Security Council once again called for an arms embargo against South Africa, but this time made it mandatory by invoking Chapter VII of the U.N. Charter.<sup>73</sup>

98. In November 1979, the United Nations Special Committee Against Apartheid in South Africa co-sponsored an International Seminar on the Role of Transnational Corporations in South Africa. The Seminar expressed the view that “transnational corporations bear a major share of responsibility for the maintenance of the system of apartheid, for strengthening the repressive and military power of the racist regime and for the undermining of international action to promote freedom and human dignity in South Africa.”<sup>74</sup>

99. Following acts of police violence against student demonstrators, the Security Council adopted a Resolution supporting the arms embargo and condemning the violence in South Africa:

1. *Strongly condemn*[ed] the racist régime of South Africa for further aggravating the situation and its massive repression against all opponents of *apartheid*, for killings of peaceful demonstrators and political detainees and for its defiance of General Assembly and Security Council resolutions . . .

3. *Reaffirm*[ed] that the policy of *apartheid* is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of man, the Charter of the United Nations and the Universal Declaration of Human Rights and seriously disturbs international peace and security; . . .

11. *Request*[ed] the Security Council Committee . . . to redouble its efforts to secure full implementation of the arms embargo against South Africa by recommending by 15 September 1980 measures to close all loop-holes in the arms embargo, reinforce and make it more comprehensive.<sup>75</sup>

100. The U.N. General Assembly declared by Resolution that:

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<sup>73</sup> S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

<sup>74</sup> Charles Peter Abrahams, *The Doctrine of Odious Debts* (Rijks Universiteit Leiden, Aug. 2000) at 79 (citing *Transnational Corporations in South Africa and Namibia, The Review – International Commission of Jurists*, No. 36-39 (1986-87), at 34).

<sup>75</sup> S.C. Res. 473, U.N. Doc. S/RES/473 (June 13, 1980).

*continuing* political economic and military collaboration of certain Western states and their transnational corporations with the racist regime of South Africa encourages its persistent intransigence and defiance of the international community and constitutes a major obstacle to the elimination of the inhuman and criminal system of apartheid in South Africa. . . .<sup>76</sup>

101. The General Assembly adopted a Resolution in December 1983 “reaffirming that apartheid is a crime against humanity” and strongly condemning the apartheid regime for its repression and brutal acts of torture, murder, and terror. The Resolution specifically criticized “transnational corporations and financial institutions that have increased political, economic and military collaboration with the racist minority regime of South Africa despite repeated appeals by the General Assembly. . . .”<sup>77</sup>

102. In 1984, the General Assembly adopted another Resolution “vigorously” condemning transnational corporations and other organizations which maintain or continue to increase their *collaboration* with the racist regime of South Africa, especially in the political, economic, military and nuclear fields, thus encouraging that regime to persist in its inhuman and criminal policy of brutal oppression of the peoples of southern Africa and denial of their human rights.<sup>78</sup>

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<sup>76</sup> General Assembly Resolution, *Policies of Apartheid of the Government of South Africa: Situation in South Africa*, G.A. Res. 36/172 A, U.N. Doc. A/RES/36/172 A (Dec. 17, 1981). Further, the United Nations General Assembly proclaimed the year 1982 as International Year of Mobilization for Sanctions Against South Africa. General Assembly Resolution, *Policies of Apartheid of the Government of South Africa, International Year of Mobilization for Sanctions Against South Africa*, see also G.A. Res. 36/172 B, U.N. Doc. A/RES/36/172 B (Dec. 17, 1981).

<sup>77</sup> G.A. Res. 38/39, U.N. Doc. A/RES/38/39 A (Dec. 5, 1983).

<sup>78</sup> G.A. Res. 39/15, U.N. Doc. A/RES/39/15 (Nov. 23, 1984).

103. The Security Council further condemned apartheid as “a system characterized as a crime against humanity” including the “continued massacres of the oppressed people, as well as the arbitrary arrest and detention of leaders and activists of mass organizations....”<sup>79</sup>

104. In 1984, the General Assembly again condemned the increasing violence of the Apartheid regime.<sup>80</sup>

105. In 1985, the Security Council urged states to prohibit “all sales of computer equipment that may be used by the South African army and police.”<sup>81</sup>

106. In 1986, the Security Council urged:

States to take steps to ensure that components of embargoed items do not reach the South African military establishment and police through third countries; . . .

all States to prohibit the export to South Africa of items which they have reason to believe are destined for the military and/or police forces of South Africa, have a military capacity and are intended for military purposes, namely, aircraft, aircraft engines, aircraft parts, electronic and telecommunication equipment, computers and four-wheel drive vehicles.<sup>82</sup>

107. The General Assembly in 1989 adopted another Resolution regarding the supportive ties of international corporations with South Africa, noting that “the maintenance of the apartheid economy and the expansion of military and police expenditures substantially

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<sup>79</sup> S.C. Res. 556, U.N. Doc. S/RES/556 (Oct. 23, 1984).

<sup>80</sup> General Assembly Resolution, *Policies of Apartheid of the Government of South Africa: Comprehensive Sanctions against the apartheid regime and support to the liberation struggle in South Africa*, G.A. Res. 39/72 A, U.N. Doc. A/RES/39/72 A (Dec. 13 1984). These voluntary sanctions were renewed in 1985. General Assembly Resolution, *Policies of Apartheid of the Government of South Africa: Comprehensive Sanctions against the apartheid regime and support to the liberation struggle in South Africa*, G.A. Res. 40/64 A, U.N. Doc. A/RES/40/64 A (Dec. 10, 1985).

<sup>81</sup> S.C. Res. 569, U.N. Doc. S/RES/569 (July 26, 1985).

<sup>82</sup> S.C. Res. 591, U.N. Doc. S/RES/591 (Nov. 28, 1986).



depend on the supply of further credits and loans by the international financial community . . .

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108. These United Nations resolutions as well as the accompanying domestic legislation of individual states singled out the manufacturers, vehicles, and the technology corporations that designed and supported the passbook systems to enforce racial segregation and the suppression of dissent, and provided specific forewarnings that their assistance to the security forces of the South African apartheid regime knowingly and intentionally aided and abetted torts in violation of international law.

109. The United States adopted numerous export regulations to reduce the supply of strategic goods, technologies, and financing to the security forces of the apartheid regime.

110. In 1963, the United States adopted an arms embargo against South Africa, except for existing contracts.

111. In 1971, the Department of Commerce enacted regulations stating: “In conformity with the United Nations Security Council Resolution of 1963, the United States has imposed an embargo on shipments to the Republic of South Africa of arms, munitions, military equipment, and materials for their manufacture and maintenance.”<sup>84</sup>

112. This ban remained in effect until 1978, when it was expanded to cover a broader range of goods and technologies destined for use by the apartheid security forces. The revised regulations stated:

An embargo is in effect on the export or re-export to the Republic of South Africa or Namibia of any commodity, including commodities that may be exported to any destination in Country Group V under a general license, where the exporter or reexporter knows or has reason to know that the

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<sup>83</sup> G.A. Res. 44/27, U.N. Doc. A/RES/44/27 (Nov. 22, 1989).

<sup>84</sup> 15 C.F.R. § 385.4 (1971).

commodity will be sold to or used by or for military or police entities in these destinations or used to service equipment owned, controlled or used by or for such military or police entities.<sup>85</sup>

113. Under the U.S. regulations, “A validated export license [was] required for the export to the Republic of South Africa and Namibia of any instrument and equipment particularly useful in crime control and detection . . . .”<sup>86</sup>

114. In 1981, the list of commodities subject to the U.S. embargo specifically included vehicles specially designed for military purposes, such as military mobile repair shops; all other specially designed military vehicles; engines, including those modified for military use; pneumatic type casings (tires) constructed to be bullet proof or to run when deflated; specially designed components and parts to the foregoing; [and] pressure refuellers.<sup>87</sup>

115. Likewise, the embargo applied to “Specialized machinery, equipment, gear, and specially designed parts and accessories therefore specially designed for the examination, manufacture, testing, and checking of the arms, ammunition, appliances, machines, and implements of war; components and parts for ammunition; nonmilitary shotguns, barrel length 18 inches and over; [and] nonmilitary arms, discharge type.”<sup>88</sup>

116. In the technology sector, the Export Administration Regulations of 1982 provided that

An embargo is in effect on the export or reexport to the Republic of South Africa or Namibia of technical data . . . where the exporter or reexporter has reason to know that the technical data is for delivery to or use by or for the military or policy entities. In addition, users in the Republic of South Africa of technical data must be informed in writing at the time of export or reexport that the data may not be sold or otherwise made available,

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<sup>85</sup> 15 C.F.R. § 385.4 (1979) (emphasis added).

<sup>86</sup> 15 C.F.R. § 385.4 (1979).

<sup>87</sup> 15 C.F.R. § 379 (1981).

<sup>88</sup> *Id.*

directly or indirectly, to the military or police entities in these destinations.<sup>89</sup>

117. Export licenses were required under United States regulations for any computer exported to government consignees. Licenses were awarded “on a case by case basis for the export of computers which would not be used to support the South African policy of apartheid.”<sup>90</sup>

118. U.S. law also regulated the role of the banking sector in supporting apartheid. In 1978, the Export-Import Bank Act of 1945 was amended to state:

In no event shall the Bank guarantee, insure, or extend credit or participate in the extension of credit (a) in support of any export which would contribute to enabling the Government of the Republic of South Africa to maintain or enforce apartheid; (b) in support of any export to the Government of the Republic of South Africa or its agencies unless the President determines that significant progress toward the elimination of apartheid has been made . . . or (c) in support of any export to other purchasers in the Republic of South Africa unless the United States Secretary of State certifies that the purchaser has endorsed and has proceeded toward the [elimination of apartheid].<sup>91</sup>

119. The United States strongly condemned apartheid and restricted exports, from financing to commodities, that would substantially assist the South African government in maintaining or enforcing apartheid. As the 1983 Export Administration Regulations succinctly stated: “Authorizations for exports, reexports, sales to or for use by or for military or police entities in the Republic of South Africa will be denied except for medical supplies and similar goods.”<sup>92</sup>

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<sup>89</sup> 15 C.F.R. § 385.4 (1982).

<sup>90</sup> *Id.*

<sup>91</sup> Pub. L. No. 95-630, 1978 HR 14279 (1978) (codified at 12 U.S.C. 635(b) (1978)).

<sup>92</sup> 15 C.F.R. § 385.4 (1983).

120. To ensure the embargo's efficacy, the Department of Commerce adopted a broad definition of the term "military or police entities." Commerce declared that "It is the Department's position that the following are police or military entities: ARMSCOR, Department of Prisons, Bureau of State Security, South African Railways Police Force, and certain municipal and provincial law enforcement officials such as traffic inspectors and highway patrolmen."<sup>93</sup>

121. The United States maintained broad export restrictions against South Africa until 1994, the year South Africa held its first universal suffrage general elections.

122. During the relevant period, Defendants were on notice that the security forces of the apartheid regime in South Africa were abusing the Black South African population.

123. Defendants, with the purpose of facilitating these abuses, provided substantial assistance to the security forces of the apartheid regime of South Africa.

#### **VIII. AIDING AND ABETTING: PURPOSE, INTENT, AND SUBSTANTIAL ASSISTANCE**

##### **A. The Apartheid Security Forces Relied on United States Corporations to Carry Out the Violence of Apartheid**

124. The security forces of the apartheid regime enlisted the aid of United States corporations, including Defendants, to provide the means and methods to carry out the violence and terror necessary to maintain and enforce apartheid.

125. Apartheid was "more than the programme of one political party."<sup>94</sup> Business interests were

active participants and initiators in constructing a political and economic system which, in the end, was classified in international law as a crime against humanity. . . . The period of extreme repression, from 1960 onwards, was intended to save the system that protected privilege based on

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<sup>93</sup> 15 C.F.R. § 385 (1981).

<sup>94</sup> *Role of Business*, *supra* note 19, at 1.

race, thereby continuing to guarantee business its exclusive place in the South African economy and society.<sup>95</sup>

126. The South African security forces depended on foreign sources for advanced technology, materials, goods, and services in four strategic sectors—banking, armaments, technology, and transportation—that substantially assisted the regime to perpetuate apartheid and commit systematic acts of violence and terror against Plaintiffs and members of the classes, including extrajudicial killing; torture; prolonged unlawful detention; denationalization; and cruel, inhuman, and degrading treatment.

127. Certain businesses, including Defendants, played an important role in South Africa's defense of Apartheid from "civil unrest," cooperating closely with and providing financial, logistical and other material support to the security forces of the apartheid regime.

128. In 1977, P.W. Botha, then Minister of Defense, discussed the National Security Management System in a Defense White Paper: "The resolution of the conflict in the times in which we now live demands interdependent and coordinated action in all fields: military, psychological, economic, political, sociological, technological, diplomatic, ideological, cultural, etcetera."<sup>96</sup>

129. In May 1980, South African Prime Minister P.W. Botha appointed business leaders to a Defense Advisory Board. Botha told the House of Assembly that the Defense Force had succeeded in obtaining the goodwill and cooperation of business leaders and said:

[W]e have obtained some of the top business leaders in South Africa to serve on the Defense Advisory Board in order to advise me from the inside, not only about the armaments industry, but also about the best methods to be applied within the Defense Force ... *I want to unite the*

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<sup>95</sup> *Id.* The ANC noted that several core measures of apartheid were actively promoted by important business groups.

<sup>96</sup> *First Submission, supra* note 6, at 9.

*business leaders of South Africa, representative as they are, behind the South African Defense Force. I think I have succeeded in doing so.*<sup>97</sup>

130. The South African security forces performed the wrongful acts of apartheid; extrajudicial killing; torture; prolonged unlawful detention; denationalization; and cruel, inhuman, and degrading treatment that caused Plaintiffs' injuries.

131. From the time of the Sharpeville Massacre in 1960 until the fall of apartheid in 1994, it was common knowledge that the security forces of the regime were engaged in violent, criminal acts; that these acts were intended to cause death or serious bodily injury to civilians; and that the purpose of such acts was to intimidate and coerce the civilian population.

132. U.S. corporations, including Defendants in South Africa used loopholes to undermine the goals of the U.S. arms embargo and assist the South African security forces with the purpose of facilitating these violations of international law. As the U.S. mission in Pretoria to the State Department acknowledged: "It is our understanding that most U.S. firms have been able to continue sales by shifting to non-U.S. sources for components," cabled an official to the State Department."<sup>98</sup> Defendants were part of an overall criminal enterprise at the time they provided assistance.

133. Defendants' assistance to the apartheid security forces' acts of violence and terror spanned several decades. During this time, Defendants, acting from their respective headquarters in the United States, provided various forms of practical support to the security forces in a consistent and repeated manner—they made regular deliveries of equipment from the United States to South Africa and provided long-term design and maintenance services. Defendants persisted in this course of conduct to purposely facilitate the violent ends to which

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<sup>97</sup> Abrahams, note 74, at 65 (emphasis added).

<sup>98</sup> *Automating Apartheid* at 65.

their assistance was put, fully cognizant of the well-publicized and universally-condemned atrocities committed by the security forces in South Africa.

**B. IBM**

134. IBM's complicity in implementing and perpetuating apartheid and denationalization in South Africa and the Bantustans, including Bophuthatswana, was directed from the United States; machinery and technology, as well as technical support, came from the United States for these purposes; IBM was intent on supplying hardware and software to South Africa, including to support denationalization, as demonstrated by IBM first trying to prevent U.S. sanctions on the apartheid regime and later trying to circumvent the U.S. embargo; IBM's support for apartheid contradicted U.S. foreign policy at the time; and IBM's effort to portray its equipment as dual-use was misleading, as the company supplied hardware and software with the intent to violate international law and for the purpose of denationalizing black South Africans.<sup>99</sup>

**i. IBM Directed and Controlled its South African Policies from the United States, Exported Supplies from the United States, and Acted to Circumvent the United States Sanctions Regime**

135. IBM is a global leader in manufacturing computer systems, software, networking systems, storage devices, and microelectronics. IBM Corp. is headquartered in New York State and does business in New York State. The South African subsidiary, IBM-SA, operated as the agent and/or alter ego of IBM Corp. at all times relevant to this complaint.

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<sup>99</sup> Sources of information in this memorandum of law are based on public sources, which are cited, or interviews, which are not cited just as they would not be in a complaint.

136. IBM is and was a centralized corporation,<sup>100</sup> directed from U.S. headquarters.<sup>101</sup>

Its Board of Directors, which meets in the United States, is responsible for supervising the company's overall affairs.

137. At 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.

138. IBM headquarters provided personnel policies for employees throughout the company, including in South Africa.<sup>102</sup> Adoption of the Sullivan Principles is a specific example of how IBM's United States headquarters controlled and directed its South African policy.<sup>103</sup>

139. For a significant time period, IBM controlled nearly half of the South African computer industry<sup>104</sup>—it was the largest computer supplier in South Africa, with total annual sales estimated at 300 million rand.

140. IBM's relationship with the apartheid regime began in 1952, when IBM-SA received its first order for an "electronic tabulator." This tabulator was the first step in the

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<sup>100</sup>See Thomas W. Malone, *Making the Decision to Decentralize*, WORKING KNOWLEDGE (Mar. 29, 2004), available at <http://hbswk.hbs.edu/archive/4020.html#1> (citing Louis V. Gerstner Jr., *Who Says Elephants Can't Dance? Inside IBM's Historic Turnaround* (New York: HarperBusiness, 2002), 12-13, 57-62, 68-70).

<sup>101</sup>Implicit in IBM's public claim that it applied the Sullivan Principles in South Africa is that it could direct the personnel and policies of its operations there. Ranjay Gulati, REORGANIZE FOR RESILIENCE. (Harvard Business School Publishing Corporation, 2009). See also IBM Highlights, 1885-1969, available at <http://www-03.ibm.com/ibm/history/documents/pdf/1885-1969.pdf>.

<sup>102</sup>IBM Highlights, 1885-1969 (discussing expansion of nondiscrimination policy in 1961).

<sup>103</sup>As of 1979 both IBM and IBM South Africa had signed the Sullivan Principles. Elizabeth Schmidt, DECODING CORPORATE CAMOUFLAGE, 61 (Institute for Policy Studies, 1980) Appendix I "Signatories to the Sullivan Principles".

<sup>104</sup>Paul N. Edwards & Gabrielle Hecht, *History and the Technopolitics of Identity: The Case of Apartheid South Africa*, 36 J. S. AFR. STUD. 630 (2010).



automation and expansion of the population control program, which became increasingly sophisticated until the collapse of the apartheid regime.

141. IBM did not have research and development or manufacturing facilities in South Africa but directed and controlled its operations in South Africa from the United States. Indeed, between 1960 and 1980, South Africa had no indigenous domestic computer industry and was entirely dependent on outside sources for all computerized operations.<sup>105</sup>

142. IBM's export from the United States to South Africa of equipment, expertise, and training on how to use and maintain its technology substantially assisted apartheid.<sup>106</sup>

143. Rep. Howard Berman, the sponsor of legislation to ban computer sales to South Africa, testified in 1985 that:

Computers are essential to the South African government's pervasive control over every aspect of existence for every black individual. From the age of sixteen, all Africans must carry passbooks indicating where they have permission to live and work and whether they are allowed to live with their families . . . . Computers help in the collection, retrieval and use of this information . . . . As the South African economy and population grew, political leaders became concerned that a growing white manpower shortage would inhibit the implementation of apartheid. Computers have helped solve that problem. Moreover computers have enabled the South African government to strengthen its grip on the population and intensify apartheid enforcement over recent years. Pass law arrests doubled between 1980 and 1982. Political detentions have increased sharply . . . . Armed with more thorough and more readily available information on black residents, the government has accelerated forced removals of whole communities from so-called 'black-spots'—areas where black families

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<sup>105</sup> Lawrence Litvak et al., SOUTH AFRICA: FOREIGN INVESTMENT AND APARTHEID, 50 (Institute for Policy Studies 1978), *see also* Edwards and Hecht, at 619, 630-31 (2010) (“In 1975, Management magazine surveyed the entire computer inventory of S.A., tallying 1,119 machines and guessing the true total at about 1,500.”).

<sup>106</sup> NARMIC/AMERICAN FRIENDS SERVICE COMMITTEE, AUTOMATING APARTHEID: U.S. COMPUTER EXPORTS TO SOUTH AFRICA AND THE ARMS EMBARGO, 10-12 (1982) (“*Automating Apartheid*”). Even if some sales did not technically violate the embargo, some sales specifically were designed to denationalize and help enforce apartheid.

have lived for generations, but which the government has declared 'white'.<sup>107</sup>

144. "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.<sup>108</sup>

145. A "lack of access to foreign technology could cripple South Africa, as [U.S. government] cable point[ed] out. The incapacitation of a single computer would necessitate 'having to find hundreds of bookkeepers who are not available on [the] labor market.'"<sup>109</sup>

146. As of 1986, South Africa relied on imported mainframe computers.<sup>110</sup> As a computer industry official in South Africa explained: "We're entirely dependent on the United States. The economy would grind to a halt without access to the computer technology of the West."<sup>111</sup>

147. The South African government, including its security forces, recognized the importance of the computer support as well; it developed ways to get around sanctions regimes and also sought to develop more self-sufficiency over time.

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<sup>107</sup> *Testimony of U.S. Rep. Howard Berman Before the H. Comm. on Foreign Affairs, 99th Cong.* (reprinted in Cong. Rec. Apr. 18, 1985).

<sup>108</sup> Richard Knight, *U.S. Computers in South Africa*, The Africa Fund, 1986, available at <http://richardknight.homestead.com/files/uscomputers.htm>.

<sup>109</sup> *Automating Apartheid* at 9.

<sup>110</sup> Some personal computers were assembled locally, the parts were imported. *See Knight, U.S. Computers in South Africa.*

<sup>111</sup> Interview with C. Cotton, Managing Director, Burroughs South Africa, in Johannesburg, South Africa (Mar. 3, 1971), at 3.

148. This dependency on foreign technology companies made IBM's U.S.-based decisions about its South African policy all the more important.<sup>112</sup>

149. In the United States, IBM opposed shareholder resolutions related to divestment<sup>113</sup> and advocated for a sanctions regime that would allow it to support the South African government's implementation and enforcement of apartheid, thereby interfering with U.S. foreign policy.<sup>114</sup>

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<sup>112</sup> Edwards and Hecht at 630-31 (noting also that monitoring such U.S. exports and restrictions could be done with relative ease).

<sup>113</sup> Edwards and Hecht at 630-31 ("From 1972 on, activist minority shareholders introduced divestment resolutions at every annual IBM stockholder meeting."). For example, in 1975, church-related stockholders asked IBM to stop selling computers to South Africa, contending that the computers helped the government implement the pass system. Kevin Danaher, IN WHOSE INTEREST? A GUIDE TO U.S.-SOUTH AFRICA RELATIONS 116 (1984).

At its 1987 annual meeting—the year that IBM “divested” from South Africa, *see infra* Part IV.C, IBM also overwhelmingly voted down a resolution sponsored by anti-apartheid activists that would have banned the sale of IBM products. *See* John Pickles and Jeff Woods, “Undermining Divestment: From a Marginal Propensity to Invest to a Propensity to Invest in the Margins,” *Africa Today*, Vol. 37, No. 2, *Dismantling Apartheid: Problems and Possibilities* (2nd Qtr., 1990), at 72.

<sup>114</sup> In November, 1977 following the passage of a mandatory arms embargo resolution by the UN Security Council, the Carter administration announced new curbs affecting computer sales to South Africa, that prohibited, in furtherance of the administration's policies “supporting human rights,” the sale, direct or indirect, of any U.S. commodities or technical data to military or police entities in South Africa. *See* Knight, *U.S. Computers in South Africa*. During the early years of the Reagan administration, the sanctions were loosened. *See Automating Apartheid* at 61-62. When the Export Administration Act became law in July 1985, it contained a clause that enacted the controls that had been in effect under President Reagan also issued an executive order in September 1985 banning computer sales to the military, police, prison system and national security agencies. In 1986, Congress passed the Comprehensive Anti-Apartheid Act, prohibited the export of computers, software, and other technology for the use of South Africa government entities associated with apartheid and the extension of new loans or credit to such entities. *See* Pub. L. No. 99-440, 100 Stat. 1086, §§ 301-23 (1986).

150. IBM decided to maintain maximum flexibility for continued sales to the apartheid government despite the fact that its operations supported unlawful behavior that the U.S. government sought to prevent.<sup>115</sup>

151. For example, after the adoption of the 1978 regulations that would have curbed sales to South Africa, IBM pushed for a system that lacked enforcement and interpreted flexibility in the sanctions regime.<sup>116</sup>

152. Senior officials in the United States from the home offices of IBM registered their opposition to the 1978 sanctions and asked that the ban be lifted.<sup>117</sup>

153. IBM 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.<sup>118</sup>

154. In 1978, a year after the UN Resolution imposing a mandatory arms embargo on South Africa, IBM’s South African sales jumped 250%.

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<sup>115</sup> *Automating Apartheid* at 7-8 (discussing lack of direct presence but continuous and conscious effort to pursue sales in South Africa); *id.* at 9-12 (discussing concerted effort to oppose 1978 sanctions so as to allow sales to South African military and police).

<sup>116</sup> *Id.* at 62.

<sup>117</sup> *Id.* at 9-10; *id.* at 10 (new regulations allowed computer sales that did not “contribute significantly to security operations”); *id.* (U.S. components could be sold to “security forces from foreign countries” if “they are incorporated in a larger system and make up no more than twenty percent of it”); *id.* (re-export and re-sale of “insubstantial portions” of goods also allowed “if the commodities would not play a major role in security operations”); *id.* (computer and similar products generally “considered favorably for export unless they would be used to enforce apartheid.”).

<sup>118</sup> *Id.* at 71.

155. The practical effort of the opposition to restrictions was that U.S. corporations—like IBM—were “setting the actual operating parameters of the embargo.”<sup>119</sup>

156. This “left enough of South Africa’s supply conduits intact so as to insure that the Pretoria regime will have continued access to computers, communications gear, electronics and security equipment.”<sup>120</sup>

157. 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.

158. The Chairman of IBM, Frank Cary, noted at IBM’s 1977 annual meeting: “I have said time and again that we have investigated each instance brought to our attention where there was any reason to believe IBM computers might be used for repressive purposes, and we have found no such use.”<sup>121</sup> However, at the same meeting, IBM confirmed that its machines stored the data of colored, Asian, and white South Africans.<sup>122</sup>

159. On another occasion, IBM stated that it would continue to service computers in the South African Department of Defense.<sup>123</sup> Jack Clark, head of IBM South Africa, said that it would do so by using parts already in South Africa.<sup>124</sup> IBM was therefore able to continue to support apartheid while giving the appearance of compliance with the U.S.-imposed embargo.

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 62.

<sup>121</sup> Richard Leonard, *Computers in South Africa: A Survey of U.S. Companies*, at 4.

<sup>122</sup> *Id.*

<sup>123</sup> E. Drake Lundell, Jr., *Churches Hit IBM Inaction on Rights in South Africa*, *COMPUTERWORLD*, May 29, 1978; see also Richard Leonard, *IBM Update: Still Computing Apartheid*, 16 ICCR Brief 3A (1987), available at <http://kora.matrix.msu.edu/files/50/304/32-130-1363-84-cic%20No5-87%20opt.pdf> (quoting Jack F. Clark, former manager of IBM South Africa, as stating “There will be no change in the supply of IBM products.”).

<sup>124</sup> *Id.*

160. In an advertisement in a software catalog published in South Africa in 1980, IBM's General Systems Division marketed a "Law Enforcement System." In response to inquiries about the package, an IBM spokesperson did not deny that the police system was available in South Africa but said that it marketed this product via "direct proposals" as opposed to "passive" advertising in publications.<sup>125</sup>

161. This admission caused a scandal and IBM subsequently denied placing the ad or selling the software.<sup>126</sup> Only after the existence of the package was publicly disclosed did IBM begin to insist that it was not available in South Africa. The company was unwilling or unable to say how the law enforcement software appeared in the South African computer publication.<sup>127</sup>

162. IBM made many arguments in the United States defending its support of apartheid.

163. IBM asserted that South African government agencies used IBM computers only for "administration" and not for repressive use.<sup>128</sup> This claim ignored the nature both of the government and the tasks it performed, such as denationalization of an entire ethnic group.

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<sup>125</sup> *Automating Apartheid*, at 9-10 (providing citations to cables). Victor R. Macdonald, IBM vice president, omitted this key fact from his letter. IBM originally leased this system to the Interior Department. The South African government may have subsequently purchased it outright, but it would still have needed spare parts from IBM.

<sup>126</sup> *Testimony from the American Friends Service Committee Concerning U.S. Controls on Exports to South Africa: Hearing Before the Subcomm. on Afr. and the Subcomm. On Int'l Econ. Policy & Trade of the H. Comm. on Foreign Affairs, 97th Cong. (1982)* (statement of Thomas Conrad, Staff Researcher, American Friends Service Committee), available at [http://kora.matrix.msu.edu/files/50/304/32-130-1A83-84-AFSC\\_SA\\_Testimony\\_feb9\\_1982\\_opt.pdf](http://kora.matrix.msu.edu/files/50/304/32-130-1A83-84-AFSC_SA_Testimony_feb9_1982_opt.pdf).

<sup>127</sup> *Id.*

<sup>128</sup> Barnaby J. Feder, "IBM Is Shedding South Africa Unit; Pressure Is Cited," *The New York Times*, Oct. 22, 1986.

164. In 1985, Chairman Akers explained: “If we elect to leave it will be a business decision. What other kind of decision would it be? We are not in business to conduct moral activity, we are not in business to conduct socially responsible action. We are in business to conduct business.”<sup>129</sup>

165. IBM also asserted that its equipment was not essential or significant and that legitimate purposes overshadowed any risk of harm, even while IBM acknowledged that its equipment facilitated racial separation and denationalization.<sup>130</sup> In fact, IBM was determined to circumvent the United States sanctions regime and made plans to camouflage its operations through deceptions arranged with affiliates in other countries.<sup>131</sup>

166. IBM acknowledged that it intended to use overseas subsidiaries to supply embargoed goods and services to the South African security forces and that it supplied non-U.S.-made parts to some embargoed South African agencies that were not permitted to receive U.S. equipment.

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<sup>129</sup> David Sanger, “South African Prospects Leave I.B.M. Chief Glum,” *New York Times*, April 1986.

<sup>130</sup> *Automating Apartheid* at 15 (“When questioned about IBM’s role in the expansion of [the pass] system, an IBM official replied, ‘We feel that the fact that it is being done with computers hasn’t any appreciable overall effects on the apartheid situation. This pass system could be done in many other ways besides computers.’”). *Id.* at 45 (discussing Infoplan, and IBM sales to it, which IBM maintained were legal and did not support military projects). *Id.* at 52-55 (discussing IBM’s deep connections with the military-industrial complex in South Africa, including “top explosives manufacturers”). *Id.* at 66 (discussing IBM training facility in Johannesburg, which includes training for Infoplan and CSIR (which is part of the military-industrial complex). Since much of computer technology is about know-how, this efforts supports apartheid as much as equipment sales.

<sup>131</sup> *Id.* at 9, 63-65.



167. *Computer Weekly* reported IBM's statement that it would continue to supply spare parts and service to any affected South African military or police computers as long as supplies lasted.<sup>132</sup> IBM justified these transactions by arguing that U.S. regulations did not restrict them.

168. In 1987, Akers said that IBM had sold its assets in South Africa and that IBM's South Africa representative no longer sold directly to the police or military.<sup>133</sup> Implicit in Akers' assertion is that, even after IBM's sale of assets to a newly created company, that company still followed U.S.-directed policies.

169. This interpretation is consistent with the statement of the former head of IBM South Africa, who became head of the newly formed company:

The former manager of IBM South Africa, Jack F. Clarke will be managing director of the new independent company. In full page advertisements in major South African papers, Clarke has gone out of his way to reassure IBM's South African customers that they will still be able to buy IBM computers and other products. "The new company will hold the sole franchise for IBM in South Africa, and has a supply and service contract with IBM. . . . There will be no change in the supply of IBM products," he wrote in a personally signed letter. Annual sales are estimated at over \$200 million, the largest by far of any computer company in South Africa. IBM computers will continue to dominate the South African market.<sup>134</sup>

170. Years of IBM's actions make evident that IBM pursued business in a manner directly contrary to the intent of the U.S. embargo and sanctions regime, and IBM's own public statements indicate that decisions about its South African operations, including business with

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<sup>132</sup> *Computer Weekly*, United Kingdom, March 31, 1978.

<sup>133</sup> William Howard, *South Africa Resolution is Defeated*, PALM BEACH POST, Apr. 26, 1988, at 6B, available at <http://news.google.com/newspapers?nid=1964&dat=19880426&id=4iMjAAAIAIAJ&sjid=js4FAAAAIAIAJ&pg=2658,4149529>.

<sup>134</sup> Knight, *U.S. Computers in South Africa*.



institutions involved in implementing apartheid and denationalization, were made in the United States.

**ii. IBM Participated in a Criminal Enterprise by Providing Practical Assistance to the Apartheid Security Forces With the Purpose of Facilitating the Perpetration of Apartheid Human Rights Abuses**

171. Despite sanctions and international condemnation of supplying technology to the South African security forces and government, Defendant IBM and its subsidiary and alter ego, International Business Machines South Africa Limited (“IBM-SA”), made policy, management, investment, sales, and operational decisions that purposefully supported and facilitated sales, leases, and services to advance the goals of apartheid. By providing computer technology, systems, software, hardware, and training, IBM participated in a criminal enterprise to sustain the apartheid regime and facilitate the apartheid security forces’ control and repression of the black population.

172. IBM sought contracts that would achieve these ends and then executed those contracts in order to maintain its business in South Africa as well as to accomplish the goals of apartheid.

173. The South African security forces used computers supplied by IBM to restrict Black people’s movements within the country, to track non-whites and political dissidents, and to target individuals for the purpose of repressing the Black population and perpetuating the apartheid system.

174. IBM purposefully assisted in the implementation of apartheid by producing race-based identity documents used to: (1) strip Plaintiffs of their nationality and citizenship; (2) restrict their travel in and out of South Africa; and (3) facilitate discrimination and the geographic separation and segregation of the races into impoverished and isolated tribal areas known as homelands or “Bantustans.”

**a. Book of Life**

175. South African law required citizens to carry either a passbook or a “Book of Life,” depending on the person’s racial classification. These books were used in conjunction with specially-designed, state-of-the-art electronic databases that stored information on the individual’s race, employment status, criminal history, and residence.

176. By the late 1970s, the South Africa National Intelligence Service maintained extensive computer files on government opponents. Through IBM systems, these computer files could be accessed instantaneously for research or reference purposes related to government dissidents.

177. In the early 1980s, an average of more than 70 people were arrested each day for pass law violations. IBM’s computer systems and software substantially assisted the unlawful detention, torture, rape, and cruel, degrading treatment of many South African citizens, including class members.

178. IBM claimed that it would not knowingly sell equipment to customers who would use it to further repression, but, in fact, IBM pursued contracts with the purpose of supporting the implementation of apartheid, including the “Book of Life” and the Bantustan identity documents. Although IBM was outbid for the contract to provide technology to produce the African passbook in 1965,<sup>135</sup> IBM hardware served as the electronic memory bank for a large part of South Africa’s national identity system.

179. IBM provided the South African Department of the Interior (“DOI”) with a specially-designed, computerized population registry. IBM supplied the software and database

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<sup>135</sup> Litvak at 52.

design as well as the hardware to run the system on two IBM mainframes that stored details on seven million citizens.<sup>136</sup>

180. The “Book of Life” enabled authorities to classify individuals as coloured, Asian, Indian, or other, to determine their rights in accordance with their movement, employment, and other status, and also had to be carried at all times.<sup>137</sup> The Group Areas Act, which controlled the movements of coloureds and Asians and allowed the government to suppress them, could not have been enforced without the Book of Life.<sup>138</sup>

181. IBM knew that the Book of Life had no legitimate purpose other than to restrict the movement of black South Africans, facilitate discrimination and segregation, and strip Plaintiffs and Class Members of their nationality and citizenship.

182. Thomas Conrad of the American Friends Service Committee, an authority on corporate involvement in apartheid, testified that

for several years IBM has knowingly rented a Model 370 computer system to the South African Department of the Interior which is used for the regime’s national identity system. The IBM machine stores files on seven million people the regime has designated as coloreds, Asians, and whites. . . . Since IBM owns the equipment and leases it to the government, it could withdraw from the arrangement, but has declined to do so.<sup>139</sup>

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<sup>136</sup> At least one-third of IBM’s business was with the government, including the use of an IBM computer by the Department of Prisons and two IBM systems used in the population registration system known as the Book of Life. The newsletter quotes IBM Chairman Frank Cary. IBM Workers United, *IBM: Speak Up! The Truth about the Company in South Africa* (Johnson City, New York, 1979), available at [http://africanactivist.msu.edu/document\\_metadata.php?objectid=32-130-14BA](http://africanactivist.msu.edu/document_metadata.php?objectid=32-130-14BA).

<sup>137</sup> Litvak at 52.

<sup>138</sup> Litvak at 52 (citing n.80).

<sup>139</sup> *Controls on Exports to South Africa: Hearings before the Subcomms. on International Economic Policy and Trade and on Africa of the H. Comm. on Foreign Affairs, 97th Cong. 72* (1982) (statement of Thomas Conrad, American Friends Service Comm.); see also *Economic Sanctions and their potential Impact on U.S. Corporate Involvement in South Africa: Hearing before the Subcomm. on Africa of the H. Comm. on Foreign Affairs, 99th Cong. 22* (1985)

183. During the 1970s, new computers and peripheral equipment were added to expand and upgrade the system's capability. IBM supplied multiple Model 370/158 mainframe computers to the DOI. The DOI used the IBM system to process and store a vast quantity of information about the designated population, including identity numbers, racial classification, residence, and place of work. The system also contained a history of government opposition. The same IBM computer served as the basis for the "Book of Life," an identity document issued to all those covered by the database. The IBM system was used to track racial classifications and movement for security purposes.

184. The IBM computerized population registry was specially designed for the South African security forces. Its function was to provide practical assistance to the South African security forces in implementing and enforcing the racial pass laws and other structural underpinnings of the apartheid system, such as the suppression of political dissent. IBM custom-tailored this product to perform that function at the highest level for the apartheid regime.

185. As of 1976, at least one third of IBM business in South Africa was done directly with the South African government. IBM computers were used by the Department of Defense, the Department of the Interior, and the Bantu Administration Boards, the local administrators of apartheid. The apartheid government was IBM's largest single customer in South Africa.<sup>140</sup>

186. IBM's 370 computer was used by many South African government agencies, including the Department of the Prime Minister, the Department of Statistics, and the Department of Prisons, which was widely known to hold and torture political prisoners without

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(statement of Dr. Jean Sindab, Executive Director, Washington Office on Africa) (testifying that an IBM computer was used by the regime to maintain the pass system for the "Colored" population).

<sup>140</sup> *Automating Apartheid*, at 6.

trial. These agencies, which were a significant component of the apartheid state apparatus, relied on IBM computers for their administration.

187. The Bantustans represented the ultimate goal of apartheid: the creation of a white majority South Africa through denationalization of the black majority, who were forced to become citizens of “independent” homelands (Bantustans) comprising 13% of the undesirable rural land that had been a part of South Africa. The administrations of at least one Bantustan—Bophuthatswana—relied on IBM System 3/10 computers.<sup>141</sup>

188. Bophuthatswana was accorded nominal independence, as a putatively sovereign state, in 1977, and established some indicia of statehood, including the capacity to have “citizens”. This status was forced upon black South Africans of Tswana descent as part of the exercise of denationalization that was both the foundation and goal of Grand Apartheid—the permanent physical separation of the races. The Bophuthatswana government imposed identity documents and passports on those who were denationalized.

189. For this purpose, the Bophuthatswana government used IBM computers and systems, including both hardware and software. Bophuthatswana government employees working with IBM computers and systems were trained in an IBM-specific programming language.

190. IBM ran training courses for government employees in Johannesburg and Bophuthatswana. The courses also covered the proper use and maintenance of IBM machines. Programmers who attended these courses were government employees.

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<sup>141</sup> *Id.* (also discussing use of same computer in Gazankulu, though that Bantustan never attained full “independence.”).

191. Some computer programs run by the Bophuthatswana government on IBM machines were developed and written in-house with the assistance of IBM employees. When government employees encountered difficulty with their machines or programs, IBM employees assisted in troubleshooting and repairing problems.

192. By 1978, IBM actively participated in creating a new identity book for the Bophuthatswana government by developing a sub-system to produce the identity book. IBM developed both the hardware and software, used to create the Bophuthatswana identity document.

193. Once IBM had developed the system, it was transferred to the Bophuthatswana government for implementation. IBM employees trained Bophuthatswana government employees to use the IBM machine and program to produce identity documents. IBM was contacted when problems arose with the identity book system and IBM employees would fix problems.

194. The identity documents produced for the Bophuthatswana government contained the name, sex, racial classification, ethnic origin, and residential and/or postal address of the individual. Bophuthatswana residents were required to carry the Bophuthatswana identity documents produced by the Bophuthatswana government with the active and intentional participation of IBM.

195. In addition to effecting denationalization, the Bantustan system that IBM helped to establish 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.

196. Other homeland governments, including, but not limited to, Gazankulu, KwaZulu, Lebowa, Transkei, Ciskei, and Venda also used IBM hardware and software to produce identity documents.

197. IBM officials in the United States maintained that the Interior Department installation for the Book of Life was not objectionable because it did not cover the black population; this assertion was intended to obscure the fact that IBM's hardware played a key role in facilitating the very system of racial classification that made apartheid possible.<sup>142</sup> Moreover, the implication is clear that the origin of the machinery was the United States.

198. 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. This system was the basis for the "Book of Life" which, along with the passbook, facilitated the racial classifications that made apartheid possible.<sup>143</sup>

199. IBM purposely facilitated the implementation of apartheid by producing race-based identity documents and sorting and storing information in databases used to strip Plaintiffs of their South African nationality and citizenship and force upon them citizenship in "independent" Bantustans—impoverished and isolated tribal areas—created for the very purpose of isolating and suppressing the black population, as well as to restrict Plaintiffs' travel in, out, and within South Africa. The Bantustan system facilitated discrimination and the geographic separation of the races in South Africa on a massive scale, depriving blacks of their South African citizenship and associated rights, including participation in the South African economy.

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<sup>142</sup> Litvak at 52.

<sup>143</sup> See Thomas Conrad, Letter to the Editor, *Machines that Help Make Apartheid Run*, N.Y. TIMES, May 18, 1985, available at <http://www.nytimes.com/1985/05/18/opinion/1-machines-that-help-make-apartheid-run-249678.html>.

No foreign government ever accorded diplomatic recognition to any Bantustan. By supporting and implementing this fictitious administrative separation, IBM purposely facilitated denationalization, including the forced relocation of blacks to inhospitable areas, separation of families, and severe restrictions on food, medicine, educational, and employment opportunities, by improving the effectiveness and efficiency of race separation.

200. IBM intentionally facilitated the denationalization of Plaintiffs and Class Members. Plaintiffs were stripped of their South African nationality and citizenship, restricted in their ability to travel in to, out of, and around South Africa, and discriminated against by being forcibly geographically separated and segregated into homelands on the basis of race.

201. IBM knew that the normal market for these technologies was the security forces or government agencies utilizing security forces services. Any sales or agreements IBM entered into with general government entities were done with the intention that all equipment and technology linked to the passbook and Book of Life systems would ultimately be used by the security forces to enforce the oppressive laws of apartheid, often through violent means. In persisting with voluminous and repetitious sales of computer equipment and technologies linked to the passbook and Book of Life systems to the apartheid regime, IBM intentionally facilitated ongoing atrocities in South Africa.

**b. IBM Support to South African Defence Force (“SADF”)**

202. In order to facilitate the government’s ability to procure strategic equipment for the security forces after the mandatory embargo took effect, the apartheid government resorted to the use of a “dummy” front organization to procure sensitive equipment for the security forces. Infoplan, a Pretoria-based data processing corporation offered hardware, software, computer training and services, acted as such a conduit.



203. After the imposition of the mandatory embargoes in 1977 and 1978, IBM shifted much of its business with the South African government to Infoplan. While IBM supplied Infoplan with parts, services, education and technical data which were not covered by the U.S. embargo, Infoplan in turn transferred this equipment and expertise to the SADF.

204. Directly and indirectly, IBM was a top supplier for the SADF. The SADF inventory of IBM computers included model 360s (for instance, a model 360 was installed at the Simontown Naval Installation) and model 370s.

205. IBM rented at least seven computers to Leyland-South Africa, a firm that produced Land Rovers for the security forces and the police. IBM also rented several computers to a explosives manufacturer, the African Explosives and Chemical Industries, Ltd. ("AECI"). AECI reportedly had specialized in the manufacture of riot control gas, napalm, and nerve gas that were used against Plaintiffs and class members. At least four AECI installations use IBM hardware. For instance, AECI employs an IBM computer at its Modderfontein facility, where the company reportedly made the tear gas used against demonstrators at the Soweto massacre.

206. For much of the equipment leased to the South Africans, IBM provided maintenance and service on the equipment over the term of the lease. IBM's regular servicing of the apartheid government's computer systems, in addition to its custom design of certain products, demonstrates how closely IBM collaborated with the South African government in implementing and improving the enforcement of the racial pass laws and sustaining the apartheid system.

207. IBM's services were performed according to manuals originated in, created by, and distributed from IBM in the United States.

208. IBM conceded that the equipment and services it supplied to South Africa may be used for repressive purposes, noting that “It’s not really our policy to tell our customers how to conduct themselves.”<sup>144</sup>

209. IBM was fully aware of Infoplan’s relationship to the South African security forces when it supplied equipment and services to Infoplan after the imposition of the 1978 embargo.

210. The South African government also used computers supplied by IBM in defense research and arms manufacture.

211. The South African government used computers supplied by IBM to supply ammunition and supplies to military units. For instance, beginning in 1977, the SADF operated an automated military logistics system—using IBM equipment—to supply ammunition and other military supplies to military units.

212. In South Africa, the Armaments Development and Production (“ARMSCOR”) state enterprise was developed by the apartheid regime in the late 1960s to “promote and coordinate the development, manufacture, standardisation, maintenance, acquisition, or supply of armaments.”<sup>145</sup>

213. Due to the secrecy of these activities, not all facts are presently known. However, it is known that ARMSCOR worked closely with private companies, to ensure that the security forces of the apartheid regime acquired the armaments and military equipment it needed to

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<sup>144</sup> Erin MacLellan, *U.S. Business Debates South Africa Ties Limits on Computer Exports are Difficult to Enforce*, Washington Post, Aug. 25, 1985.

<sup>145</sup> Armaments Development and Production Act 57 of 1968.

suppress dissent and control the population despite the international arms embargoes. The businesses linked to ARMSCOR also included Defendant IBM.<sup>146</sup>

214. The ANC noted that many of the companies working with ARMSCOR were foreign: “many of the local private sector corporations were not involved in the genuine development of these war materials. They were more often useful conduits for foreign technologies, helping the apartheid state to evade the UN arms embargo.”<sup>147</sup>

215. The influx of armaments and related equipment, services, and expertise to ARMSCOR and the rest of the apartheid regime substantially assisted the suppression of dissent, the control and manipulation of the African population, and systematic violence against dissidents and non-whites in violation of international law.

216. IBM made profits which they knew could only come from their encouragement of the security forces’ illicit operations through the sale of computer equipment and technologies designed to implement and enforce the oppressive policies of apartheid. By reaping these profits, IBM acquired a stake in the criminal venture of the apartheid regime.

217. IBM provided the South African security forces with the technology and services to enforce apartheid by force; extrajudicial killing; torture; prolonged unlawful detention; denationalization; and cruel, inhuman, and degrading treatment against Plaintiffs and members of the classes intending that the technology and those services would be (or only could be) used in connection with that purpose.

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<sup>146</sup> COSATU Submission to the Truth and Reconciliation Commission Hearings on Business and Apartheid at 17.

<sup>147</sup> *Role of Business*, *supra* note 19, at 8.

**iii. IBM Camouflaged its Continued Assistance of the Apartheid Security Forces in Order to Avoid Sanctions**

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

219. Although IBM formally withdrew from South Africa in 1987, it intentionally continued to support the security forces' repressive enforcement of apartheid and denationalization.

220. In 1986, IBM announced its intention to sell its South African holdings, although it would continue to license and distribute its products in the country. IBM said that it would sell its subsidiary, which it operated for 34 years, in 1987 for an undisclosed price to a new company established "for the benefit of the employees of IBM South Africa."<sup>148</sup> Company spokespersons said this was done so that the newly independent company could fulfill IBM South Africa's existing contractual responsibilities.

221. While IBM itself would no longer have assets, capital, or employees in South Africa, the new company signed multi-year contracts to import and sell IBM products, services,

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<sup>148</sup> South Africa History Online, *The Company, IBM, re-forms in South Africa*, (Oct. 21, 1986), available at <http://www.sahistory.org.za/dated-event/company-ibm-re-forms-south-africa>.

and technologies.<sup>149</sup> The same IBM employee, Jack Clarke, who headed IBM South Africa, headed the new company.<sup>150</sup>

222. After divestment, IBM ensured that its West German subsidiary and the Japanese company Hitachi could supply parts to service embargoed IBM equipment.<sup>151</sup>

223. Although IBM claimed to “sell” its South African subsidiary, IBM stated that it would provide a loan allowing local investors to buy the subsidiary. IBM retained a buy-back option to the new company as a term of the sale. The new entity was run by the person who was the general manager of IBM South Africa prior to the sale. IBM continued to sell its products, parts and services through the new company and continued to be the top supplier of computers to South Africa after the “divestiture.” Around 1992, IBM purchased a 24% stake in the local distributor of IBM products.

224. After IBM publicly announced it was leaving South Africa, a letter was sent to customers by the Managing Director of IBM South Africa stating that “there will be no change to the supply of IBM products.”<sup>152</sup> 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.”<sup>153</sup>

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<sup>149</sup> IBM also would profit from interest on loans it made to the South African buyers of the subsidiary. *Id.*

<sup>150</sup> Wall Street Journal, August 24, 1987.

<sup>151</sup> Rita Arditti, et al., SCIENCE AND LIBERATION 204 (1980), available at [http://books.google.com/books?id=rE4SnULjDgQC&pg=PA204&lpg=PA204&dq=ibm+west+german+subsidiary+hitachi+south+africa+embargo&source=bl&ots=V1YBG79BUc&sig=8sY5u mobUsRtMd9CGAaa31Dt-NY&hl=en&sa=X&ei=DMeIU\\_qmDeHEsATRx4C4Dw&ved=0CCgQ6AEwAA#v=onepage&q=ibm%20west%20german%20subsidiary%20hitachi%20south%20africa%20embargo&f=false](http://books.google.com/books?id=rE4SnULjDgQC&pg=PA204&lpg=PA204&dq=ibm+west+german+subsidiary+hitachi+south+africa+embargo&source=bl&ots=V1YBG79BUc&sig=8sY5u mobUsRtMd9CGAaa31Dt-NY&hl=en&sa=X&ei=DMeIU_qmDeHEsATRx4C4Dw&ved=0CCgQ6AEwAA#v=onepage&q=ibm%20west%20german%20subsidiary%20hitachi%20south%20africa%20embargo&f=false).

<sup>152</sup> Letter of J.F. Clarke, Managing Director, IBM South Africa, entitled “Notice to the Customers and Associates of IBM Throughout South Africa.”

<sup>153</sup> ICCR Brief Vol. 16 No. 5p. 3A 1987. “According to a management letter leaked to *The Financial Times*, IBM operations would continue as normal through the creation of a locally-

225. Newspapers reported that “[a] letter leaked from IBM’s Johannesburg offices reveals that IBM’s pull-out from South Africa is not all it seems. Users are being reassured that IBM products and services will be freely available from the company established as a result of IBM selling off its subsidiary. And the letter boasts that the lack of restrictions will leave it free from international pressure . . . . This has been interpreted as evidence that IBM’s withdrawal was aimed at dodging international disapproval and as a means of taking political heat off IBM in the US.”<sup>154</sup>

226. These arrangements violated the letter and spirit of U.S government restrictions, since parts would be made under IBM patents registered in the United States. It is clear that IBM intended—as it had for years—to continue, uninterrupted, its supply of goods and services to the South African security forces, contrary to the intent and policy of U.S. regulations and U.N Declarations.

**C. FORD**

227. Ford was not merely a passive investor in South Africa but rather provided vehicles to purposely support specific unlawful violence against black South Africans, including Plaintiffs and those similarly situated. Ford provided such support knowing that the international community and the United States viewed vehicle and vehicle parts sales to the security forces as critically linked to the enforcement of apartheid and violence against black South Africans.

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owned company to handle IBM’s business; the letter also claimed: “[T]he new company will be able to respond with greater flexibility than a wholly-owned IBM subsidiary. In the current international climate such flexibility will clearly be to our customer’s advantage.” Pickles and Woods, at 72.

<sup>154</sup> *IBM Leak Reveals No Change in SA*, Datalink, Jan 29, 1987; Philip Basset, *Unions claim IBM Operations Still Continuing in South Africa*, Financial Times, Jan 14, 1987 (IBM “has in practice not withdrawn from its South African operations, in spite of its decision last October to disinvest in the country”).

228. Ford U.S.'s complicity in implementing and perpetuating apartheid in South Africa was directed from the United States; management, machinery, and technology came from the United States for the purpose of supporting the apartheid security apparatus in its repression of black South Africans and anti-apartheid activities; Ford's conduct contradicted U.S. foreign policy at the time; and Ford intentionally sought to circumvent U.S. law.

**i. Ford Directed and Controlled its South African Policies from the United States, Exported Equipment from the United States, and Acted to Circumvent the United States Sanctions Regime**

229. Defendant **Ford Motor Company** ("Ford") and is an American multinational automaker based in Dearborn, Michigan, near Detroit, whose Michigan headquarters at all relevant times has directed the operations of its subsidiaries globally; it includes a global automotive group with a single president, who was also an executive vice-president from the headquarters.<sup>155</sup>

230. Ford supplied vehicles, parts, and other equipment to the apartheid security forces. This equipment was specifically designed for the purposes of, and was in fact used for, transporting, arming, and protecting military personnel in offensive actions against Plaintiffs and Class Members. The equipment was used to patrol townships to target political opponents, repress the African population, quell public displays of dissent, and brutalize and kill many citizens as described herein.

231. At all relevant times, Ford vehicles and components were developed and produced wherever it was best equipped to do so.<sup>156</sup>

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<sup>155</sup> See, e.g., 1987 Annual Report, at 5, 8.

<sup>156</sup> Id. at 8.

232. Ford controlled its South African operations through Ford Motor Company of South Africa (Pty) Ltd. (“Ford South Africa”), which was formed in 1933. It was a wholly-owned subsidiary of Ford Motor Company of Canada, Ltd. (“Ford Canada”), which was itself 76% owned by Ford.

233. 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).

234. After the merger, Ford had a 42% stake in SAMCOR, with the rest held by Anglo American.<sup>157</sup> In November 1987, Ford announced that it would dispose of its share in SAMCOR by selling it to Anglo American and creating a trust for SAMCOR employees.<sup>158</sup>

235. Although Ford was formally divested of its stake in SAMCOR, Ford allowed SAMCOR to continue “to use its trade name and . . . provide[d] parts, vehicles and management assistance.”<sup>159</sup> Ford transferred tens of millions from the payment it received from the sale directly to SAMCOR.

236. Ford became the major shareholder again in 2000 and then renamed SAMCOR, Ford of South Africa.<sup>160</sup>

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<sup>157</sup> John Battersby, *South Africa Sale by Ford Will Give Blacks Big Stake*, N.Y. Times, June 15, 1987.

<sup>158</sup> *Id.*

<sup>159</sup> *Ford to dispose of its stake in South Africa’s Samcor*, The Wall Street Journal Europe, Nov. 25, 1987 WSJ (emphasis added).

<sup>160</sup> Deon Sonnekus, *Samcor becomes Ford of Southern Africa*, News24, Aug. 21, 2000, available at: <http://www.news24.com/xArchive/Archive/Samcor-becomes-Ford-of-Southern-Africa-20000821>.



237. Foreign companies, including Ford, historically dominated the auto industry in South Africa, and by the late 1970s, of the ten auto companies in South Africa, only one was South African owned.<sup>161</sup>

238. In 1978, Ford's sales in South Africa were estimated at \$288 million and its investments were valued at \$119 million.<sup>162</sup> At that time, with the auto industry in a downturn and the South Africa government seeking to minimize companies in the industry to ones that could be more stable and profitable, "GM and Ford [were] two of the best-capitalized car manufacturers, possessing the resources to sit out a transition and emerge strong."<sup>163</sup>

239. During all relevant times, key decisions about investments, policy, and operations in South Africa were made by Ford in the United States.

240. Thus, despite the tightening of U.S. trade sanctions in February 1978, Ford U.S. still announced a "large infusion[] of capital into its South African subsidiary. Ford injected \$8 million for upkeep and retooling."<sup>164</sup>

241. Ford U.S. made policy, management, investment, sales, and operational decisions with the purpose of supporting the apartheid security forces, including with sales of specialized vehicles designed for controlling by force the black population of South Africa.<sup>165</sup>

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<sup>161</sup> Kenneth Propp and Desaix Myers III, "The Motor Industry in South Africa," South Africa Review Service: Industry Sector Report (February 1979) by the Investor Responsibility Research Center (IRRC), at 2-4, 6. Ford built the first assembly plant in the country in 1923 and was the market leader in 1977 and second in 1978. *Id.* at 7. In 1978, Ford's sales in South Africa were estimated at \$288 million and its investments were valued at \$119 million. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 10.

<sup>164</sup> *Id.* at 20 (noting also that "company has been constrained to inject foreign capital into operations that now do not return much on their already large assets.").

<sup>165</sup> *Id.* at 18 ("Disclosures by GM and Ford about the volume of their sales to the police and military indicate that even if these sales [to the defense and police] do not represent a large

242. At all times, both Ford South Africa's and SAMCOR's business activities were directed by Ford in Michigan.<sup>166</sup> Ford adopted the Sullivan Principles, for example, regarding operations in South Africa.<sup>167</sup>

243. Ford regularly sent U.S. delegations to South African facilities and provided experts for work on new installations there. Ford also sent employees to deal with Human Resource issues and to establish HR programs such as "Zero Defects."

244. Management personnel were transferred from one part of Ford to another. For example, the general manager of Ford South Africa was appointed and sent from Ford in Detroit and went on to other jobs in Ford outside South Africa.

245. Similarly, Lewis Booth, the general manager of SAMCOR, started in 1978 with Ford of Europe, went to Dearborn, Michigan from 1993 to 1996, then to SAMCOR, and

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proportion of the companies' aggregate sales, both the automakers and the government consider them important. Obviously, motor vehicles and tires are central to the maintenance of a prepared defense and police establishment. GM especially has been anxious to preserve its supplier relationship with the government, as have the major tire manufacturers, despite current restrictions on such sales imposed by the U.S. government. The companies appear to believe that the government's perception of whether they are willing to cooperate in car and truck sales outweighs the actual volume of sales.").

<sup>166</sup> Ford Motor Co. (1989) Form 10-K 1989 (stating Ford operates in South Africa through SAMCOR).

<sup>167</sup> "The Motor Industry in South Africa," at 14. Ford executives also implicitly acknowledged direction from the headquarters for its activities in South Africa. In a July 1979 meeting with a religious taskforce, Ford officials, including William Broderick, the Vice President for international and government affairs for Ford in the United States, explained the company's actions in South Africa. Ford officials said that the loss of police and military contracts would lead to layoffs and potentially a consumer boycott of Ford. Broderick further stated that UN Security Council Resolutions did not prohibit the sale of non-military vehicles or equipment. See Renate Pratt, IN GOOD FAITH: CANADIAN CHURCHES AGAINST APARTHEID 43 (Canadian Corporation for Studies in Religion, 1997), available at [http://books.google.com/books?id=KII0T9N7NzcC&pg=PA42&lpg=PA42&dq=ford+apartheid&source=bl&ots=ZTidly\\_iZV&sig=S9I1B0YFO6csH5tZ8GUXSoVXII4&hl=en&sa=X&ei=inN\\_U5XhLs6osASGtICgAQ&ved=0CC0Q6AEwAThu#v=onepage&q=ford%20apartheid&f=false](http://books.google.com/books?id=KII0T9N7NzcC&pg=PA42&lpg=PA42&dq=ford+apartheid&source=bl&ots=ZTidly_iZV&sig=S9I1B0YFO6csH5tZ8GUXSoVXII4&hl=en&sa=X&ei=inN_U5XhLs6osASGtICgAQ&ved=0CC0Q6AEwAThu#v=onepage&q=ford%20apartheid&f=false)

subsequently became president of Asia Pacific and Africa Operations for Ford as of January 1, 2000.<sup>168</sup>

246. Ford acknowledged that it was able to and did impose policies on its operations globally. In addition to claims about its implementation of the Sullivan Principles of non-discrimination, Ford controlled its major global policies, including its employment policies, ethical business policies and code of conduct.<sup>169</sup>

247. Ford U.S.'s involvement in specific South African employee matters demonstrates its involvement from the United States. Plaintiff Thozamile Botha, a former SAMCOR employee, was banned in South Africa.<sup>170</sup>

248. While in exile, a Ford lawyer who liaised with Ford South Africa took Botha to Ford Headquarters in Michigan. She was a lawyer representing Ford and interviewed Botha over two days. She showed him a letter from Ford South Africa to Ford headquarters referring to Botha, which read, "[v]ery intelligent, hard working, if he could be on our side."

249. The author of the letter was the Head of Personnel/Human Resources in South Africa, Fred Ferreira, who was also a member of the Broederbond. Although she only showed Botha one letter, Ford had a file on him in the United States that included other documents.

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<sup>168</sup> Biography of Lewis Booth, Ford Motor Co., U.S. Dept. of State, available at <http://2001-2009.state.gov/e/eeb/ace/2001/80311.htm>.

<sup>169</sup> Ford Motor Co. (1989) Annual Report 1986, at Unnumbered "Centers of Excellence", 10, 20, 41; Ford Motor Co. (2012) Sustainability Report: Environmental Management 2012, available at <http://corporate.ford.com/microsites/sustainability-report-2011-12/blueprint-governance-management-environmental>; Ford Motor Co. (2012) Sustainability Report: Ethical Business Practices 2012, available at <http://corporate.ford.com/microsites/sustainability-report-2011-12/blueprint-governance-sustainability-ethical>. See also Penske Corp., *Case Study: Ford Motor Company* (2010), available at [http://www.penskelogistics.com/pdfs/01\\_ford\\_case\\_study\\_updated.pdf](http://www.penskelogistics.com/pdfs/01_ford_case_study_updated.pdf) (describing Ford's structure).

<sup>170</sup> See Pratt, IN GOOD FAITH CANADIAN CHURCHES AGAINST APARTHEID.

250. The files and communications kept in the Michigan headquarters about Plaintiff Botha reveal that Ford monitored specific employees inside the plant, which indicates a tight level of control over its operations in South Africa.

**ii. Ford Participated in a Criminal Enterprise by Providing Practical Assistance to the Apartheid Security Forces With the Purpose of Facilitating Perpetration of Apartheid Human Rights Abuses**

251. Defendant Ford 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.

252. Ford knew that its role in South Africa was significant to the continued operations of Ford South Africa and its successors. Ford specifically supported the military and police, which one U.S. official noted in discussing the purposes of the embargo were, "the instruments most directly concerned with the enforcement of apartheid."<sup>171</sup>

253. Because of their strategic importance, some industries were designated as National Key Points, and as such, there was a particularly close relationship between these corporations and South African security forces. Defendant Ford, as an automobile manufacturer, would have been designated as a National Key Point.

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<sup>171</sup> "The Motor Industry of South Africa," at 19. See also *id.* at 6 (noting that *the Financial Mail* arms and armaments were not only goods of importance to South African Department of Defence as "motor vehicles . . . are among the strategic materials produced by foreign-controlled firms."). See also *id.* at 18.

254. Ford support was significant: “[B]etween 1973 and 1977 [Ford] sold 128 cars and 683 trucks directly to the South African Ministry of Defense and 646 cars and 1,473 trucks to the South African police.”<sup>172</sup> Ford sold at least 1,582 F series U.S.-origin trucks to the police.<sup>173</sup>

255. Ford explicitly acknowledged that its support for the South African police and military was essential to Ford’s broader business interests in South Africa.<sup>174</sup> Ford continued to supply “parts to the military and police despite the 1978 Commerce Department regulations that prohibit the sale of any American commodity to the South African police or military.”<sup>175</sup>

256. In February 1978, the United States Department of Commerce issued regulations that prohibited Ford from supplying passenger vehicles to the South African security forces, because some of Ford’s passenger vehicles contained U.S.-made parts.<sup>176</sup>

257. The 1978 sanctions regime was created to eliminate “gray areas” and ensure that American supplies were not flowing to vehicles used by, or increasing the “operational capacity of,” the South African security forces.<sup>177</sup>

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<sup>172</sup> *Id.* at 4.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 18.

<sup>175</sup> Elizabeth Schmidt, *Decoding Corporate Camouflage*, at 61.

<sup>176</sup> 15 C.F.R. § 385.4 (1979); *see supra* ¶ 112.

<sup>177</sup> “The Motor Industry in South Africa,” at 12 (“At the same time, the administration has sought to ensure, in the words of one official, that ‘the United States should act in no way to increase the operational capacity of the South African military and police.’ Responding to South Africa’s arrests and bannings in October 1977, the Commerce Department on Feb. 16, 1978, issued its regulations designed to curb sales of products and technology to the South African police and military. . . . The intent of the 1978 restrictions is to tighten up ‘grey area’ sales to South Africa. ‘Grey area’ items encompass materials of a non-military nature that could be converted on short notice to military or police use such as light airplanes, specialized computer systems, certain electronic components and strategic spare parts.”).

258. Despite the prohibitions, Ford continued to supply vehicles to the South African security forces with the purpose of facilitating apartheid crimes. Ford denied that its continued sales to the South African security forces ran counter to the U.S. prohibitions, on the basis that the vehicles did not contain parts or technical data of U.S. origin.<sup>178</sup>

259. From its own statements, Ford acknowledged that it controlled the South African plant from the United States, including supply chain policy and sales to South African forces.<sup>179</sup> Ford intended to continue this supply and support to maintain relations and business, even to the extent that these activities purposefully facilitated oppression.

260. Ford claims that it lost some sales to certain South African security forces as a result of the February 1978 regulations, but the effects of those losses were minimal.<sup>180</sup> Ford's sales to the South African security forces continued.<sup>181</sup>

261. Occasionally these sales were temporarily halted by sanctions imposed by foreign governments. For example:

In the mid-1960s, Ford bid on a contract to supply four-wheel drive vehicles to the government. But the Canadian government refused to issue an export permit to Ford's Canadian subsidiary, which was to supply the vehicles, on the grounds that the items might violate the then non-mandatory UN arms embargo against South Africa.<sup>182</sup>

262. In 1986, as justification for its continued sales to the South African security forces, Ford explained that if it refused to supply military vehicles to the security forces, it could

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<sup>178</sup> Letter from Sidney Kelly to Shareholder (May 8, 1980) ("Kelly Letter") at 1.

<sup>179</sup> *Id.* at 15.

<sup>180</sup> Karen Rothmeyer, *U.S. Motor Industry in South Africa: Ford, General Motors and Chrysler*, The Africa Fund 1979, p. 8.

<sup>181</sup> Kelly Letter, *supra* note 178, at 1 ("FSA sells a small number of non-US origin civilian vehicles to the Police and Military").

<sup>182</sup> Rothmeyer, *supra* note 180, at 12.

lose all government sales in South Africa, which could in turn render the company economically unviable in South Africa.<sup>183</sup> Ford catered to the security forces' demands in order to protect its other profitable operations with other branches of the apartheid regime.

263. Ford sold its products to the South African security forces through a central government purchasing authority. The central authority purchased vehicles for use by the security forces.

264. The Comprehensive Anti-Apartheid Act of 1986 prohibited any U.S. entity from engaging in any form of cooperation with the South African security forces except for activities that were reasonably designed to facilitate collection of necessary intelligence.<sup>184</sup>

265. Despite the 1986 Act, Ford, in addition to supplying strategic security-force equipment, assisted with its repair and maintenance. Ford's cooperation with and practical assistance to the South African security forces for the servicing of military vehicles demonstrates its close collaboration with the apartheid regime in maintaining and enforcing apartheid.

266. In addition to vehicles, parts, and maintenance, Ford supplied the South African security forces with the necessary technology and skills to design and improve security force vehicles. This purposeful support for the apartheid regime was clear from its specialization of vehicles for the South African police.

267. Notably, into the 1980s, Ford sold vehicles that did not need to be "converted" by the apartheid government for military or police use but were already specialized before leaving the plant in South Africa. Tags on cars being produced on the line in South Africa would

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<sup>183</sup> Rothmeyer, *supra* note 180, at 13; Richard Knight, "Sanctions, Disinvestment, and U.S. Corporations in South Africa," in *Sanctioning Apartheid* (1990, Robert E. Edgar, ed.).

<sup>184</sup> White Wheels of Fortune: *Ford and GM in South Africa*, Interfaith Center on Corporate Responsibility, Vol. 8 No. 6 1989, at 3A.



indicate which cars were intended for the South African police or government. The engines in some of these models were more powerful than in other cars, and they were only made for the police or the government.

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

269. Boxes of parts including nuts, bolts, and carburetors to be used in the specialized vehicles would arrive from overseas, mainly from Ford, and receive expedited treatment to get them to the plant.<sup>185</sup>

270. Ford continued to assist the apartheid regime intending that their equipment and technology was being used to commit violations of international law.

271. Ford’s support for the security forces of the apartheid regime extended beyond the mere supply of specialized military vehicles.

272. The military vehicles, equipment, and services that Ford supplied to the South African security forces were intentionally designed to practically enable the security forces to track and attack civilians, patrol communities, and terrorize the Black population with the purpose of perpetuating the oppressive apartheid regime. In the hands of the apartheid security forces, the equipment supplied by Ford had an inherent capacity for harm and was particularly susceptible to harmful and illegal use under international law.

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<sup>185</sup> “The Motor Industry in South Africa,” at 15 (discussing import of carburetors).



273. Ford knew that the normal market for these vehicles was the security forces. The vehicles were deliberately pre-equipped with armor and military fixtures and designed for easy modification by the security forces to add additional defensive and offensive features.

274. Ford entered into agreements with the apartheid regime with the intention that this equipment would ultimately be used by the security forces to enforce the oppressive laws of apartheid, often through violent means. Ford persisted with voluminous and repetitious sales of such equipment and service agreements despite their knowledge that such sales and services provided practical assistance to the South African security forces which had a substantial effect on perpetrating ongoing atrocities in South Africa.

275. Ford also worked in deliberate cooperation with security forces to repress anti-apartheid and union activists. South African police and military regularly visited and entered industrial plants.

276. Employees in the South African plants were disciplined by Ford for anti-apartheid activities outside of work, and employees active in workplace organizing were arrested by the police and security forces, questioned about their activities based on information supplied by Ford, and tortured and imprisoned.

277. Ford, thus, purposely supported the repression of anti-apartheid activists and cooperated with and benefited from government repression of blacks who supported unions.

278. Ford vehicles provided substantial assistance to the apartheid security forces in Soweto. The student-led Soweto Uprising on June 16, 1976, to protest mandatory Afrikaans language instruction in schools, led to violent suppression by the security forces. Women and children were shot and killed. Ford military trucks were used as part of the military protocols in Soweto.

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

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

281. At a mass burial service for victims of the massacre held later in August, security forces once again opened fire on attendees resulting in additional injuries and deaths. Security forces continued to perpetrate violence against Duncan Village residents at least through 1986. Security forces relied on vehicles manufactured by Ford for coordination, monitoring the black population's activities, gathering information, and transportation throughout this time period.

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

violations.” Security forces active at this time relied on vehicles manufactured by Defendant Ford for coordination, monitoring activities, intelligence gathering, transport, and protection.

283. By making profits which they knew could only come from their encouragement of the security forces’ illicit operations through the sale of vehicles, parts, designs, and services, Ford acquired a stake in the criminal enterprise that was the apartheid regime.

284. Ford provided the South African security forces with vehicles and services for the purpose of assisting enforcement of apartheid by force; extrajudicial killing; torture; prolonged unlawful detention; denationalization; and cruel, inhuman, and degrading treatment against Plaintiffs and members of the classes.

**iii. Ford Camouflaged its Continued Assistance of the Apartheid Security Forces in Order to Avoid Sanctions**

285. As set forth above, the general manger of Ford South Africa became the head of SAMCOR.

286. After SAMCOR was created, Ford continued its seamless operation in South Africa through SAMCOR.

287. Ford created the fiction of this formally separate company to use its trade name and provided SAMCOR with parts, vehicles, managerial assistance, and capital derived from Ford’s sale of its interests. Nothing changed except the names and stamps on boxes.

288. As Ford spokesman William J. Goodell, speaking from Detroit, said in 1987, “Samcor needs Ford’s participation to be a viable company...They produce Ford-designed vehicles. They need the Ford name on vehicles to sell them.”<sup>186</sup>

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<sup>186</sup> Ralph Vartabedian and Michael Parks, Ford Discussing Plans to Divest in South Africa: Firm Would Give 24% Stake to Workers, But Maintain a Presence, June 15, 1987.

289. Even after Ford announced it was “withdrawing” from South Africa, Ford continued to sell components to SAMCOR and allowed SAMCOR to use its trade name.<sup>187</sup> “[W]e are committed to supporting [SAMCOR’s] continued operation and the employment of its people,” said Ken Brown, spokesman for Ford.<sup>188</sup>

290. When apartheid ended, Ford voided the fiction and stepped back into the place it claimed to have left by buying a 45 percent stake in SAMCOR following the demise of apartheid. These maneuvers revealed Ford’s maintenance and control of its business activities, including its purposeful support for and imposition of apartheid, while circumventing and undermining U.S. policy.

#### **IX. EQUITABLE TOLLING**

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

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

#### **X. CLAIMS FOR RELIEF**

##### **FIRST CLAIM FOR RELIEF**

##### **(APARTHEID AS A CRIME AGAINST HUMANITY)**

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<sup>187</sup> Janet Braunstein, *Ford Leaving South Africa But Not Abandoning SAMCOR*, Associated Press, Nov. 25, 1987.

<sup>188</sup> *Id.*

**(AGAINST BOTH DEFENANTS)**

293. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

294. Plaintiffs, all members of the proposed Extrajudicial Killing Class, all members of the proposed Torture Class, all members of the proposed Detention Class, all members of the proposed Cruel Treatment Class, and all members of the proposed Denationalization Class seek relief from crimes against humanity committed by the apartheid state with the complicity of Defendants, either directly and/or through their agents and alter egos, either by aiding and abetting or participating in a joint criminal enterprise with the South African security forces.

295. The acts described herein constitute the crime of apartheid and offenses committed in furtherance of or ancillary to that crime in violation of the Alien Tort Claims Act (28 U.S.C. § 1350), international law, and the common law of the United States.

296. The crimes against humanity for which Defendants are liable are intentional acts that were purposely committed as part of widespread or systematic attacks directed against a civilian population.

297. The acts which form the basis of Defendants' liability for crimes against humanity include apartheid itself as well as murder, deportation or forcible transfer of population, revocation of nationality, imprisonment or other severe deprivation of physical liberty in violation of international law, torture, the persecution against any identifiable group or collectivity on political, racial, national, or ethnic grounds, and/or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

298. Each single act constitutes a crime against humanity because it was committed within the context of widespread or systematic attacks against a civilian population. In addition, apartheid itself has been long recognized as a crime against humanity.

299. Defendants provided assistance to the South African security forces through material, logistical, financial, and/or other means of practical support, to purposely facilitate violations of international norms toward the Plaintiffs and the classes.

300. Defendants' practical assistance to the South African security forces had a substantial effect on the perpetration of its criminal and tortious activities and was provided with the purpose of facilitating those activities.

301. Plaintiffs and the members of the classes they represent suffered injuries as a result of Defendants' actions.

302. The Defendants' actions were committed with knowing and reckless disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against each Defendant.

**SECOND CLAIM FOR RELIEF  
(DENIAL OF THE RIGHT TO A NATIONALITY)  
(AGAINST DEFENDANT IBM)**

303. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

304. Denationalization Plaintiffs, on behalf of themselves and the Denationalization Class they represent seek relief from the denial of the right to a nationality committed against him by the apartheid state with the complicity of Defendant IBM acting either directly and/or through their agents and alter egos, and either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise. Defendant IBM conspired with the apartheid security forces.

305. Denationalization Plaintiffs the Denationalization Class they represent were stripped of their South African nationality and citizenship, were restricted in their ability to travel in to, out of and around South Africa, and were discriminated against by being forcibly geographically separated and segregated into homelands on the basis of race.

306. Defendant provided assistance to the South African security forces through material, logistical, financial, and/or other means of practical support, to purposely facilitate violations of international norms toward the Plaintiffs and the classes.

307. Defendant's practical assistance to the South African security forces had a substantial effect on the perpetration of its criminal and tortious activities and was provided with the purpose of facilitating those activities.

308. Denationalization Plaintiffs the Denationalization Class suffered injuries as a result of Defendant IBM's actions.

309. Defendant IBM's actions were committed with knowing and reckless disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against Defendant IBM.

**THIRD CLAIM FOR RELIEF  
(EXTRAJUDICIAL KILLING)  
(AGAINST DEFENDANT FORD)**

310. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

311. Extrajudicial Killing Plaintiffs on behalf of themselves and the Extrajudicial Killing class they represent, seek relief from extrajudicial killings committed against them by the apartheid state with the intentional complicity of Defendant acting either directly and/or through

their agents and alter egos, and, either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise. Defendant conspired with the apartheid security forces.

312. Defendant provided assistance to the South African security forces through material, logistical, financial, and/or other means of practical support, to purposely facilitate violations of international norms toward the Plaintiffs and the classes.

313. Defendant's practical assistance to the South African security forces had a substantial effect on the perpetration of its criminal and tortious activities and was provided with the purpose of facilitating those activities.

314. These Plaintiffs and the Extrajudicial Killing class they represent suffered injuries as a result of these Defendant's actions.

315. Defendant's actions were committed with knowing and reckless disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against Defendant.

**FOURTH CLAIM FOR RELIEF  
(TORTURE)  
(AGAINST DEFENDANT FORD)**

316. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

317. Torture Plaintiffs, on behalf of themselves and the Torture Class they represent, seek relief from torture committed against them by the apartheid state with the intentional complicity of Defendant Ford, acting either directly and/or through its agents and alter egos, and either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise. Defendant conspired with apartheid security forces.



318. The tortures described herein were inflicted deliberately and intentionally for purposes that included, among others, punishing the victims or intimidating the victim or third persons.

319. Defendant provided practical assistance to the South African security forces through material, logistical, financial, and/or other means of practical support, to purposely facilitate violations of international norms toward the Plaintiffs and the classes.

320. Defendant's practical assistance to the South African security forces had a substantial effect on the perpetration of its criminal and tortious activities and was provided with the purpose of facilitating those activities.

321. Plaintiffs and the class they represent suffered severe mental and physical injuries as a result of these Defendant's actions.

322. Defendant's actions were committed with knowing and reckless disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against Defendant.

**FIFTH CLAIM FOR RELIEF**  
**(CRUEL, INHUMAN OR DEGRADING TREATMENT)**  
**(AGAINST BOTH DEFENDANTS)**

323. The allegations set forth in the above paragraphs are realleged and reincorporated by reference as if fully set forth below.

324. Cruel Treatment Plaintiffs and the Cruel Treatment Class they represent suffered injuries as a result of Defendants' actions that constitute cruel, inhuman or degrading treatment (CIDT).

325. The acts described herein had the intent and the effect of grossly humiliating and debasing the Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and/or breaking their physical or moral resistance.

326. The acts described herein constitute CIDT committed against the Plaintiffs by the apartheid state with the complicity of Defendants, acting either directly and/or through their agents and alter egos, and, either by aiding and abetting or engaging in a conspiracy or joint criminal enterprise; or committed directly by the Defendants themselves. Each Defendant conspired with the apartheid security forces.

327. Defendants provided assistance to the South African security forces through material, logistical, financial, and/or other means of practical support, to purposely facilitate violations of international norms toward the Plaintiffs and the classes.

328. Defendants' practical assistance to the South African security forces had a substantial effect on the perpetration of its criminal and tortious activities and was provided with the purpose of facilitating those activities.

329. All Plaintiffs and the classes they represent suffered injuries as a result of Defendants' actions.

330. The Defendants' actions were committed with knowing and reckless disregard for Plaintiffs' rights. As a result, Plaintiffs are entitled to an award of punitive damages against each Defendant.

## **XI. PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray that judgment be entered against the Defendants as follows:

- (a) Granting Class Plaintiffs class action certification;

- ⤴ (b) Declaring that Defendants aided and abetted the commission of a tort in violation of international law enforceable in this court as federal common law and the law of nations;
- (c) Awarding Class Plaintiffs compensatory and punitive damages arising out of the unlawful behavior of Defendants;
- (d) Disgorging Defendants' profits;
- (e) Awarding the costs of bringing this action; and
- (f) Granting such other further relief as shall seem just to the Court.

**XII. JURY DEMAND**

Plaintiffs hereby demand a jury trial on all issues so triable.

Dated: August 8, 2014

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*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I, Kristen M. Ward, hereby certify that on August 8, 2014, a copy of Plaintiffs' Proposed Third Amended Complaint was filed and served on all parties of record by way of CM/ECF.

/s/ Kristen M. Ward  
Kristen M. Ward

**CERTIFICATE OF SERVICE**

I, Kristen M. Ward, hereby certify that I caused a true and correct copy of the foregoing *Joint Appendix* to be served on all counsel of record via CM/ECF on January 30, 2015.

/s/ Kristen M. Ward  
Kristen M. Ward