05-2326

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Lungisile Ntzebesa, Hermina Digwamaje, Andile Mfingwana, F.J. Dlevu, Lwazi Pumelela Kubukeli, Frank Brown, Sylvia Brown, Nyameka Goniwe, Sigqibo Mpendulo, Doroty Molefi, Themba Mequbela, Lobisa Irene Digwamaje, Kaelo Digwamaje, Lindiwe Petunia Leinana, Matshidiso Sylvia Leinana, Kelebogile Prudence Leinana, David Motsumi, Sarah Nkadimeng, Moeketsi Thejane, Moshoeshoe Thejane, Pascalinah Bookie Phoofolo, Khobotle Phoofolo, Gladys Mokgoro, Jongani Hutchingson, Sefuba Sidzumo, Gobusamang Laurence Lebotso, Edward Thapelo Tshimako, Rahaba Mokgothu, Jonathan Makhudu Lediga, Anna Lebese, Sipho Stanley Lebese, William Nbobeni, John Lucas Ngobeni, Clement Hlongwane and Masegale Monnapula,

Plaintiffs-Appellants,

Sakwe Balintulo Khulumani, P.J. Olayi, Wellington Baninzi Gamagu, Violations of Pass Laws, unlawful detention 1981-1983, torture subjected to discriminatory labor practices 1981 and William H. Durham,

Plaintiffs,

-----v.----

Daimler Chrysler Corporation, National Westminster Bank PLC, Colgate Palmolive, Barclays Bank PLC, UBS AG, Citigroup Inc., Deutsche Bank AG, Dresdner Bank AG, Commerzbank AG, Ford Motor Company, Holcim, Inc., Exxon Mobil Corporation, Shell Oil Company, J.P. Morgan, Mennesota Mining and Manufacturing Co. (3M Co.), General Electric Company, Bristol-Meyers Squibb Co., E.I.Dupont de Nemours, Xerox Corporation, IBM, General Motors, Honeywell International, Inc., Bank of America, N.A., The Dow Chemical Company, Coca-Cola Co., Credit Agricole S.A., Hewlett-Packard Company, EMS-

Chemie (North America) Inc., Chevron Texaco Corporation, American Isuzu Motors, Inc. and Nestle USA, Inc.,

Defendants-Appellees,

Sulzer AG, Schindler Holding AG, Anglo-American Corporation, Debeers Corporation, Novartis AG, Banque Indo Suez, Credit Lyonnais, and Unknown officers and directors of Danu International, Standard Chartered, P.L.C., Corporate Does, Credit Suisse Group, Citigroup AG, Securities Inc., as successor to Morgan Guaranty, Manufacturers Hannover, Chemical Bank & Chase Manhattan Bank, Unisys Corporation, Sperry Corporation, Burroughs Corporation, ICL, Ltd., Amdahl Corp., Computer Companies, John Doe Corporation, Holcin, Ltd., Henry Blodget, Justin Baldauf, Kristen Campbell, Virginia Syer Genereux, Sofia Ghachem, Thomas Mazzucco, Edward McCabe, Deepak Raj, John 1-10 Doe, Oerlikon Contraves AG, Oerlikon Buhrle AG, Corporate Does 1-100,Royal Dutch Petroleum Co., Shell Transport &Trading Company PLC and Shell Petroleum, Inc., Merrill Lynch & Co. Inc., Kenneth Seymour

Defendants.

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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In Re: South African Apartheid Litigation
05-2326-cv

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PRELIMINARY STATEMENT

The cases before this Court seek to hold numerous corporate defendants[1] accountable for their participation and complicity in human rights violations committed by the apartheid regime in South Africa. The apartheid system was premised upon the systematic violation of universally accepted human rights norms by the minority white population against the majority of South Africans. Defendant corporations actively cooperated with the apartheid regime, provided substantial assistance to the regime's systematic repression of the plaintiffs and the classes they represent, and profited from the widespread human rights crimes perpetrated by the regime.

The District Court dismissed all of these actions on the ground that "the various complaints do not sufficiently allege that defendants violated international law." *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 543 (S.D.N.Y. 2004) ("*Apartheid Litigation*"). Yet all of plaintiffs' human rights claims fit squarely within the standard the U.S. Supreme Court identified for establishing jurisdiction for actionable claims under the Alien Tort Statute

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[1] The decision below applied by its terms to defendants who did not contest personal jurisdiction; however, the Court's holding appears applicable to plaintiffs' claims against all of the named defendants.

("ATS")[2] in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) ("*Sosa*"). In reaching the extraordinary conclusion that none of the defendant corporations could be found liable for any injuries suffered by any plaintiff, the District Court misapprehended the Supreme Court's decision in *Sosa* and improperly discounted the overwhelming international legal consensus that apartheid and its constituent human rights violations contravene customary international law. Not since the systematic human rights violations committed by the Nazis, violations that spurred the development of a modern international human rights law, has the world been confronted by a system so fundamentally premised on violations of basic human rights. Under the District Court's analysis, however, even Nazi industrialists who used slave labor in their factories would have immunity from suit under the ATS. Every other court to consider the question has held that the ATS provides for liability for corporations that aid and abet egregious abuses of human rights. International law has come too far to return to the pre-Nuremberg view that corporations may provide substantial assistance to governments that engage in egregious repression and systematic human rights violations and commit such

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[2] The ATS states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

violations themselves without consequence. This appeal is a test of that proposition.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1350. These appeals are filed pursuant to Federal Rule of Civil Procedure 54, providing for an immediate appeal from the Court's November 29, 2004, Dismissal Order and the Court's March 31, 2005, Summary Order denying plaintiffs' request to file a consolidated amended complaint. A1138.[3] Plaintiffs filed a timely Notice of Appeal on May 3, 2005. A1152.

ISSUES PRESENTED FOR REVIEW

1. The District Court erred by applying a heightened standard of pleading to plaintiffs' allegations. Had the standards applicable to a motion to dismiss been applied properly, the District Court should have denied defendants' motion to dismiss, permitted plaintiffs to file an amended consolidated complaint, and allowed the cases to proceed to discovery.

2. The District Court erred in deciding that aiding and abetting liability is not available under the ATS as a matter of law.

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[3] "A" refers to the Joint Appendix; "SPA" refers to the Special Appendix; "S" refers to Plaintiffs' Supplemental Appendix.

3. The District Court erred in finding plaintiffs' allegations that defendants acted under color of law were insufficient, notwithstanding the many allegations in the complaints of defendants' active collaboration with the South African government in its maintenance of the discriminatory and repressive apparatus of apartheid.

4. The District Court erred by failing to address plaintiffs' allegations that some defendants violated international law by their own conduct.

5. The District Court erred by refusing to allow plaintiffs to amend their complaint in response, *inter alia*, to the deficiencies identified in its opinion.

STANDARD OF REVIEW

A district court's dismissal for failure to state a claim upon which relief may be granted is reviewed *de novo*, assuming all allegations in the complaint to be true and drawing all reasonable inferences in the plaintiff's favor. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Dismissal should be granted only if there is no possibility that the plaintiffs' facts may state a claim for relief. *Id.* If the allegations provide the basis for any claim for relief, the motion must be denied. *MacDonald v. Safir*, 206 F.3d 183, 190 (2d Cir. 2000).

The standard of review for the denial of a motion for leave to amend is abuse of discretion. *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002).

An abuse of discretion is established unless it is clear that the proposed amendments would be futile. *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 283 (2d Cir. 2000).

STATEMENT OF THE CASE

A. Procedural History

The *Ntsebeza* and *Digwamaje* plaintiffs filed their actions between June 19, 2002, and December 6, 2002.[4] *Apartheid Litigation*, 346 F. Supp. 2d at 542. All of the cases were consolidated in the Southern District of New York, along with cases filed by another group of victims.[5] In July 2003, all of the defendants brought a joint motion to dismiss.

On October 30, 2003, the U.S. State Department responded to an August 7, 2003 letter issued *sua sponte* by the District Judge by submitting a Statement of Interest requesting dismissal of the actions. A1082. The parties filed supplemental briefs in response to the State Department's submission, and to the views of the South African government, which had been conveyed to the Court in

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[4] Nine separate actions were filed initially by these plaintiffs. The operative pleadings at the time the District Court issued its summary judgment order were the Second Amended Class Action Complaint filed by *Digwamaje* plaintiffs ("D. Compl.") on March 19, 2003, A370, and the Second Consolidated & Amended Complaint filed by *Ntsebeza* plaintiffs ("N. Compl.") on March 12, 2003. A261.

[5] *Khulumani, et al. v. Barclays National Bank Ltd., et al.*

July 2003. A797. After the Supreme Court's June 2004 *Sosa* decision and before ruling on the pending motion to dismiss, the District Court requested additional supplemental briefing. On November 29, 2004, the District Court dismissed all of the actions.[6]

The District Court dismissed plaintiffs' claims on three primary grounds. First, the Court found that plaintiffs had not alleged facts to establish that defendants engaged in state action. *Id.* at 548-49. The District Court narrowly construed plaintiffs' allegations as "engaging in business with the South African regime" and "benefitt[ing] from the unlawful state action of the apartheid government." *Id.* The Court did not consider the active support by the defendant corporations for apartheid authorities or whether some of plaintiffs' claims were actionable without state action.

Second, the Court found that aiding and abetting liability was unavailable under the ATS. *Id.* at 549-54. The District Court found that plaintiffs were required under *Sosa* to show that international law specifically prescribed civil aiding and abetting liability for these claims. The Court neither engaged in the

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[6] The November 29, 2004, order purported to include a certification for immediate appeal pursuant to Federal Rule of Civil Procedure 54; however, the certification did not comply with Rule 54 and a stipulation was entered, which led to the issuance of the March 31, 2005, Rule 54 certification.

federal common law analysis required under *Sosa* nor considered whether basic principles of aiding and abetting liability in tort law applied to plaintiffs' claims. Further, the District Court, without explanation, discounted the evidence of aiding and abetting liability in international criminal law because this is a civil case. Moreover, the District Court declared that the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82, 189-90 (1994) ("*Central Bank*"), denying aiding and abetting liability in the context of modern securities legislation, somehow precluded such liability under the ATS. The Court did not address the many ATS cases recognizing aiding and abetting liability that differentiated themselves from *Central Bank.*

Third, the District Court extensively discussed whether a claim of "doing business" in South Africa alone was a basis for liability. Though all plaintiffs in these actions disclaimed this theory of liability, the District Court reviewed numerous international documents to find that this hypothetical "doing business" claim was not actionable. *Apartheid Litigation,* 346 F. Supp. 2d at 549-54.

The District Court also found that *Digwamaje* plaintiffs did not state a claim under the Torture Victim Protection Act ("TVPA"), *id.* at 555, and that the court lacked jurisdiction to hear a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id.* at 555-57.

On March 28, 2005, the *Ntsebeza* and *Digwamaje* plaintiffs requested permission to file an amended complaint to respond to the District Court's concerns. S90. In particular, plaintiffs sought to address the District Court's view that plaintiffs' theories of liability were based solely on defendants' merely "doing business" in South Africa and sought to allege more specific connections between defendants' actions and plaintiffs' claims in an amended consolidated complaint. S95. The District Court denied permission in a March 31, 2005, Order finding without explanation that any amendment would be "fruitless." A1138-39.

Plaintiffs filed timely Notices of Appeal from both orders on May 3, 2005. A1152.

B. Statement Of Facts

The complaints detail the systemic human rights violations at the core of apartheid South Africa and the role of corporate defendants in actively supporting the regime and directly contributing to the violations plaintiffs suffered.

In 1948, the unabashedly racist National Party assumed power in South Africa. Over the following decades, the apartheid regime enacted a battery of laws[7] designed to implement its master plan of imposing complete separation of

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[7] *See, e.g.*, Population Registration Act of 1950 (separating population into "White," "Bantu" (black African), and "Coloured" (mixed race)), SPA184; A394-95 (D. Compl. ¶ 86); Group Areas Act of 1950 (dividing land into distinct

the races at every level of society. It also cemented the political, economic and social dominance of the white minority through the use of systemic violence and repression. Certain defendants financed militias that participated in extrajudicial killings, torture, forced relocation, forced labor and displacement of thousands of victims. Others helped formulate apartheid policies that envisioned the gross violation of human rights. The complaints reflect the full scope of these and other violations.

Large business corporations operating in South Africa – including defendants herein – played an integral role in apartheid crimes. The symbiotic relationship between the apartheid state and corporate business that led to systemic human rights abuses is meticulously documented by the Truth and Reconciliation Commission ("TRC"),[8] a South African governmental body established in 1995

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residential zones for whites and blacks, and reserving the best land for whites), SPA152; A394-95 (D. Compl. ¶ 86); Pass Laws Act of 1952 (requiring all Africans over sixteen to carry a pass at all times and allowing the government or defendant employers to expel a worker from an area for any reason and at any time), SPA210; A391-92 (D. Compl. ¶ 79.)

[8] The TRC was established "[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights" committed during the apartheid era. Promotion of National Unity and Reconciliation Act, No. 34 of 1995. The Final Report was issued in two parts: Volumes 1-5 in 1998 (available at http://www.goshen.edu/library/EMBARGO) and Volume 6 in 2003 (available at http://www.info.gov.za/otherdocs/2003/trc). Of particular interest here are Vol. 4,

pursuant to the country's new Constitution after the election of South Africa's first democratic government in 1994. In its multi-volume final report, an encyclopedic overview of every aspect of apartheid, the TRC found that "business was central to the economy that sustained the South African state during the apartheid years. Certain defendant corporations, especially the mining industry, were involved in helping to design and implement apartheid policies." A451 (D. Compl. ¶ 271, quoting *TRC Final Report*, Vol. 4, Chap. 2, ¶ 161.) "Hundreds and probably thousands" of businesses, "including subsidiaries of leading corporations, became willing collaborators in the creation of [the apartheid] war machine, which was responsible for many deaths and violations of human rights." *TRC Final Report*, Vol. 4, Chap. 2, ¶ 126. Plaintiffs allege that these defendants became active and willing collaborators in apartheid crimes, not that defendants simply "did business" with, passively profited from, or were coerced into cooperating with the apartheid regime. The detailed allegations in the complaints mirror the conclusions of the TRC – a body of unquestioned integrity and reliability – whose work was internationally hailed as one of the most intensive investigations of human rights violations ever undertaken.

Chap. 2, "Institutional Hearing: Business and Labor" and Vol. 6, § 2, Chap. 5, "Reparations and the Business Sector." A937-51.

Fully aware of the ongoing systematic human rights violations and in defiance of internationally imposed sanctions, the defendant corporations directly supported and collaborated with the apartheid regime and its security apparatus. Defendant corporations did more than passively benefit from the vast pool of cheap labor created by the apartheid system. Some defendants are directly implicated in the design of apartheid policy;[9] some created, funded, or actively collaborated with security forces that murdered, maimed or exploited blacks;[10] some violently

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[9] *See, e.g.,* A332-33 (N. Compl. ¶¶ 168-170) (tactics used to destroy opposition to apartheid were formulated at joint military / business conferences which allowed multinational corporations to help mold apartheid policy, leading to one of the bloodiest periods in South African history); A465 (D. Compl. ¶ 312) (Carlton Conference of 1979 introduced a "new era" of cooperation between business leaders and government officials through a "total strategy," which promoted the maxim that the struggle was 20% military and 80% social, political, and economic); A477 (D. Compl. ¶ 359) (several defendant corporations were actively represented on the Defence Manpower Liaison Committee and other key policy-making bodies, placing them at the heart of the South African military-industrial decision making complex).

[10] *See, e.g.,* A426 (D. Compl. ¶ 183) (upon its designation as a Key Point industry, defendant General Motors recruited white employees to join a citizen commando force. These citizen commando forces were actively involved in vigilante killings and repressive political activities by the apartheid regime); A478 (D. Compl. ¶ 361) (pursuant to the National Keypoints Act, defendants were required to train and equip their own militia and provide storage facilities for arms); A451 (D. Compl. ¶ 273) (Anglo American used the apartheid security apparatus, as well as its own security personnel, to murder, control, and exploit workers).

suppressed black trade unions[11] and created deplorable labor conditions;[12] some violated United Nations sanctions by selling arms to the regime;[13] and some threw the regime a life raft by financing the system when it was on the verge of collapse, knowing that the funds were being used to intensify repression and cause the human rights violations alleged in the complaints.[14] *All* defendants are liable to plaintiffs for egregious human rights violations.

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[11] *See, e.g.,* A448 (D. Compl. ¶ 261) (defendant mining companies and other corporations systematically denied trade union rights to workers and worked hand in glove with the apartheid regime to subjugate the black majority); *id.* (D. Compl. ¶ 262) (in an attempt to put down a 1986 strike, Implats invited and permitted Bophuthatswana riot police to attack workers with teargas and dogs); A452 (D. Compl. ¶¶ 274-275) (in response to a 1987 strike, Anglo American and other defendant mining corporations employed mass firings and brutal police repression in an attempt to break the strike).

[12] *See, e.g.*, A391-400, 413-14, 446-47, 464-65 (D. Compl. ¶¶ 79-98, 148-150, 257-259, 310-311.) The subject of labor repression and forced labor is addressed at length in the *amicus* brief submitted by the International Labor Rights Fund.

[13] *See, e.g.*, A427-28 (D. Compl. ¶ 188) (Despite the UN arms embargo, American computer technology did not just support the apartheid regime; rather, the entire country was dependent upon it.) A429-30, 433 (*id.* ¶¶ 192-193, 209) (IBM knowingly violated UN sanctions by providing Armscor, the state weapons procurement arm, with equipment and systems).

[14] *See, e.g.,* A334-36 (N. Compl. ¶¶ 178, 182-183) (a consortium, led by defendant banks UBS and Credit Suisse, agreed to acquire old debt and fund billions of dollars to support the faltering apartheid regime); A438 (D. Compl. ¶ 228) (Citibank, Morgan Guaranty Trust, and Bank of America provided a multimillion dollar loan directly to the South African government in order to cover deficit spending made necessary by increased defense and security expenditures).

A Representative Claim - The experience of Plaintiff John Lucas Ngobeni, A379 (D. Compl. ¶ 26), is illustrative of the claims presented in these actions by the plaintiffs and the classes they represent. Plaintiff Ngobeni worked at defendant Anglo American's Greenside Colliery for over thirty years, during which time he was paid slave wages at a scale substantially lower than that of white employees with equal or inferior qualifications and experience. Confined in prison-like compounds for black migrant laborers, in 1984 Ngobeni formed a union with other black workers, subjecting him and fellow employees to mass dismissals and the forfeiture of wages, retirement, pension and other benefits. When Ngobeni engaged in strike activity, Anglo American brutally repressed the strike by unleashing its own security forces, resulting in severe bodily injuries to Ngobeni.

The Defendants' Active Collaboration With the Apartheid Regime –

The complaints allege the specific ways the corporations acted in concert and collaborated with the apartheid state to secure extraordinary returns. Like Nazi-era firms that profited from forced labor during World War Two, defendants actively sought cooperation with the regime to secure profits.

Some defendants participated in secret military-business conferences dedicated to defeating resistance to apartheid. A332-33, 465, 474-75 (N. Compl. ¶¶ 168-170; D. Compl. ¶¶ 312, 351-353.) These conferences represented joint

action to preserve and promote the apartheid system. A476 (D. Compl. ¶ 357.) *See also TRC Final Report*, Vol. 4, Chap. 2, ¶ 120 (corporate leaders joining Joint Management Committees ("JMCs")); *TRC Final Report*, Vol. 6, § 2, Chap. 5, ¶ 50 (providing intelligence to the state regarding trade union leaders); *TRC Final Report*, Vol. 4, Chap. 2, ¶ 120 (corporate involvement in coordination of repressive and violent acts). The TRC found that participation by businesses in the JMCs resulted in or facilitated human rights abuses by the security establishment. *Id.* ¶ 122.

Furthermore, the TRC found that the mining industry's "direct involvement with the state in the formulation of oppressive policies or practices that resulted in low labor costs (or otherwise boosted profits) can be described as first-order involvement" in apartheid. A448-49 (D. Compl. ¶ 263.) These oppressive policies, including land expropriation, ethnic cleansing, pass laws, and influx control, were designed to benefit the mining corporation defendants by providing them with a cheap, stable, and compliant migratory labor force. A452, 937 (D. Compl. ¶ 274; *TRC Final Report*, Vol. 6, § 2, Chap. 5, ¶ 3 sub. b.)

Defendants participated in two bulwarks of the regime's security apparatus system: the National Keypoints Act and the Defense Manpower Liaison Committee. The 1980 National Keypoints Act outsourced part of the functions and

costs of national security to private interests, including the named defendants.[15] Key Point industries were defended both by state paramilitaries and by armed guards employed by defendants. For example, General Motors supported a commando force which engaged in repressive actions. A425-26 (D. Compl. ¶¶ 182-83.)

The Defense Manpower Liaison Committee ("Demalcom") facilitated the conscription of white men to the South African Defense Force ("SADF") by supplementing the income of soldiers during their stints in the army. A476-77 (D. Compl. ¶¶ 358-359.) Defendant corporations that served on Demalcom thus effectively financed the SADF. *TRC Final Report*, Vol. 6, § 2, Chap. 5, ¶ 51. So seamless was government-business cooperation in apartheid South Africa that part-time soldiers and militias, who committed human rights violations complained of in these actions, were paid in part by the companies that employed them in civilian life. A476-77 (D. Compl. ¶ 358.)

Defendant Anglo American collaborated with the security apparatus in controlling, exploiting, and in some cases, murdering workers. A451 (*id.* ¶ 273.)

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[15] For further information on the scope of the National Keypoints Act, *see* Jackie Cilliers, "An Outline to Effect Defence Related Legislative Reform," *African Defence Review*, 16, 1994 (available at http://www.iss.co.za/Pubs/ASR/ADR16/Cilliers2.html).

As described above, in 1984 Plaintiff John Lucas Ngobeni participated in a strike that Anglo American brutally repressed by unleashing police and its own security forces; he received severe injuries. A379 (N. Compl. ¶ 26.) In addition, during an August 1987 National Union of Mineworkers strike, Anglo American and other mining defendants retaliated with mass firings, accompanied by brutal police repression. A452 (D. Compl. ¶ 274.)

Defendant Gencor was also intimately involved in implementing apartheid policies. On January 1, 1986, 30,000 workers at Gencor's Impala Platinum ("Implats") mines in Bophuthatswana went on strike. A448 (*id.* ¶ 262.) Six days later, Implats dismissed 25,000 workers and then summoned Bophuthatswana riot police to attack them with teargas and dogs. *Id.* Similar mass dismissals and repression took place again during 1991 strikes at Gencor mines. *Id.*

Plaintiffs' allegations against IBM illustrate their theories of aiding and abetting liability and of joint action with the apartheid regime. IBM developed, marketed, and provided a "law enforcement system" that was consciously designed with the apartheid system's needs and goals in mind. A433 (D. Compl. ¶ 208.) The system was used, with IBM's knowledge, to systematically seek out and eliminate dissidents through targeted detention, torture and assassinations. A430 (D. Compl. ¶ 194); A308-12 (N. Compl. ¶¶ 86-102.) There was a direct link

between these human rights crimes and the use of IBM equipment in computerizing the Book of Life, which racially designated Coloureds and Asians. A430 (D. Compl. ¶ 194.) IBM's actions in South Africa are the equivalent of its creation of software to track Jews in Nazi Germany. A430-31 (D. Compl. ¶¶ 194, 199); A308-12 (N. Compl. ¶¶ 86-102); A433 (*id.* ¶ 209); A429-30 (*id.* ¶ 192-93.)

A similar analysis can be made with respect to each of the defendants. The complaints contain numerous allegations that plaintiffs and members of the class they represent suffered severe injuries as a result of human rights violations caused by apartheid policies that were implemented with the direct assistance of defendants.[16] While some links between particular corporations' acts and particular plaintiffs' injuries need to be further litigated, plaintiffs have sufficiently alleged these links to overcome a motion to dismiss.

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[16] *See, e.g.,* A373-79 (D. Compl. ¶¶ 5-26); A384-85 (*id.* ¶¶ 56-61); A390 (*id.* ¶ 77); A391-92 (*id.* ¶ 79); A407 (*id.* ¶ 123); A426 (*id.* ¶ 183); A429-30 (*id.* ¶¶ 192-194); A431 (*id.* ¶ 197); A431-32 (*id.* ¶¶ 200-203); A441 (*id.* ¶ 241); A442-46 (*id.* ¶¶ 248-256); A447 (*id.* ¶ 259); A448-49 (*id.* ¶¶ 262-264); A450-52 (*id.* ¶¶ 270-274); A453-54 (*id.* ¶¶ 277-280); A455-56 (*id.* ¶¶ 283-284); A459 (*id.* ¶ 290); A464-65 (*id.* ¶¶ 309-311); A476-77 (*id.* ¶ 358); A485-89 (*id.* ¶¶ 400-409); A267 (N. Compl. ¶ 15); A276-83 (*id.* ¶¶ 34-41); A304-05 (*id.* ¶¶ 71-73); A307-10 (*id.* ¶¶ 84-92); A316 (*id.* ¶ 118); A325-26 (*id.* ¶¶ 148-150); A330-31 (*id.* ¶¶ 164-166); A336-38 (*id.* ¶¶ 184-194.)

C. Summary Of Argument

The question at the heart of these cases is whether defendants are immune from complicity in egregious human rights violations in South Africa during the apartheid era. No legislation anywhere provides for such an immunity. Yet the District Court created protection for dozens of corporations, most of them based in the United States, by the misapplication of ATS jurisprudence. In doing so, the District Court not only denied remedies for some of the most egregious human rights violations of our times, but undermined ATS principles in ways that will harm human rights victims in many other contexts. This Court should rectify both of these errors.

Plaintiffs' allegations satisfy the standard for an actionable ATS claim set by the U.S. Supreme Court in the *Sosa* case, where a six Justice majority effectively adopted the "specific, universal, and obligatory" standard previously used by most circuit courts. 124 S. Ct. at 2765. The *Sosa* Court endorsed the type of human rights violations alleged in these actions, which have long been recognized by this Court as actionable under the ATS. 124 S. Ct. at 2764-67.

Few human rights claims are more firmly entrenched in the "law of nations" than those asserted herein. The apartheid system was based upon systematic human rights violations of the most extreme kind: state-sponsored murder, torture,

and the complete subjugation of the majority population on explicitly racial grounds. Just as Nazi industrialists faced international tribunals for their complicity in Nazi forced labor regimes, corporations that actively cooperated with the apartheid regime and its discriminatory and repressive practices may be found liable under the ATS.

The decision below by the District Court is the first and only decision not to recognize aiding and abetting liability in an ATS case, before or after the *Sosa* decision. The District Court erred in holding that plaintiffs had to demonstrate that international law specifically provided for aiding and abetting liability in civil damage actions. *Sosa* imposed no such requirement for ancillary issues in ATS cases. Nor did the Supreme Court's decision in *Central Bank*, decided in a very different context, erect any barrier to aiding and abetting liability in ATS cases.

Had the District Court employed the federal common law analysis required by *Sosa*, it would have held, as all other courts in ATS cases have held, that aiding and abetting liability is necessary to fulfill the remedial purposes of the ATS in human rights cases. Under both international and domestic law, those who provide knowing practical assistance which has a substantial effect on the perpetration of a wrong are as responsible as the actual perpetrators. *See, e.g.*, Restatement of Torts, § 876(b). Aiding and abetting liability has been recognized since the ATS was

enacted and no development since justifies granting the aiders and abettors of fundamental human rights violations an undeserved immunity.

The District Court erred in two ways in finding that plaintiffs failed to allege that defendants acted under the color of law: 1) it improperly applied a heightened pleading standard to plaintiffs' allegations; 2) it selectively quoted from the allegations in plaintiffs' complaints to find that defendants did not act under color of law. 346 F. Supp. 2d at 548-49.

The complaints are replete with allegations of joint action and collaboration by defendants with the apartheid regime in human rights violations. No other court has dismissed such allegations at the pleadings stage. Plaintiffs were denied the basic opportunity to take discovery into the relationships between the defendants and the apartheid regime and resolve the underlying human rights violations on an evidentiary record. The record fails to support the District Court's misguided conclusion that defendants were only "doing business" and passively benefitting from the massive human rights violations endemic to apartheid South Africa.

The District Court also erred by failing to address plaintiffs' direct liability claims. Defendants engaged in actions that directly violated the rights of some plaintiffs and the class they represent. *See* § IV, *infra*. Plaintiffs' direct liability claims should go forward regardless of how this Court rules on the aiding and

abetting issue.

Finally, the District Court erred in denying plaintiffs the opportunity to amend their complaints. The District Court's conclusion that amendments would be "fruitless" is clearly erroneous and stems from the Court's errors of law, not plaintiffs' inability to allege facts that would satisfy the requirements of the ATS.

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING A HEIGHTENED PLEADING STANDARD TO PLAINTIFFS' ALLEGATIONS.

The District Court patently required more of plaintiffs than the notice pleading requirements of the federal rules. Under the notice pleading standard of Federal Rule of Civil Procedure 8(a), plaintiffs are required to provide no more than "a short and plain statement of the claim showing that the pleader is entitled to relief." *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) ("there is no pleading requirement of stating 'facts sufficient to constitute a cause of action.'"). A complaint may be dismissed for failure to state a claim only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957).

Claims brought under the ATS are not governed by a heightened pleading standard. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and*

Coordination Unit, 507 U.S. 163 (1993). The Supreme Court recently reaffirmed its holding in *Leatherman* that any requirement of greater specificity for particular claims "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *See also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515, 122 S. Ct. 992, 999 (2002). There is no mention of "heightened pleading" in *Sosa*. Moreover, although this Circuit ruled in *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), that a "more searching review" is appropriate with respect to the jurisdictional inquiry into whether a plaintiff has alleged a specific violation of international law, it is doubtful whether this "searching review" survives *Swierkiewicz*. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003) (questioning the standard) ("*Presbyterian Church*"); *see also Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *5 (S.D.N.Y. Feb. 28, 2002) (declining to use either a heightened standard or "searching review"). *Kadic* only requires a district court to carefully assess whether the claim asserted by the plaintiff is premised on a violation of a clearly established and specifically defined violation of the law of nations. In this case, the underlying "law of nations" violations are both well established and specifically defined, thus easily satisfying the *Kadic* standard.

II. PLAINTIFFS' ATS CLAIMS SATISFY THE SOSA STANDARD.

A. Plaintiffs Allege Violations Of "Specific, Universal, And Obligatory" Norms.

The human rights violations alleged by plaintiffs satisfy the *Sosa* test. The *Sosa* Court pointedly endorsed the approach of dozens of federal courts – including this Court's seminal decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and the Ninth Circuit's decision in *In re Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) – that plaintiffs may pursue claims for violations of international norms that are "specific, universal, and obligatory." 124 S. Ct. at 2766.

The *Sosa* Court held that when the ATS was enacted, it "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law," *id.* at 2754, and that modern federal courts can enforce international norms today that are of a similar character to the norms recognized by the first Congress (e.g., piracy). *Id.* at 2765. New claims "must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized." *Id.* at 2761-66. Those sources of international law, the Court explained, are "the customs and usages of civilized nations, and as evidence of these . . . the works of jurists and commentators . . ." *Id.*

at 2766-67 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). *Filartiga*, cited with approval by the Supreme Court, established that "the law of nations" must be understood as an evolving standard that now encompasses more than it did at the time of the statute's enactment. *Filartiga,* 630 F.2d at 881.[17]

Plaintiffs' allegations fall comfortably within the core of a small set of well-established human rights violations. Other than the ATS claim based on short-term detention at issue in *Sosa* itself, the *Sosa* Court did not take issue with a single case in which an international human rights norm had been recognized as meeting this standard. In contrast, the violations alleged herein, including torture, extrajudicial killing, prolonged arbitrary detention, forced labor, and forced displacement, have

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[17] The District Court's dismissal of well-established international law claims results from its misunderstanding of international customary law. The District Court stated that the various international law sources cited by plaintiffs "simply do not create binding international law." 346 F. Supp. 2d at 552. While general provisions of treaties and declarations on their own may not be definite enough to embody actionable customary norms under *Sosa*, *see, e.g., Flores v. Southern Peru Copper Co.,* 343 F.3d 140, 161 (2nd Cir. 2003), the Court failed to engage in an analysis of all of the materials cited by plaintiffs to decide if a particular norm is recognized as being part of the "law of nations." Treaties like the International Covenant on Civil and Political Rights and declarations like the Universal Declaration of Human Rights do not automatically create customary norms, but they are certainly evidence of such norms. *See Igartua de la Rosa v. United States*, No. 04-2186, 2005 U.S. App. LEXIS 15944 (1st Cir. Aug. 3, 2005); *Roper v. Simmons*, 125 S. Ct. 1183, 1199-1200 (2005) (United Nations Convention on the Rights of the Child, although unratified by the United States, constitutes evidence of universal opinion regarding juvenile capital punishment to which the United States should pay heed).

all been recognized by numerous courts and scholars as satisfying the Sosa standard.[18] As the Supreme Court emphasized, "[t]his limit [the Court's requirement of definiteness] upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court," citing, *inter alia*, *Filartiga* and *Marcos*. 124 S. Ct. at 2765-66.

B. Apartheid Is Actionable Under *Sosa*

In addition to the constituent human rights violations already well established in ATS case law, this Court should further find that apartheid constitutes a violation of a "specific, universal, and obligatory" international norm. 124 S. Ct. at 2766. Apartheid as practiced in South Africa and alleged in plaintiffs' complaints was an institutionalized regime of systematic racial discrimination,

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[18] *See, e.g.*, *Presbyterian Church*, 244 F. Supp. 2d 289 (torture, extrajudicial killing, forcible displacement); *Kadic,* 70 F.3d 232 (genocide, torture, and summary execution); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (torture, summary execution, arbitrary detention, cruel, degrading, or inhuman treatment); *Wiwa,* No. 96 Civ. 8386 (KMW), 2002 WL 319887 (torture, summary execution, arbitrary detention, cruel, degrading, or inhuman treatment, crimes against humanity, violations of the right to life, liberty, and personal security); *Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (right to associate and organize); *Mehinovic v. Vuchovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (torture crimes against humanity); *Estate of Cabello v Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (extrajudicial killing); Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) ("Restatement of Foreign Relations") (murder, torture, prolonged arbitrary detention, systematic racial discrimination, consistent pattern of gross violations of internationally recognized human rights).

where violent and inhumane practices were necessary to establish and maintain dominion by one racial group over another majority racial group. These practices included murder, infliction of bodily or mental harm, arbitrary arrest, illegal imprisonment, dividing the population along racial lines, and stifling the majority's social, political, and economic participation in the life of the country. The specific violations alleged by plaintiffs were plainly part of this integrated system of racial discrimination and systematic violence.

The crime of apartheid has long been widely recognized by the international community as a violation of customary international law. This is demonstrated by numerous United Nations resolutions,[19] international conventions,[20] court opinions,[21] state practice, and scholarly works.[22] In addition, the customary law

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[19] *See, e.g.*, G.A. Res. 44(1), UN Labor, 1st Sess. (1946).

[20] *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, *entered into force* July 18, 1976, Art 1, 28 U.N. GAOR Supp., No. 30, at 75, U.N. Doc. A/9030, SPA254. This Convention declares that the policies and practices of apartheid are crimes against humanity and international law; Article III of the Convention attaches personal criminal responsibility to all who commit, participate in, incite, abet, encourage or cooperate in the crime of apartheid. *See also* Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, *entered into force* Jan. 12, 1951, G.A. Res. 260 A (III), art. 3, SPA117; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, *entered into force* 1969, 660 U.N.T.S. 195.

[21] The International Court of Justice declared apartheid to be "a flagrant violation of the purposes and principles of the Charter," and found that South Africa's

status of apartheid has long been recognized in U.S. law. Section 702 of the Restatement of Foreign Relations provides that systematic racial discrimination, where practiced as a matter of state policy, violates international law.[23]

C. The District Court Erred In Creating A Multi-Tiered Test To Evaluate Plaintiffs' ATS Claims.

The District Court erred by converting considerations cited in *Sosa* into a set of independent prerequisites that plaintiffs must satisfy *in addition* to *Sosa's* substantive requirement to establish ATS jurisdiction. 346 F. Supp. 2d at 547-48. The considerations in Part IV.A of Justice Souter's opinion formed part of the explanation for the particular evidentiary standard adopted in *Sosa* and were only a response to the arguments advanced by the United States opposing the recognition

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imposition of apartheid was a violation of customary international law. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (1971).

[22] *See, e.g.,* Roger S. Clark, *Apartheid*, in INTERNATIONAL CRIMINAL LAW, Volume I, Crimes, 655 (M. Cherif Bassiouni, ed., 2d. *ed.*, Transnational Publishers, Inc. 1999).

[23] "Systematic racial discrimination" as noted in § 702 is defined by reference to South Africa, stating that acts such as those practiced by the apartheid regime violate the provisions of § 702 as well as the provisions of international covenants and conventions. Restatement § 702, cmt. I. *See Presbyterian Church*, 244 F. Supp. 2d at 305 (citing Restatement of Foreign Relations § 702, affirming that states practicing systematic racial discrimination violate international law).

of *any* actionable claims under the ATS.[24] These considerations do not create an independent set of hurdles that human rights claims must overcome. 346 F. Supp. 2d at 547-48. For instance, torture claims are actionable under the ATS whether they occur in South Africa or Paraguay and whether or not the State Department of any particular administration supports the claim. The founding generation placed tort actions by aliens for "law of nations" violations in the hands of the Judiciary, not the Executive Branch or the foreign ministries of other countries. By using a threshold multi-tiered test, the District Court has denied a jurisdiction confirmed by Congress and thus created its own open-ended and unmanageable standard for ATS claims never intended by the *Sosa* Court. The practical considerations within a *Sosa* analysis are to be examined as part of the evidentiary test in finding a valid international law claim, not by way of creating a separate threshold test. The majority in *Sosa* made it clear that limitations on ATS actions based on established violations of the "law of nations" must be found in traditional doctrine (*e.g.*, exhaustion of domestic remedies, *forum non conveniens*) and not a novel "practical considerations" test.

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[24] The Court's comment that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts," *Sosa*, 124 S. Ct. at 2766, came in the context of deciding whether Dr. Alvarez' particular arbitrary arrest claim was clearly supported by international customary law.

III. THE DISTRICT COURT ERRED IN HOLDING THAT AIDING AND ABETTING LIABILITY IS UNAVAILABLE UNDER THE ATS.

A. Introduction

Until the decision below, every court considering whether the ATS provides for aiding and abetting liability has determined that it does. Under the federal common law analysis required by *Sosa*, aiding and abetting liability is an essential part of the remedial scheme embodied in the ATS. By ignoring federal common law and misinterpreting *Sosa*, the District Court reach the unprecedented and extraordinary conclusion that aiders and abettors of egregious human rights violations may not be sued under the ATS.

Plaintiffs show first that *Sosa* does not require theories of liability like aiding and abetting to meet the same evidentiary standard as that for actionable "law of nations" violations under the ATS. Plaintiffs next demonstrate why a federal common law analysis compels the conclusion that aiding and abetting is a viable theory of liability under the ATS. The appropriate standard for aiding and abetting is whether defendants have provided knowing practical assistance with a substantial impact on the perpetration of the violation. Plaintiffs then address the District Court's erroneous view that the *Central Bank* case undermines aiding and

abetting liability under the ATS. Finally, plaintiffs show why their allegations of aiding and abetting are sufficient under the proper legal standard.

B. "Aiding and Abetting" And Other Ancillary Rules Of Decision Need Not Meet The Threshold "Specific, Universal, And Obligatory" Test For *Substantive* "Law Of Nations" Violations Under The ATS.

In deciding that federal common law should guide courts' elaboration of claims for violations of the "law of nations" under the ATS, the *Sosa* Court assumed that federal courts would continue to develop the common law regulating the non-substantive rules governing the conduct of litigation. 124 S. Ct. at 2765. "By enacting Section 1350 Congress entrusted [the task of enforcing international law] to the courts, and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into U.S. common law." *Filartiga v. Pena Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) ("*Filartiga II*"). Numerous federal courts have followed this approach, drawing upon international and domestic norms to craft federal common law principles to govern ATS litigation. *See, e.g., Kadic*, 70 F.3d at 246; *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied,* 508 U.S. 972 (1993); *Filartiga*, 630 F.2d at 886. *Sosa* adopted this methodology

and cited these cases with approval. 124 S. Ct. at 2765-66.[25] The District Court did not conduct a federal common law analysis, stating there was "little that would lead this court to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation." 346 F. Supp. 2d at 549. It read *Sosa* to require that plaintiffs who bring claims under § 1350 to allege *both* a substantive violation *and* a theory of liability "accepted by the civilized world and defined with a specificity comparable to the features of the 18th Century paradigms." 124 S. Ct. at 2761-62.[26]

Sosa stands for the proposition that judges retain "residual common law discretion" to manage ATS claims, though the substance of those claims must be subject to "judicial caution" and "vigilant doorkeeping." 124 S. Ct. at 2762, 2764, 2769. *Sosa* did not hold that its evidentiary standard applied to issues other than the threshold "law of nations" violations. Indeed, the District Court's approach is utterly inconsistent with the basic structure of the ATS, which specifically incorporates "tort" remedies, and the basic structure of international law, which

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[25] *See also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (the ATS "establishes a federal forum where courts may fashion domestic common law remedies...").

[26] For further explanation of why ancillary norms are generally not required to meet the *Sosa* threshold, *see generally* Paul Hoffman and Daniel Zaheer, "The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act," 26 Loyola-L.A. Int'l & Compl. L.R. 47, 52 (2003).

prescribes norms but not the precise remedies or theories of liability states may choose to enforce such norms. Since Congress has authorized the federal courts to supply tort remedies for "law of nations" violations in the ATS, it is unnecessary to seek remedies in customary international law.[27]

The District Court should have determined whether plaintiffs' complaint alleged substantive violations of "specific, universal, and obligatory" international norms, and then consulted federal common law to determine whether aiding and abetting liability exists for suits under the ATS.

C. Aiding And Abetting Liability Has Been Found In Every Other ATS Case Before And After *Sosa*.

To plaintiffs' knowledge, the District Court's decision is the only decision, before or after *Sosa*, in which aiding and abetting liability was denied in an ATS case. As Judge Schwartz noted in *Presbyterian Church*, 244 F. Supp. 2d at 321, federal courts "have almost unanimously permitted actions premised on a theory of

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[27] *See Filartiga II*, 577 F. Supp. at 863 (noting that "[t]he international law described by the Court of Appeals does not ordain detailed remedies but sets forth norms.") *See also Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995) ("[w]hile it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles.").

aiding and abetting" under the ATS.[28] The District Court declined to follow the *Presbyterian Church* decision, noting that it had been decided before *Sosa*. However, in response to a motion for reconsideration based on *Sosa,* the District Court again found that aiding and abetting liability exists under the ATS. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005). Judge Cote agreed with Judge Schwartz' prior analysis that the weight of international authority demonstrates that aiding and abetting liability for human rights violations such as these is part of customary international law.

Likewise, the only two post-*Sosa* appellate decisions affirm that aiding and abetting liability exists under the ATS. In *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), the Eleventh Circuit consulted international and regional instruments, conducted a common law inquiry, and concluded that the ATS "reaches conspiracies and accomplice liability" and permitted recovery "based on [both] direct and indirect theories of liability." 402 F.3d at 1157-58. It reaffirmed

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[28] In March 2005 Judge Weinstein reached the same conclusion, adopting extensive portions of an *amicus* brief in support of his decision that "even under an aiding and abetting theory, civil liability may be established under international law." *In re Agent Orange Product Liability Litigation,* 373 F. Supp. 2d 7, 37 (E.D.N.Y. 2005). *See also Wiwa,* No. 96 Civ. 8386 (KMW), 2002 WL 319887; *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 312 (S.D.N.Y. 2001); *Bodner v. Banque Paribas*, 114 F. Supp. 2d. 117, 134 (E.D.N.Y. 2000); *Carmichael v. United Tech. Corp.,* 835 F.2d 109, 113-14 (5th Cir. 1988) (assuming without deciding that the ATS includes aiding and abetting liability).

that conclusion in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, No. 04-10234, 2005 WL 1587302 (11th Cir. Jul. 8, 2005).

D. Aiding And Abetting Liability Should Be Found To Be Available To Redress Violations Of The "Law of Nations" Under A Federal Common Law Analysis.

Had the District Court undertaken the federal common law analysis required by *Sosa*, it would have found aiding and abetting liability supported by the history of the ATS, early federal precedent, and in established and universally accepted principles of international law. It also would have been found to be a standard feature of domestic tort law.

1. The Original Understanding

A 1795 Opinion issued by Attorney General Bradford and relied on by the *Sosa* Court, 124 S. Ct. at 2761, states that a claim for relief would be available for "aiding and abetting" under the ATS in a civil action arising out of violations of the laws of war. 124 S. Ct. at 2759. He wrote with reference to American citizens who had aided and abetted a French fleet in plundering British ships that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit" under the ATS. *Breach of Neutrality,* 1 Op. Att'y Gen. at 58-59.

Moreover, Blackstone recognized that those who aided or abetted piracy, a paradigmatic ATS violation, were themselves liable as pirates. William Blackstone, Commentaries on the Laws of England, Book IV, Chap. 5 (1769).

Finally, the Supreme Court held in 1795 that a French citizen who had aided a U.S. citizen in unlawfully capturing a Dutch ship acted in contravention of the law of nations and was liable for the value of the captured assets. *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795).

2. International Law

Aiding and abetting liability for human rights violations of the kind cited in the complaints has also been recognized in international law at least since Nuremberg.[29] The Statute of the International Military Tribunal at Nuremberg stated that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the

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[29] See *Mehinovic,* 198 F. Supp. 2d at 1355-56; *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); William Schabas, "Enforcing International Humanitarian Law: Catching the Accomplices," 83 I.R.R.C. 439 (Jun. 2001) (cited in *Presbyterian Church,* 244 F. Supp. 2d at 322; Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations," 20 Berkeley J. Int'l. L. 91, 113-18 (2002).

foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[30]

Nuremberg jurisprudence provides that knowingly facilitating grave abuses creates liability. For example, in *U.S. v. Friedrich Flick*, a civilian industrialist, was convicted "under settled legal principles" for contributing money to the Nazi regime when fully aware of its murderous activities. 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1216-1223 (1952). That Flick did not participate in, or even condone, the atrocities did not exculpate him. Similarly, in *In re Tesch*, 13 Int'l. L. Rep. 250 (Br. Mil. Ct. 1946), an industrialist was convicted for supplying poison gas to a concentration camp, knowing its use. In *U.S. v. Krauch*, pharmaceutical executives were charged with sending experimental vaccines to the SS, knowing that the SS would use them in tests on concentration camp inmates. 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1081, 1169-72 (1952).

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[30] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279.

Furthermore, the Convention Against Torture establishes liability for those who aid and abet violations of its provisions.[31] Congress also codified this principle through the TVPA in 1992. Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992). The Senate Report accompanying the TVPA noted that the legislation covers "lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. No 102-249 (1991).[32] Similarly, Article 3(e) of the Genocide Convention provides that "complicity" in genocide is a punishable offense.[33] Numerous other international treaties establish aiding and abetting liability.[34]

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[31] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, *entered into force* June 26, 1987, G.A. Res. 39/46, 39 U.N. GAOR, No. 51, at 197, U.N. Doc. A/39/51 (1984) Arts. 1, 4, SPA314.

[32] *See also Aldana,* No. 04-10234, 2005 WL 1587302, at *4 ("[T]he Torture Victim Protection Act reaches those who ordered, abetted, or assisted in the wrongful act.").

[33] Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, *entered into force* Jan. 12, 1951, G.A. Res. 260 A (III), art. 3, SPA117.

[34] *See, e.g.*, Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery, *entered into force* April 30, 1957, art. 6, 266 U.N.T.S. 3, 43 (establishing liability for "being an accessory" to enslavement); Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *adopted* Dec. 19, 1988, 28 I.L.M. 493 (1989), art. 3 (establishing aiding and abetting liability), SPA326; Convention for the Suppression of Terrorist Bombings, *adopted* Jan. 9, 1998, G.A. Res. 52/164 (mandating that states criminalize the aiding and abetting of terrorist bombing), SPA416; International Convention for the Suppression of the Financing of Terrorism, *adopted* Dec. 9, 1999, G.A. Res. 54/109 (requiring states to criminalize

The jurisprudence of the Ad Hoc Tribunals for the Former Yugoslavia ("ICTY") and Rwanda, which draws upon customary law principles, also recognizes aiding and abetting liability. Article 7 of the ICTY Statute provides for individual criminal responsibility if a person "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime." U.N. Doc S/Res/827, *reprinted* in 32 I.L.M. 1192 (1993). In *Prosecutor v. Furundzija*, IT-95-17/1/T, ¶ 249 (Dec. 10, 1998), *reprinted at* 38 I.L.M. 317, (1999), the ICTY stated that "*actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," while the "*mens rea* required is the knowledge that these acts assist the commission of the offence." The accomplice need not "share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime." *Id.* ¶ 245. In *Prosecutor v. Delalic*, IT-96-21, ¶ 231 (Nov. 16, 1998), the ICTY further noted that "the relevant act of assistance may be removed both in time and place from the actual commission of the offense" and that aiding and abetting standards are principles of customary international law.[35]

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aiding and abetting the willful provision or collection of funds with knowledge they will be used to carry out terrorist acts), SPA485.

[35] United States military commissions also prosecute aiding and abetting a host of crimes. *See* Military Commission Instruction No. 2, Art 6(A), (B), and (C) (Apr. 30, 2003) (aiding and abetting is "in any...way facilitating the commission" of an

The District Court disregarded these international authorities,[36] believing their criminal context rendered them irrelevant. 346 F. Supp. 2d at 550. The Court ignored the fact that when a specific violation of international law is committed, aiding and abetting liability has been acknowledged as part of the common law for the corresponding tort in all relevant ATS cases. *See* § III.C., *supra*. Indeed, the Court gives no reason for its failure to apply the stringent international criminal law standards for aiding and abetting liability in ATS tort cases. Not only has this approach has been recognized as valid at least since the 1795 Bradford Opinion, the eighteenth century paradigms recognized in *Sosa* were based on the international criminal law of that era.

Moreover, aiding and abetting liability is also commonplace in domestic tort law under a standard similar to the international law standard. *See Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (test for "aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who

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offense with the knowledge the act would aid or abet). This standard "derives from the law of armed conflict," i.e., international law, and is "declarative of existing law." *Id.* Art. 3(A).

[36] Though, as noted, the availability of aiding and abetting liability is not governed by the "specific, universal, and obligatory" standard, *see* § II.A., *supra*, plaintiffs' argument is that the existence of such liability in international law would be dispositive even on the assumption that aiding and abetting was governed by the "specific, universal, and obligatory" standard.

performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct."). *See also* Restatement of Torts, § 876(b) (person liable if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.").

E. The District Court's Reliance On *Central Bank* Was Misplaced.

In *Central Bank*, 511 U.S. at 166-67, the Supreme Court was concerned with whether Congress intended to impose aiding and abetting liability when it fashioned a new statutory cause of action. It held, in the context of the Securities Exchange Act, that it did not. *Id.* at 191. To extend this holding to the ATS fundamentally misapprehends *Sosa*.

Central Bank is distinguishable because the Court therein sought to determine congressional intent to create aiding and abetting liability when Congress created a new cause of action under the Securities Exchange Act, whereas the *Sosa* Court expressly concluded the ATS "creat[ed] no new causes of action," 124 S. Ct. at 2761, but instead was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* The distinction is crucial. That the ATS merely created jurisdiction over what the Framers conceived as preexisting common law causes of action means that a court

utilizing the ATS does not determine the standards of liability through statutory interpretation, but instead recognizes law of nations norms by means of a federal common law analysis. *See Sosa*, 124 S. Ct. at 2761 (stating that federal courts are not precluded "from recognizing a claim under the law of nations as an element of common law..."); *id.* at 2765 ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms...").

The holding of *Central Bank* that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors," 511 U.S. at 182, does not apply to the ATS because the ATS is not "a statute under which a person may sue and recover damages from a private defendant." Rather, the ATS is a wholly jurisdictional statute that authorizes courts to fashion federal common law remedies for violations of international law. While it was entirely reasonable for the Court in *Central Bank* to find that Congress would have expressly included aiding and abetting liability in the context of the Securities Exchange Act - a detailed liability-creating statute within an even more detailed statutory scheme - it would have been unreasonable to expect Congress to fashion any particular aiding and abetting

liability standard at all in the ATS, a statute with the sole purpose of recognizing the federal courts' common law powers.

Courts interpreting statutes more closely analogous to the ATS than the Securities Exchange Act and in more comparable factual contexts have found that *Central Bank* did not eliminate aiding and abetting liability. For example, in *Boim v. Quaranic Literacy Inst.*, 291 F.3d 1000, 1019-20 (7th Cir. 2002), the Seventh Circuit found that *Central Bank* had no application to whether "aiding and abetting" liability could be found under the Antiterrorism Act of 1990. The Court agreed with the argument that international principles of aiding and abetting liability should be employed under the Antiterrorism Act as a matter of federal common law, even though the Act did not explicitly provide for such liability. *Id.* Any other view would undermine the policies underlying that Act. The same holds true here.

F. Plaintiffs' Allegations Adequately Allege Aiding And Abetting Liability.

An aiding and abetting theory requires allegations that defendants, with actual or constructive knowledge, substantially assisted in the perpetration of violations of international law actionable under the ATS. *See Halberstam v. Welch*, 705 F.2d 472, 478; Restatement of Torts, § 876(b). Plaintiffs' allegations

fully comply with this standard. Far from the District Court's observation that plaintiffs' claims were based on "merely doing business,"[37] the complaints are replete with allegations that defendants actively collaborated with the apartheid regime in ways that substantially and directly contributed to the human rights violations alleged by plaintiffs. *See, e.g.*, A426 (D. Compl. ¶ 183) (General Motors knowingly provided substantial assistance to the apartheid regime by cooperating and assisting in the creation and maintenance of commando security forces, including its own workers, which took part in vigilante killings and other acts of violent oppression); A430 (D. Compl. ¶ 194) (without IBM's assistance and participation in the computerization of the "Book of Life" system, South Africa would have been unable to enforce the Group Areas Act, which controlled every detail of the lives of persons classified by the regime as "Coloured" or "Asian"); *id.* (IBM was instrumental in establishing the administrative mechanism for the subjugation and forced displacement and repression of millions of South Africans, including the targeting of political activists for imprisonment, torture and

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[37] The District Court's reliance on *Bigio v. Coca-Cola*, 239 F.3d 440, 449 (2d. Cir. 2000) is misplaced. In *Bigio*, the defendants purchased a Jewish business that had been seized by the Egyptian government in purported violation of international law. An improper seizure of property is hardly comparable with the active, knowing collaboration with a regime systematically engaged in crimes such as extrajudicial killing, torture, systematic racial discrimination and forced dislocations.

assassination); A450 (D. Compl. ¶¶ 268-269) (Mining industry defendants, including Anglo American and Gencor, actively participated in formulating and implementing apartheid policies); A438 (D. Compl. ¶ 228) (Banking defendants bailed out the apartheid regime time and again during moments of financial crisis engendered by resistance within the country and international pressure; apartheid and its attendant violations could not have continued without those banks' significant financial assistance); A941 (*TRC Final Report*, Vol. 6, § 2, Chap. 5, ¶ 17) (In the 1980s, direct assistance was provided by the Swiss Banks Credit Suisse and UBS, which the TRC cites as "important partners" of the apartheid regime); A334-35 (N. Compl. ¶¶ 174-180) (Loans provided by these banks supported the government during the bloodiest period of apartheid in the late 1980s).

In the context of a motion to dismiss, the District Court should have found that these allegations of active collaboration were sufficient to proceed with discovery under the proper standard for aiding and abetting liability.

IV. THE DISTRICT COURT IGNORED PLAINTIFFS' DIRECT LIABILITY CLAIMS.

This Court's holding in *Kadic,* 70 F.3d at 236-37, 239 applies to plaintiffs' allegations that defendants are directly liable to plaintiffs for crimes against humanity. In *Kadic,* this Court held that "certain forms of conduct violate the law

of nations whether undertaken by those acting under the auspices of a state or only as private individuals"[38] and that an individual "may be found liable for genocide, war crimes, and crimes against humanity in his private capacity." *Id.* Thus, the District Court erred by disregarding controlling precedent in this Circuit (*Kadic*) and by ignoring plaintiffs' claims that certain defendants are directly liable for crimes against humanity.[39] For example, the District Court failed to address plaintiffs' claim that defendant Anglo American and other mining companies used private security personnel to commit acts of violence, terror, and forced labor in violation of customary international law. A451 (D. Compl. ¶ 273.) Since plaintiffs' claims reflect the claims of many members of the putative class who suffered injuries directly at the hands of defendants,[40] the District Court erred by

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[38] Since ATS claims are creations of international law, not domestic constitutional law, whether state action is required for a particular ATS claim is a question of international law.

[39] *See, e.g.,* A276-77, 280-81 (N. Compl. ¶¶ 34, 39); A379 (D. Compl. ¶ 26.) Given defendants' secrecy regarding their acts in South Africa and the fact that plaintiffs have not yet had an opportunity to conduct discovery, A347-48 (N. Compl. ¶¶ 207-210), it is possible defendants may be directly liable to other individual plaintiffs in this litigation and/or to putative class members.

[40] This Court has consistently allowed plaintiffs in a class action lawsuit to amend their complaints to add new plaintiffs. *See, e.g., Cortigiano v. Ocean Manor Home for Adults*, 227 F.R.D. 194 (E.D.N.Y. 2005); *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 224 F.R.D. 534 (E.D.N.Y. 2004); *Encarnacion v. Barnhart*, 180 F. Supp. 2d 492 (S.D.N.Y. 2002); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407 (S.D.N.Y. 2002); *Doe v. Pataki*, 3 F. Supp. 2d

failing to consider any of plaintiffs' claims against defendants for their direct acts of repression and discrimination.

V. THE DISTRICT COURT ERRED IN FINDING PLAINTIFFS' STATE ACTION ALLEGATIONS INSUFFICIENT.

The District Court's state action analysis erred in two fundamental respects. First, the Court subjected plaintiffs' state action claims to a level of scrutiny that is improper at the pleadings stage. The Court then used its improper and incorrect assessment of plaintiffs' allegations to conclude that the complaints failed to allege that defendants acted under color of law. Plaintiffs address each of these errors in turn.

A. The District Court's Evaluation of Plaintiffs' State Action Claims Was Improper At The Pleadings Stage.

Despite the fact that "the proper time for addressing the state action requirement is at the summary judgment phase," *Estate of Rodriquez v. Drummond Co., Inc.,* 256 F. Supp. 2d 1250, 1262 (N.D. Ala. 2003), the District Court engaged in a selective reading of the facts in plaintiffs' complaint. For example, the Court apparently decided that defendants' alleged collaboration with security forces in

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456 (S.D.N.Y. 1998). *See also Doe v. Karadic,* 176 F.R.D. 458 (S.D.N.Y. 1997) (plaintiffs in a genocide class action against a Bosnian-Serb leader permitted to amend their complaint and promote nine other class members to the status of class representative).

crushing strikes constituted "*necessary preparations* to defend their premises from uprisings" and therefore could not, as a matter of law, be state action. *See* 346 F. Supp. 2d 538 at 549 (emphasis added). But the motion to dismiss stage is not the correct stage of the proceedings for the Court to make such an assessment. Genuine evaluation of the nexus between the state and private defendants in this context requires a careful analysis of facts on a complete evidentiary record. Such a record can only achieved after discovery and examined at the summary judgment stage. *See National Coalition Government of the Union of Burma v. Unocal, Inc.,* 176 F.R.D. 329, 346 (C.D. Cal. 1997) ("the state-action inquiry is more easily resolved on summary judgment than on a motion to dismiss because the court must review the facts and 'circumstances surrounding the challenged action in their totality.'") (citing *Collins v. Womancare,* 878 F.2d 1145, 1150 (9th Cir. 1989)).

Other courts have heeded this rationale in the ATS context. In *Aldana*, No. 04-10234, 2005 WL 1587302, at *5, the Eleventh Circuit reversed the dismissal of an ATS complaint, noting that separate paragraphs of the complaint, "when read together," sufficiently alleged a town's mayor to have been more than a "mere observer" of abuses. The Court emphasized that while the district court's reading "might be one reasonable reading of the complaint," it could not be said to be the "only reasonable reading and the complaint" and that "'the complaint should be

construed in the light most favorable' to Plaintiffs." *Id.* (quoting from *Miccosukee Tribe of Indians of Fla. v. So. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002)). Had the District Court applied these well-accepted principles, it would have denied defendants' motions.

B. Plaintiffs Properly Alleged That Defendants Engaged In State Action.

Having improperly constructed a strawman version of plaintiffs' complaint, the Court then concluded that all of plaintiffs' allegations save one "relate to business activities akin to that at issue in *Bigio*." 346 F. Supp. 2d at 549; A478 (D. Compl. ¶ 361.) The District Court held that this allegation alone "does not constitute joint action with the apartheid regime to commit the slew of international law violations that are complained of." 346 F. Supp. 2d at 549. In fact, plaintiffs made many more allegations, both in A478 (D. Compl. ¶ 361) and elsewhere, disclosing a wide-ranging and intimate collaboration between the defendants and the apartheid regime for mutual benefit.

Under established "color of law" jurisprudence, such allegations are sufficient to surmount a motion to dismiss.[41] As this Court determined in *Kadic*,

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[41] The Supreme Court has articulated an interpretive gloss on the various models that have been used by the Court in determining whether alleged private conduct can be fairly attributable to state action. This two-part approach, outlined in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), requires the following: "First, the

the "color of law" jurisprudence of 42 U.S.C. § 1983 is a pertinent guide to determine whether a defendant has engaged in official action for purposes of jurisdiction under the ATS. *Kadic*, 70 F.3d. at 245.[42] Applying § 1983 jurisprudence, all prior ATS decisions, other than the holding below, found allegations of joint action between corporations and government officials responsible for human rights violations to be sufficient to overcome a motion to dismiss. *See Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *Abdullahi v. Pfizer, Inc.*, No. 01 CIV. 8118, 2002 WL 31082956 (S.D.N.Y. Sept. 17, 2002); *Wiwa*, No. 96 Civ. 8386 (KMW), 2002 WL 319887; *National Coalition Government of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D.

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deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* at 937.

[42] Where state action is required, it is a requirement of international law, not one imposed by the text of the ATS. *See* 28 U.S.C. § 1350. Thus, although § 1983 state action principles can be a guide, *Kadic*, 70 F.3d. at 245, international standards are also relevant. As detailed above, international law ascribes liability to private parties who aid and abet state actors in committing human rights abuses. The act of aiding and abetting itself provides a sufficient nexus with the state to afford liability. Congress recognized this in enacting the TVPA; although torture requires state action, the TVPA recognizes that those who abet torture are liable.

Cal. 1997); *cf. Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 373-80 (E.D. La. 1997) (dismissing without prejudice and allowing leave to amend where theory of state action was not clear).

There are three traditional forms of a state action analysis: 1) the private performance of a public function, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974); 2) joint activity between a state and a private party, *see United States v. Price*, 383 U.S. 787, 794 (1966); and 3) a mutually beneficial or "symbiotic relationship" between a state and a private party, *see Burton v. Wilmington Parking Authority*, 81 S. Ct. 856 (1961). Using any of these categories, plaintiffs' allegations are sufficient to establish that defendants were acting "under color of law" at this procedural stage.

1. Private Performance Test

As articulated by the Supreme Court, a private party's practice of what is traditionally a government function may constitute state action. *Jackson,* 419 U.S. at 352. By forming and maintaining private commando forces to help secure and uphold the South African government's policies, General Motors was delegated a critical component of traditional government authority and was thereby performing a core public function. A426 (D. Compl. ¶ 183.) Another example of such delegation was Anglo American's joint participation with state police in repressing

a 1984 strike. A379 (D. Compl. ¶ 26.)

2. Joint Participation Test

Defendants' actions, evaluated under the joint participation model, can again be characterized as state action. A private individual acts under color of law when he or she is engaged in joint activity or acts in concert with state officials. *Price*, 383 U.S. at 794.[43] In *Price*, private and state actors collaborated in assaulting and killing three civil rights workers. *Id.* at 795. Like the private actors in *Price*, defendants willingly and consistently participated alongside state actors in perpetrating violations of basic human rights.

For example,

- Anglo American's private security forces participated alongside state police to repress a 1984 labor strike, resulting in serious injury to plaintiff Ngobeni. A379 (D. Compl. ¶ 26.)
- General Motors worked with the government to establish citizen commando forces composed of white employees, which were involved in vigilante killings and repressive political activities committed by the apartheid regime. A426 (D. Compl. ¶ 183.)
- Business and military leaders met, developed, and declared a "total strategy"

[43] *See also Kadic*, 70 F.3d at 245; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Dennis v. Sparks*, 449 U.S. 24 (1980); *Lugar,* 457 U.S. at 937.

to defeat resistance to apartheid at joint business-military conferences. A450, 465 (D. Compl. ¶¶ 269, 312.)

- Corporate defendants worked together with high-level military personnel on the Joint Management Committees and the Defense Manpower Liaison Committee. A477 (D. Compl. ¶ 359.)
- The mining industry joined the state in the formulation of oppressive policies and/or practices that resulted in low labor costs.[44] A448-49 (D. Compl. ¶ 263.)
- Defendants directly subsidized the SADF by voluntarily paying employees during their service with commando units and militias, some of which engaged in egregious human rights violations. A476-77 (D. Compl. ¶ 358.)

These allegations are more than sufficient to allege state action - notably, none of these allegations were mentioned by the District Court.

3. Symbiotic Relationship Test

Plaintiffs' allegations also demonstrate an ongoing mutually beneficial or

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[44] In *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1543-45 (9th Cir.) (*en banc*), *cert. denied*, 493 U.S. 809 (1989), the court reversed a summary judgment where the evidence showed encouragement by the police to engage in activities that violated the rights of union members. Here, both Anglo American and Gencor went well beyond mere "encouragement" by sanctioning brutal attacks by police on their workers to further each defendant's practice of forced labor and displacement.

"symbiotic relationship" between defendants and the apartheid regime. In *Burton*, 81 S. Ct. at 857-58, 862, the Court found a symbiotic relationship between a city-owned parking structure and its lessee, a restaurant located inside the structure, thereby elevating the restaurant's discriminatory practices to state action. According to the Court, the restaurant "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit." *Id.* at 861. The Court continued to state that the relationship between the parties conferred on each "an incidental variety of mutual benefits." *Id.*

The symbiotic relationship found in *Burton* parallels the apartheid regime's relationship with the defendants. The regime could not have survived without the numerous resources provided by defendants. Such resources included financial assistance from defendant banking institutions, A438 (D. Compl. ¶ 228), technological support such as defendant IBM's development of a "law enforcement system," A433 (D. Compl. ¶ 208), and security support provided by defendant Anglo American and others by maintaining commando forces and stockpiling weapons. A426, 478 (D. Compl. ¶¶ 183, 361.) In turn, defendants relied upon and benefitted from the regime's policies such as land expropriation, forced removals, forced labor, and labor repression. For example, such policies provided defendant mining companies such as Gencor and Anglo American with a stable source of

cheap labor. A937 (*TRC Final Report*, Vol. 6, § 2, Chap. 5, ¶ 3 sub. b.) These allegations establish state action under the symbiotic relationship test.

Under at least three of the tests the courts have traditionally used to determine whether private parties have engaged in state action, plaintiffs' allegations are sufficient to withstand a motion to dismiss. The extensive allegations of active and ongoing collaboration between defendants and the apartheid regime render implausible the finding by the District Court that the defendants were simply "doing business" in apartheid South Africa.

VI. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' TVPA CLAIMS.

Congress passed the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), to "establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal District Courts to hear claims by aliens for torts committed 'in violation of the law of nations.'" *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (citing H.R. Rep. No. 367, 102d Cong., 2d Sess. 3, *reprinted in* 1992 U.S.C.C.A.N. 84, 86). The sole basis for the dismissal of plaintiffs' TVPA claims was the District Court's erroneous conclusion that plaintiffs failed to allege state

action. For the reasons set forth in § V, *supra,* plaintiffs' allegations of state action satisfy the TVPA.

VII. THE DISTRICT COURT ERRED BY DENYING PLAINTIFFS LEAVE TO AMEND AND CONSOLIDATE THEIR COMPLAINTS.

Rule 15(a) requires that "leave [to amend] shall be freely given when justice so requires." That is because "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). As with the notice pleading standard of Rule 8(a), Rule 15 places the emphasis on substantial justice, rather than on technicalities. Thus when a complaint is dismissed pursuant to Rule 12(b)(6) and the plaintiff requests permission to file an amended complaint, that request should ordinarily be granted. *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991).

Denial is appropriate only when there is a good reason, such as futility, bad faith, or undue delay. *Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002) (citing *Chill v. General Elec. Co.*, 101 F.3d 263, 271-72 (2d Cir. 1996)). Determinations of futility are made under the same standards that govern Rule 12(b)(6) motions to dismiss. *Nettis v. Levitt*, 241 F.3d 186, 194 n.4 (2d Cir. 2001) (citing *Ricciuti*, 941 F.2d at 123). Just as a court should only dismiss a complaint

for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957), it should only deny leave to file a proposed amended complaint when the same rigorous standard is met. *Ricciuti*, 941 F.2d at 123.

The District Court based its conclusion that plaintiffs' proposed amendments would be "fruitless" entirely upon its erroneous ruling that aiding and abetting liability does not exist under the ATS. The District Court thus ignored the fact that plaintiffs expressly sought leave to amend not only to replead allegations that would support an aiding and abetting theory, but also to cure possible deficiencies identified in their state action and color of law theories. S98-102 (Mot. Leave ¶¶ 14-18.)[45] The District Court was silent as to why proposed amendments with respect to these theories would be "fruitless."[46]

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[45] Despite the District Court's ruling concerning aiding and abetting liability, plaintiffs indicated their intent to maintain their aiding and abetting theories, noting a recent ruling from the Eleventh Circuit. S95-96 (Mot. Leave ¶ 8, n.2.) Plaintiffs thus moved for leave to replead allegations supporting an aiding and abetting theory of liability in order to support their position on appeal. S95-96 (*id.* ¶ 8.)

[46] The District Court should have permitted plaintiffs to amend their complaint to add putative class members harmed by the actions of individually named defendants. *See Sullivan v. West New York Residential, Inc.*, No. 01-CV-7847 (ILG), 2003 WL 21056888, at *1 (E.D.N.Y. Mar. 5, 2003) ("Rule 21 [of the Federal Rules of Civil Procedure] allows the court broad discretion to permit the

Plaintiffs outlined nine areas in which they would allege detailed cases of joint action between particular defendants and state security forces that caused specific violations against specific plaintiffs. S99-100 (Mot. Leave ¶ 15.) Plaintiffs further proposed four areas in which specific allegations of contracts between particular defendants and elements of the state security apparatus would serve as the basis for conspiracy under a state action theory. S101 (*id.* ¶ 16.) Plaintiffs would allege with particularity that certain defendants directly participated in crimes in violation of international norms, including instances of extrajudicial killing by Anglo American and DeBeers and forced removal by DeBeers. S98 (*id.* ¶ 14.) Given these supplemental allegations and the rigorous standard to deny leave to amend, the District Court erred in denying leave to amend

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addition of a party at any stage in the litigation.") (citations omitted). Plaintiffs should have also been allowed to amend their RICO claims. *See, e.g., Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1249 (N.D.Cal. 2004); *Wiwa*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at **20-22.

CONCLUSION

This Court should reverse and remand these actions so that plaintiffs may amend their complaints and so the amended consolidated complaint may be considered under the proper legal standards.

Dated: August 19, 2005

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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ACKNOWLEDGEMENT OF SERVICE

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JEFFREY S. CHEMERINSKY, being duly sworn, deposes and says that the deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or

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That on the 19th day of August, 2005, deponent served ten copies of within Brief for Plaintiffs-Appellants, to the Clerk of the Court, United States Court of Appeal, Second Circuit, 40 Foley Square, Room 1803, New York, New York 10007 via certified mail. I further certify that I served two copies of said Brief via certified mail upon the following attorneys:

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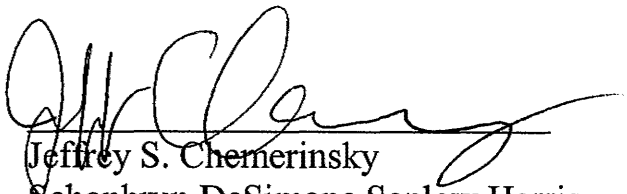
I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.



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ACKNOWLEDGEMENT OF SERVICE

STATE OF NEW JERSEY)
)
COUNTY OF ESSEX)

DIANE E. SAMMONS, being duly sworn, deposes and says that the deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or

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