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

United States Court of Appeals

for the

Second Circuit

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

v.

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

(For Continuation of Caption See Inside Cover)

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

JOINT BRIEF FOR DEFENDANTS-APPELLEES FORD MOTOR COMPANY AND INTERNATIONAL BUSINESS MACHINES CORPORATION

KEITH R. HUMMEL
TEENA-ANN V. SANKOORIKAL
JAMES E. CANNING
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

Attorneys for Defendant-Appellee International Business Machines Corporation

JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

– and –

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000

Attorneys for Defendant-Appellee Ford Motor Company

GENERAL MOTORS CORP.,

Defendant.

LUNGISILE NTZEBESA, DOROTHY MOLEFI, TOZAMILE BOTHA, MNCEKELELI HENYN SIMANGENTLOKO, SAMUEL ZOYISILE MALI, MSITHELI WELLINGTON NONYUKELA, MPUMELELO CILIBE, WILLIAM DANIEL PETERS, JAMES MICHAEL TAMBOER, NONKULULEKO SYLVIA NGCAKA, individually and on behalf of her deceased son, NOTHINI BETTY DYONASHE, individually and on behalf of her deceased son, MIRRIAM MZAMO, individually and on behalf of her deceased son, LESIBA KEKANA, DENNIS VINCENT FREDERI BRUTUS, MARK FRANSCH, ELSIE GISHI, THOBILE SIKANI, REUBEN MPHELA, CATHERINE MLANGENI, ARCHINGTON MADONDO, MICHAEL MBELE, THULANI NUNU, MAMOSADI MLANGENI, THANDIWE SHEZI, SAKWE BALINTULO,

Plaintiffs-Appellants,

SIGQIBO MPENDULO, NYAMEKA GONIWE, THEMBA MEQUBELA, ANDILE MFINGWANA, F. J. DLEVU, unlawfully detained and tortured during period 1964/4, LWAZI PUMELELA KUBUKELI, unlawfully forced to flee into exile in 1985, FRANK BROWN, P. J. OLAYI, SYLVIA BROWN, H. DURHAM, M.D., WELLINGTON BANINZI GAMAGU, Violations of Pass Laws, unlawful detention 1981/1983, torture subjected to discriminatory labor practices 1981, HERMINA DIGWAMAJE, SAKWE BALINTULO KHULUMANI,

Plaintiffs,

HANS LANGFORD PHIRI,

ADR Provider-Appellant,

v.

SULZER AG, DAIMLERCHRYSLER NORTH AMERICA HOLDING CORPORATION, DEBEERS CORPORATION, SCHINDLER HOLDING AG, NOVARTIS AG, ANGLO-AMERICAN CORPORATION, BANQUE INDO SUEZ, CREDIT LYONNAIS, and Unknown officers and directors of DANU INTERNATIONAL, STANDARD CHARTERED BANK PLC, CITIGROUP AG, J.P. MORGAN SECURITIES INC., as successor to Morgan Guaranty, MANUFACTURERS HANOVER, CHEMICAL BANK & CHASE MANHATTAN BANK, CORPORATE DOES, COMMERZBANK AG, CREDIT SUISSE, CITIGROUP INC., DEUTSCHE BANK AG, UBS AG, DRESDNER BANK AG, UNISYS CORPORATION, SPERRY CORPORATION, BURROUGHS CORPORATION, ICL, LTD., JOHN DOE CORPORATION, AMDAHL CORP., COMPUTER COMPANIES, FORD MOTOR COMPANY, FORD MOTOR COMPANY, HOLCIN, LTD., HENRY BLODGET, MERRILL LYNCH & CO., INC., KIRSTEN CAMPBELL, KENNETH M. SEYMOUR, JUSTIN BALDAUF, THOMAS MAZZUCCO, VIRGINIA SYER GENEREUX, SOFIA GHACHEM, JOHN DOE, Defendants 1 through 10, EDWARD MCCABE, DEEPAK RAJ, CORPORATE DOES,

1-100, their predecessors, successors and/or assigns, OERLIKON CONTRAVES AG, EXXON MOBIL CORPORATION, OERLIKON BUHRLE AG, SHELL OIL COMPANY, SHELL PETROLEUM, INC., ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT & TRADING COMPANY PLC, NATIONAL WESTMINSTER BANK PLC, MINNESOTA MINING AND MANUFACTURING COMPANY/3M COMPANY, FUJITSU LTD., BARCLAYS NATIONAL BANK LTD., DAIMLER AG, GENERAL MOTORS CORPORATION, INTERNATIONAL BUSINESS MACHINES CORPORATION, UNION BANK OF SWITZERLAND AG,

Defendants-Appellees,

RHEINMATALL GROUP AG, BARCLAYS BANK PLC,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, defendants-appellees state that:

1. Defendant-appellee Ford Motor Company ("Ford") states that it has no parent corporation. State Street Corporation, a publicly traded company whose subsidiary State Street Bank and Trust Company is the trustee for Ford common stock in the Ford defined contribution plans master trust, has disclosed in filings with the U.S. Securities and Exchange Commission that as of December 31, 2014, it holds 10% or more of Ford's common stock, including 5.9% of Ford's common stock that is beneficially owned by the master trust.

2. Defendant-appellee International Business Machines Corporation ("IBM") states that it is a non-governmental entity with no parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Thirteen years ago, plaintiffs first brought claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, against Ford and IBM (the "Companies") for apartheid-era crimes that were committed by the South African government against South African citizens on South African soil. Since then, plaintiffs have amended, withdrawn, and modified their claims in five separate complaints. This Court has already recognized in *Balintulo v. Daimler AG*, 727 F.3d 174, 181 (2d Cir. 2013), that the current ATS claims against the Companies are simply not viable. Plaintiffs' latest attempt to amend their complaints to plead around *Balintulo* was correctly rejected by the district court (Scheindlin, J.) because the proposed amendments added only new words, not new substance: "[W]hile the newly proposed allegations are substantially more detailed and specific, the *theories* of the American corporations' liability are essentially the same as those in plaintiffs' existing complaints." SA016 (quotation omitted). The district court accordingly rejected the proposed amendments as futile and dismissed the complaints. That judgment should be affirmed.

In recent years, this Court and the Supreme Court have announced three significant limitations on the scope of the ATS, each of which independently dooms plaintiffs' proposed complaints as a matter of law. *First*, the Supreme Court held in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013)

("*Kiobel II*"), that federal courts may not recognize ATS causes of action based on conduct that occurred outside the United States. Courts since *Kiobel II* have repeatedly dismissed ATS complaints based on primary conduct that occurred on foreign soil. The outcome should be no different here: Apartheid occurred entirely in South Africa, and plaintiffs do not and cannot allege any conduct committed within the United States by the Companies that aided-and-abetted the South African government's crimes. Instead, they allege that the Companies' *separate South African subsidiaries* aided and abetted those crimes, and that the Companies should be held liable by virtue of the "control" they exercised as corporate parents. But this Court has already correctly rejected that control theory as a basis for circumventing *Kiobel*'s extraterritoriality rule. *Balintulo*, 727 F.3d at 192.

Second, this Court recognized in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), that to satisfy the *mens rea* requirement for an aiding-and-abetting claim under the ATS, a plaintiff must show that the defendant not only knew that his acts could facilitate the commission of international crimes, but that the defendant specifically *intended* to facilitate such crimes. What is more, based on the territorial limitation of the ATS, this Court has made clear that only purposeful acts committed *within the United States* can properly support a claim under the ATS for aiding and abetting violations of

customary international law. Unsurprisingly, plaintiffs come nowhere close to alleging that two major, respected international corporations specifically intended to cause the torture, extrajudicial killing, and denationalization of black South Africans.

Third, this Court held in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"), that only natural persons, and not corporations, may be held liable for violations of human rights norms under the federal common law applicable to ATS claims. That precedent remains the binding law of this Circuit, and is in any event entirely correct, precluding plaintiffs' ATS claims against the Companies.

For each of these separate reasons, the district court's judgment rejecting plaintiffs' motion for leave to amend, and dismissing the complaints with prejudice, should be affirmed.

JURISDICTIONAL STATEMENT

Plaintiffs purport to rest jurisdiction in the district court on the ATS, 28 U.S.C. § 1350. Pls. Br. 4. The district court lacked jurisdiction under that provision. *See infra* Parts I-III.

The district court dismissed plaintiffs' complaints with prejudice on August 28, 2014. SA019-20. Plaintiffs timely noticed this appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether plaintiffs have plausibly alleged that the Companies engaged in conduct within the United States relevant to rebutting the presumption against extraterritoriality and, if so, whether that conduct was specifically intended by the Companies to facilitate the South African apartheid regime's torture, killing, and denationalization of black South Africans.

2. Whether liability for international law violations under the ATS is limited to natural persons.

3. Whether private parties can be held liable under the ATS for aiding and abetting the human rights abuses of a foreign sovereign, on its own soil, against its own citizens.

STATEMENT OF FACTS

A. Original Complaints, *Sosa*, And First Motion To Dismiss

In 2002, three sets of plaintiffs filed ten separate actions against several dozen corporations, alleging that the defendants, *inter alia*, aided and abetted the South African apartheid regime in committing violations of customary international law against its citizens, with jurisdiction predicated on the ATS. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007). The cases were eventually consolidated into the two actions that are the subject of this appeal.

In June 2004, the Supreme Court decided *Sosa v. Alvarez-Machain*, 542

U.S. 692 (2004), which held that the ATS does not itself confer a cause of action for violations of the law of nations because "the statute is in terms only jurisdictional." *Id.* at 712. Nevertheless, the Court held that courts could in some circumstances entertain, under federal common law, a narrow class of claims based on a "norm of international character accepted by the civilized world and defined with a specificity comparable to" the small set of 18th-century actions under international law that were then recognized at common law. *Id.* at 725. The *Sosa* Court also made clear that "[t]his requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law," and referenced *this case* as the prime example of ATS litigation that could be dismissed in deference to views of the Executive Branch, which had consistently objected to the case's continued adjudication. *Id.* at 733 n.21; *see Balintulo v. Daimler AG*, 727 F.3d 174, 184-85, 188 (2d Cir. 2013) (describing prior objections of the United States and other sovereigns).

The district court, relying on *Sosa*, granted defendants' motion to dismiss. The court held, *inter alia*, that the ATS does not encompass aiding-and-abetting claims. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 554-55 (S.D.N.Y. 2004).

B. This Court's First Decision On Appeal

In a per curiam opinion, a panel majority—over the dissent of Judge Korman and the objections of (among others) the United States and South Africa, *see Khulumani*, 504 F.3d at 292-337 (Korman, J., dissenting); Br. of United States as *Amicus Curiae*, No. 05-2141 (Oct. 14, 2005); Br. of *Amicus Curiae* Republic of South Africa, No. 05-2141 (Oct. 14, 2005)—vacated the dismissal of plaintiffs' aiding-and-abetting claims, concluding that "the district court erred in holding that aiding and abetting violations of customary international law cannot provide a basis for [ATS] jurisdiction." *Khulumani*, 504 F.3d at 260 (per curiam). The majority did not agree, however, on the proper *mens rea* standard for aiding-and-abetting liability in ATS claims. *Compare id.* at 277 (Katzmann, J., concurring) (purpose of facilitating international crime required), *with id.* at 291 (Hall, J., concurring) (knowledge that actions could assist international crime suffices).

Defendants petitioned for certiorari. The United States took the extraordinary step of filing an uninvited amicus brief, arguing that the Supreme Court should order dismissal of these actions because the ATS does not apply extraterritorially, and does not encompass aiding-and-abetting claims alleging unlawful primary conduct by a foreign sovereign. Br. of United States as *Amicus Curiae*, 2008 WL 408389 (Feb. 11, 2008) ("U.S. Supreme Court Br."). The Supreme Court could not address the merits, however, because multiple recusals

(resulting from the large number of companies sued) deprived the Court of a quorum. The judgment accordingly was affirmed as if by an equally divided Court under 28 U.S.C. § 2109. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

C. Remand To The District Court

1. On remand, plaintiffs amended their complaint and dropped most of the defendants. The *Ntsebeza* plaintiffs retained five defendants: Ford, General Motors Corp., Daimler AG, IBM, and Barclays Bank PLC. The *Balintulo* plaintiffs named the same companies and three others: UBS AG, Fujitsu Ltd., and Rheinmetall AG. The amended complaints, while including more specific allegations, continued to seek recovery on an aiding-and-abetting theory.

The complaints included two separate general allegations as to Ford. *First*, plaintiffs alleged that Ford's South African subsidiary ("FSA") "aided and abetted" extrajudicial killing by selling "heavy trucks, armored personnel carriers, and other specialized vehicles to the South African Defense Forces and the Special Branch, the South African police unit charged with investigating anti-apartheid groups." *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 264 (S.D.N.Y. 2009). *Second*, they alleged that FSA aided and abetted torture because its "management provided information about anti-apartheid activists to the South African Security Forces, facilitated arrests, provided information to be used by interrogators, and

even participated in interrogations." *Id.*

Plaintiffs alleged that IBM (through its South African subsidiary IBM South Africa) "aided and abetted the South African Government's denationalization of black South Africans through the provision of computers, software, training, and technical support." *Id.* at 265. IBM allegedly "sold the South African Government … computers used to register individuals, strip them of their South African citizenship, and segregate them in particular areas of South Africa," and IBM's South African employees allegedly "assisted in developing computer software and computer support specifically designed to produce identity documents and effectuate denationalization." *Id.*

Because these acts were alleged to have been done by the Companies' South African subsidiaries in South Africa, not the Companies themselves, plaintiffs sought to allege facts establishing the Companies' vicarious liability for the acts of their subsidiaries in South Africa under an agency theory, i.e., that the Companies had the right to, and did, "exercise control over the subsidiary with respect to matters entrusted to the subsidiary." *Id.* at 272.

2. Ford, IBM, and all but one of the other defendants moved to dismiss the complaint. Upon Judge Sprizzo's passing, the cases were reassigned to Judge Scheindlin. On April 8, 2009, the district court denied the motion to dismiss as to Ford and IBM. The court held, among other things, that (i) the ATS applies

extraterritorially, *S. African Apartheid Litig.*, 617 F. Supp. 2d at 246-47; (ii) corporations may be held liable under the ATS, *id.* at 254-55; (iii) the *mens rea* standard under an aiding-and-abetting theory is "mere *knowledge* that the accomplice's acts will provide substantial assistance to the primary violation," *id.* at 259; and (iv) plaintiffs sufficiently alleged vicarious liability under an agency theory as to both Companies, *id.* at 274-75.

D. Interlocutory Appeal And Intervening Decisions Of This Court And The Supreme Court

1. The Companies and several other defendants appealed, citing the collateral order doctrine, and urging the Court in the alternative to treat the appeal as a petition for a writ of mandamus. *See Balintulo*, 727 F.3d at 181. This Court subsequently stayed proceedings in the district court, *id.*, and heard oral argument on the merits on January 11, 2010.

2. While this case was pending, this Court decided two cases that directly undermined the bases for the district court's denial of the Companies' motion to dismiss.

First, the Court held in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), that a plaintiff may not state a claim of aiding-and-abetting under the ATS merely by alleging that the defendant "*knowingly* (but not purposefully) aid[ed] and abet[ted] a violation of international law." *Id.* at 259. Rather, plaintiffs must allege facts establishing that the defendant acted for the

"purpose of facilitating the commission of th[e] crime." *Id.* (quotation omitted).

Second, this Court held in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"), that the ATS "does not provide subject matter jurisdiction over claims against corporations," *id.* at 149, because customary international law does not treat corporate entities (as opposed to the natural persons through whom the entities act) as having the capacity to violate human rights norms, *id.* at 131-45.

3. The Supreme Court granted certiorari in *Kiobel I*, but explicitly declined to reach the corporate-liability question. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) ("*Kiobel II*"). The Court instead affirmed this Court's decision on the alternative ground that a claim under the ATS cannot "seek[] relief for violations of the law of nations occurring outside the United States." 133 S. Ct. at 1669. The *Kiobel* plaintiffs, like plaintiffs here, alleged that corporate defendants "aided and abetted [a foreign] Government in committing violations of the law of nations in [the foreign country]." *Id.* at 1662. The Court rejected that claim, relying heavily on the "presumption that United States law governs domestically but does not rule the world." *Id.* at 1664 (quotation omitted). The "presumption against extraterritoriality," the Court concluded, "applies to claims under the ATS," and "nothing in the statute rebuts that presumption." *Id.* at 1669. To the contrary, the Court observed, the concerns underlying the

presumption—i.e., "protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord"—are "magnified in the context of the ATS." *Id.* at 1664 (quotation omitted). The Court repeatedly emphasized that ATS claims arising from "conduct within the territory of a foreign sovereign" have already generated "diplomatic strife." *Id.* at 1669; *see id.* at 1664, 1665, 1667. The Court accordingly held that the ATS does not allow for suits "seeking relief for violations of the law of nations occurring outside the United States." *Id.* at 1669. That rule barred the *Kiobel* plaintiffs' claims because "all the relevant conduct took place outside the United States." *Id.*

E. This Court's Decision In This Case (*Balintulo*)

After *Kiobel II*, this Court ordered further briefing in this case, and then held that *Kiobel II* "plainly forecloses the plaintiffs' claims as a matter of law." *Balintulo*, 727 F.3d at 194. The Court explained that because this action "alleg[es] violations of customary international law based solely on conduct occurring abroad," *id.* at 182, "the Supreme Court's holding in *Kiobel* plainly bars the plaintiffs' claims," *id.* at 193. The Court rejected plaintiffs' contention that the *Kiobel II* presumption against extraterritoriality is overcome because the Companies are U.S. corporations. *Id.* at 189-90. And the Court rejected the contention that the presumption is overcome because the Companies "took affirmative steps in this country to circumvent the [U.S. anti-apartheid] sanctions

regime." *Id.* at 192 (quotation omitted). The Court explained that the Companies' alleged actions to avoid U.S. sanctions did not "tie[] the relevant human rights violations to actions taken within the United States," because the complaints alleged "only vicarious liability of the defendant corporations based on the actions taken within South Africa by their South African subsidiaries," so all the "relevant conduct" alleged in the complaint took place abroad. *Id.*

Apart from the complaints' failure to overcome the presumption against extraterritoriality, the Court also reiterated that because *Kiobel II* had not disturbed this Court's corporate-liability holding in *Kiobel I*, the "law of this Circuit" remains that "corporations are not proper defendants under the ATS in light of prevailing customary international law." *Id.* at 191 n.26 (citing *Kiobel I*, 621 F.3d at 149).

In light of those conclusions, the Court denied the Companies' mandamus petition as "unnecessary," because "defendants can seek the dismissal of all of the plaintiffs' claims, and prevail, prior to discovery, through a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure." *Id.* at 188. To facilitate the Rule 12(c) judgment it contemplated, the Second Circuit "vacate[d] [the] stay on the District Court proceedings so that the defendants may move for judgment on the pleadings." *Id.* at 182.

F. The Decisions Below

1. On remand, defendants moved the district court for judgment on the pleadings based on *Kiobel II, Talisman*, and *Balintulo*. The district court granted judgment to all remaining defendants other than the Companies, but ordered the remaining parties to brief the question whether this Court's corporate liability holding in *Kiobel I* had survived after *Kiobel II.* The district court held that *Kiobel I* was no longer good law, A0373-76, and that "corporations may be held liable for claims brought under the ATS," A0377.

2. Having concluded that corporations may be sued under the ATS, the court gave plaintiffs the opportunity to seek leave to again amend their complaint to allege facts sufficient to establish the U.S. connection required by *Kiobel II* and the "purpose" aiding-and-abetting *mens rea* required by *Talisman*. A0387. Plaintiffs proffered amended complaints, but the district court held that the proposed amendments were futile because they alleged in substance the same conduct this Court had already held in *Balintulo* to be insufficient to satisfy *Kiobel II*.

a. As with the complaints addressed in *Balintulo*, plaintiffs' proposed complaints allege that "Ford" engaged in two distinct categories of conduct that

plaintiffs say aided and abetted the apartheid regime's human rights abuses.[1] *First*, the complaints allege that FSA sold "specialized" vehicles to the apartheid government's Special Forces. A0510-19. But while their previous complaints alleged that Ford and other "automotive defendants" sold "heavy trucks, armored personnel carriers, and other specialized vehicles to the South African Defense Forces and the Special Branch," *S. African Apartheid Litig.*, 617 F. Supp. 2d at 264, plaintiffs' proposed complaints allege only that "Ford built a limited number of XR6 model Cortinas known as 'interceptors' that were sold almost exclusively to security forces," and that this model was "special because it had three Weber model double carburetors, as opposed to all other Cortinas that had only one double carburetor." A0515-16. *Second*, plaintiffs allege that FSA managers in South Africa shared information with the apartheid regime about anti-apartheid and union activists, allegedly facilitating the suppression of anti-apartheid activity. A0519-27.

The allegations concerning IBM are likewise substantively identical to those addressed in *Balintulo*. Plaintiffs' proposed complaints allege that IBM aided and

[1] Plaintiffs' proposed complaints also press a theory of conspiracy. *E.g.*, Pls. Br. 2. To the extent conspiracy is a viable theory under the ATS, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 192 n.21 (2d Cir. 2014) (declining to decide the question), aiding-and-abetting and conspiracy claims under the ATS are subject to the same *mens rea* and territorial limitations, so while this brief focuses on plaintiffs' aid-and-abet theory, the "analysis applies with equal force to plaintiffs' claim predicated upon a theory of conspiracy." *Id.*

abetted the international law violations of apartheid and denationalization principally by assisting in the creation of (i) identity documents for the Bophuthatswana homeland (*compare* A0544-A0548 *with S. African Apartheid Litig.*, 617 F. Supp. 2d at 265) and (ii) the "Book of Life," a population registry for non-blacks, for the South African government (*compare* A0543-44 *with* 617 F. Supp. 2d at 268).

b. The complaints do not allege that any of the foregoing acts occurred within the United States. As to Ford, plaintiffs allege that the "specialized" vehicles that are the focus of the complaints were assembled and sold in South Africa with parts sent to South Africa from outside the United States. *E.g.*, A0506-07. The complaints similarly allege that the FSA managers who allegedly shared information about labor activists with apartheid forces did so *in South Africa*. *E.g.*, A0519-21. As to IBM, plaintiffs allege that IBM South Africa personnel trained Bophuthatswana government employees to use IBM hardware and software to create identity books for the Bophuthatswana homeland. *E.g.*, A0547-548. Plaintiffs further allege that the South African government ran the Book of Life registry (which, again, was not even used to compile information about black South Africans) on IBM computers. *E.g.*, A0543.

The only allegations of U.S. conduct in the complaints involve the Companies' general exercise of corporate "control" over their South African

subsidiaries. A0504; *see* A0528. For example, plaintiffs allege that Ford (i) closely monitored and oversaw FSA, A0508, (ii) sought to circumvent U.S. sanctions to sell vehicles in South Africa, A0513-14, and (iii) directed parts to be shipped to South Africa from Canada and England, A0513-14; *see* SA009-11 (district court's summary of the allegations against Ford). And they allege that IBM (i) controlled its subsidiary IBM South Africa, A0529, (ii) made decisions concerning IBM's operations in South Africa, A0529; and (iii) sought to circumvent U.S. sanctions to sell computers in South Africa, A0536-39; *see* SA007-9 (district court's summary of the allegations against IBM). Plaintiffs do not make any allegations suggesting that the Companies' control over their subsidiaries differed from that of most companies headquartered in the United States with subsidiaries in other countries.

c. The district court held that plaintiffs' proposed amended complaints were not materially different from the existing complaints, denied leave to amend as futile, and dismissed the complaints with prejudice. "[W]hile the newly proposed allegations are substantially more detailed and specific," the court observed, "the *theories* of the American corporations' liability are essentially the same as those in plaintiffs' existing complaints." SA016 (quotation omitted). Plaintiffs, the court emphasized, previously argued that the Companies could be held liable for aiding and abetting apartheid "because critical policy-level decisions were made in the

United States, and the provision of expertise, management, technology, and equipment essential to the alleged abuses came from the United States." SA017 (alteration omitted). "Although now supported with detailed facts," the court noted, "this theory of liability was already rejected by the Second Circuit in *Balintulo* as establishing vicarious liability at most, and therefore being insufficient to overcome *Kiobel II*'s presumption against extraterritoriality." *Id.* The court explained that the "*Balintulo* court also rejected plaintiffs' effort to tie the international law violations to the 'affirmative steps' defendants 'took ... in this country to circumvent the sanctions regime.'" *Id.* (quoting *Balintulo*, 727 F.3d at 192).

Because the court concluded that "plaintiffs have failed to show that they could plausibly plead facts to overcome the presumption against extraterritoriality," the court did "not address whether the proposed amended complaint meets the extraordinarily high *Talisman Energy* standard" for pleading a "purpose" aiding-and-abetting *mens rea*. SA006 n.11.

SUMMARY OF ARGUMENT

I. Plaintiffs' proposed complaints, which arise from alleged international law violations by a foreign sovereign against its own citizens on its own soil, do not establish federal jurisdiction under the ATS because they do not plausibly allege (i) that the defendant Companies themselves engaged in any "relevant

conduct" within the United States so as to overcome the presumption against extraterritorial application of the ATS, or (ii) that the Companies engaged in any act within the United States for the specific purpose of facilitating the foreign sovereign's international law violations.

A. This Court's precedents require plaintiffs seeking to hold private defendants like the Companies liable under the ATS for aiding and abetting a foreign government's human rights abuses to clear two jurisdictional hurdles, one territorial and one substantive. *First*, plaintiffs must plausibly allege that the defendants themselves—not the defendants' foreign subsidiaries—engaged in "relevant conduct" within the United States, i.e., conduct within the United States that is alleged by plaintiffs to constitute acts that aided and abetted the principal actor's violation of the law of nations. *Second*, plaintiffs must plausibly allege that this U.S.-based "relevant conduct" was committed for the specific *purpose* of facilitating the underlying crime, and not merely with knowledge that the conduct could facilitate the crime. Plaintiffs' proposed complaints fail at each step.

B. Plaintiffs fail to allege any relevant conduct by either Company within the United States. To the contrary, the conduct they allege as aiding-and-abetting activity occurred entirely within South Africa. Plaintiffs allege that Ford South Africa *in South Africa* assembled and sold vehicles to the South African government, and that Ford South Africa managers *in South Africa* provided

information about employees to the government that led to their torture. Similarly, plaintiffs allege that IBM South Africa personnel *in South Africa* trained Bophuthatswana government employees to use IBM hardware and software to create identity materials for the Bophuthatswana homeland, and that the South African government used IBM computers *in South Africa* to run the Book of Life population registry. This plainly extraterritorial conduct cannot support jurisdiction under the ATS.

Rather than allege U.S.-based conduct that itself constitutes aiding-and-abetting activity, plaintiffs plead various alleged U.S.-based acts intended to show that the Companies exercised control over their South African subsidiaries. But such control allegations do not establish that the parent company *itself* engaged in conduct that qualifies as aiding and abetting. Control allegations instead at most might support a claim that the parent company is *vicariously* liable for the subsidiary's conduct, but this Court in *Balintulo* already rejected a vicarious liability theory based on allegations materially identical to those asserted here. Thus, as the district court recognized, plaintiffs' proposed complaints fail to overcome the presumption against extraterritoriality for the same reason their already-dismissed complaints did.

C. Plaintiffs also fail to plausibly allege that the U.S.-based conduct described in the proposed complaints was committed specifically for the *purpose*

of facilitating the apartheid government's crimes. This Court has repeatedly distinguished the required "purpose" *mens rea* standard from the insufficient standard of "knowledge," emphasizing that merely knowing one's act could aid in the commission of another's crime does not suffice to establish the "purpose" *mens rea*. Because plaintiffs do not—and, consistent with their Rule 11 obligations, cannot—allege that Ford and IBM *specifically intended* to facilitate the torture, slaughter, and denationalization of black South Africans, plaintiffs cannot establish an aiding-and-abetting claim.

As to Ford, plaintiffs' proposed complaints include no plausible concrete allegation that Ford acted for the purpose of facilitating international law violations by the South African government rather than for legitimate business reasons. To the contrary, the complaints allege only a "knowledge" *mens rea*, i.e., that Ford in the United States was aware that its vehicles and information could be used by the South African police forces to commit violations of international law. Certainly the mere sale of police vehicles—which obviously have myriad lawful uses—does not justify an inference of specific intent to facilitate criminal acts. Indeed, plaintiffs' complaints explicitly assert that Ford did not sell those vehicles with the malign purpose to facilitate the torture and slaughter of black South Africans, but with the opposite, *legitimate* purpose of maintaining a business presence in South Africa in anticipation of an emancipated and growing black South African

consumer market.

As to IBM, plaintiffs' proposed complaints do not plausibly allege that IBM acted for the specific purpose of advancing international law violations. Nor could they—the Bophuthatswana identity books and the Book of Life that form the basis of plaintiffs' claims are alleged to contain only basic population data that any government might gather for legitimate purposes. The most that can plausibly be inferred from plaintiffs' allegations is that IBM had knowledge that the identity books and the Book of Life *could* be used by the South African government for improper purposes, such as denationalization and apartheid, but that is insufficient to support allegations that IBM itself had the purpose of advancing denationalization or apartheid. Indeed, various allegations from plaintiffs' proposed complaints, including that IBM had a non-discrimination policy in South Africa as early as 1962, actually establish exactly the opposite purpose.

II. The proposed complaints also fail to state a claim for the alternative reason that the Companies are corporations, and there is no corporate liability under the ATS.

A. This Court held in *Kiobel I* that the ATS does not extend to suits against corporations. The Supreme Court affirmed that decision in *Kiobel II* on an alternative ground, and specifically did not reach the corporate liability question. In that circumstance, and contrary to the district court's holding, *Kiobel I* remains

binding, as this Court has repeatedly observed, including in its prior opinion in this case.

B. The holding in *Kiobel I* that there is no corporate ATS liability is in any event correct. As this Court explained, whether the ATS reaches corporations is a question of international law, and international law does not recognize corporate liability for the types of human rights abuses at issue in this and other modern ATS cases. Even if federal common law applied, it should not be construed as recognizing corporate ATS liability. Corporate tort liability is recognized in some federal common law actions, but *not* in the context most analogous to the judicially implied common law right of action under the ATS, i.e., constitutional tort actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In addition, courts fashioning federal common law must be guided by the policies established in closely analogous congressional enactments, which here is the Torture Victim Protection Act ("TVPA"), a statute enacted by Congress to create an express cause of action *under the ATS*. In creating that cause of action, Congress determined that only natural persons could be liable, not corporations. *See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012). Courts should apply the same policy to the implied cause of action under the ATS and limit liability to natural persons.

III. Plaintiffs' proposed complaints are also inadequate because the ATS

does not support aiding-and-abetting liability. Although a panel of this Court previously held to the contrary, the Supreme Court's decision in *Kiobel II* undermines that holding. The same foreign policy concerns that led the Supreme Court to preclude extraterritorial ATS actions are implicated when, as here, plaintiffs ask federal courts to hold private defendants liable for aiding and abetting the conduct of foreign sovereigns on their own soil against their own citizens.

STANDARD OF REVIEW

Whether to permit a plaintiff to amend a complaint is a matter "within the sound discretion of the district court." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). Leave to amend should be denied when amendment would be futile, i.e., when "proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012).

To survive a motion to dismiss, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Mastafa v. Chevron Corp.*, 770 F.3d 170, 177 (2d Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[A]lthough a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action,

supported by mere conclusory statements, do not suffice." *Id.* (quoting *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009)). A complaint does not state a "plausible" claim for relief "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679.

ARGUMENT

I. PLAINTIFFS' MOTION FOR LEAVE TO AMEND WAS PROPERLY DENIED BECAUSE PLAINTIFFS CANNOT SATISFY THE ATS'S TERRITORIALITY AND *MENS REA* REQUIREMENTS

A. Plaintiffs Must Plausibly Allege The Companies Committed "Relevant Conduct" Within The United States For The Purpose Of Facilitating The Apartheid Regime's Human Rights Abuses

The Supreme Court's decision in *Kiobel II* establishes that a plaintiff asserting an ATS claim must allege "relevant conduct within the United States giving rise to a violation of customary international law." *Balintulo*, 727 F.3d at 192. Applying that rule, courts throughout the country have dismissed ATS complaints against U.S. companies based on primary conduct committed by foreign governments against their own citizens on their own soil. *See*, *e.g.*, *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 593-601 (11th Cir. 2015); *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1235-39 (11th Cir. 2014); *Mujica v. AirScan Inc.*, 771 F.3d 580, 592-95 (9th Cir. 2014); *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014); *Ben-Haim v. Neeman*, 543 F. App'x 152, 155 (3d Cir. 2013); *Ahmed-Al-Khalifa v. Al-Assad*, 2013 WL 4401831, at *2 (N.D.

Fla. Aug. 13, 2013); *Mwangi v. Bush*, 2013 WL 3155018, at *4 (E.D. Ky. June 18, 2013).

This Court's decisions have established two additional principles that further restrict ATS claims seeking to hold U.S. defendants liable for foreign conduct committed by foreign governments. One is that a plaintiff cannot simply seek to hold a U.S. defendant *vicariously* liable for the foreign conduct of a foreign subsidiary. Instead, the plaintiff must identify specific *conduct* by the *defendant itself* in the United States that would establish liability (including aiding-and-abetting liability) under international law. *See Mastafa*, 770 F.3d at 185; *Balintulo*, 727 F.3d at 192. The other principle is that ATS aiding-and-abetting liability requires allegation and proof that the defendant acted specifically for the "*purpose* of facilitating the commission of th[e] crime," and not merely with "knowledge" that its acts could facilitate the foreign government's wrongful conduct. *Talisman*, 582 F.3d at 259 (emphasis added).

The territoriality and *mens rea* rules together establish a straightforward pleading requirement for a plaintiff seeking to hold a U.S.-based defendant liable for aiding and abetting foreign law-of-nations violations: the plaintiff must plausibly allege relevant conduct committed (i) by the defendant itself (not a distinct corporate entity), (ii) within the United States (not on foreign soil), and (iii)

for the specific purpose of facilitating the foreign government's crimes (not for a distinct business purpose).

This Court recently confirmed and elaborated on that analysis in *Mastafa.* The Court explained that for purposes of *Kiobel II*'s extraterritoriality rule, the "relevant conduct" to be analyzed is "the conduct of the defendant which is alleged by plaintiff to be either a direct violation of the law of nations or … conduct that constitutes aiding and abetting another's violation of the law of nations." 770 F.3d at 185; *see id.* at 186 ("relevant conduct" is "conduct which constitutes a violation of the law of nations or aiding and abetting such a violation"). A court must "isolate" that relevant conduct from the rest of the complaint's allegations, then apply "a two-step jurisdictional analysis" to it. *Id.* at 185.

The first step is to determine whether the relevant conduct itself "sufficiently 'touches and concerns' the territory of the United States so as to displace the presumption against extraterritoriality." *Id.* at 186. If so, the second step is to determine whether the conduct "adequately states a claim that the defendant violated the law of nations or aided and abetted another's violation of the law of nations." *Id.* Under this analysis, even if a complaint alleges "domestic conduct of the defendant," a court "may not rely on that conduct for its extraterritoriality analysis" if it "does not satisfy even a preliminary assessment of the merits." *Id.*

Notably, the *Mastafa* Court emphasized that in determining whether the complaint states an aiding-and-abetting claim based on U.S. conduct, the relevant question is whether the complaint plausibly alleges that defendants "acted with the 'purpose' to advance the Government's human rights abuses, *not* whether defendants merely *knew* that those abuses were occurring and that defendants' business was enabling such acts." *Id.* at 193 (citation omitted). In other words, the question is whether the "defendants *intended* to aid and abet violations of *customary international law*." *Id.* In *Mastafa*, for example, the plaintiffs were unable to establish the "plausibility of a large international corporation intending—and taking deliberate steps with the purpose of assisting—the Saddam Hussein regime's torture and abuse of Iraqi persons." *Id.* at 194.

Finally, the *Mastafa* Court reiterated that in applying the jurisdictional analysis of a complaint, reviewing courts must be "mindful of the Supreme Court's emphasis on the potential foreign policy implications of the ATS." *Id.* at 187. Thus, "lower federal courts must proceed with caution when determining whether a particular case alleges conduct that is sufficiently 'domestic,' such that the presumption is 'displaced' (i.e., does not apply)." *Id.*

As shown in the following two sections, the district court correctly denied leave to amend and dismissed plaintiffs' complaints, because plaintiffs do not and cannot allege any U.S. conduct by the Companies that is either "relevant" within

the meaning of *Kiobel II, Balintulo*, and *Mastafa*, or that plausibly satisfies the *mens rea* requirement of an aiding-and-abetting claim.

B. Plaintiffs Fail To Allege Any "Relevant Conduct" Within The United States

1. Plaintiffs' proposed amended complaints fail at the threshold because they do not and cannot allege conduct within the United States that is "relevant" to the jurisdictional analysis, i.e., conduct that itself constitutes either "a violation of the law of nations or aiding and abetting such a violation." *Mastafa*, 770 F.3d at 186. The underlying acts alleged to be law-of-nations violations all occurred in South Africa, so the only basis on which plaintiffs could even theoretically establish ATS jurisdiction is by alleging that the Companies committed acts in the United States that qualified as aiding-and-abetting the alleged violations occurring in South Africa. But the relevant conduct they specifically allege as aiding-and-abetting law-of-nations violations *did not occur in the United States* and was undertaken in South Africa by the Companies' subsidiaries.[2]

Plaintiffs erroneously assert that acts that "substantially assist" the commission of the underlying violation can count as relevant conduct for an

[2] In *Mastafa* itself, by contrast, the presumption against extraterritoriality was overcome (though the complaints were ultimately dismissed under the second step of the analysis just described) because the U.S.-based defendants were alleged to have engaged in "specific and domestic" conduct—i.e., "multiple domestic purchases and financing transactions" that allegedly aided and abetted international law crimes in Iraq. 770 F.3d at 191.

aiding-and-abetting violation. A0553. In fact, acts of "substantial assistance" do not suffice to establish a claim, because the only *actus reas* standard that has been universally accepted under international law as sufficient to establish aiding-and-abetting liability requires a showing that the defendant's acts were "*specifically directed* to assist ... the perpetration of a certain specific crime." *Prosecutor v. Perišić*, Case No. IT-04-81-A, Appeal Judgment, ¶ 26 (ICTY Feb. 28, 2013) (emphasis added).[3] Plaintiffs do not even argue that they could satisfy the "specific direction" standard here. But even under plaintiffs' "substantial assistance" standard, the proposed complaints fail to allege conduct that is "relevant" under the *Kiobel II* / *Balintulo* / *Mastafa* rule.

With regard to Ford, the only alleged acts identified in the proposed complaints as "substantially assisting" the apartheid regime are (i) the manufacture and sale of "specialized" vehicles to the security forces, *e.g.*, A0489 (the "provision of vehicles manufactured by Ford for the security forces provided

[3] Some decisions of the ICTY Appeals Chamber can be read to adopt a "substantial assistance" standard in some circumstances. *See Prosecutor v. Šainović*, Case No. IT-05-87-A, Appeal Judgement (ICTY Jan. 23, 2014) (distinguishing *Perišić* as involving a defendant physically "remote" from the crime, as in this case); *but see Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Motion for Reconsideration (ICTY Mar. 20, 2014) (denying the motion by the ICTY Prosecutor to reconsider the *Perišić* judgement in light of *Šainović*). But the relevant question is which standard is *universally accepted*, *see Talisman*, 582 F.3d at 259, and only the "specifically directed" standard satisfies that requirement.

substantial assistance" for "extrajudicial killing"), and (ii) the sharing of information about plant workers with the apartheid government, *e.g.*, 521 (FSA "management provided information on anti-apartheid activities at Ford to South African security forces, which led to Ford employees being … tortured"). Just as with the prior complaints, plaintiffs allege that these acts occurred in South Africa. FSA—not Ford—allegedly assembled the "specialty" vehicles sold to the security forces in South Africa, with parts shipped from Canada and the United Kingdom. A0506-07, A0514. FSA managers—not Ford managers—allegedly shared information with the apartheid government about anti-apartheid activists in South Africa. A0519-21.

Plaintiffs' claims of substantial assistance by IBM similarly focus on conduct in South Africa that was undertaken by IBM's South African subsidiary. Plaintiffs allege that (i) IBM South Africa personnel in South Africa trained Bophuthatswana government employees to use IBM hardware and software to create identity materials for the Bophuthatswana homeland, including by helping Bophuthatswana employees develop and write their own computer programs, *e.g.*, A0547 ("IBM employees trained Bophuthatswana employees to use the IBM machine and programs to produce ID documents"); A0446 ("[C]omputer programs run by the Bophuthatswana government on IBM machines were developed and written in-house with the assistance of IBM employees."); A0545 (IBM ran

training courses for government employees in South Africa); and (ii) the South African government ran the Book of Life population registry on IBM computers, *e.g.*, A0543. The actual creation of both the Bophuthatswana identity books and the Book of Life is alleged to have taken place in South Africa, with assistance provided by IBM South Africa employees. *See* A0546-47, A0543-44.

Moreover, despite making the conclusory statement that IBM helped to create the "identity documents that denationalized black South Africans," Pls. Br. 9, plaintiffs never allege that IBM provided any assistance, much less "substantial assistance," either in the United States *or* in South Africa, in the South African government's decision to declare that the IDs of black South Africans were no longer valid—the only act that that allegedly constituted denationalization. Rather, denationalization is alleged to be an act of the *South African government alone*, without any involvement by IBM. *See*, *e.g.*, A0403 (defining "Denationalization Class" as persons "who were stripped of their South African nationality and/or citizenship *by South African security forces* during the period from 1960-1994.") (emphasis added); *compare* A0408 (alleging that the South African government's enactment of pass laws governing black South Africans "stripped Plaintiffs and Class Members of their nationality and citizenship") *with* A0528 (conceding that IBM did not provide any assistance with regard to technology relating to the pass

laws).[4]

2. Rather than alleging relevant conduct within the United States, plaintiffs rest their theory of ATS jurisdiction on the Companies' alleged exercise of "rigid control" over their "South African subsidiaries and operations." A0504. For example, plaintiffs allege that Ford closely monitored and oversaw FSA's operations, made general policy and investment decisions that applied to FSA, approved any modifications to vehicle designs made by FSA, and arranged for shipment of parts from outside the United States for assembly in South Africa, allegedly to avoid U.S. customs restrictions. Pls. Br. 16-21; A0503-19. Similarly, plaintiffs allege that IBM made key decisions about operations in South Africa, controlled the top management personnel of IBM South Africa, and made regular visits to South Africa to make certain its policies and practices were followed. Pls. Br. 9-11; A0528-0531.

As the district court held, these allegations are nothing new, and have already been rejected in *Balintulo*. Plaintiffs' prior complaints sought to prove that

[4] That IBM in the United States allegedly developed the hardware and software used to create the Bophuthatswana identity records (A0445) is not "relevant conduct." This Court has already found that allegations of merely supplying the South African government with products are insufficient to overcome *Kiobel II*. *See Balintulo*, 727 F.3d at 192 ("[P]laintiffs refer to various paragraphs in the complaints asserting that the American defendants *continued to supply the South African government with their products*, notwithstanding various legal restrictions against trade with South Africa.") (emphasis added).

the Companies could be held vicariously liable for their foreign subsidiaries' conduct because they had "the right to *exercise control* over [the subsidiaries] with respect to matters entrusted to [them]." *S. African Apartheid Litig.*, 617 F. Supp. 2d at 272. The "rigid control" allegations in the proposed complaint may be asserted with more emphasis—like adding the adjective "rigid"—but as the district court observed, the allegations are "essentially the same as those in plaintiffs' existing complaints." SA016 (quotation omitted).

Such "control" allegations do not count as "relevant conduct" because they establish neither a primary law-of-nations violation nor a secondary, aiding-and-abetting violation that occurred on U.S. soil. As this Court explained in rejecting plaintiffs' prior, substantively-identical control theory of jurisdiction, it is simply not enough to "allege[] only vicarious liability of the defendant corporations based on the actions taken within South Africa by their South African subsidiaries," because those "putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law." *Balintulo*, 727 F.3d at 192.[5] The Court also specifically rejected plaintiffs' reliance on the Companies' alleged efforts to "supply the South African government with their

[5] The *Balintulo* Court expressly left open whether vicarious liability theories are available at all in ATS cases. 727 F.3d at 192 n.28. In other words, even if such theories generally are allowed, plaintiffs' theory in this case fails because it is based on primary conduct that occurred in a foreign country.

products notwithstanding various legal restrictions against trade with South Africa," *id.*—the very same allegations plaintiffs rely on here, Pls. Br. 19-21—because those efforts did not count as "relevant conduct within the United States giving rise to a violation of customary international law." *Balintulo*, 727 F.3d at 192.

Plaintiffs' new complaints are no different. Even if the Companies exercised "control" over their subsidiaries—whether "rigid," "flexible," or some other measure of control—only *their subsidiaries* are alleged to have committed the acts that are central to their claims. Only *FSA* is alleged to have sold "specialized" vehicles to the apartheid government or to have shared information with that government in a manner that allegedly facilitated its international crimes. And only *IBM South Africa* is alleged to have provided training to Bophuthatswana employees to assist in the creation of the Bophuthatswana identity books.

Indeed, plaintiffs do not seriously dispute that their "new" allegations of U.S.-based conduct are factually equivalent to their prior allegations. What has changed, plaintiffs say, is their *legal* theory. While *Balintulo* rejected their prior theory of "vicarious liability," plaintiffs say they are now alleging "*direct* theories of liability." Pls. Br. 25 (emphasis added). But there is a reason plaintiffs previously asserted only vicarious liability—to sustain a theory of direct liability, plaintiffs would have to plausibly allege facts establishing that the Companies

themselves were each "*directly* a participant in the wrong complained of." *United States v. Bestfoods*, 524 U.S. 51, 64 (1998) (quotation omitted); *see id.* at 65 (direct liability means that the "parent is directly liable for its own actions"). The proposed complaints, however, confirm that plaintiffs cannot allege that the Companies themselves were each "directly a participant" in the alleged acts of aiding and abetting the apartheid regime's crimes—the only direct alleged participants in acts that could even in theory count as aiding and abetting were the Companies' foreign subsidiaries.

3. Consideration of "the potential foreign policy implications of the ATS," *Mastafa*, 770 F.3d at 187, further compels rejection of plaintiffs' control theory to overcome the presumption against extraterritoriality. Adverse foreign policy consequences are "implicated in any case arising under the ATS," but they "are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." *Id.* (quoting *Kiobel II*, 133 S. Ct. at 1665). That concern is directly implicated here. Both the primary law-of-nations violations and the secondary aiding-and-abetting activity took place within South African territory.

The potential for adverse foreign-policy consequences is at its zenith in that circumstance, as the history of this litigation demonstrates. In 2003, various senior South African officials made public statements vigorously objecting to this

litigation. For example, on July 23, 2003, Penuell Mpapa Maduna, South Africa's Minister of Justice and Constitutional Development, submitted *sua sponte* to the district court a declaration stating that "these proceedings interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest," and therefore "should be dismissed." A0081. In October 2003, the United States submitted a statement of interest, communicating the Executive Branch's "view that continued adjudication of [these] matters risks potentially serious adverse consequences for significant interests of the United States." A0098. And as explained earlier, the Supreme Court in *Sosa* specifically referenced *this litigation*, quoting the United States's statement of interest and the Maduna declaration, as an example of a case in which "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 U.S. at 733 n.21.[6]

4. Plaintiffs rely on cases from other courts that have found the presumption against extraterritoriality displaced even where foreign primary conduct was involved, but there is a crucial difference between those cases and this one that

[6] On September 2, 2009, this Court "received a letter from the South African government reversing its earlier position and declaring that it was 'now of the view that [the SDNY] is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.'" *Balintulo*, 727 F.3d at 181. The United States, however, subsequently affirmed that its statement of interest objecting to the continuation of these cases "has not been modified or withdrawn." *Id.* at 188 n.19.

demonstrates why the presumption is not displaced here: In each of the cited cases, the claims were allowed to proceed because the U.S.-based defendant *itself* committed violations of international law through its U.S.-based conduct. *See Al Shimari v. CACI Premier Tech, Inc.*, 758 F.3d 516, 528-29 (4th Cir. 2014) (alleged violations were "committed by United States citizens who were employed by an American corporation" in the "performance of a contract ... with the United States government," "occurred at a military facility operated by United States government personnel," and managers located in the United States "attempt[ed] to 'cover up' the misconduct"); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 320-22 (D. Mass. 2013) (defendant acted in U.S. as "an upper-level manager or leader of a criminal enterprise," with "alleged actions in planning and managing a campaign of repression in Uganda from the United States" that were "analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there"); *Krishanti v. Rajaratnam*, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014) (all alleged violations—giving money to and hosting operatives of designated terrorist organization—occurred in United States). Plaintiffs' proposed complaints included no such allegations of U.S.-based conduct that itself constituted or aided and abetted the alleged law-of-nations violation.

C. Plaintiffs Fail To Plausibly Allege U.S.-Based Acts Intended To Facilitate The Apartheid Regime's International Crimes

Plaintiffs' proposed complaints also fail because they do not contain sufficient factual allegations plausibly alleging any U.S.-based actions by the Companies conducted "with the 'purpose' to advance the [apartheid] Government's human rights abuses." *Mastafa*, 770 F.3d at 193. Plaintiffs know full well that they cannot plausibly allege—consistent with Rule 11—that Ford *wanted* the government of South Africa to kill, torture, or maim black South Africans, or that IBM *wanted* the government to denationalize black South Africans. *See Mastafa*, 770 F.3d at 194 ("Plaintiffs never elaborate upon this assertion in any way that establishes the plausibility of a large international corporation intending—and taking deliberate steps with the purpose of assisting—the Saddam's Hussein regime's torture and abuse of Iraqi persons."). They accordingly cannot allege the *mens rea* required for an aiding-and-abetting claim under this Court's precedents.

1. *Plaintiffs Must Plausibly Allege That The Companies Specifically Intended To Further The Human Rights Violations They Are Alleged To Have Aided And Abetted*

This Court has established that the "purpose" *mens rea* standard applicable in ATS cases requires allegations that the defendant specifically "*intended* to aid and abet violations of *customary international law*." *Mastafa*, 770 F.3d at 193. The Court has emphasized that this specific-intent standard is significantly more

stringent than, and must be distinguished from, a mere "knowledge" standard. The question is whether the defendants "acted with the 'purpose' to advance the Government's human rights abuses, *not* whether defendants merely *knew* that those abuses were occurring and that defendants' business was enabling such acts." *Id.* (quotation omitted).

The Court's analysis in *Talisman* demonstrates the fundamental distinction between knowledge and purpose. The *Talisman* plaintiffs had no evidence that Talisman itself "participated in any attack against a plaintiff and no direct evidence of Talisman's illicit intent"—only that Talisman had "knowledge of the Government's record of human rights violations, and its understanding of how the Government would abuse the presence of Talisman." 582 F.3d at 261 (quotation omitted). Rejecting that theory, the Court observed that even though Talisman helped build infrastructure with "awareness that this infrastructure might be used for attacks on civilians," an inference of malign purpose was impermissible because "roads and airports are necessary features of a remote facility for oil extraction." *Id.* at 262. Moreover, the Court held that even if Talisman committed the acts "with the intention that the military would also be accommodated," the acts did not suggest a purpose to facilitate atrocities, because Talisman "had a legitimate need to rely on the military for defense." *Id.*

Talisman thus makes clear that a court cannot infer a "purpose" *mens rea*

from acts that have an obvious legitimate purpose, even though the defendant was aware that those acts *also* could facilitate unlawful primary conduct—only acts that are "*inherently* criminal or wrongful" will satisfy the standard. *Id.* at 261 (emphasis added). And while *Talisman* was decided at summary judgment, the same principle applies at the pleading stage. *See Mastafa*, 770 F.3d at 186; *see also Iqbal*, 556 U.S. at 679 (complaint's allegations must establish more than "the mere possibility of misconduct" to plead a valid claim).

Plaintiffs' proposed complaints fail completely under the applicable standard. Those complaints allege, *at most*, that the Companies acted with *knowledge* that their acts might facilitate the apartheid regime's crimes. They come nowhere close to alleging that the Companies took actions in the United States that were specifically intended to cause the torture, extrajudicial killing, and denationalization of black South Africans.

2. *Plaintiffs Fail To Plausibly Allege Ford U.S.-Based Conduct Done For The Purpose Of Facilitating International Crimes*

Plaintiffs do not and cannot allege that Ford committed acts in the United States specifically for the purpose of facilitating international law violations by the South African government. Rather, plaintiffs *at most* allege that Ford "merely *knew* that those abuses were occurring and that defendants' business was enabling such acts," which is not enough to establish the "purpose" *mens rea* for aiding-and-abetting liability. *Mastafa*, 770 F.3d at 193; *see Talisman*, 582 F.3d at 260-65.

As to FSA's sale of "specialized" vehicles, plaintiffs allege only that Ford in the United States "*understood* that its products would be used to violently suppress blacks and opponents of apartheid." A0517 (emphasis added); *see* A0516 ("Ford … *understood* that such vehicles, including specialized ones, substantially contributed to apartheid and its violence" (emphasis added)). And as to FSA managers' alleged information sharing, plaintiffs say only that "Ford in the United States was *specifically informed* about" FSA managers' collaboration with the apartheid government. A0521 (emphasis added); *see* Pls. Br. 22 ("Despite Detroit having control over its operations in South Africa, *and its knowledge of human rights violations*, the abusive managers in South Africa were not removed." (emphasis added)). Those allegations assert nothing more than that Ford in the United States acted "merely *knowingly*" with respect to the underlying law-of-nations violations. *Mastafa*, 770 F.3d at 193.

Indeed, plaintiffs' proposed complaints actually establish that Ford acted for a lawful business purpose, rather than for the malign purpose of facilitating the torture and slaughter of plaintiffs and other black South Africans. Plaintiffs note that Ford allegedly sought to "circumvent U.S. sanctions in order to continue sales to South Africa," A0513, simply in order to avoid "harm[ing] Ford's business interests," including "the long-term potential for profit on its substantial existing investment, with a desire to wait for the development of, and be included in, the

black South African market." A0512-13. It may be true that the existence of a profit motive does not itself necessarily negate the required *mens rea*, *if* the defendant *also* intends to facilitate the underlying criminal acts. Pls. Br. 44. But again, plaintiffs cannot plausibly allege that Ford sold police vehicles for the specific purpose of facilitating criminal acts of violence against innocent black South Africans. Plaintiffs instead plead the *opposite* purpose: Ford wanted to "wait for the development of, and be included in, the black South African market." A0513.

To the extent plaintiffs' allegations leave any ambiguity about Ford's intentions, that ambiguity itself defeats their aiding-and-abetting claims. Plaintiffs allege that FSA sold the apartheid government's security forces "specialized" vehicles—by which they only mean vehicles with more carburetors than normal vehicles. A0515-16. Because such vehicles obviously have myriad legitimate uses, there is no basis for inferring that Ford secretly intended the vehicles to be used *not* for those myriad lawful purposes, but specifically for the unlawful mass slaughter of innocent villagers.

3. *Plaintiffs Fail To Plausibly Allege IBM U.S.-Based Conduct Done For The Purpose Of Facilitating International Crimes*

Plaintiffs' proposed complaints similarly fail to allege that IBM assisted the Bophuthatswana or South African governments with the purpose of facilitating apartheid and denationalization. Plaintiffs assert that "IBM bid on contracts whose

very purpose was to denationalize and classify black South Africans based on race." Pls. Br. 47. But the only bid specifically alleged to have been made by IBM, rather than IBM South Africa, was the bid to create the passbook that applied to black South Africans, A0528—and, according to plaintiffs, IBM *did not get that contract*, *id*. Plaintiffs allege that another technology company, ICL, won the contract over IBM and that ICL—not IBM—assisted the South African government to create the passbooks, A0169-70. Plaintiffs do not even try to allege that IBM (U.S.) made the bids for the contracts for the Bophuthatswana identity books or the Book of Life.

Nor can plaintiffs plausibly allege that the creation of the Bophuthatswana identity books or the Book of Life by itself was wrongful, much less a violation of the law of nations. Rather, both the identity books and the Book of Life are alleged to contain population data that would not be unusual for any government to collect, *e.g.*, A0543 ("The Book of Life contained assorted information, including racial classification, name, sex, date of birth, residence, photograph, marital status, driver license number, dates of travel/exit from and/or return to the country, place of work or study, and finger prints."); A0548 ("The IDs produced for the Bophuthatswana government contained the name, sex, racial classification, ethnic origin, and residential address/postal address of the individual."). That the identity books and the Book of Life are not alleged to be wrongful in and of themselves

precludes the inference that IBM necessarily acted with the purpose of advancing apartheid or denationalization. *See Talisman*, 582 F.3d at 261.[7]

The most that can plausibly be inferred from plaintiffs' allegations against IBM is that IBM had *knowledge* that the Bophuthatswana identity books and the Book of Life could be used for denationalization and apartheid. E.g., A0543 (alleging that IBM supplied the South African government with the technology for the Book of Life that "facilitated the racial classifications and population tracking that made apartheid possible"); A0548 ("Bophuthatswana residents were required to carry the IDs produced by the Bophuthatswana government with the active participation of IBM, and their South African IDs were no longer valid."). But mere knowledge that the South African government might misuse the information collected by these systems is insufficient under the governing "purpose" standard, as already explained.[8]

---

[7] Significantly, as plaintiffs concede, the Book of Life included data on white, Asian, and mixed race South Africans but *not* black South Africans. IBM's alleged involvement with the Book of Life therefore cannot provide any support for allegations that IBM had the purpose of advancing the denationalization of *black* South Africans.

[8] The allegation that IBM misled its shareholders when its chairman stated that IBM had investigated and found that its products were not being used for repressive purposes, while admitting at the same meeting that its machines were being used to store the data of "coloured" (mixed race), Asian and white South Africans, A0530; Pls. Br. 13-14, 47, cannot create a plausible inference that IBM shared the purpose of denationalization and apartheid. There was clearly no intent to mislead as the information that allegedly corrected the statement was disclosed

Indeed, plaintiffs' proposed complaints actually establish that IBM did *not* share the purpose of the South African government to advance either apartheid or denationalization. Plaintiffs allege that IBM had a non-discrimination policy in South Africa as early as 1962, A0432; that "[a]s of 1979 both IBM and IBM South Africa had signed the Sullivan principles," *id.*[9]; that IBM's chairman stated that IBM was monitoring and investigating all reports of IBM computers potentially used for "repressive purposes" in South Africa, A0617; that IBM's vice chairman criticized South Africa's passbook system as discriminatory, stating "I feel the passbook system is definitely a sign of the way they treat whites much better than they do colored, Asians, and blacks," A0531, and that IBM divested from South Africa in 1987 by selling its assets in the country, A0619. Plaintiffs also allege that IBM's chairman stated in 1985: "We are not in business to conduct moral activity, we are not in business to conduct socially responsible action. We are in business to conduct business." A0439. This statement shows that IBM's purpose

---

at the same time the statement was made. Moreover, IBM's alleged misstatement to shareholders is not directly linked to any alleged law-of-nations violation. *See Mastafa*, 770 F.3d at 194. Finally, at most, the statement to shareholders would reflect IBM's knowledge as to how the South African government was using IBM technology, not whether IBM shared the purpose of denationalization and apartheid.

[9] Plaintiffs allege in their existing complaints that "[t]he Sullivan Principles were a voluntary code of corporate conduct developed by African-American preacher Robert Sullivan in 1977 to demand equal treatment for blacks employed by American companies operating in South Africa." A0285.

was to conduct business through the sale of its technology, not to facilitate denationalization or apartheid.

* * *

For the reasons elaborated above, this case is nothing like the *Zyklon B* case cited by plaintiffs (Pls. Br. 42), in which the defendant not only supplied the S.S. with poisonous gas, but also trained its members to use it to kill people. *Khulumani*, 504 F.3d at 276 n.11. Because there was no obvious lawful alternative purpose for that conduct, the conduct itself sufficed to establish its unlawful purpose.[10] Here, the sale of police vehicles has the obvious alternative purpose of facilitating lawful police work (even if Ford or FSA knew it was possible the vehicles also could be used for unlawful purposes by the government) and the creation of identity records had the obvious alternative purpose of facilitating lawful government work (even if IBM and IBM South Africa knew it was possible that the records could be used for unlawful purposes). This is no different from the conduct at issue in *Talisman*, where the funding and construction of civil infrastructure had the obvious lawful purpose of facilitating resource development (even if the defendant knew it was possible the military would use the

[10] The same is true for *In Direct Sales Co. v. United States*, 319 U.S. 703 (1943), where an unlawful purpose could be inferred because the defendant sold a harmful restricted good in quantities that could be used *only* for illicit purposes, while stimulating sales by high pressure methods. *Id.* at 711.

infrastructure for unlawful repression). *See supra* at 39-40.[11]

In short, plaintiffs fail to allege any U.S.-based "relevant conduct"—i.e., conduct that itself allegedly aided-and-abetted the apartheid regime's human rights abuses. And they certainly fail to allege facts that "establish[] the plausibility of a large international corporation intending—and taking deliberate steps with the purpose of assisting," *Mastafa*, 770 F.3d at 194—the apartheid government's law-of-nations violations. In fact, the *mens rea* allegations in this case are materially indistinguishable from those in *Mastafa* and *Talisman*. The district court's judgment should be affirmed.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE CORPORATIONS MAY NOT BE HELD LIABLE UNDER THE ATS

In addition to the reasons explained in the prior section, the district court's judgment can also be affirmed for the alternative reason that the Companies are corporations, and the law of this Circuit correctly precludes ATS suits against corporations.

A. This Court's Decision In *Kiobel I* Remains The Law Of This Circuit

This Court held in *Kiobel I* that the ATS "does not provide subject matter

[11] Plaintiffs argue that their allegations that the Companies sought to evade U.S. trade restrictions support an inference that the Companies intended to facilitate the commission of international crimes. Pls. Br. 47, 49. But those allegations demonstrate at most the Companies' *knowledge* that the apartheid government could use their products for unlawful purposes, not that the Companies specifically intended for the government to do so.

jurisdiction over claims against corporations." *Kiobel I*, 621 F.3d at 149. The Supreme Court affirmed that judgment on alternative grounds, explicitly declining to consider the corporate liability question. *See Kiobel II*, 133 S. Ct. at 1663. *Kiobel I* remains binding because this Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court," *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (citation omitted).

Indeed, even after *Kiobel II,* this Court concluded *in this case* that the "law of this Circuit already provides … that corporations are not proper defendants under the ATS in light of prevailing customary international law." *Balintulo*, 727 F.3d at 191 n.26. The Court then reaffirmed that conclusion in *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014), explaining that "the Supreme Court's decision in *Kiobel* did not disturb the precedent of this Circuit … that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS." *Id.* at 49 n.6. And, most recently, the Court noted in *Mastafa* that "the holding of our *Kiobel* opinion has not been modified or disturbed." 770 F.3d at 179 n.5. That should be the end of the matter.

Despite this Court's repeated and consistent statements that *Kiobel I* has not been disturbed and thus remains the law of this Circuit, plaintiffs say that "the

rationales" of *Kiobel II* and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), "indicate[]" that *Kiobel I* is no longer good law. Pls. Br. 52-53. Plaintiffs misread both cases.

As for *Kiobel II*, plaintiffs cite the Supreme Court's observation that "mere corporate presence" in the United States does not suffice to overcome the presumption against extraterritoriality. 133 S. Ct. at 1669. According to plaintiffs, the Court's reference to "corporate presence" proves that corporations can be defendants in ATS cases. But the reference was made only in response to an argument the *Kiobel* plaintiffs made about why the presumption against extraterritoriality was overcome, 133 S. Ct. at 1669—the Court did not itself invoke "corporate" status as a potentially relevant factor. And in any event, the Court's *rejection* of "corporate presence" as sufficient to establish ATS jurisdiction hardly proves that corporations can be defendants.

Daimler is similarly off point. Plaintiffs argue that the case implicitly overruled *Kiobel I* because it involved ATS, TVPA, and state-law claims, 124 S. Ct. at 751, all of which the Court collectively analyzed "by reference to the appropriate jurisdiction for a corporate entity." Pls. Br. 52. If there were no ATS corporate liability, plaintiffs contend, the *Daimler* Court would not have needed to address personal jurisdiction for corporate entities. *Id.* But *Daimler* involved state-law claims that clearly *did* apply to corporations, and to which *Daimler*'s

personal-jurisdiction analysis was fully applicable. And *Daimler* also involved TVPA claims that indisputably *do not* apply to corporations. *See Mohamad*, 132 S. Ct. at 1705. If *Daimler*'s discussion of corporate jurisdiction proves that there is corporate ATS liability, it also proves that there is corporate TVPA liability, which makes no sense in light of *Mohamad*.

Plaintiffs also assert that in *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013), this Court "[r]ecognized that *Kiobel II* changed the status of *Kiobel I*." Pls. Br. 53. That assertion mischaracterizes *Licci*, and is contradicted by this Court's precedent both before and after *Licci* affirming that *Kiobel I* remains binding law.

Licci involved numerous claims against two corporations. One ATS claim was involved. 732 F.3d at 166. The Court's opinion focused not on that claim, but on whether the Court could exercise personal jurisdiction over one of the defendants. *Id.* at 167-74. At the end of the decision, the Court added a brief note on the ATS claim, beginning with its statement in a previous iteration of the case that if the Supreme Court were to affirm the Second Circuit's holding in *Kiobel I*, the Court would be required to affirm the dismissal of that claim because the *Licci* defendants are corporations. *Id.* at 174. The Court then observed that the "Supreme Court has indeed affirmed, but on different grounds from those upon which we decided the appeal." *Id.* And "[b]ecause the question of subject matter

jurisdiction was not briefed on appeal, because the Supreme Court's opinion did not directly address the question of corporate liability under the ATS, and in light of the other claims brought by the plaintiffs," the Court thought "it best for the district court to address this issue in the first instance." *Id.*

Licci thus does not—and as a panel opinion, could not—overrule *Kiobel I*. The Court invited consideration of this issue only because the issue had not been briefed on appeal, and because dismissing the ATS claim would not have disposed of the case in any event, since other non-ATS claims would remain. *Id.* That exercise of appellate prudence cannot be read as a statement one way or the other about *Kiobel I*'s ongoing viability. And plaintiffs' contrary reading of *Licci* flatly conflicts with the view of three panels of this Court both before and after *Licci*, which have squarely held that *Kiobel I* remains controlling Circuit precedent. *See Mastafa*, 770 F.3d at 179 n.5; *Chowdhury*, 746 F.3d at 49 n.6; *Balintulo*, 727 F.3d at 191 n.26.

B. *Kiobel I* Correctly Holds That ATS Liability Is Limited To The Natural Persons Responsible For The Alleged International Human Rights Violations

1. *The Question Of Corporate ATS Liability Is Determined With Reference To International Human Rights Law, Which Does Not Recognize Corporate Liability*

Kiobel I explains at length why courts must "look[] to customary international law to determine *both* whether certain conduct leads to ATS liability

and whether the scope of liability under the ATS extends to the defendant being sued." 621 F.3d at 128; *see id.* at 127-31; *Sosa*, 542 U.S. at 732 n.20. As *Kiobel I* further explains, customary international law does not treat corporate entities (as opposed to the natural persons through whom the entity acts) as having the capacity to violate human rights norms. 631 F.3d at 131-45.

Kiobel I's analysis need not be fully repeated here, but certain points can be briefly summarized. Most critically, every international criminal tribunal beginning with Nuremberg has extended liability for international human-rights law violations only to natural persons. *See id.* at 132-37. While these international tribunals address crimes rather than torts, their judgments are crucial to the corporate ATS liability question because their jurisdiction has always reflected customary international law, which is why this Court's caselaw "has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the [ATS]." *Khulumani*, 504 F.3d at 270 n.5 (Katzmann, J., concurring).[12] There is no basis for *accepting* those sources to establish a binding international law norm while at the same time *rejecting* those same sources on the question whether the norm extends liability to corporations.

[12] *See Talisman*, 582 F.3d at 258 n.7 ("[C]ustomary international law norms prohibiting … war crimes[] and crimes against humanity have 'been developed largely in the context of criminal prosecutions rather than civil proceedings'" (quoting *John Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002))).

Moreover, international tribunals reject corporate liability for an important reason that applies fully to civil proceedings under the ATS: there is no international consensus that a corporation as an entity can form its own *mens rea*, as required for criminal culpability. Because the same *mens rea* is required to establish a violation of the human rights norms enforceable under the ATS, there is no basis in international law for enforcing those norms against corporate entities.

Plaintiffs argue that the ATS's text does not distinguish between corporate and individual defendants. Pls. Br. 54-55. But the ATS's text does not refer to defendants at all—only to the types of actions over which it grants federal jurisdiction, i.e., torts "in violation of the law of nations." 28 U.S.C. § 1350. And as *Kiobel I* holds, the "law of nations" does not recognize corporate liability for human rights violations.

Plaintiffs also argue that various common and civil law systems recognize corporate tort liability under their *domestic* law. Pls. Br. 55. Customary international law, however, consists of norms of "mutual concern," not those of "several concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248-49 (2d Cir. 2003) (quotation omitted). All civilized nations prohibit (for example) murder and theft, but those prohibitions do not reflect customary international law because they concern matters of "several" rather than "mutual" concern. The domestic laws on which plaintiffs rely fall into the same category. *See Filartiga v. Pena-*

Irala, 630 F.2d 876, 888 (2d Cir. 1980). Further, the question whether a particular type of defendant can be held liable under the ATS must be answered "on a norm-specific basis," *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011); *see Sosa*, 542 U.S. at 732 n.20, so it is irrelevant that nations generally recognize corporate tort liability. What matters is that there is no consensus among nations that corporate entities are capable of violating international human rights norms like those asserted by plaintiffs here.

2. *There Is No Basis For Corporate ATS Liability In Federal Common Law*

According to the district court, the source of corporate liability for ATS claims is not international law, but U.S. federal common law. A0379. Even if the court were right about the source of law, it would still be wrong about the result, because federal common law similarly does not permit corporate liability for ATS claims.

a. While it is true that corporations often are subject to tort liability under positive law and state common law, they are not subject to liability in the federal common law context most analogous to implied ATS actions: implied actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to enforce constitutional guarantees against federal agents. *See Sosa*, 542 U.S. at 742-43 (Scalia, J., concurring in judgment). In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Supreme Court exercised its

federal common-lawmaking authority and refused to extend *Bivens* liability to corporations. *Id.* at 63. The Court so held because it deemed corporate liability unnecessary to further *Bivens*'s core purpose to deter individual federal officers from violating the Constitution, *id.* at 70, and because the "caution toward extending *Bivens* remedies into any new context … forecloses such an extension here," *id.* at 74. *Malesko* thus demonstrates that corporate liability under federal common law should not be assumed, especially in fraught areas—like the ATS—requiring "great caution" before creating new federal common law. *Sosa*, 542 U.S. at 728.

b. In addition to the Supreme Court's guidance regarding the circumstances under which federal common law allows for corporate liability, Congress itself established an equally—if not more—significant guidepost when it enacted the TVPA to provide an express cause of action *under the ATS* for torture and extrajudicial killing, while providing *only* for liability against natural persons. *See Mohamad*, 132 S. Ct. at 1705.

The "general practice" in fashioning federal common law under the ATS, as in any other context, "has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa*, 542 U.S. at 726. In particular, when Congress has provided policy guidance in the form of positive law addressing the same subject matter, those positive-law enactments both guide and

restrict the courts' authority to establish the federal-common-law rules. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24 (1990). In *Miles*, the Court looked to federal maritime statutes to determine the rule to apply in the analogous federal common law context of admiralty jurisdiction. As with actions under the ATS, actions in admiralty sound in federal common law, *see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-90 (2008), but the *Miles* Court explained that "legislation has always served as an important source of both common law and admiralty principles," 498 U.S. at 24 (quotation omitted). Indeed, an admiralty court making federal common law "should look *primarily* to … legislative enactments for policy guidance." *Id.* at 27. A court must keep federal common law rules "strictly within the limits imposed by Congress," the Court explained, *id.* at 27, because positive law does not merely reflect "general policies," but also the "limits" of those policies, which a court making federal common law "is not free to go beyond," *id.* at 24.

Adhering to the approach required by *Miles*, Congress's policy judgment concerning corporate liability in the TVPA should control the formulation of federal common law under the ATS. The cause of action made available in the TVPA for torture and extrajudicial killing, 28 U.S.C. § 1350 note, § 2, is directly analogous to the implied action federal courts are authorized to recognize under the ATS for violation of international human rights norms, except that the TVPA

applies to both aliens *and* U.S. citizens. When the TVPA was enacted in 1992, it was unclear whether the ATS itself authorized a cause of action, or merely created federal jurisdiction and required a statutory cause of action for any claim to proceed. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (1984) (Edwards, J., concurring) (ATS creates a cause of action), *with id.* at 799 (Bork, J., concurring) (ATS is purely jurisdictional and requires further congressional action). The TVPA was enacted specifically to moot this dispute and provide the statutory cause of action under the ATS that Judge Bork believed was required. *See* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 3-4 (1991).

In enacting this statutory ATS cause of action in the TVPA, Congress established the clear policy that only natural persons may be sued for violating international law norms like torture and extrajudicial killing. That congressional policy determination answers the question presented in this case; neither plaintiffs nor the district court have identified any policy reason why the norms at issue here (which include allegations that the apartheid government tortured and extrajudicially executed black South Africans) should be treated differently from the torture and extrajudicial killing norms addressed by Congress in the TVPA. In the words of *Miles*, the "decisional law" to be made under the ATS, 498 U.S. at 24, must "keep strictly within the limits imposed by Congress," *id.* at 27. Accordingly, this Court must restrict federal common law liability under the ATS to natural

persons, just as Congress restricted statutory liability under the ATS in the TVPA.

If corporate liability for ATS claims *were* recognized, an intolerable anomaly would arise—aliens (who can sue under the ATS) would be allowed to sue U.S. corporations for alleged acts of torture, while U.S. citizens (who can only sue under the TVPA) could not sue either foreign or U.S. corporations for the exact same conduct. That inexplicable and indefensible policy result is reason enough to construe federal common law concerning corporate liability under the ATS consistent with the policy judgment reflected in the TVPA. *See Miles*, 498 U.S. at 33 (construing federal common law to avoid "anomaly" and "unwarranted inconsistency" in legal treatment of similar situations).[13]

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THERE IS NO AIDING AND ABETTING LIABILITY UNDER THE ATS

A divided panel of this Court held in *Khulumani* that federal courts may recognize aiding-and-abetting claims under the ATS. 504 F.3d at 260. The analysis in *Kiobel II* casts more than enough "doubt" on that holding for this Court to conclude that *Khulumani* "can no longer be considered good law on this point." *Zarnel*, 619 F.3d at 169.

[13] Plaintiffs rely on precedent from other circuits holding that corporations may be held liable under the ATS. Pls. Br. 56. But the precedent of *this* Circuit is to the contrary, and most of the out-of-circuit cases plaintiffs cite were decided before *Mohamad* unanimously held that Congress rejected corporate liability for statutory ATS actions under the TVPA.

Kiobel II emphasized the potential for "diplomatic strife" and the "foreign policy concerns" raised by any ATS claim arising from conduct occurring on foreign soil—the same concerns expressed by the United States with respect to aiding-and-abetting claims challenging the underlying conduct of a foreign sovereign. *See* U.S. Supreme Court Br. at *19-20 (explaining that aid-and-abet claims would "require federal courts to sit in judgment of the conduct of foreign states" and thus "will inevitably give rise to tension in relations between the United States and the country whose conduct is at issue"). *Kiobel II* itself implicitly makes the same connection in quoting from Justice Story's opinion in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C. Mass. 1822). *Kiobel II* quotes *La Jeune Eugenie* in support of the point that ATS claims challenging foreign conduct raise foreign policy concerns, *see Kiobel II*, 133 S. Ct. at 1668, but the complete quotation makes clear that Justice Story is not simply warning about the foreign policy consequences of adjudicating foreign conduct, but specifically about the consequences of adjudicating *the conduct of a foreign sovereign*:

> No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. … No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

La Jeune Eugenie, 26 F. Cas. at 847.

Aiding-and-abetting claims like those asserted here require the courts of this Nation to "sit in judgment" upon the actions of other nations, in direct contravention of the foreign policy concerns expressed in *Kiobel II*. Such judgments are the domain of the political branches and of properly empowered international tribunals. Because the proposed complaints allege that the Companies aided and abetted human rights violations committed by the South African government, those complaints would fail to state a claim under the ATS, and amendment would be futile for that reason as well.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Keith R. Hummel
KEITH R. HUMMEL
TEENA-ANN V. SANKOORIKAL
JAMES E. CANNING
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

Counsel for IBM Corporation

/s/ Jonathan D. Hacker
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 326-2000

Counsel for Ford Motor Company

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,873 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Anton Metlitsky
Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 326-2000

Dated: May 20, 2015