09-2778-CV

09-2779-cv; 09-2780-cv; 09-2781-cv; 09-2783-cv; 09-2785-cv; 09-2787-cv; 09-2792-cv; 09-2801-cv; 09-3037-cv

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In The
United States Court of Appeals
for the Second Circuit

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

BRIEF OF APPELLEES

SAKWE BALINTULO, as personal representative of SABA BALINTULO, DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH, as personal representative of ANTON FRANSCH, ELSIE GISHI, LESIBA KEKANA, ARCHINGTON MADONDO, as personal representative of MANDLA MADONDO, MPHO ALFRED MASEMOLA, MICHAEL MBELE, MAMOSADI CATHERINE MLANGENI, REUBEN MPHELA, THULANI NUNU, THANDIWE SHEZI, THOBILE SIKANI, LUNGISILE NTSEBEZA, MANTOA DOROTHY MOLEFI, individually and on behalf of her deceased son, MNCEKELELI HENYN SIMANGENTLOKO, TOZAMILE BOTHA, MPUMELELO CILIBE, WILLIAM DANIEL PETERS, SAMUEL ZOYISILE MALI, MSITHELI WELLINGTON NONYUKELA, JAMES MICHAEL TAMBOER, NOTHINI BETTY DYONASHE, individually and on behalf of her deceased son, NONKULULEKO SYBLVIA NGCAKA, individually and on behalf of her deceased son, HANS LANGFORD PHIRI, MIRRIAM MZAMO, individually and on behalf of her deceased son,

Plaintiffs-Appellees

(Caption continued on inside cover)

v.

DAIMLER AG, FORD MOTOR COMPANY, INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendants-Appellants,

GENERAL MOTORS CORPORATION, RHEINMETALL AG,

Defendants.

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PRELIMINARY STATEMENT

Plaintiffs-Appellees ("Plaintiffs") seek relief on behalf of themselves and proposed classes under the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"), for actions by Defendants-Appellants ("Defendants") to aid and abet specific violations of universally recognized human rights during apartheid in South Africa.

This Court previously ruled these cases could proceed under a theory of aiding and abetting liability, while remanding for the District Court to consider prudential concerns arising under political question and international comity doctrines. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260-64 (2d Cir. 2007), *aff'd for want of quorum, Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008). This Court noted that remand for consideration of these issues was "particularly appropriate" in light of Plaintiffs' representations that, by amending their complaints, "they would narrow their claims and clarify the nature of their allegations against the various defendants." *Id.* at 263. Plaintiffs did so.

On remand, Plaintiffs filed "two amended, consolidated Complaints that now constitute the entirety of the litigation." SPA-16-17.[1] These complaints made significant changes responding to *Khulumani* and the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), as well as to U.S. and South

[1] "A" and "SPA" refer to Defendants' appendix and special appendix, respectively. "PA" and "PSPA" refer to Plaintiffs' appendix and special appendix, respectively. "AOB" refers to Appellants' Opening Brief.

African concerns about the cases' original scope. Plaintiffs narrowed their claims and clarified their allegations, making it absolutely clear that they were not alleging liability for companies' merely doing business in South Africa during apartheid. Plaintiffs removed numerous defendants and, for the few that remained, articulated clear violations of international law and a nexus between the remaining Defendants' direct assistance to the apartheid regime, including its military, security, and police agencies, and Plaintiffs' injuries. Additionally, Plaintiffs made clear they were no longer seeking broad equitable relief.

Thus, when Defendants moved to dismiss the newly amended complaints, the District Court was considering significantly different cases from those that had originally been opposed by South Africa and, consequently, the U.S. After an exhaustive review of the issues, the District Court concluded that, given the cases' significantly narrowed scope, neither political question nor international comity doctrine mandated dismissal.

Defendants' attempted interlocutory appeal of this ruling is based on an erroneous assertion of jurisdiction. Defendants ask this Court to expand the collateral order doctrine in an unprecedented manner and to accept an untimely appeal, proposing rules that, while convenient for Defendants in this case, would significantly disrupt appellate procedure.

Defendants' arguments on the merits are equally unavailing, relying principally on two flawed assertions. First, they argue that South Africa's *prior* statements opposing the original complaints support dismissal of the *current* amended complaints, referring to those statements on nearly every page of their brief. This argument is untenable, however, since South Africa made clear in a *sua sponte* submission to the District Court and this Court on September 1, 2009, that it does not oppose the current cases and, in fact, believes the District Court is "an appropriate forum" to hear the "very serious crimes" alleged. PA-538-39.

Second, Defendants argue that the District Court "wholly discounted" the prior statements about these cases by the U.S. and South Africa, giving "them no weight whatever." AOB 2. In fact, as this Court instructed, the District Court analyzed whether the concerns articulated in the prior statements made six years ago still applied to Plaintiffs' claims in the dramatically revised amended complaints. South Africa's recent submission confirms the soundness of the District Court's judgment in allowing the cases to proceed and demonstrates the error of Defendants' argument that the court should have reflexively dismissed the amended complaints based on dated governmental statements about Plaintiffs' prior pleadings.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to hear Defendants' appeal because: (1) the collateral order doctrine does not apply to this interlocutory appeal, (2) the appeal was untimely filed, and (3) Defendants are not entitled to the extraordinary remedy of a writ of mandamus. *See* Section I *infra.*

The ATS confers subject matter jurisdiction to hear Plaintiffs' claims. As Defendants concede, "[t]his Court held in *Khulumani* that the ATS provides jurisdiction for claims alleging aiding and abetting of a state actor's violation of customary international law." AOB 47. This Court does not have jurisdiction over Defendant's aiding and abetting, extraterritoriality, or corporate liability arguments. S*ee Abney v. United States*, 431 U.S. 651, 663 (1977) (pendant claims "appealable if, and only if, they too fall within *Cohen*'s collateral order exception to the final-judgment rule"); *see also Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755-57 (2d Cir. 1998) ("[A] rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets.") (citing *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995)).

If this Court decides to exercise pendent jurisdiction, the standard of review for subject matter jurisdiction is that a claim may be dismissed only if it is so "plainly unsubstantial" that it falls outside the statutory grant of jurisdiction. *Ex*

Parte Poresky, 290 U.S. 30, 32 (1933). To survive a challenge to subject matter jurisdiction, plaintiffs must only make nonfrivolous or substantiated allegations of a tort in violation of the law of nations.[2] In these cases, Plaintiffs have clearly made such allegations. *See* Sections V, VI, and VII *infra*.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction under the collateral order doctrine given that South Africa does not object to the "very pendency" of these actions and the prior U.S. concerns were based on South Africa's now-withdrawn objections?

2. Whether this Court has jurisdiction when Defendants first gave notice of their definite intention to take a direct appeal 75 days after the ruling at issue?

3. Whether these cases must be dismissed under prudential doctrines, or on other grounds, where South Africa does not oppose the narrowed claims and the U.S. has never expressly requested dismissal on prudential grounds?

STANDARD OF REVIEW

The District Court's decisions regarding application of the prudential doctrines of political question and international comity should be reviewed for abuse of discretion. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de*

[2] A district court has subject matter jurisdiction over an ATS claim if the plaintiff's allegation of a violation of international law is not "immaterial" or "wholly insubstantial and frivolous," even if the court later determines that the complaint does not state a claim for relief. *Herero People's Reparations Corp. v. Deutsche Bank*, 370 F.3d 1192, 1194 (D.C. Cir. 2004) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)).

C.V., 412 F.3d 418, 422 (2d Cir. 2005) (comity reviewed for abuse of discretion); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (political question is non-jurisdictional, prudential doctrine); *cf. Handberry v. Thompson*, 446 F.3d 335, 355-56 (2d Cir. 2006) (prudential abstention doctrines reviewed for abuse of discretion).

While this Court has not definitively articulated the standard for reviewing political question rulings, such analysis necessarily depends on the facts and circumstances of the case, with which the district court has unique competence. *See Buford v. United States*, 532 U.S. 59, 65-66 (2001) (court reviews for abuse of discretion where "factual nuance may closely guide the legal decision, with legal results depending heavily upon an understanding of the significance of case-specific details" and "fact-bound nature" of the decision "limits the value of appellate court precedent") (citation omitted). Questions of law are reviewed *de novo*. *See Gorman v. Consol. Edison,* 488 F.3d 586, 591 (2d Cir. 2007).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Original Complaints and Motion to Dismiss

The original complaints, filed in 2002 and 2003, brought claims against more than 50 defendants, PA-1-2, 111-12, 256-58, including South African companies and (in some cases) all "financial institutions, corporations and companies which profited and/or derived a benefit from . . . the apartheid system."

PA-40, ¶ 60. Viewed as a whole, the complaints broadly challenged corporate conduct in South Africa during apartheid. Some complaints named toothpaste manufacturers and beverage companies, alleging that they "provide[d] additional support to the apartheid system's businesses." PA-57-58, ¶¶ 119, 122, 125; PA-123-24, ¶¶ 52-53. Consequently, the District Court read the complaints as alleging that merely "doing business" in South Africa during apartheid violated international human rights norms. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 549-54 (S.D.N.Y. 2004) ("*Apartheid I*").

Some original complaints also requested broad equitable relief, including the creation of "an independent international historical commission to report upon and provide an accounting of all profits unjustly derived by defendants," "affirmative action programs and/or other employment based programs," and "educational and training programs" to be applied throughout South Africa. PA-12-13, ¶ 30 (iii)-(iv).

In 2003, certain defendants moved to dismiss, PA-426, arguing, *inter alia*, that merely "doing business" with apartheid South Africa could not give rise to ATS liability and that the claims raised prudential concerns.

B. Government Submissions

On July 11, 2003, South Africa filed a letter with the District Court outlining its concerns with the original complaints. A-236. The central objections it raised

were that Plaintiffs sought to pursue policies at odds with South Africa's Truth and Reconciliation Commission ("TRC") and that Plaintiffs were suing South African and foreign corporations for merely doing business in South Africa during apartheid. A-237, ¶ 2; A-241-42, ¶ 7.

On October 27, 2003, in response to a request from the District Court, the U.S. submitted a letter stating that its principal concern was that, in light of South Africa's views, the litigation could harm foreign policy as "[s]upport for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country." A-255. Significantly, however, the U.S. did not request dismissal on prudential grounds. Thus, the U.S. left open the opportunity for the complaints to be amended in such a way as to meet South Africa's, and therefore its own, case-specific concerns.

C. The *Sosa* Decision

In June 2004, the Supreme Court decided *Sosa*, affirming that norms of customary international law are cognizable under the ATS. 542 U.S. at 731. In a footnote referring to this case, the Supreme Court noted that federal courts should give serious weight to the Executive Branch's view of a case's impact on foreign policy. *Id.* at 732 n.21. The footnote affirmed traditional approaches to prudential doctrines where deference is given to the Executive branch on foreign policy matters. As this Court recognized, *Sosa*'s footnote does not mandate dismissal.

Khulumani, 504 F.3d at 261 n.9 (taking "footnote 21 of *Sosa* at face value, as simply observing that there is a strong argument that the views of the Executive Branch *on the issue of the case's impact on foreign policy* should be given 'serious weight'").

D. Dismissal and Reversal on Appeal

In November 2004, the District Court granted defendants' motion to dismiss. *Apartheid I*, 346 F. Supp. 2d at 538. The Court characterized the cases as targeting corporations that merely did business in apartheid South Africa and concluded that: (1) "the [ATS] presently does not provide for aider and abettor liability," *id.* at 550, and (2) merely "doing business in apartheid South Africa" was not a violation of the law of nations, *id.* at 551. Plaintiffs appealed.

The U.S. filed an *amicus* brief supporting the District Court's legal conclusion that the ATS does not provide for aiding and abetting liability. A-276-93. The brief, however, did *not* request dismissal on prudential grounds, nor did it suggest that the "mere pendency" of the case threatened important U.S. interests.

On appeal, this Court reinstated the ATS claims, holding that a plaintiff may plead aiding and abetting liability under the ATS. *Khulumani*, 504 F.3d at 260. This Court also vacated the District Court's denial of Plaintiffs' motion to amend the complaints to address *Sosa*'s concerns as to customary international law and the issues raised by the U.S. and South African statements of interest. *Id.* at 263.

The Court recognized that Plaintiffs could "narrow their claims and clarify the nature of their allegations" in such a way as to "affect how the district court ultimately resolve[s] these issues." *Id.*

E. U.S. Support for Certiorari Petition

Defendants petitioned for a writ of certiorari to the Supreme Court. PA-441. The U.S. filed a brief supporting Defendants' petition on the legal issue of whether the ATS provides for aiding and abetting liability. A-348. The U.S. brief was premised specifically on the government's understanding that Plaintiffs sought liability for corporations that did business with the South African government during apartheid. The U.S. stated that plaintiffs' broad claims of aiding and abetting liability, if recognized, would "invite lawsuits challenging the conduct of foreign governments . . . through the simple expedient of naming as defendants those private corporations that lawfully *did business with* the governments." A-352 (emphasis added).

In addition, the U.S. argued that the decision should be reviewed because the "democratically elected government of South Africa has repeatedly objected to this litigation as interfering with its sovereign authority to address the wrongs according to its own policy judgments." A-366. The U.S., however, was notably of the view that the Court should *not* grant the petition on the political question issue. A-365. The U.S. did not request dismissal on prudential grounds, nor did it

argue that the "mere pendency" of the cases threatened U.S. foreign relations, even in the context of the expansive nature of Plaintiffs' original complaints.

F. Amended Complaints and Renewed Motion to Dismiss

Plaintiffs filed amended complaints in October 2008, which responded to the concerns raised by the U.S. and South Africa by, *inter alia*, removing numerous defendants, including all South African corporations and the unnamed class of corporations, and by omitting the former requests for broad equitable relief. A-58, 155, 161, 212 ¶ 186.

After the April 2009 District Court decision at issue, these cases now include only five corporate defendants—IBM, General Motors, Ford, Daimler, and Rheinmetall.[3] Plaintiffs allege clear violations of international law by pleading a nexus between Defendants' substantial, purposeful assistance to the apartheid regime, including its military, security, and police agencies, and Plaintiffs' injuries.

IBM: Plaintiffs allege that IBM aided and abetted the South African government's denationalization of black South Africans by providing computers, software, training, and technical support intended for that express purpose. IBM

[3] The April 2009 decision dismissed all claims against Barclays and UBS on the grounds that the allegations did not meet the court's stringent standard for pleading an aiding and abetting violations. SPA-67, 76. The Court dismissed Fujitsu on June 25, 2009, for lack of adequate agency allegations. PA-535. Rheinmetall is challenging personal jurisdiction, and General Motors is in bankruptcy.

designed, manufactured, and provided the South African and Bantustan governments with computers and systems intended to register individuals and strip them of their South African citizenship to replace it with the fictitious nationality of the Bantustan. A-200-02, ¶133-35, 137. The "Bantustans" or "homelands" were impoverished areas carved out of white South Africa and made into "independent nations" to isolate and confine the black population in order to create a majority white South Africa and secure white control of economy and political power. A-78, ¶ 63; A-114, ¶ 220. IBM employees assisted in developing computer software and support specifically designed to produce identity documents and effectuate denationalization. A-200, ¶ 133. IBM also "provided the South African Department of the Interior with a specially-designed, computerized population registry," A-485, ¶ 207, that was "specifically designed for the South African government . . . to assist the government in implementing and enforcing the racial pass laws and other structural underpinnings of the apartheid system, such as the suppression of political dissent." A-486, ¶ 209. IBM was thus "intimately involved in sustaining the apartheid regime through the design, importation, installation, and maintenance of high technology systems for the South African government." A-484, ¶ 204.

The Automotive Companies: Plaintiffs allege that the automotive companies aided and abetted apartheid and extrajudicial killing by supplying

specially designed and manufactured military vehicles intended for the purpose of violently suppressing anti-apartheid activities. A-491, ¶ 232. These vehicles were the means by which security forces carried out attacks in black townships, "suppress[ing] dissent and targeting Blacks and political dissidents." A-491-93, ¶¶ 231-42; A-181-87, ¶¶ 64-65, 68-76, 85-86; A-192, ¶ 104.

Plaintiffs further allege that Defendant automotive companies were intimately involved in torture and cruel, inhuman, and degrading treatment ("CIDT"). Management at Daimler, GM, and Ford worked in tandem with the South African security forces, providing information about anti-apartheid employees used to facilitate arrests and harassment and even participating in abusive interrogations. A-179-181,¶¶ 56-58, 61; A-187-90, ¶¶ 89-96; A-193-97, ¶¶ 106-122.

Rheimetall: Plaintiffs allege that Rheinmetall's actions "ensure[d] that the security forces of the apartheid regime acquired the armaments and military equipment it needed to suppress dissent and control the population despite the international arms embargoes." A-474, ¶ 148. Rheinmetall's intentional support for apartheid crimes included "export[ing] a complete ammunition factory to apartheid South Africa" in spite of sanctions, A-474, ¶ 152, training members of the South African security forces, A-475, ¶ 155, and otherwise supplying weapons and services that "would be (or only could be) used in connection with" apartheid,

extrajudicial killing, torture, prolonged unlawful detention and CIDT against Plaintiffs. A-478, ¶ 168.

G. The District Court's Ruling on Defendants' Motion to Dismiss

Defendants moved to dismiss the amended complaints in December 2008, and the District Court issued an April 2009 opinion, dismissing the financial institution defendants and allowing only certain claims to proceed, including several against IBM, General Motors, Ford, and Daimler. SPA-60, 134-35.

The District Court dismissed all direct liability claims for the crimes of apartheid and declined to recognize conspiracy as a distinct tort under the ATS. SPA-33, 59-60. It also dismissed certain aiding and abetting claims for failure to sufficiently plead that certain defendants provided purposeful substantial assistance to the perpetrator in the commission of a tort in violation of the law of nations. SPA 66-67, 70-71, 74-75. The District Court dismissed all financial institutions on that basis. SPA 67, 76.

However, after conducting an exhaustive review of prior statements submitted by the U.S. and South Africa, the District Court determined that "the limited actions that have survived this Court's analysis of defendants' other challenges need not be dismissed" on political question grounds. SPA-92. The District Court noted that "in all of its submissions, the United States implicitly and explicitly characterized plaintiffs' claims, as well as the basic application of aiding

and abetting liability under ATCA, as seeking liability simply for doing business in South Africa." SPA-95. Accordingly, the court concluded that, given the narrowed complaints, less deference was owed to the previous U.S. submissions addressed to Plaintiffs' prior complaints. SPA-111. The District Court then explained that "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction" and declined to dismiss on this basis. SPA-109. The court noted that the TRC was not exclusive, victims were not barred from suing those who did not receive amnesty, and the TRC process did not grant amnesty to multinational corporations—facts Defendants did not dispute. SPA-114-15. Thus, it held, "[t]he absence of a conflict between this litigation and the TRC process is fatal to the argument that international comity requires dismissal." SPA-114.

H. Subsequent Proceedings

On April 22, 2009, Defendants moved for reconsideration of the court's *mens rea* and agency liability rulings. PA-512. Defendants also moved to certify an interlocutory appeal of three issues: (1) whether "case-specific deference" requires dismissal, (2) the *mens rea* requirement for aiding and abetting liability, and (3) the standard for vicarious liability. A-382. The District Court denied both motions on May 27, 2009. A-407-08, 428. Defendants filed untimely notices of

appeal on June 25, 2009. A-523-69. Plaintiffs moved to dismiss the appeal for lack of jurisdiction. This motion remains pending.

I. The South African Government Letter

On September 1, 2009, after this Court heard argument on the motion to dismiss, South Africa *sua sponte* submitted a letter to the District Court stating that, given the narrowed scope of the litigation, it is "of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law." PA-538-39. It also observed that Plaintiffs' remaining claims "are based on aiding and abetting very serious crimes" and that the District Court's dismissal of corporations that "merely did business with the apartheid government also addressed some of the concerns which the Government of the Republic of South Africa had." PA-539.

The U.S. has indicated that it has initiated an inter-agency process to consider a response to this Court's invitation to submit its views. The U.S. has been permitted to provide its views by November 30, 2009. The U.S. has never stated a position on Plaintiffs' amended complaints.

SUMMARY OF ARGUMENT

Defendants base their appeal almost entirely on South Africa's initial and now withdrawn statement objecting to the original scope of the litigation and the previously expressed U.S. support for that objection. Defendants' arguments rest

on their assertion that these governmental views necessarily remained fixed despite substantial changes made to the original complaints filed seven years ago. South Africa has affirmatively stated that, given the litigation's narrowed scope, it views the District Court as "an appropriate forum" to hear Plaintiffs' claims. PA-539. Defendants' speculation about South Africa's views has been superseded by South Africa's actual views.

Defendants' appeal fails for the following reasons. *First*, and fundamentally, this Court does not have jurisdiction to hear Defendants' appeal. Defendants assert that jurisdiction exists under the collateral order doctrine because "the *very pendency* of these cases conflicts with South African sovereignty and U.S. foreign policy." AOB 43. There is, however, no legal justification for expanding the doctrine to encompass orders denying motions to dismiss on political question grounds. Moreover, South Africa no longer believes these cases offend its sovereignty and there is no basis for concluding that their "mere pendency" will affect U.S. foreign relations in a manner that requires abandoning the important policies underlying the final judgment rule. *See* Section I.A *infra*.

This Court also lacks jurisdiction because Defendants' appeal is untimely. Defendants admit they did not file "notices of appeal" until 75 days after the order at issue. AOB 3. Nor did Defendants file any intervening motion tolling the appeals period under Federal Rule of Appellate Procedure 4(a). Defendants'

belated effort to rescue their appeal by asserting that their motion seeking certification of an interlocutory appeal was *itself* a "notice of appeal" must be rejected since that motion did not give notice of a definite intention to take a direct appeal. *See* Section I.B *infra*. Mandamus jurisdiction is inappropriate because Defendants' claim is reviewable after final judgment, and Defendants cannot show that any purported error by the District Court was sufficiently egregious to warrant this extreme remedy. *See* Section I.C *infra*.

Second, if this Court reaches the merits, Defendants' argument that the District Court erred by not dismissing on case-specific deference grounds also lacks merit. As this Court has emphasized, principles of case-specific deference are appropriately analyzed under traditional doctrines of political question and international comity, in which an administration's view is but one factor a court considers. *Khulumani*, 504 F.3d at 261. There is no case-specific deference doctrine, only the well-established requirements of the political question or international comity doctrines.

Here, the District Court gave serious weight to the Executive Branch's views about the original scope of the litigation, but, in light of the narrowed scope of the amended complaints and a careful analysis of the *Baker v. Carr* factors, 369 U.S. 186 (1962), it properly concluded those views did not merit dismissal. Notably, the U.S. has never asked any court to dismiss these cases on prudential grounds

although it knows how to make such an explicit request. *See, e.g., Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 62-68 (2d Cir. 2005). *See* Sections II.A&B *infra*. Similarly, the District Court correctly declined to dismiss on international comity grounds given that, as the South African Government Letter confirms, there is no conflict between the limited pending claims and the TRC process. *See* Section II.C *infra*.

Finally, even if this Court accepts pendent jurisdiction over Defendants' aiding and abetting, extraterritoriality, and corporate liability arguments, Plaintiffs meet the standard for subject matter jurisdiction relative to these claims. Contrary to Defendants' arguments, the District Court carefully considered all arguments properly before it about the potential "practical consequences" of allowing these cases to proceed. This Court's decisions in *Khulumani*, 504 F.3d 254, and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016, 2009 U.S. App. LEXIS 21688 (2d Cir. Oct. 2, 2009), eliminate Defendants' argument that there is no aiding and abetting liability under the ATS, and the District Court will apply this Court's aiding and abetting liability standards in its further consideration of the merits of Plaintiffs' claims. *See* Section III *infra*.

Moreover, Defendants' argument that the ATS does not apply outside U.S. territory or to corporations are erroneous. Numerous courts have recognized that the ATS can reach corporate, extraterritorial liability since *Filártiga v. Pena-Irala*,

630 F. 2d 876 (2d Cir. 1980), before and after *Sosa*. *See* Sections IV and V *infra*.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO HEAR THIS APPEAL.

A. The Collateral Order Doctrine Does Not Apply.

Defendants argue for an unprecedented expansion of the collateral order doctrine to cases where the "mere pendency" of litigation is considered a threat to governmental interests, even when the U.S. has *not* explicitly requested dismissal on that basis. Accepting Defendants' proposal would conflict with the Supreme Court's repeated admonitions to keep this doctrine selective, narrow, and well-defined. *See Will v. Hallock*, 546 U.S. 345, 350 (2006) ("[A]lthough the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citing *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 270 (1982) (noting the Supreme Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated")).

The collateral order doctrine is a "narrow exception to the general rule that appellate review is only available for final orders," *United States v. Philip Morris*

Inc., 314 F.3d 612, 617 (D.C. Cir. 2003), and is limited to cases where a challenged order: (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the actions," *and* (3) "[is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Cohen v. Beneficial Indus. Loan Corp.* 337 U.S. 541, 546 (1949). Here, Defendants cannot meet the third prong.

The D.C. Circuit has expressly rejected the argument that the *Cohen* test is satisfied where a court denies a motion to dismiss on political question grounds. *Doe v. Exxon Mobil*, 473 F.3d 345 (D.C. Cir. 2007). That court noted the "effectively unreviewable" prong is only met when the defendant asserts a "*right* to avoid trial." *Id.* at 350-51 (emphasis added). *See, e.g., P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-47 (1993) (Eleventh Amendment immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (absolute immunity); *Abney,* 431 U.S. 651 at 660-62 (double jeopardy). Defendants assert no such right in this case.

Unlike double jeopardy and immunity defenses, political question doctrine does *not* confer upon Defendants a right to avoid trial. *See Exxon*, 473 F.3d at 351. Finding jurisdiction here would extend the collateral order doctrine into a new domain of cases with no clear limits or criteria.

Under Defendants' argument, appellate courts would have immediate jurisdiction upon the mere assertion by the U.S. or a foreign government that a pending case conflicts with its interests, regardless of how those interests are articulated. Since this argument would presumably apply beyond ATS cases, a broad array of commercial cases would be affected by such an expansion of the collateral order doctrine, leading to protracted interlocutory appellate proceedings.

Defendants' reliance on *Will,* 546 U.S. 345, is unavailing. *Will* "does not support the broad principle that all district court orders that reject separation of powers defenses are immediately appealable under the collateral order doctrine." *Exxon,* 743 F.3d at 351. *See also United States v. Cisneros*, 169 F.3d 763, 769-71 (D.C. Cir. 1999). In *Will*, the Supreme Court held that, even where "the efficiency of Government [would] be compromised and the officials burdened and distracted" by trial, the defendants were *not* entitled to immediate interlocutory appeal. 546 U.S. at 353.

Defendants also mischaracterize the U.S. *Amicus* Brief in *Exxon*, AOB 45, which argued *against* application of the collateral order doctrine to a court's order rejecting a political question defense. The U.S. proposed that immediate interlocutory appeal from a denial of a motion to dismiss on political question grounds might be appropriate where the "pendency" of an action threatens U.S. foreign policy interests, *but only* "[w]hen the Executive *explicitly* seeks dismissal"

and the court denies the request. Brief for United States as *Amicus Curiae*, *Exxon Mobil Corp. v. Doe,* 2007 U.S. Briefs 81, 14, 2008 U.S. S. Ct. Briefs LEXIS 2280, at *24 (U.S. May 16, 2008) (No. 07-81) (emphasis added). Defendants selectively quote the U.S. *Exxon* Brief to obscure the explicit request requirement, which would at least ensure that the real party in interest—the Executive Branch—explicitly asserts that foreign policy interests require dismissal before an appellate court assumes jurisdiction not bestowed by Congress.[4] The Executive has never made such an explicit request for dismissal in this case. Thus, the U.S.'s proposed modest exception, which has not been accepted by any court, lends no support to Defendants' efforts to secure an immediate appeal.

In light of the South African Government Letter, past U.S. submissions do not even implicitly support dismissal on foreign-relations grounds. The U.S. explained in its 2003 statement that "*[t]o the extent that* adjudication impedes South Africa's on-going efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests." A-255 (emphasis added). There is currently no reason to believe that adjudication of the narrowed claims will impede South Africa's interests.

[4] The U.S. proposal had the advantage of certainty of application, thus eliminating the delays caused by immediate appeal whenever interested litigants, like Defendants here, offer self-interested interpretations of governmental submissions.

South Africa has not merely lifted its opposition to this litigation; it now believes the District Court is "*an appropriate forum*" to hear these cases. PA-539 (emphasis added). Accordingly, the "mere pendency" of these narrowed actions does not threaten South Africa's sovereignty concerns or U.S. foreign policy interests as these governments have defined them.

The new submission by South Africa and the forthcoming submission by the U.S. only serve to underscore the importance of the final judgment rule and the Supreme Court's admonitions about the collateral order doctrine's narrow scope. Defendants have caused months of additional delay in these actions, already seven years old, by pursuing this appeal, even though no government has submitted a statement of interest suggesting the narrowed claims pose any threat to U.S.-South African relations or any other important governmental interest.

B. The Court Lacks Jurisdiction Because Defendants' Appeal is Untimely.

Defendants did not file notices of appeal until 75 days after the ruling at issue. Defendants' effort to save their appeal now hinges on the erroneous argument that their motion seeking certification of an interlocutory appeal in the District Court was actually a notice of a direct appeal to this Court under Rule 3 of the Federal Rules of Appellate Procedure ("FRAP").

Defendants' motion did not hint, much less provide the "clear" notice Rule 3(c)(4) requires, that Defendants were taking a direct appeal at that time. Instead,

Defendants indicated they were placing the possibility of any interlocutory appeal in the District Court's hands. Thus, Defendants' motion did not "provide[] sufficient notice to other parties and the courts," *Smith v. Barry*, 502 U.S. 244, 248 (1992), of "a *definite* intention to appeal the judgment of the district court," *Haugen v. Nassau County Dep't of Soc. Servs.*, 171 F.3d 136, 138 (2d Cir. 1999) (emphasis added). Such notice was provided only when Defendants filed their untimely notices of appeal.

Instead of providing notice of a *definite* intention to appeal, Defendants' motion seeking certification of an interlocutory appeal provided notice only that Defendants (i) *might* file an appeal, (ii) at a *later date*, (iii) depending upon, *inter alia*, the District Court's ruling on the motion. Indeed, the logical import of Defendants' motion was that there would be no appeal if the District Court denied Defendants' motion. Such contingent notice of a possible future appeal does not provide Rule 3's requisite clear notice.

Accepting Defendants' argument would disrupt the judicial process and undermine the clarity intended by the Federal Rules. As Defendants have argued, Defs.' Mem. Opp'n Pls.' Mot. Dismiss at 20 n.21, filing a notice of appeal automatically "divests the district court of jurisdiction to proceed" when the claim on appeal could end the litigation, "unless the district court certifies that the appeal is frivolous." *City of New York v. Beretta U.S.A. Corp.*, 234 F.R.D. 46, 51-52

(E.D.N.Y. 2006). Thus, courts and parties must know when an appeal is *definitely* being taken, not when it *might* be taken in the *future*, so (1) they can know if and when a district court is divested of jurisdiction, and (2) the district court can have an opportunity to retain jurisdiction by certifying the appeal as frivolous. Such notice is crucial when the appeal is interlocutory because "an interlocutory appeal disrupts ongoing proceedings in the district court." *Stewart v. Donges*, 915 F.2d 572, 575 (10th Cir. 1990).

Here, the District Court continued to make substantive rulings in the case (often at Defendants' behest), including dismissing Fujitsu. PA-535. If Defendants' motion is now considered a notice of appeal, those rulings are presumably void since the District Court was divested of jurisdiction. Moreover, the fact that Defendants *themselves* asked the District Court to make rulings after their motion demonstrates that even they did not consider it a notice of appeal. Defendants' argument that *other* parties (and the courts) should have been on notice thus strains credibility.

If this Court rules that a motion seeking certification for interlocutory appeal is a valid notice of a direct appeal, lower courts will presumably be divested of jurisdiction to *rule upon* such motions, as well as subsequent motions, at least when the issue in question could be case-dispositive. The validity of rulings Circuit-wide will be in doubt. Additionally, parties could create mischief by filing

a motion seeking certification for interlocutory appeal, waiting well beyond the 30-day deadline—even through trial—before filing a standard notice of appeal, and successfully arguing that, because their motion was a valid notice of appeal, *all rulings* in between are void. *Cf. Stewart*, 915 F.2d at 579 (judgment following trial nullified where district court had not certified that interlocutory appeal was frivolous).

Defendants' cases stand only for the proposition that when a filing makes clear a party's definite intent to take a direct appeal, the party should not be barred from doing so because of a procedural error. In *Smith*, 502 U.S. at 246-47, the *pro se* party filed an appellate *brief* in the court of appeals within the time to appeal, after his initial notice of appeal was rendered void. In *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), the plaintiff moved *in the court of appeals* for permission to appeal "within the time for taking an appeal," *id.* at 44, and the Court found that "[b]oth the Court and the opposing parties were put on notice of [the plaintiff's] intent to appeal." *Id.* at 46. Similarly, in *Remer v. Burlington Area School District*, 205 F.3d 990, 994 (7th Cir. 2000), after the plaintiff's case was *dismissed,* and the plaintiff mistakenly filed a petition in the *court of appeals*, the court found that "[n]o one ... could have been left wondering who was appealing, what she was

appealing, or to which court she was appealing." *Id.* at 995.[5]

Defendants do not claim they made a procedural mistake while trying to take a direct appeal. Defendants' only error was filing their notices of appeal too late, and this error cannot be excused. *See Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264 (1978) ("This 30-day time limit [of FRAP 4] is 'mandatory and jurisdictional.'") (citation omitted).

C. Defendants Are Not Entitled to the Drastic Remedy of Mandamus.

Nor can Defendants meet the stringent prerequisites for a writ of mandamus. Because the writ is a "drastic and extraordinary" remedy, Defendants must demonstrate that: (1) they have no other means of attaining relief; (2) their right to the writ is clear and indisputable; and (3) the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004).

Defendants do not lack an alternative means of relief as the District Court's Order is reviewable upon direct appeal, rendering both review under the collateral

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[5] *See also U.S. v. Moats*, 961 F.2d 1198, 1204 (5th Cir. 1992) (after notice of appeal was rendered void, party filed petition for permission to appeal in court of appeals); *Landano v. Rafferty*, 970 F.2d 1230, 1237 (3d Cir. 1992) (state mistakenly filed timely petition for permission to appeal in *court of appeals*); *San Diego Comm. Against Registration and the Draft v. Governing Bd.*, 790 F.2d 1471, 1474 (9th Cir. 1986) (party mistakenly filed motion under FRAP 5 in district court, which "provided clear notice to both the court and the Board that [the party] intended to appeal the order"); *Berrey v. Asarco Inc.*, 439 F.3d 636, 642 (10th Cir. 2006) (party expressly requested that certification request be treated "as a notice of appeal" under collateral order doctrine to extent the doctrine applied).

order doctrine *and* mandamus relief unavailable. *See, e.g., Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *United States v. Helmsley*, 866 F.2d 19, 22 (2d Cir. 1988).

Defendants' right to the writ is also far from clear and indisputable. Defendants argue simply that the District Court erred, AOB 45, presenting no authority that its rulings constituted a clear abuse of judicial power.[6] *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27 (1943) (mandamus inappropriate where decision, even if erroneous, involved no abuse of judicial power); *In re Volkswagen of Am., Inc.* 545 F.3d 304, 310 (5th Cir. 2008) (mandamus requires decision be patently erroneous in that it falls outside "bounds set by relevant statutes and relevant binding precedents").

Defendants *cannot* meet this standard because the District Court acted in accordance with this Court's instructions on remand and prior precedent by evaluating the governments' views under the *Baker* political question factors and international comity doctrine. *See* Section II.B *infra*. Nor can the District Court's

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[6] Defendants' cases, AOB 46 n.10, are inapposite. *See Cheney*, 542 U.S. 367 (declining to issue writ and remanding for reconsideration where discovery order issued on Vice President was broad and court failed to consider separation-of-powers issues); *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943) (involving litigation that would upset negotiated settlement between State Department and foreign sovereign); *In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163-65 (2d Cir. 2001) (involving dismissal contingent upon enactment of legislation by foreign sovereign where court lacked authority over foreign legislation).

consideration of those views in the context of the significantly narrowed scope of these cases be *patently* erroneous, as South Africa no longer objects to this litigation on that basis, and the position of the U.S. government, in light of South Africa's revised position, is now, at best, ambiguous.[7] *See In re Dow Corning Corp.*, 261 F.3d 280, 285 (2d Cir. 2001) (where record is ambiguous, the writ will not issue).

II. PRUDENTIAL DOCTRINES OF POLITICAL QUESTION AND INTERNATIONAL COMITY DO NOT MANDATE DISMISSAL OF THESE SUBSTANTIALLY NARROWED CASES.

A. There is No Independent "Case-Specific Deference" Doctrine.

The District Court properly concluded that "case-specific deference" is not a stand-alone doctrine and does not necessitate the dismissal of a lawsuit, authorized by Congress under the ATS, where the Executive Branch expresses foreign policy concerns about the litigation. *Sosa* did not establish a new doctrine of deference;[8] this Court has emphasized that "case-specific deference" is not its own doctrine; and the parties have so agreed. *See Khulumani*, 504 F.3d at 261 ("This policy of [j]udicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential justiciability doctrine known as the

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[7] In *Exxon*, the court recognized mandamus relief was inappropriate where, *inter alia,* the district court had mitigated concerns on which the U.S.'s previously articulated foreign policy concerns were based. 473 F.3d at 353-54.

[8] The Supreme Court did not create a new doctrine in a footnote in *Sosa*, in which "case-specific deference" was not an issue before the Court.

'political question' doctrine.") (quoting *Whiteman,* 431 F.3d at 69); *see also Khulumani*, 504 F.3d at 262 n.10 ("The parties agree that *Sosa*'s reference to 'case-specific deference' implicates either the political question or international comity doctrine.").

Contrary to settled law and their prior representations to this Court, Defendants now present "case-specific deference" as a distinct, virtually standard-less doctrine. Instead, this Court requires an analysis of the *Baker* factors, *see Whiteman*, 431 F.3d at 68-74 (applying *Baker* factors), which this Court has consistently applied before and after *Sosa*. *See Kadic*, 70 F.3d 232, 249-50 (2d Cir. 1995); *Khulumani*, 504 F.3d at 261; *Conn. v. Am. Elec. Power Co.*, No. 05-5104, 2009 U.S. App. LEXIS 20873, at *27, 55 (2d Cir. Sept. 21, 2009) (applying *Baker*'s "discriminating inquiry" in foreign affairs arena).

The deference afforded to the U.S. government's views must be analyzed under political question doctrine in light of the facts and circumstances of each case. The District Court correctly conducted just this analysis, by applying the *Baker* factors. SPA 105-07, 110-13. Defendants' brief ignores *Baker* altogether.

B. The Court Properly Analyzed Political Question Doctrine in Light of the Amended Complaints.

Defendants' argument that absolute deference must be granted to the Executive under political question analysis is erroneous. Defendants contend that courts must automatically defer to Executive views so long as they are "reasonably

explained" and presented "in concrete and clear terms," without regard to the terms. AOB 26-27. This argument conflicts with prevailing law and precedent. Contrary to Defendants' assertions, *Whiteman* did not hold that presenting objections in "concrete and clear terms," AOB 27, is sufficient to mandate absolute deference. *See Whiteman,* 431 F.3d at 59-60. Defendants' only authority for their assertion that a reasonable explanation is sufficient for Executive fiat is *Exxon*'s dissent.[9] *See* AOB 27 (citing *Exxon*, 473 F.3d at 363 (Kavanaugh, J. dissenting)). But as Judge Hall observed in *Khulumani*: "Mere executive fiat cannot control the disposition of a case before a federal court. Our principle of separation of powers not only counsels the judiciary to conduct an independent inquiry—it requires us to do so." 504 F.3d at 292 (Hall, J., concurring); *see also Kadic*, 70 F.3d at 250 (Executive Branch assertion of political question doctrine is due "respectful consideration" but does not preclude adjudication).

Defendants' position that dismissal is "required" whenever the U.S. or a foreign government asserts that a suit conflicts with its interests, without first analyzing such assertions, AOB 25, ignores a crucial countervailing separation of powers concern: Congress has delegated review of such matters to the federal courts. To hold, as Defendants argue, that *Baker* should be supplanted by a

[9] None of the cases cited in the *Exxon* dissent, including *Republic of Austria v. Altmann*, 541 U.S. 677, 702, n.23 (2004) (Executive's views not dispositive), found that Executive Statements are entitled to absolute deference.

doctrine providing a general Executive veto power over cases brought under federal statutes like the ATS would violate fundamental separation of powers principles. *See Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Accordingly, this Court has stated that in tort suits regarding human rights, "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Kadic*, 70 F.3d at 249 (citation omitted). *See also Whiteman*, 431 F.3d at 74 & n.19; *Khulumani* 504 F.3d at 263 & n.14 ("to give dispositive weight to the Executive Branch's views would likely raise serious separation-of-powers concerns").

1. The District Court properly applied the *Baker* factors.

Even before South Africa made clear it does not oppose these narrowed cases, the District Court properly determined that political question doctrine does not mandate dismissal. The District Court carefully analyzed each *Baker* factor, paying "respectful consideration" to the Executive Branch's views. *Kadic*, 70 F.3d at 250; SPA-105-07; 110-13. The District Court's *Baker* analysis is consistent with this Court's instructions.[10] *See, e.g., Am. Elec.*, 2009 U.S. App. LEXIS

[10] The high bar established by *Baker* is illustrated by the fact that "in the almost forty years since *Baker v. Carr* was decided, a majority of the [Supreme] Court has found only two issues present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches." *Am. Elec.*, 2009 U.S. App. LEXIS 20873, at *22 (internal citations and

20873, at *21 (applying "high bar for nonjusticiability: Unless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for non-justiciability on the grounds of a political question's presence'"). Defendants point to no error in the District Court's application of *Baker* factors.

The District Court explained that the first three *Baker* factors rarely apply in ATS suits, "which are committed to the judiciary by statute and utilize standards set by universally recognized norms of customary international law." SPA-106 (citing *Kadic*, 70 F.3d at 249). This analysis is fully consistent with this Court's past decisions in ATS cases. *See Kadic*, 70 F.3d at 249. Further, the "fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of the question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." SPA-106 (quoting *Kadic*, 70 F.3d at 249). Defendants do not challenge this analysis; they ignore it in favor of pressing an absolute deference rule.

The District Court did not "second-guess" the effects of this case on foreign relations or discount the stated views of the Executive Branch. AOB 29. Rather, the court made a legal judgment within its core competence that, based on the cases' narrowed scope and the legal standard it imposed for liability, prior U.S.

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quotations omitted). In contrast, the ATS is a grant of delegated authority to the federal courts.

concerns were no longer significantly implicated. SPA–110 ("allowing these suits to continue would not contradict American foreign policy in a manner that would seriously interfere with important governmental interests") (internal quotations omitted). The District Court "declined to dismiss the actions largely because the Governments' litigation positions were predicated on the faulty *legal* assumption—to which no deference is due—that these actions sought to hold defendants liable for merely doing business in South Africa. Once this Court held that plaintiffs were required to show much more to obtain relief, there was no longer any conflict between maintaining the suits and the core foreign-policy concerns expressed by both governments." A-400 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)).

Defendants cannot point to any case where a statement of interest similar to the prior submissions of the U.S. in this case merited dismissal. Instead, they cite to cases that involved statements that *directly and unequivocally* opposed the continued litigation of those cases.[11] *See Matar v. Dichter*, 500 F. Supp. 2d 284, 294 (S.D.N.Y. 2007) (State Department "urge[d] dismissal"); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1169 (C.D. Cal. 2005), *vacated on other grounds*, 564 F.3d 1190 (9th Cir. 2009) (State Department explicitly "oppos[ed]

[11] The Executive has not hesitated to state its unequivocal opposition to a case where it deems it to pose a serious and concrete threat to its conduct of foreign affairs.

the pursuit of the instant litigation"). In contrast, the U.S. has never requested dismissal of this case on prudential grounds.

Defendants' reliance on *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), is equally unavailing. *Joo* dismissed claims not because of Executive Branch objections, but because such claims were barred by peace treaties with Japan following World War II that established an alternate, exclusive mechanism for resolution: "it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits."[12] *Id.* at 50.

Moreover, now that South Africa has affirmed its belief that the District Court is "an appropriate forum" to hear these suits, it is unmistakably and irrefutably clear that these actions do not offend South African sovereignty and will not irritate U.S.-South Africa relations, the only case-specific concerns made in previous government submissions. The South African Government Letter thus reinforces the correctness of the District Court's *Baker* analysis, and its conclusion

[12] *Freund v. Republic of France*, 592 F. Supp. 2d 540, 568-70 (S.D.N.Y. 2008) and *In re Nazi Era Cases Against German Defendants Litig.*, 334 F. Supp. 2d 690, 694-97 (D.N.J. 2004), *aff'd*, 196 F. App'x 93 (3d Cir. 2006) also arise out of cases that interfered with general settlement funds created after extensive negotiations between U.S. and foreign governments, formalized by Executive Agreements, and whose success depended on dismissal of pending cases. *See also Whiteman*, 431 F.3d at 59-60 (settlement fund for Nazi-era property deprivation by Austria and Austrian entities negotiated by U.S. and Austria). No such Executive Agreement exists with South Africa.

that this case does not raise a political question. PA-538-39. The District Court's decision should be affirmed.

2. The U.S.'s other prior concerns do not mandate dismissal.

Thus, Defendants are left only with the speculative argument that "adjudication of the apartheid cases may deter foreign investment where it is most needed." A-255; AOB 30. The District Court carefully considered this argument too, and correctly determined that this concern does not implicate any *Baker* factor or warrant dismissal of the narrowed cases. SPA -111-113 & n.349.

First, it is unclear whether the U.S. retains this concern in light of the narrowed scope of these cases and the South African Government Letter. The prior U.S. statement addressed cases in which a host of companies from numerous countries were named under a broad theory of liability that could conceivably encompass doing business with pariah regimes. In contrast, there is no evidence that these actions in their current form would have any chilling effect on foreign investment in South Africa or elsewhere.[13]

Second, generalized concerns about the potential impact of these cases on foreign investment do not meet *Baker*'s "high bar for justiciability." *Am. Elec.*, 2009 U.S. App. LEXIS 20873, at *21. As this Court explained, "the areas where

[13] In considering the extent to which the narrow pending claims could have an impact on future foreign investment, the District Court properly considered the submission by Nobel Prize winning economist Joseph Stiglitz. SPA-116 n.369.

federal courts have found non-justiciable political questions in foreign relations matters" involve specific, concrete conflicts between Executive power and the relief pursued, such as "recognition of foreign governments," "which nation has sovereignty over disputed territory," "recognition of belligerency abroad," determination of "a person's status as representative of a foreign government," and "[d]ates of duration of hostilities." *Id.* at *7 (quoting *Baker*, 369 U.S. at 212-13) (internal quotations omitted). "[T]he *Baker* analysis is not satisfied by semantic cataloging of a particular matter as one implicating foreign policy. . . Instead, *Baker* demands a discriminating inquiry into the precise facts and posture of a particular case before a court may withhold its own constitutional power to resolve cases and controversies." *Id.* at *27 (internal citations and quotations omitted).

A speculative concern that a case might deter foreign investment simply cannot meet *Baker*'s "discriminating inquiry," particularly where, as here, the government did not identify any country or region where any express policy to encourage foreign investment would be obstructed. *See City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 377 & n.17 (2d Cir. 2006) (disregarding U.S. views that holding would allow plaintiffs to bootstrap property claims against foreign government where concerns were not "severe enough" and "presented in a largely vague and speculative manner . . . [without] the level of specificity required to justify . . . a dismissal on foreign

policy grounds"). Moreover, because the Executive's concern was predicated on the "extent" to which this litigation deterred investment, A-256, and the extent of deterrence is related to the standard of liability (a question within the court's competency), the District Court properly analyzed the likelihood of deterrence in light of the actions' current claims. General concerns about foreign investment are often present in corporate ATS cases, and yet such cases routinely survive motions to dismiss on political question grounds. *See, e.g., Exxon*, 473 F.3d 355; *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377 (S.D.N.Y. 2009); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No 01-9882, 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. Aug. 30, 2005).

Defendants do not identify a single case where Executive speculation that litigation might deter foreign investment was sufficient to require dismissal under *Baker*. In contrast, the cases on which Defendants rely involve direct interference with a specific foreign policy clearly adopted and implemented. *See* Section III.B.2 *supra*. That a government might *prefer* dismissal of ATS claims does not itself warrant dismissal. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 64 (E.D.N.Y. 2005) (holding political question doctrine did not require dismissal despite State Department arguments, including that suit would interfere with prior policy decisions).

In addition, since Congress is free to amend the ATS to address any concern about allowing aiding and abetting corporate liability, "there is no need for the protections of the political question doctrine." *Am. Elec.*, 2009 U.S. App. LEXIS 20873, at *54 ("[W]here Congress may, by legislation, displace common law standards by its own statutory or regulatory standards and require courts to follow those standards, there is no need for the protections of the political question doctrine."). As the Supreme Court noted in *Sosa*, despite various parties raising policy concerns, Congress has not seen fit to circumscribe the ATS in the 200 years since its passage. 542 U.S. at 725.

C. The Cases Cannot Be Dismissed on Comity Grounds.

A case may be dismissed pursuant to international comity doctrine only where there is a proven "true conflict" between American law and foreign law. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993); *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996). As the court below explained, there is no conflict for comity purposes "where a person subject to regulation by two states can comply with the laws of both." SPA-109 (quoting *Hartford Fire*, 509 U.S. at 799). Here, the District Court correctly found no conflict between the narrowed claims and South African law or the TRC process. The South African Government Letter confirms this conclusion.

1. The South African letter confirms that no true conflict exists.

Defendants' arguments for dismissal on comity grounds are predicated on a South African government position that no longer exists, namely that this action somehow interferes with or contradicts the TRC process and South Africa's approach to addressing the legacy of apartheid. This argument is mooted by South Africa's express statement that the District Court represents "an appropriate forum" to hear the cases in their present form. *See Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.* 560 F.3d 118, 125 (2d Cir. 2009) (dismissing appeal as moot where essential controversy as to appeal was eliminated).

2. The District Court did not abuse its discretion in finding no true conflict between the narrowed cases and South African law.

The District Court relied on proper authorities to find no "true conflict" where no amnesty was granted to multinational corporations through the TRC, which allowed a "victim [to] sue those who declined to offer testimony to the TRC." SPA-114-16. Defendants have never questioned these conclusions.

Defendants argue that the District Court "appears to have" improperly given weight to views of TRC commissioners over the South African government. AOB-38. Although the court summarized the TRC submission in its "Factual Background" section, it did not cite the submission in its substantive discussion of political question and comity doctrines. The TRC submission confirmed facts

regarding the TRC process, such as the lack of general amnesty—facts that Defendants never dispute. While statements by governments of sovereign states are generally owed "respectful consideration," *Kadic*, 70 F.3d 250, statements by private parties may have weight when they lie within an area of expertise, *see, e.g.*, *Sosa*, 542 U.S. at 714 (crediting views of *amici* professors of federal jurisdiction and history regarding common law at time of ATS enactment). TRC Commissioners have expertise on the scope of the TRC process.[14]

This case is distinguishable from *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582 (2d Cir. 1993), which was not decided on comity grounds. *Bi* deferred to Indian law making the Indian government the exclusive representative of gas leak disaster victims "in courts around the world." *Id.* at 586. The Supreme Court of India had confirmed the Indian Government's exclusive authority to compromise "*all* litigations, claims, rights and liabilities related to and arising out of the [Bhopal] disaster." *Id.* at 583, 585 (emphasis added). In contrast, the South

[14] The District Court cited statements submitted by former TRC Commissioners, regarding the facts of the TRC process, but the court never stated that it was giving deference to those statements over prior governmental statements. SPA-98-102. Plaintiffs have not found any authority suggesting that courts may not consider views of former officials of a key foreign entity involved in matters relevant to the Court's political question determination. Even if the District Court arguably relied upon statements by private actors while interpreting the significance of past U.S. statements, this was permissible. *Cf. Arakaki v. Lingle*, 477 F.3d 1048, 1068 (9th Cir. 2007) (court does not exercise powers reserved to Congress or the President when it interprets implications of past congressional or executive inaction or action).

African government did not reserve the right to represent all victims of apartheid in civil suits, nor was the TRC intended as the sole mechanism to address all claims arising from apartheid. As the District Court recognized, "the TRC process was explicitly *not* exclusive." SPA-115 n.358.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RECOGNIZING AIDING AND ABETTING LIABILITY UNDER THE ATS.

A. Defendants' "Practical Consequences" Argument is Superseded by this Court's Decisions.

Defendants' argument that Plaintiffs' aiding and abetting claims should not be allowed to proceed because of "practical consequences" merely rehashes their "case-specific deference" argument. That argument is properly addressed to Congress as the basis for an amendment to the ATS, not as legal assertions. *See* Section II *supra*. To the extent Defendants attempt to mount a legal challenge to aiding and abetting liability, their argument cannot be sustained after this Court's decisions in *Khulumani* and *Talisman*.

This Court has clearly rejected Defendants' arguments against aiding and abetting liability and has held, in the context of ATS claims against corporations for complicity in human rights violations, that aiding and abetting liability is a viable theory under the ATS.[15]

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[15] In *Khulumani*, after holding that "a plaintiff may plead a theory of aiding and abetting liability under the [ATS]," 504 F.3d at 260, this Court noted that the

B. The District Court's Aiding and Abetting Ruling is Consistent with This Court's Decision in *Talisman*.

In *Talisman*, this Court adopted the aiding and abetting standards set forth in Judge Katzmann's opinion in *Khulumani*. *Talisman*, 2009 U.S. App. LEXIS 21688, at *37-41. The District Court similarly determined that it "must adhere to the restrictive approach to *mens rea* laid out in Judge Katzmann's *Khulumani* concurrence" and "set the [*mens rea*] requirement at a level where all major sources of customary international law would authorize the imposition of such liability." SPA 51-52. Accordingly, the District Court adopted a *mens rea* standard consistent with Judge Katzmann's approach, while noting an ambiguity remains about whether purpose must be primary, shared, or secondary.[16] SPA 56;

District Court should also consider case-specific "prudential principles" before permitting Plaintiffs' claims to go forward—specifically, political question and international comity doctrines. *Id.* at 261-62. Contrary to Defendants' suggestion, the Court did *not* hold that the District Court should also apply some additional, amorphous "practical consequences" analysis, untethered to these doctrines.

[16] Defendants do not expressly argue that this Court has jurisdiction at this interlocutory stage to review the District Court's *mens rea* ruling. Defendants have not shown, and could not show, that ruling is "inextricably intertwined" with, or "necessary to ensure meaningful review of" the issues on appeal. *Jones v. Parmley*, 465 F.3d 46, 64-65 (2d Cir. 2006) (declining to exercise pendent jurisdiction over cross-appealed issues and stating that such jurisdiction should only be exercised in "exceptional circumstances"); *see also Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 757 (2d Cir. 1998) (refusing to exercise pendent jurisdiction over personal jurisdiction issues and cautioning that pendent jurisdiction should not permit parties to turn "collateral orders into multi-issue interlocutory appeal tickets"). Defendants are, of course, free to renew their motion to dismiss in the District Court based on *Talisman* so that the court may consider any arguments in the first instance and any request by Plaintiffs for

see also Khulumani, 504 F.3d at 276-77 (Katzmann, J., concurring). The District Court observed that in a case such as this, where each remaining Defendant is alleged to have directly supplied the means by which a crime in violation of the law of nations was carried out, purpose may be inferred from knowledge of the "likely consequences of the act." SPA 56; *see also Khulumani,* 504 F.3d at 77 n.11 (Katzmann, J., concurring). The District Court also expressly recognized that many of Plaintiffs' allegations meet the Rome Statute's purpose standard: "Plaintiffs have advanced numerous allegations evincing specific intent, particularly concerning the automotive defendants." *In re S. African Apartheid Litig.*, 624 F. Supp. 2d 336, 343 & n.30 (S.D.N.Y. 2009).

The District Court conducted its analysis in the context of Plaintiffs' pre-discovery allegations, just as the District Court in *Talisman* rejected the defendants' motions to dismiss. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005). As the District Court here recognized, the claims it permitted to proceed more than adequately set forth allegations satisfying the standards outlined in Judge Katzmann's opinion in *Khulumani* and, thus, this Court's recent decision in *Talisman.*

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permission to amend their complaints to clarify that they satisfy *Talisman*'s standard. The impact, if any, of that standard on Plaintiffs' claims must be considered by the District Court in the first instance.

In *Talisman*, which was decided on summary judgment on a full evidentiary record, this Court held that plaintiffs did not allege that defendant designed and supplied the very means to be used directly to perpetrate crimes in violation of the law of nations. Instead, this Court found that "[t]he activities which the plaintiffs identify as assisting the [Sudanese] Government in committing crimes against humanity and war crimes *generally accompany any natural resource development business or the creation of any industry*." *Talisman*, 2009 U.S. App. LEXIS 21688, at *45 (quoting district court) (emphasis added). The allegations in Plaintiffs' complaints are far more specific, and Defendants' alleged activities extended far beyond practices incidental to legitimate business operations. *See* Subsection F *supra*.

Moreover, unlike the *Talisman* plaintiffs, Plaintiffs in these cases properly alleged agency liability. *Cf. Talisman*, 374 F. Supp. 2d at 689 (denying plaintiffs leave to amend to allege agency, joint venture, and alter ego liability); *Talisman*, U.S. App. LEXIS 21688, at *66-67 (affirming denial of leave to amend). Thus, the range of admissible evidence likely available to Plaintiffs in discovery here is far greater than in *Talisman*.

In contrast to how this Court saw the *Talisman* plaintiffs' intentions, these cases do not seek a ruling amounting to an embargo on "doing business" with a pariah regime. Plaintiffs have alleged that Defendants purposefully aided and

abetted specific violations of international human rights with full awareness of their actions' illegality. Thus, as the District Court recognized, this is a case in which Defendants' purpose can be inferred from the facts and circumstances given the allegations in Plaintiffs' complaints. The final decision about whether Plaintiffs can *prove* Defendants' liability must await discovery and a full summary judgment or trial record before appellate review is appropriate.

V. THE ATS APPLIES EXTRATERRITORIALLY.

The District Court followed well-established precedent when it rejected Defendants' argument that the ATS does not apply extraterritorially. *See Filártiga*, 630 F.2d at 885 ("It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction."); *Kadic*, 70 F.3d 232 (exercising ATS jurisdiction over torts committed in former Yugoslavia); *Khulumani*, 504 F.3d 254; *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *see Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.10 (2d Cir. 2000). Courts asked to consider this issue have consistently found that the ATS grants jurisdiction over extraterritorial claims. *See, e.g., In re Estate of Marcos*, 978 F.2d 493, 500 (9th Cir. 1992) ("[W]e are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury"). *Sosa*, which arose out of conduct occurring entirely in Mexico, itself clearly understood that the ATS grants jurisdiction over causes of

action arising in other countries and endorsed a line of cases in which courts allowed such claims to proceed. 542 U.S. at 732 (citing with approval *Filártiga*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, (D.C. Cir. 1984) (Edwards, J., concurring), and *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994)).

Defendants' claim that the ATS's history provides no support for extraterritorial application is undermined by some of the earliest ATS interpretations rendered by Executive Branch officials. As the Supreme Court noted in determining the intent of the statute, these officials clearly contemplated that the ATS would be applicable to conduct committed outside U.S.'s territorial borders. *Sosa*, 542 U.S. at 721 (citing 1 Op. Att'y Gen. 57, 58 (1795) ("[T]here can be no doubt" that the victims of an attack on a British settlement in Africa "have a remedy by a civil suit" under the ATS.) (emphasis omitted)).[17]

At the time of the statute's enactment, the Framers conceived of civil actions in tort as transitory, in that the tortfeasor's wrongful act created a liability that could follow him across national boundaries. *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 248-49 (1843) (stating that English courts were open to foreigners bringing civil torts, even against other foreigners found in England, for torts committed both inside and outside England and its dominions). In enacting the ATS, the First

[17] Defendants' citation to this opinion, AOB 56, is misleading, as it references Attorney General Bradford's view of limitations of federal *criminal* jurisdiction and not the availability of civil remedies in U.S. courts.

Congress likely wished to ensure the possibility of a federal forum for the limited subset of transitory torts involving a violation of international law while declining to interfere with the right of the states to hear ordinary transitory tort suits. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

Defendants' position would require the perverse conclusion that, while state courts have the power to hear torts between aliens, federal courts do not, even where important questions of international law are concerned. The Framers' experience under the Articles of Confederation strongly suggested that they feared the prospect of multiple and inconsistent interpretations of the law of nations by state courts. Louis Henkin, *Foreign Affairs and the Constitution* 33 (1972). The ATS was one of the instruments of national control over the adjudication of such disputes.

Thus, the ATS does not impose a territorial precondition for exercises of jurisdiction.[18] Rather, as one court in this Circuit properly observed, "[b]ecause of the nature of the alleged acts, the United States has a substantial interest in

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[18] Although "[t]he Framers might not have anticipated the fact that the law of nations would come to prohibit one alien from torturing another, . . . it is unrealistic to think that they would have wanted the federal courts to shrink from enforcing the law of nations 'in its modern state of purity and refinement.'" William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L., 687, 701 (2002) (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J. concurring)).

affording alleged victims of atrocities a method to vindicate their rights." *Talisman*, 244 F. Supp. 2d at 340.

Finally, Defendants' argument that the presumption against extraterritoriality is intended to avoid the risk of interfering with the prerogative of a foreign nation to regulate its own affairs is irrelevant.[19] As the District Court noted, because the ATS applies universal norms, the adjudication of claims stemming from acts committed abroad will not generate conflicting legal obligations and there is a substantially reduced likelihood that adjudication will legitimately offend the sovereignty of foreign nations. SPA-21-22 & n.60 (citing *The Apollon,* 22 U.S. (9 Wheat) 362, 370 (1824)). Moreover, it is clear that Congress intended the ATS to apply to actions (*e.g.,* piracy) arising outside U.S. territorial boundaries.

Accordingly, this Court should affirm the District Court's analysis that: "[g]iven the universal agreement of federal courts, as well as the inapplicability of the presumption against extraterritorial application of statutes, Defendants' extraterritoriality defense is rejected. The [ATS] provides this Court with the authority to hear claims for torts committed abroad, including allegations at issue in this case." SPA-23.

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[19] Defendants' reliance on *F. Hoffman-La Roche Ltd. V. Empagram S.A.*, 542 U.S. 155 (2004) is misplaced: that case dealt with anti-competitive conduct and did not implicate the violation of *jus cogens* norms alleged here.

VI. CORPORATIONS ARE NOT IMMUNE FROM SUIT UNDER THE ATS.

Defendants also argue they cannot be held liable because they are corporations. AOB 57-59. *Talisman* observed that the Circuit has not directly addressed this issue. 2009 U.S. App. LEXIS 21688, at *47 n.12. However, the Second Circuit has decided numerous ATS cases involving corporate liability, and never once accepted the argument that corporations are immune from suit. *See, e.g., Pfizer*, 562 F.3d at 174 ("In [*Khulumani*] we held that the ATS conferred jurisdiction over multinational corporations that purportedly collaborated with the government of South Africa in maintaining apartheid because they aided and abetted violations of customary international law.") (internal citations omitted). *See also Vietnam Ass'n for Victims of Agent Orange*, 517 F.3d 104, 108 (2d Cir. 2008); *Khulumani*, 504 F.3d at 282, 289 (Katzmann, J., concurring and Hall, J., concurring); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 244 (2d Cir. 2003); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000); *Wiwa*, 226 F.3d at 104; *Jota*, 157 F.3d 153.

Other courts asked to consider this issue in ATS cases have consistently found, implicitly and explicitly, that corporations are subject to suit. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Romero v. Drummond Co., Inc.*, 552

F.3d 1303 (11th Cir. 2008); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007); *Doe v. Exxon Mobil Corp.*, 573 F.Supp.2d 16 (D.D.C. 2008); *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164 (C.D. Cal. 2005).

Under basic principles of international law, states may assert jurisdiction over tort claims unless there is a countervailing principle of international law restricting the exercise of such jurisdiction. *S.S. Lotus (France v. Turkey)*, PCIJ Rep., Series A, No 10, at 4 (1927). No international law principle restricts the exercise of jurisdiction over corporations for the tort claims asserted here. Indeed, general principles of law common to all legal systems universally recognize the imposition of civil liability when companies commit any variety of torts.[20]

The ATS does not restrict its application to natural persons. And its earliest interpretations confirm that corporations are not exempt from liability. In 1907, the Attorney General of the United States determined that corporations are capable of violating the law of nations or a treaty of the United States for ATS purposes. *See* 26 Op. Att'y Gen. 250 (1907) (concluding that Mexicans harmed by private company's diverting the channel of the Rio Grande in violation of treaty between Mexico and U.S. could sue the company under the ATS).

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[20] *See, e.g.*, Beth van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L. J. 141 (2001).

In *Bigio*, 239 F.3d 440, this Court made clear that the liability of corporations for international law violations is determined in the same way as for any other non-state actor. Recent judicial decisions similarly conclude that "[a] private corporation is a juridical person and has no *per se* immunity under U.S. domestic or international law. . . . Given that private individuals are liable for violations of international law in some circumstances, there is no logical reason why corporations should not be held liable." *Talisman*, 244 F. Supp. 2d at 319. As a result of the widespread understanding that both natural and juridical persons can be held liable for violations of international law, *no court* has ever dismissed a case on the basis that corporations cannot be held liable in ATS suits. *See generally Wiwa*, 226 F.3d 88.

There is no relevant distinction in any theory of tort or criminal law that immunizes one class of private actors with respect to ordinary wrongs, and it would be particularly nonsensical to apply such a theory to the narrow class of heinous wrongs that are the concern of customary international law. This is likely why, far from questioning this principle of jurisprudence, *Sosa* cited *Kadic* with approval in including corporations within the class of private actors subject to ATS liability. 542 U.S. at 732 n.20.[21] Courts reviewing ATS cases with corporate

[21] Footnote 20 notes that some international norms apply directly to non-state actors, whereas others require a showing of state action. It draws no distinction between corporations and natural persons. *Sosa*, 542 U.S. at 732 n.20 ("Compare

defendants since *Sosa* have repeatedly found, implicitly and explicitly, that the ATS permits corporate liability. *See Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring) ("We have repeatedly treated the issue of whether corporations may be held liable under the [ATS] as indistinguishable from the question of whether private individuals may be."). No court since *Sosa* has distinguished between natural and juridical persons for purposes of ATS principles of liability, and numerous decisions of this Court and others would be inexplicable if such principles did not extend to corporations.[22]

Defendants also misconstrue international law in asserting that because international criminal tribunals like the International Criminal Court (ICC) do not exercise jurisdiction over corporate entities, international law prohibits the imposition of civil liability on corporations in domestic courts. The fact that the ICC lacks jurisdiction over corporations for independent reasons does not mean

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Tel-Oren v. Libyan Arab Republic, [726 F.2d at 791-95] (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, [70 F.3d at 239-41] (sufficient consensus in 1995 that genocide by private actors violates international law).").

[22] *See, e.g., Khulumani*, 504 F.3d 254 (*per curiam*); *Flores*, 414 F.3d at 244; *Bano*, 361 F.3d 696; *Aguinda*, 303 F.3d 470; *Bigio,* 239 F.3d at 447; *Jota*, 157 F.3d 153. *Accord Aldana*, 416 F.3d at 1254 (ATS in principle grants jurisdiction over claims against corporations); *Romero*, 552 F.3d at 1315 (same).

there is no corporate liability under international law or the ATS.[23] International legal sources indicate that corporate liability for offenses under international law is both permissible and desirable. Several multilateral treaties adopted in the last decade have imposed criminal or civil liability on corporations that aid and abet violations. *See, e.g.,* International Convention for the Suppression of the Financing of Terrorism art. 5, *adopted* Dec. 9, 1999, PSPA-9; United Nations Convention Against Transnational Organized Crime art. 10, *adopted* Nov. 15, 2000, PSPA-26; Optional Protocol to the Convention on the Rights of the Child on the Sale of

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[23] The Rome Statute's drafters declined to provide the ICC with jurisdiction over corporate entities in part as a result of a key feature unique to that tribunal—the principle of complementarity—and not as a result of some inherent characteristic of international law. *See* Kai Ambos, *Article 25: Individual Criminal Responsibility, in Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999). According to the principle of complementarity, the ICC must relinquish its jurisdiction and allow interested states to assume domestic jurisdiction over cases brought before the Court if they are willing and capable of doing so. *See* Rome Statute art. 17. However, some individual states do not provide for criminal liability over corporate entities—as opposed to individual officers and directors of corporations—in their domestic laws. It would be impossible for the ICC to relinquish a criminal case brought against a corporate entity at the international level to a domestic state's courts if that state's laws did not conceive of corporate entities as being capable of incurring criminal liability in the first place, a phenomenon which would render the principle of complementarity unworkable in corporate cases. *See* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 315-16 (2008). In addition, the drafters of the Rome Statute explicitly rejected the notion that its provisions embodied the current state of customary international law, providing that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law other than this statute." *See* Rome Statute art. 10.

Children, Child Prostitution and Child Pornography, art. 3, *adopted* May 25, 2000, PSPA-55-56; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 2, *adopted* Nov. 21, 1997, PSPA-65. Thus, international law clearly permits (and in some instances requires) states to impose civil liability on corporations for violating international law.

Contrary to Defendants' suggestion, international criminal law is not the only source of customary international law. *See* Statute of the International Court of Justice art. 38 (defining authoritative sources of international law); *Khulumani*, 504 F.3d at 267 (describing various sources of international law, including general principles of law recognized by civilized nations). Recently, an Expert Legal Panel of the International Commission of Jurists (ICJ) issued a report on corporate complicity in international crimes that noted that "across all types of jurisdictions, *civil liability* can arise for both company entities (legal persons) and for company officials (natural persons)." PA-575 (emphasis added). The reports contain exhaustive reviews of state practices recognizing corporate liability and conclude that nothing in international law precludes states from including provisions on corporate criminal responsibility in future agreements or amendments to the Rome Statute. PA-580-83.

Defendants' contention that the law of nations itself must define every aspect of the federal common law cause of action authorized by the ATS is at odds

with the nature of the international legal system. Customary international law is comprised of substantive norms, but it does not provide the means for its own domestic enforcement. *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring) (international law "never has been perceived to create or define the civil action to be made available; . . . by consensus, the states leave that determination to their municipal laws"); *Kadic*, 70 F.3d at 246 ("The law of nations . . . leaves to each nation the task of defining the remedies that are available for international law violations.").

Requiring international law to subject a particular category of defendant to civil liability would be no different than adopting the discredited claim that international law must supply the cause of action in an ATS case. Since U.S. law allows for corporate entities to incur both civil and criminal liability, this Court should confirm, like all those addressing the issue before it, that the ATS similarly allows corporate liability. As Judge Edwards recognized in *Tel-Oren*, "to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of [the ATS]." 726 F.2d at 778 (Edwards, J., concurring).

Nothing in the language or history of the ATS, or any international law principle, provides immunity to corporations for tort liability for fundamental

human rights violations. Defendants cannot find a case under the ATS or international law to support their argument. A wealth of authority supports corporate liability for complicity in international human rights violations.

CONCLUSION

Defendants' appeal should be dismissed for want of jurisdiction, or, alternatively, the District Court's rulings at issue should be affirmed.

Dated: October 14, 2009

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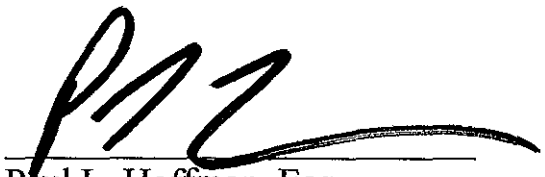

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