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09-2792-cv; 09-2801-cv; 09-3037-cv

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

**REPLY BRIEF OF APPELLANTS FORD MOTOR COMPANY AND
INTERNATIONAL BUSINESS MACHINES CORPORATION**

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, MPHONGALFRED 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 SYLVIA NGCAKA, individually and on behalf of her deceased son, HANS LANGFORD PHIRI, MIRRIAM MZAMO, individually and on behalf of her deceased son,

(Caption continued on inside cover)

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

GENERAL MOTORS CORPORATION, RHEINMETALL AG

Defendants.

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INTRODUCTION

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), the Supreme Court explained that, in *these cases*, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.” The District Court nevertheless refused to defer to the Executive’s explanation that this litigation has significant, adverse foreign-policy consequences. In so doing, the District Court improperly second-guessed the reasoned foreign-policy judgment of the Executive Branch, and ignored the Supreme Court’s admonition that “case-specific deference” is appropriate in this case. The District Court further erred in failing to dismiss this case on grounds of comity to the democratically elected South African government’s repeated statements (echoed by other nations) that this litigation conflicts with that nation’s apartheid reconciliation process and poses an affront to its sovereignty.

Plaintiffs’ arguments to the contrary are meritless. First, plaintiffs’ arguments that the Executive Branch’s explanation is not entitled to deference conflicts with *Sosa*. Second, plaintiffs’ argument that comity does not require dismissal is premised on the legally erroneous view that a conflict exists only when it is impossible to comply with the law of two nations; a conflict also exists when, as here, litigation in U.S. courts would interfere with the sovereign rights of foreign nations and otherwise harm foreign relations. Finally, plaintiffs err in

relying on a letter delivered to this Court by South African Justice Minister Radebe (Radebe Letter). The U.S. has not stated that the letter affects its view of this litigation, and South Africa has not yet responded to this Court's invitation to present its official views to the Court.

This Court has collateral order jurisdiction to consider these arguments because they are based on the U.S.'s, South Africa's, and other governments' objections to the very pendency of this litigation. The arguments would be effectively unreviewable if review were deferred to the conclusion of district court proceedings. This Court also possesses pendent jurisdiction to consider whether: (i) courts should refuse to recognize a federal common-law cause of action for aiding and abetting based on the practical consequences of doing so; (ii) the ATS encompasses claims against corporations; and (iii) the ATS allows extraterritorial application in the circumstances of this case. The upshot of those three considerations is that federal courts, at the very least, should decline to recognize a federal common-law action against a corporation based on allegations that it aided and abetted a foreign sovereign's conduct against its own citizens on its own soil.

ARGUMENT

I. This Court Has Appellate Jurisdiction To Consider The Case-Specific Deference And International Comity Questions

A. This Appeal Is Timely

Fourteen days after the District Court's order denying their motion to

dismiss, Appellants moved that court to certify its order for “immediate appellate review.” A-377. Because “[a]n appeal must not be dismissed for informality of form or title of the notice of appeal,” Fed. R. App. P. 3(c)(4), and because Appellants’ request for permission to appeal “conveys the information required by Rule 3(c),”¹ *Smith v. Barry*, 502 U.S. 244, 249 (1992), that request constituted a timely notice of appeal. Indeed, every court to consider the question has held that seeking permission to appeal manifests an intent to appeal, and therefore constitutes a valid notice of appeal. *E.g.*, *In re Bertoli*, 812 F.2d 136, 137-38 (3d Cir. 1987) (Becker, J.) (motion seeking 1292(b) certification “complies with Rule 3(c)” because it “communicates Bertoli’s intention to appeal”).²

¹ The motion specified the parties taking the appeal, designated the order being appealed, and named the court to which appeal is taken. A-377, A-382.

² *See also Landano v. Rafferty*, 970 F.2d 1230, 1238 (3d Cir. 1992) (“Petition for Permission to Appeal” “provides sufficient notice to other parties and the courts” (quotation omitted)); *United States v. Moats*, 961 F.2d 1198, 1203-04 (5th Cir. 1992) (“Petition for Permission to Appeal from an Interlocutory Order” “gave the notice to the court and the parties required for a document’s sufficiency as a notice of appeal”); *Browning v. Navarro*, 887 F.2d 553, 558 (5th Cir. 1989) (“The Brownings of course never actually filed a formal notice of appeal but their petition for interlocutory appeal is the functional equivalent of a notice of appeal”); *Cobb v. Lewis*, 488 F.2d 41, 44-46 (5th Cir. 1974) (“Petition for Leave to Appeal under 28 U.S.C. § 1292(b)” put “[b]oth the Court and the opposing parties ... on notice of their intent to appeal), *abrogated on other grounds by Kotam Elects., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724 (11th Cir. 1996) (en banc); *Remer v. Burlington Area School Dist.*, 205 F.3d 990, 994–95 (7th Cir. 2000) (“petition for interlocutory appeal” treated as valid notice of appeal, because “[n]o one, including the School District, could have been left wondering who was appealing,

Those decisions are correct. As *Bertoli* explained, when Rule 3 was amended in 1979 to provide that “[a]n appeal must not be dismissed for informality of form or title of the notice of appeal,” the Advisory Committee “cited with approval *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), which held a petition for leave to appeal sufficient to constitute a notice of appeal.” *Bertoli*, 812 F.2d at 138 (citing Fed. R. App. P. 3 advisory committee’s note to 1979 amendment). The Committee’s approval of *Cobb* demonstrates that a request for permission to appeal constitutes a notice of appeal. See *Corley v. United States*, 129 S. Ct. 1558, 1571 (2009) (relying on Committee notes to construe Federal Rules). Accordingly, a “petition for permission to appeal under § 1292(b) is treated as a notice of appeal that supports appeal as a matter of right.” 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3929.1.

Plaintiffs suggest that a request for permission to appeal constitutes a notice of appeal when filed in the court of appeals, but not when filed in the district court. Plaintiffs’ Answering Br. (PAB) 27. Three circuits, however, have held that a request for permission to appeal filed in district court constitutes a notice of appeal.

what she was appealing, or to which court she was appealing”); *San Diego Comm. Against Registration and the Draft (CARD) v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1474 (9th Cir. 1986) (“motion for permission to appeal the order under Fed. R. App. P. 5(a)” treated as notice of appeal because it “provided clear notice to both the court and the Board that CARD intended to appeal the order”), *abrogated on other grounds by Planned Parenthood v. Clark County Sch. Dist.*, 887 F.2d 935 (9th Cir. 1989).

See CARD, 790 F.2d at 1474; *Browning*, 887 F.2d at 558; *Bertoli*, 812 F.2d at 137-38. And while other cases addressed notices filed in the court of appeals, they held that the requests for permission to appeal constituted notices of appeal *despite* that fact, not because of it. *See Landano*, 970 F.2d at 1238 n.15 (“The filing of the motion for permission to appeal in the appellate court rather than the district court, as required by Fed. R. App. P. 3(a) is also not fatal to its effectiveness as a notice of appeal”); *Remer*, 205 F.3d at 994 (same); *Moats*, 961 F.2d at 1204 (same); *see also* Fed. R. App. P. 4(d).

Finally, plaintiffs argue that, because of the rule that a notice of appeal normally divests a district court of jurisdiction, accepting a 1292(b) motion as a notice of appeal would deprive the district court of jurisdiction to make any further rulings. PAB 25-27. But that rule does not apply when there is “little danger a district court and a court of appeals would be simultaneously analyzing the same judgment.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982) (per curiam). Because the request for permission to appeal will not result in the docketing of the appeal in the court of appeals, there is no danger that the district court and the court of appeals will analyze the same judgment simultaneously. Such a request therefore does not divest the district court of jurisdiction. Accordingly, while every court of appeals to have considered it has held that a request for permission to appeal constitutes a notice of appeal, none has suggested

that the filing of the request itself divested the district court of jurisdiction.

B. This Court Has Appellate Jurisdiction Under The Collateral Order Doctrine

This appeal satisfies the requirements for a collateral order appeal. In particular, because the Executive Branch asserted that the *very pendency of this litigation* interferes with U.S. foreign policy and South African sovereignty, Appellants' Opening Br. (AOB) 43 & n.9, the order is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). As the U.S. has explained, collateral order review is available in these circumstances because "the very import of the defense will be lost if the suit proceeds to discovery and trial." Brief for the United States as *Amicus Curiae*, *Exxon Mobil Corp. v. Doe*, No. 07-81 (U.S.) ("U.S. *Doe* Br."), 2008 WL 2095734, at *14.

Plaintiffs rely on *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), but *Doe* considered only whether defendants could "appeal *every time* a district court denied a motion to dismiss based upon political question grounds." *Id.* at 353 (emphasis added). The issue here is whether immediate appeal is available when the U.S. asserts that the very pendency of the litigation interferes with foreign policy. *Doe* "did not decide that question." U.S. *Doe* Br., 2008 WL 2095734, at *15.

Plaintiffs further argue against collateral order jurisdiction because, they

claim, the U.S. has not “*explicitly* [sought] dismissal” in this case. PAB 22-23 (quoting U.S. *Doe Br.*, 2008 WL 2095734, at *14). That is not so: the U.S. has explicitly sought dismissal twice, once before this Court and once in an uninvited certiorari-stage amicus brief in the Supreme Court. In both briefs, the U.S. stated that the very pendency of this litigation harms U.S. foreign relations. *See, e.g.*, A-271 (U.S. Second Circuit Br.) (the “South African Government opposes this case *being allowed to proceed* and deems these actions incompatible with South Africa’s own reconciliation process”); A-351, A-367 (U.S. Supreme Court Br.) (emphasizing that “*early dismissal*” of these actions is imperative, and that “[*t*]*he pendency of this case* and the prospect of such litigation more broadly” interferes with U.S. foreign policy objectives) (emphases added).

In any event, a collateral order appeal does not depend on any formulaic requirement of an explicit request for dismissal. The critical question is whether the U.S.’s submission necessarily implies that the case should be dismissed because the very pendency of the litigation interferes with U.S. foreign policy. And because that is the case here, appeal after final judgment is not an effective remedy. Indeed, the U.S. Statement of Interest (SOI) states that “*continued adjudication* of [these] matters risks potentially serious adverse consequences for significant interests of the United States.” A-254 (emphasis added). The only plausible reading of the SOI is that the U.S. wanted the case dismissed. That is

how the Supreme Court interpreted it in *Sosa*. 542 U.S. at 733 n.21.

Finally, plaintiffs claim that the Radebe Letter, filed after this Court heard oral argument on plaintiffs' motion to dismiss, eliminates whatever collateral order jurisdiction may have once existed. Defendants disagree with that interpretation. That aside, the U.S. has not withdrawn its SOI in light of the Radebe Letter. And that SOI continues to serve as a sufficient basis for collateral order review.

In any event, changes that post-date the filing of the notice of appeal—like the Radebe Letter—cannot affect this Court's jurisdiction. A court's subject-matter jurisdiction “depends upon the state of things at the time of the action brought.” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (internal quotation omitted). That rule was adopted “because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful.” *Id.* at 580. Appellate jurisdiction is a form of subject-matter jurisdiction,³ and likewise must be determined “at the time the notice of appeal was filed.” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981).⁴

³ See, e.g., *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006) (“Although neither party has suggested that we lack appellate jurisdiction, we have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*”).

⁴ Even if the Court could not exercise collateral order review, it would have jurisdiction to issue a writ of mandamus. As explained, *supra*, appeal after final

II. Principles Of Case-Specific Deference And International Comity Require Dismissal Of These ATS Claims

A. Principles Of Case-Specific Deference Require Dismissal On The Current Record

1. *Case-Specific Deference Requires Dismissal*

a. The District Court erred in refusing to dismiss based on case-specific deference. The U.S. explained in its SOI that the South African government had repeatedly stated that this litigation conflicts with its apartheid reconciliation process, that “[s]upport for the South African government’s efforts in this area is a cornerstone of U.S. policy towards that country,” and that it could thus “reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations.” A-254-55; *see also Sosa*, 542 U.S. at 733 n.21. That explanation was concrete and reasoned, and the District Court—upon according it the “serious weight” demanded by *Sosa*—should have deferred to it and granted dismissal.

Plaintiffs contend that the District Court correctly refused to defer to the U.S. position because it was based on the flawed assumption that plaintiffs were seeking to premise liability on doing business in South Africa. PAB 34. But the District Court gave that as a reason for failing to defer to a *different* U.S. objection, *viz.*, that the litigation would deter foreign investment. SPA-111. The court’s sole

judgment is not an adequate remedy. Moreover, as explained, *infra*, the District Court’s error in failing to dismiss on case-specific deference grounds on the record before it is both clear and indisputable.

reason for rejecting the objection that this litigation interferes with South African sovereignty and thus U.S. foreign policy was as follows: “A speculative conflict with the goal of maintaining good relations with a foreign nation—as opposed to a conflict with the authority of the political branches—is not the type of conflict that normally triggers dismissal under the political question doctrine.” SPA-112 n.349.

Plaintiffs make no effort to defend that reasoning. Nor could they. There is nothing “speculative” about the U.S. concern with the effect of the litigation on the relations between the U.S. and South Africa. To the contrary, *Sosa* expressly singled out that reason as the basis for giving serious weight to the Executive Branch’s view. 542 U.S. at 733 n.21. And while plaintiffs contend that the Radebe Letter eliminates the concern identified in the SOI, PAB 36-37, the U.S. has made no such conclusion, much less withdrawn the SOI, and South Africa has yet to respond to this Court’s invitation to submit its official views.

b. The U.S. also objected to the litigation on the separate ground that “adjudication of the apartheid cases may deter foreign investment where it is most needed.” A-255. That objection independently warrants dismissal of the complaint.

In particular, the U.S. explained that its foreign policy “relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests,

such as respect for human rights and reduction of poverty.” A-255. And it further explained that “the prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions.” A-255-56. The U.S. view that the pendency of this case interferes with its policy of encouraging foreign investment as a way of stimulating reform of repressive regimes was reasonably explained and entitled to deference. Plaintiffs’ contention that the U.S. objection reflected a “generalized concern” (PAB 37) is simply incorrect.

Plaintiffs also err in suggesting that this concern may be diminished now that they have amended their complaints. PAB 37. The SOI expressed concern over “the *prospect of costly litigation and potential liability*,” a “prospect” and “potential” that remains fully in place notwithstanding plaintiffs’ amendment to their complaints. A-255-56 (emphasis added); *see also* AOB 31-32.

2. *Case-Specific Deference Is Warranted Under Both The Political Question Doctrine And Under Federal Common Law*

a. Plaintiffs argue that case-specific deference applies only when litigation would violate the political question doctrine as articulated in *Baker v. Carr*, 369 U.S. 186 (1962). Even if that were so, deference would be required here. For the

reasons discussed, a court’s adjudication of this case would show a lack of respect for the foreign policy views of the Executive Branch, and would invite “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* at 217.

In any event, under *Sosa*, case-specific deference is a *federal common-law* “principle limiting the availability of relief in the federal courts for violations of customary international law.” 542 U.S. at 733 n.21. As the U.S. has explained, case-specific deference is “the deference owed to the Executive Branch by the courts in exercising their federal-common-law-making authority under the ATS with respect to claims alleging violations of international law.” U.S. *Doe Br.*, 2008 WL 2095734, at *17.

The federal common-law nature of case-specific deference resembles the federal common-law deference afforded the Executive Branch when deciding questions of foreign sovereign immunity before enactment of the Foreign Sovereign Immunity Act (FSIA). As the Supreme Court has explained, because “foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement,” the Court “consistently ... deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over particular actions against foreign sovereigns and their instrumentalities.” *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2003)

(citation and quotation marks omitted). Courts continue to give common-law deference to the Executive Branch on sovereign immunity questions when the FSIA does not apply, without any invocation of the political question doctrine. *See, e.g., Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009). Common-law deference is similarly applicable here.

Deference to the Executive Branch is especially important in the ATS context, where courts are required to weigh foreign-policy consequences when deciding whether to allow a common-law claim to proceed. *Sosa* specifically commands that courts be “particularly wary” of doing so when the action has “potential implications for the foreign relations of the United States,” because of the risk of “impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” 542 U.S. at 727. And because courts must be “particularly wary” of impinging on the Executive’s foreign-policy responsibilities in the ATS context, they must be particularly attentive to the Executive’s determination that a given case would threaten the foreign policy of the United States.⁵

⁵ Contrary to plaintiffs’ contention (PAB 5-6), the appropriate level of deference to the Executive Branch is a question of law, and thus reviewed *de novo*. The same would be true if case-specific deference were an aspect of the political question doctrine. *See, e.g., Arakaki v. Lingle*, 477 F.3d 1048, 1056 (9th Cir. 2007).

B. Principles Of Comity Also Require Dismissal

The District Court also erred in refusing to dismiss on comity grounds. This case implicates the former government of South Africa's treatment of its citizens in its country. And litigating that issue in a U.S. court squarely conflicts with the current, democratically elected, post-apartheid South African government's sovereign interest in deciding for itself how to address the legacy of apartheid. *See Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993); *see also* AOB 34-40.⁶

Relying on *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798 (1993), plaintiffs contend that comity does not warrant dismissal because simultaneous compliance with U.S. and foreign law is not impossible. As this Court has held, however, *Hartford's* impossibility standard applies to the question whether foreign conduct with anticompetitive consequences in this country is subject to U.S. antitrust laws; it does not automatically apply to other statutes or contexts. *See Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 746 (2d Cir. 1994); *see also In re Maxwell Commc'n Corp. PLC by Homan*, 93 F.3d 1036, 1050 (2d Cir. 1996). Thus, the Eleventh Circuit dismissed ATS litigation under the doctrine

⁶ Moreover, as the German government has recently reaffirmed in a letter to this Court dated October 13, 2009, and as the United Kingdom and Switzerland have maintained (A-367), this action conflicts with international sovereign and territorial interests.

of comity even though the impossibility standard was not met. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-40 (11th Cir. 2004). And this Court has applied the comity doctrine in ATS cases without considering whether the impossibility standard was satisfied. *See, e.g., Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453-55 (2d Cir. 2001); *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998).

As these decisions reflect, it is one thing to apply the impossibility standard to foreign conduct that actually is intended to have, and does have, consequences in this country. But it makes no sense to require impossibility as a predicate for applying comity when the conduct alleged was neither intended to cause, nor did cause, an alleged violation of international law in this country. *Cf. F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (not “reasonable to apply [U.S. antitrust] laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim” (emphasis omitted)).

Plaintiffs err insofar as they suggest that the views of former Commissioners of the Truth and Reconciliation Commission should be accorded deference on this issue. PAB 41-42. The Executive Branch alone decides who speaks for a foreign sovereign. *See Williams v. Suffolk Ins. Co.*, 38 U. S. (13 Pet.) 415, 420 (1839) (“[W]hen the executive branch of the government, which is charged with our foreign relations, shall ... assume a fact in regard to the sovereignty of any island

or country, it is conclusive on the judicial department[.]”); *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998) (“recognizing foreign states and governments is a function of the executive branch”). And the Executive Branch has decided that the South African government’s view of this litigation, not the Truth and Reconciliation Commissioners’ view, speaks for that country. A-254-55.⁷

III. This Court Should Refuse To Recognize An Aiding-And-Abetting Cause Of Action Under The ATS

A. The Adverse Practical Consequences Of Recognizing An Aiding-And-Abetting Cause Of Action Compel Dismissing These Cases

Plaintiffs’ complaint also must be dismissed because practical consequences preclude recognizing an aiding-and-abetting cause of action when the underlying conduct challenged is a foreign government’s treatment of its own citizens on its own soil. Such a cause of action invariably raises serious foreign policy concerns and circumvents a foreign government’s immunity from suit. *See* AOB 48-50.⁸

⁷ Plaintiffs assert that the comity issue has been mooted by the Radebe Letter. PAB 41. As explained, however, the South African government has yet to respond to the Court’s invitation to express its official views.

⁸ The foreign-policy harms of recognizing an aiding-and-abetting cause of action can often extend beyond the country whose conduct is the subject of the suit. That is amply demonstrated in this case, where nations including Germany, the United Kingdom, and Switzerland have expressed to the U.S. their strong objections to the pendency of this litigation. A-367. Germany, in a letter filed with this Court on October 13, 2009, reaffirmed its opposition, making expressly clear that its opposition applies equally to the amended complaints.

Plaintiffs claim that Appellants’ “practical consequences” argument “merely rehashes [Appellants’] ‘case-specific deference’ argument.” PAB 43. But the Court in *Sosa* expressly distinguished between the two, *see* 542 U.S. at 732-33 & n.21, and this Court recognized this distinction in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 260-62 & n.12 (2d Cir. 2007). As this Court stated, “*Sosa* ... identified two different respects in which courts should consider prudential concerns. First, ... the determination whether a norm is sufficiently definite to support a cause of action should ... involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.” *Id.* at 261. And second, “other prudential principles might operate to limit the availability of relief,” such as “a policy of case-specific deference to the political branches.” *Id.*

Plaintiffs similarly err in contending (PAB 43) that *Khulumani* resolved the “practical consequences” question. *Khulumani* held only that there is “ATS jurisdiction” to resolve an aiding-and-abetting claim, *i.e.*, that a “plaintiff may plead a theory of aiding and abetting liability under the [ATS.]” 504 F.3d at 260. *Khulumani* did not decide whether the “collateral consequences” of “allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe” preclude a district court from exercising “its judicial discretion to recognize a cause of action.” *Id.* at 262 (internal quotation

omitted). As to that question, *Khulumani* held that the District Court had erred in considering collateral consequences as a matter of jurisdiction, but remanded for the District Court to decide in the first instance whether collateral consequences should preclude recognition of a cause of action:

It was error for the district court to consider these collateral consequences in the context of deciding preliminarily whether it had jurisdiction to hear this case under the ATCA. However, even if we construed the district court's discussion of the "collateral consequences" as a decision not to recognize a cause of action for plaintiffs' claims, *in which context consideration of these consequences would have been appropriate*, remand would still be necessary because the district court's decision not to recognize a cause of action might still have rested, in part, on its erroneous view that the ATCA does not allow for claims of aiding and abetting liability. Because we cannot know whether the district court would have declined to recognize the cause of action plaintiffs bring in the absence of that error, we believe it is appropriate to remand, so it can have the opportunity to decide this issue in the first instance.

Id. at 262 n.12 (emphasis added); *see also id.* at 267-68, 284-85 n.18 (Katzmann, J., concurring).

Nor did this Court's recent decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2009 U.S. App. LEXIS 21688 (Oct. 2, 2009), determine that an aiding-and-abetting cause of action could be brought under the ATS despite the practical consequences of recognizing that cause. *Talisman* merely quoted *Khulumani*'s threshold jurisdictional ruling that "a plaintiff may plead a theory of aiding and abetting liability under the [ATS]." *Id.* at *35 (quoting *Khulumani*, 504 F.3d at 260) (alteration in original). Finding that plaintiffs had not shown the

requisite *mens rea* to support a claim of aiding and abetting under the ATS, *id.* at *44-55, the *Talisman* court did not purport to consider the “practical consequences” issue *Khulumani* expressly left open.

B. The District Court’s *Mens Rea* Standard Is Inconsistent With This Court’s Ruling In *Talisman*

The District Court not only erred fundamentally in recognizing an aiding-and-abetting action, it exacerbated that fundamental error by adopting an erroneous *mens rea* standard for aiding-and-abetting liability. Contrary to plaintiffs’ argument (PAB 44-45), the District Court did not apply the *mens rea* standard of *purpose* required by *Talisman* or advocated by Judge Katzmann in *Khulumani*. SPA-58-59. Indeed, the District Court expressly disavowed a “specific intent” standard in favor of *knowledge*, “conclud[ing] that customary international law requires that an aider and abettor *know* that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations.” *Id.* (emphasis added); *see also* SPA-58 (“One who substantially assists a violator of the law of nations is equally liable if he or she desires the crimes to occur *or* if he or she knows it will occur” (emphasis added)).

Plaintiffs also contend that the District Court held that their allegations met “the Rome Statute’s purpose standard.” PAB 45. But the District Court misread the Rome Statute. According to that court, the Rome Statute does not “require that an aider or abettor share the primary actor’s purpose,” but only that “he or she *is*

aware that the assistance provided will substantially assist the commission of crimes.” SPA-58. The Rome Statute, Article 25(3)(c),⁹ in fact requires showing action taken for “the purpose of facilitating the commission” of the crime. The District Court did not examine plaintiffs’ allegations under the purpose standard required by *Talisman*, exacerbating that Court’s fundamental error in recognizing an aiding-and-abetting action in the first place.¹⁰

IV. The ATS Does Not Provide Jurisdiction Over Claims Against Corporations

Plaintiffs’ complaint must also be dismissed because the ATS does not provide jurisdiction over claims against corporations. Under *Sosa*, no ATS liability can be imposed against corporations unless there is an international consensus to do so. No such consensus exists.

Corporate liability was not recognized during the Nuremberg Trials: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946).

⁹ See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

¹⁰ Plaintiffs further argue that purpose can invariably be inferred from knowledge. PAB 45. Plaintiffs’ argument proves too much, eroding the distinction between knowledge and purpose, thereby effectively rendering *Talisman* meaningless. Knowledge simply cannot be equated with purpose. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-49 (2009).

Moreover, Article 25(1) of the Rome Statute as well as the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) allow for liability only of natural persons, not corporations. *See* AOB 58; Statute of the ICTY, S.C. Res. 827, Art. 7(1), U.N. Doc. S/RES/827 (May 25, 1993); Statute of the ICTR, S.C. Res. 955, Art. 6(1), U.N. S/RES/955 (Nov. 8, 1994). Indeed, the drafters of the Rome Statute rejected a proposal that would have allowed for corporate liability, in part because “there are not yet universally recognized common standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems.” Kai Ambos, *Article 25: Individual Criminal Responsibility, in Commentary on the Rome Statute of the International Criminal Court* 478 (Otto Triffterer ed., 1999).

Plaintiffs argue that that “[s]everal multilateral treaties adopted in the last decade have imposed criminal or civil liability on corporations that aid and abet violations.” PAB 55 (citing treaties). But even if those treaties demonstrate that *some* sources of international law recognize corporate liability in some circumstances, they do not demonstrate the requisite international consensus. *See Talisman*, 2009 U.S. App. LEXIS 21688, at *40-*41 (adopting “purpose” standard for aiding-and-abetting despite some international authorities’ adoption of “knowledge” standard).

Plaintiffs contend that liability can be imposed under domestic law because international law does not foreclose it. Under *Sosa*, however, liability may not be imposed on a corporation unless “international law [itself] extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” 542 U.S. at 732 n.20. And, under *Sosa*, such an extension must be premised on an international consensus. *Id.* at 732.

Talisman confirms that extending liability to corporations would require an international consensus. There, the Court rejected plaintiffs’ argument that the standard for aiding-and-abetting liability is a “matter ordinarily left to the forum country, where (in this venue) the principle is broad and elastic.” *Talisman* held that “such an expansion would violate *Sosa*’s command that we limit liability to ‘violations of . . . international law . . . with . . . definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when [the ATS] was enacted,’” because “[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.” 2009 U.S. App. LEXIS 21688, at *39-*40. The Court adopted a purpose standard for secondary liability because, “[e]ven if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, ... no such consensus exists for imposing

liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.” *Id.* at *40. That analysis equally applies here.

Plaintiffs respond that this Court has “never once accepted the argument that corporations are immune from suit.” PAB 51. But the Court has never rejected it either. And, as plaintiffs acknowledge (*id.*), this Court expressly noted in *Talisman*, 2009 U.S. App. LEXIS 21688, at *47 n.12, that the issue of corporate liability is an open one in this Circuit. Under the proper legal analysis, the answer is clear: because there is no international consensus to extend liability to corporations, there is no basis for a federal court to do so.¹¹

V. The ATS Does Not Allow For Extraterritorial Liability In The Circumstances Of This Case

Plaintiffs’ complaint is also subject to dismissal because the ATS does not apply to a foreign sovereign’s treatment of its own citizens on its own soil. There is a long-standing presumption against extraterritorial application of federal statutes. AOB 55-56. That presumption, as the Supreme Court emphasized in *Sosa*, has particular force in suits that call into question the conduct of foreign sovereigns abroad against their own citizens. “It is one thing for American courts

¹¹ Plaintiffs cite cases from other courts (PAB 51-52), but most of those simply assume the existence of corporate liability. The only case that directly confronts the question cites a case that does not itself expressly consider it. *See Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (citing *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005)).

to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Sosa*, 542 U.S. at 727. Accordingly, ATS claims predicated on the conduct of "foreign governments over their own citizens ... should be undertaken, *if at all*, with great caution." *Id.* at 727-28 (emphasis added).¹²

Plaintiffs err in relying on Attorney General Bradford's 1795 opinion to support their extraterritorial claim. That opinion explained that while individuals injured on the high seas "have a remedy by a civil suit in the courts of the United States," 1 Op. Att'y Gen. 57, 58-59, acts committed in a foreign country "are not within the cognizance of our courts." *Id.* at 58. And that opinion certainly did not suggest that the ATS would encompass claims challenging a foreign government's treatment of its own citizens on its own soil.

¹² Ignoring the quoted portion of *Sosa*, plaintiffs state that *Sosa* "clearly understood that the ATS grants jurisdiction over causes of action arising in other countries" because the conduct there occurred in Mexico. PAB 47-48. That is incorrect. In *Sosa*, "a group of Mexicans, including [Sosa], abducted Alvarez from his house [in Mexico], held him overnight in a motel, *and brought him by private plane to El Paso, Texas*, where he was arrested by federal officers." 542 U.S. at 698 (emphasis added). The purpose of the abduction at issue in *Sosa* was to bring Alvarez back for trial in the U.S., *id.*, which provides a nexus with this country not present in this case. In any event, the question of extraterritoriality did not matter in *Sosa*, because the Court rejected the ATS claim on other grounds.

Plaintiffs cite cases in which this Court considered ATS claims based on extraterritorial conduct. PAB 47. But except for *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), those cases predated *Sosa*, and thus did not confront *Sosa*'s concerns about recognizing claims concerning the conduct of foreign sovereigns over their own citizens in their own territory. And none of the cases, including *Pfizer*, confronted the presumption against extraterritorial application of federal statutes.

Plaintiffs argue that the Framers viewed “civil actions in tort as transitory.” PAB 48. But they do not cite any evidence that this doctrine would have allowed challenging a foreign government's treatment of its own citizens on its own soil. In addition, the transitory tort doctrine would give aliens injured in a foreign country the right to sue only under the law of the country where the tort occurred, not under *federal* common law. *Slater v. Mex. Nat'l R.R. Co.*, 194 U.S. 120, 126 (1904). There is thus nothing “perverse” (PAB 49) in allowing certain actions to be brought in state court that could not be brought in federal court. Under normal choice-of-law rules and the Due Process Clause, state courts would apply foreign law, rather than state law, to resolve the claim. *See, e.g., Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 842-43 (D.C. Cir. 2009) (Garland, J.) (choice of law); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (Due Process). Plaintiffs, however, seek to project federal common law abroad. Such an action is

extraterritorial in a way that a state court action (or a federal diversity action) applying foreign law is not.

Finally, plaintiffs argue that the presumption against extraterritoriality should not apply because the “ATS applies universal norms,” ostensibly eliminating the concern for international conflict that underlies the presumption. PAB 50. But *Congress* alone possesses authority to overcome the presumption against extraterritorial application; a court may not find the presumption overcome simply because it believes that the concerns underlying the presumption are not implicated. Indeed, if the presumption did not apply when “universal norms” were in issue, the Supreme Court would not have applied it in deciding that a federal statute failed to reach piracy. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-31 (1818).

Moreover, even if only truly universal norms of liability were applied in ATS cases, that would not eliminate the concerns that underlie the presumption against extraterritoriality. Foreign governments may wish to judge for themselves whether the allegations in a complaint are true with regard to their own citizens; and “even where nations agree about primary conduct,” they may “disagree dramatically about appropriate remedies.” *Empagran*, 542 U.S. at 167. Indeed, the objections of numerous governments to the existence of these cases—including Germany’s recent reaffirmation of its objections—demonstrate that recognizing an

action such as this one implicates precisely the concerns sought to be avoided by the presumption against extraterritoriality.

VI. This Court Has Pendent Jurisdiction Over Appellants' Aiding-And-Abetting, Corporate Liability, And Extraterritoriality Arguments

This Court has pendent jurisdiction to consider the argument that an aiding-and-abetting cause of action should not be recognized where the underlying conduct is a foreign government's treatment of its own citizens, because that claim is inextricably intertwined with the claim of case-specific deference. AOB 53-55. Plaintiffs do not suggest otherwise.

This Court also has jurisdiction to consider corporate liability and extraterritoriality because they go to the District Court's subject-matter jurisdiction. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 121-23 (2d Cir. 2007). Plaintiffs assert that, "[t]o 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," citing a D.C. Circuit case for support. PAB 5 & n.2. In this Circuit, however, pleading that the defendant violated "the law of nations" within the meaning of the ATS is a jurisdictional prerequisite. *See Khulumani*, 504 F.3d at 260, 262 n.12; *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*; 517 F.3d 104, 123 (2d Cir. 2008) (plaintiff must "establish a cognizable cause of action that gives rise to jurisdiction under the ATS"); *Bigio*, 239 F.3d at 447 ("[I]f the complaint did not

plead a violation of the law of nations by [defendant], the district court was without subject matter jurisdiction under the [ATS]”); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (relying on this Court’s cases to find that pleading law-of-nations violation is jurisdictional). Thus, if the Court finds that corporate liability is not recognized by the “law of nations” within the meaning of the ATS, or that the ATS does not support extraterritorial liability based on a foreign government’s conduct abroad with respect to own citizens, the case should be dismissed for lack of subject-matter jurisdiction. *See Bigio*, 239 F.3d at 449; *Sinaltrainal*, 578 F.3d at 1263.

In any event, the Court also possesses pendent jurisdiction over the corporate liability and extraterritoriality issues because they are inextricably intertwined with the case-specific deference and international comity issues. The U.S., South Africa, and other countries have objected to this litigation in part because allowing for *corporate* liability in this case would deter foreign investment and interfere with U.S. policy of encouraging corporate investment abroad. *See* AOB 7-15, 30-32. Similarly, the case-specific foreign-policy harms emphasized by the U.S. and South Africa (and other governments) are the necessary result of the extraterritorial reach of plaintiffs’ claims.

Thus, this Court has pendent jurisdiction over Appellants’ arguments with respect to aiding and abetting, corporate liability, and extraterritoriality.

CONCLUSION

For the foregoing reasons, the District Court's denial of dismissal should be REVERSED, and the cases REMANDED with instructions to dismiss the complaints.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

Dated: October 28, 2009


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CERTIFICATE OF SERVICE

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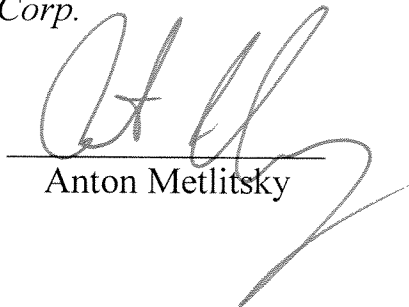
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