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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Private Performance Test

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

a 1984 strike. A379 (D. Compl. ¶ 26.)

2. Joint Participation Test

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

For example,

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

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

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

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

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

3. Symbiotic Relationship Test

Plaintiffs' allegations also demonstrate an ongoing mutually beneficial or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: August 19, 2005

By: Paul L. Hoffman (MM)
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CERTIFICATE OF COMPLIANCE

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

this brief contains 13,548 words, excluding the parts of the brief exempted by Fed. R. 32(a)(7)(B)(iii).

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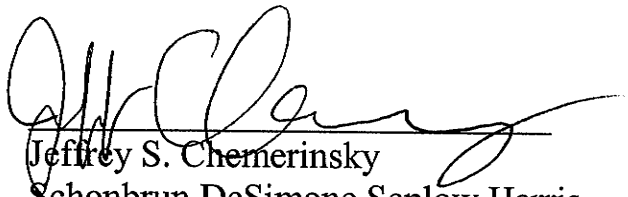

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I certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

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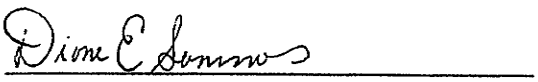

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