IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-4104-cv (Lead)

SAKWE BALINTULO, ET AL.,
Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY AND
INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendants-Appellees.

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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

For decades starting with *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir 1980), this Court was a stalwart leader in applying the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to hear claims for human rights victims. Over the last six years, in a series of decisions culminating in the panel's order, *Balintulo v. Ford Motor Co.*, Case No. 14-4104 (2d Cir., July 27, 2015) ("*Balintulo II*"), this Court has become a graveyard for human rights claims. This Petition asks whether this entire Court endorses the wholesale reversal of this Court's ATS jurisprudence. The panel's decision should be reviewed en banc because it conflicts with the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum, Inc*., 133 S. Ct. 1659 (2013) ("*Kiobel II"*), as well as prior decisions in this Circuit, including *Filartiga*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), and *Presbyterian Church of Sudan v. Talisman Energy*, *Inc.,* 582 F.3d 244 (2d Cir. 2009). *See* Fed. R. App. P. 35(b).[1]

The decision below comes in the context of long-running claims by the victims of apartheid against defendants IBM and Ford for aiding and abetting apartheid and associated international law violations.[2] The complaints include

[1] This petition for en banc rehearing is also a petition for panel rehearing. Fed. R. App. P. 40.

[2] The case originally involved dozens of defendants, but claims against most were dropped following the *Khulumani* decision; only defendants IBM and Ford remain.

detailed and specific allegations about purposeful actions taken in the United States by these defendants, in contravention of international and domestic sanctions, which substantially contributed to and facilitated violations of international law. For example, the South African government could not have implemented the denationalization of millions of black South Africans without IBM technology and knowhow provided on an ongoing basis from the United States, not by IBM's South African affiliate; the bid for the denationalization contract came from the United States, as did customized hardware, software, and training to implement that contract. Similarly, from its U.S. facilities Ford designed, manufactured, and transported specialized vehicles that facilitated security forces' suppression and killing of black South Africans; the decision to repeatedly make such sales despite international sanctions was taken in the United States, not by the South African subsidiary. The panel's decision failed to recognize these actual allegations.

There are at least three separate reasons for en banc review:

First, the panel's interpretation conflicts with the holding of *Kiobel II* by adopting the more stringent position articulated by only two Justices rather than the majority of the Supreme Court; this also places this Court at odds with the jurisprudence of other Circuits. In almost every respect the panel's view of *Kiobel II* is more draconian than the actual holding. The panel established a rule that violations of international law—namely aiding and abetting apartheid—that took

place *in the United States* are effectively not actionable under the ATS.

The drafters of the ATS understood that direct participation of U.S. citizens in international law violations outside the United States was exactly the kind of activity that could embroil the United States in controversy if there was no forum for the vindication of the rights of non-citizens in our courts. By effectively foreclosing aiding and abetting claims based on U.S. conduct, the decision also contradicts prior guidance of this Circuit, including *Khulumani*, 504 F.3d at 277, and *Talisman,* 582 F.3d at 258-59, which specifically said such claims are permitted under the ATS. The decision also ignores the significance of the U.S. citizenship of defendants and the history and purpose of the ATS. En banc review is warranted to clarify how the entire Court views the *Kiobel II* presumption in the context of U.S. defendants taking unlawful actions in the United States that substantially assist human rights violations abroad.

Second, the panel applied an interpretation of the mens rea needed to aid and abet under international law that conflicts with this Court's opinions in *Khulumani*, 504 F.3d at 277, and *Talisman,* 582 F.3d at 258-59, which had insisted that the mens rea be drawn from the Rome Statute. Rather than applying the standard articulated in prior decisions—that liability exists when a defendant "purposefully facilitates" the commission of a violation—the panel created a specific intent standard. The panel's definition of "purpose" is far more demanding than any

conceivable international criminal standard and essentially transforms aiding and abetting into joint criminal enterprise, where the accused must share the principal's mens rea. En banc review is necessary to prevent specific intent from becoming the law in this Circuit and overturning, sub silentio, *Khulumani* and *Talisman*. En banc review is also warranted because, since this Court's *Khulumani* decision, it has become irrefutably clear that the mens rea for aiding and abetting is knowledge. The international tribunals, including the Pre-Trial Chamber of the International Criminal Court (ICC), have confirmed the knowledge standard; any doubt this Court may have had on this subject eight years ago should be resolved. If knowledge is an acceptable standard for the world's worst criminal offenders, including the Nazis at Nuremberg, it should be sufficient for civil ATS claims.

Finally, the panel below reiterated, without explanation or analysis, the ban on corporate liability first enunciated by this Court in *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"). *Balintulo II*, n. 28. It thus created continued confusion about the status of *Kiobel I* and corporate liability in the Circuit, given the *Licci* panel's contrary opinion that *Kiobel I* is no longer good law. *See Licci ex rel. Licci v. Lebanese Can. Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013). The panel decision also conflicts directly with the Supreme Court's reasoning in *Kiobel II* and *Daimler v. Bauman*, 134 S. Ct. 746 (2014). No other Circuit has followed this Court's *Kiobel I* ruling on corporate liability, either

before or after *Kiobel II*. Thus, en banc review is necessary to reconcile *Licci* with the panel decision and articulate clearly whether corporate ATS liability exists in the Second Circuit in light of *Kiobel II* and other Circuits' jurisprudence.

The panel decision shows how this Court's recent jurisprudence has foreclosed virtually all ATS claims in the Circuit. As this Court recognized in *Filartiga*, and as the Supreme Court affirmed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), one purpose of the ATS was to ensure a federal forum for the litigation of law of nations claims brought by non-citizens. This Court's recent decisions have turned this principle on its head and will force such claims into state courts. The panel has essentially re-written the terms of the ATS—flouting international law jurisprudence, Supreme Court guidance dating to *Sosa*, and tort precedent to foreclose plausible allegations. The Court should hear this case en banc to reconcile conflicts within the Circuit's jurisprudence and between the Circuit's jurisprudence and Supreme Court precedent, and to ensure that the ATS continues to provide a federal forum for the redress of law of nations violations. The Petition should be granted.

ARGUMENT

I. EN BANC REVIEW IS NECESSARY BECAUSE THE PANEL'S ORDER DIRECTLY CONFLICTS WITH THE SUPREME COURT'S *KIOBEL* DECISION.

The panel's decision establishes an extreme position regarding application of

the presumption against extraterritoriality, one that is inconsistent with *Kiobel II*. En banc review is necessary to articulate a standard for the "touch and concern" test that can be reconciled with *Kiobel II*.

In *Kiobel II*, the Supreme Court did not elucidate the scope of its new "touch and concern" test in large part because the decision was concerned with a foreign corporation and human rights violations occurring on foreign soil. In the absence of Supreme Court guidance, a Circuit spilt has emerged[3] with some courts taking the view that judges must evaluate all U.S. contacts of a case before determining whether the "touch and concern" standard has been satisfied. *See Al-Shimari v. Caci Premier Tech., Inc.*, 758 F.3d 516, 528-30 (4th Cir. 2014).

The panel, on the other hand, adopted the most restrictive possible view "touch and concern." The panel appears to have accepted Justice Alito's proposed test, which requires a violation of international law to have occurred in the United States, as the law in this Circuit. This approach was taken despite the fact that even Justice Alito acknowledged that the Court had not endorsed his proposed test and he was writing for only two Justices. At least four Justices took the position that the *Kiobel II* presumption would be overcome in all cases in which the defendant was a U.S. citizen. This Court should decide the meaning of the "touch

[3] Compare *Al-Shimari v. Caci Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) *with Cardona, et al. v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014).

and concern" test en banc and reject the panel's use of Justice Alito's minority view as the applicable law in this Circuit.

Indeed, the proposed amended complaints plead new and non-conclusory facts that defendants' extensive activity *within* the United States unlawfully facilitated violations in South Africa, and which are clearly sufficient to overcome the *Kiobel II* presumption. The allegations indicate that violations of international law took place inside the United States, namely defendants' actions aiding and abetting crimes against humanity. *See, e.g.*, Rome Statute of the International Criminal Court, arts. 7, 8, 25, 28, July 17, 1998, 2187 U.N.T.S. 90. Under *Kiobel II*, this U.S.-based conduct squarely displaces the presumption against extraterritoriality. By creating an impossibly high standard to proceed and to show aiding and abetting, *see infra* Part II, the panel has undone decades of jurisprudence.[4] The panel's decision effectively renders aiding and abetting *from*

[4] The panel decision also raises questions about this Court's prior decision in *Mastafa v. Chevron Corp.,* 770 F.3d 170 (2d Cir. 2014), and whether any case will ever meet the standard established there. *Mastafa* instructs that the extraterritoriality inquiry must focus on "relevant conduct" in the United States and is a fact-intensive determination. *Id.* at 182-83, 185-87, 189-93. *Mastafa* also affirms that aiding and abetting is, itself, "relevant conduct." *Id*. at 186. If the facts here do not meet the *Mastafa* standard, it is unclear when allegations of aiding and abetting will suffice to create actionable claims.

Indeed, the panel's application of heightened a "plausibility" standard based on *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to reject plaintiffs' allegations raises questions about the interplay between pleadings and subject matter jurisdiction that are worthy of en banc

the United States not a viable cause of action under the ATS. This position cannot be reconciled with this Circuit's jurisprudence, including *Khulumani* and *Talisman*, or the Supreme Court decisions in *Kiobel II* or *Sosa*, which affirmed international law violations were viable ATS claims. The panel decision even raises questions about adherence with the text of the ATS itself, which mandates tort claims "in violation of the law of nations." 28 U.S.C. § 1350.

The ramifications of the panel's decision are brought into stark relief when measured against the Nuremberg tribunal. If the Nazi industrialists convicted at Nuremburg had operated in the United States, rather than Germany, when they sold Zyklon B gas to support and facilitate the Holocaust, the panel's opinion would foreclose claims against them. This was not the gravamen of the Supreme Court's decision in *Kiobel II*, and this Court should not endorse a standard that would result in such an outcome.

II. EN BANC REVIEW IS NECESSARY BECAUSE THE PANEL'S AIDING AND ABETTING STANDARD CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND IGNORES ESTABLISHED INTERNATIONAL LAW.

This Court has previously said that it will look to international law to

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review. In establishing an almost impossible standard that is out of line with *Twombly* and *Iqbal*, the panel ignored the rule that at this stage of proceedings, plaintiffs' allegations must be taken as true, including in this case allegations of direct wrongdoing by the parent companies in the United States, which the panel omitted in its analysis.

determine the appropriate mens rea for aiding and abetting, and has applied a standard that requires purposefully facilitating the violation. *Khulumani*, 504 F.3d at 277-78; *Talisman*, 582 F.3d at 258-59. The panel decision transformed this Circuit's existing purpose standard into a new specific intent requirement that is unsupported by customary international law or the Rome Statute, thus creating a conflict with prior decisions of this Court. Exacerbating the panel's error, it is now uncontroverted that under international law, the applicable mens rea for aiding and abetting liability is knowledge. The Court should grant en banc review to clarify that this Circuit applies the international law mens rea for aiding and abetting liability, and that under international law the correct standard is knowledge.

A. En Banc Review is Necessary to Prevent the Panel's Specific Intent Standard—Not Found in International Law, the Rome Statute, or this Court's Precedent—From Becoming the Law of this Circuit.

In *Khulumani*, Judge Katzmann looked to international law, and particularly the Rome Statute, to determine the aiding and abetting mens rea and found that, in 2007, only a "purpose" standard was sufficiently well-established to impose aiding and abetting liability. 504 F.3d at 277-78. This Court subsequently adopted Judge Katzmann's purpose standard in *Talisman*. 582 F.3d at 258-59. *See also Mastafa*,

770 F.3d at 193.[5] The panel's decision, however, interprets purpose as specific intent, creating a direct conflict with the Circuit's jurisprudence and establishing a heightened standard totally unsupported by international law. *Balintulo II*, at 18-19 ("[P]laintiffs do not—and cannot—plausibly allege that by developing hardware and software to collect innocuous population data, IBM's purpose was to denationalize black South Africans and further the aims of a brutal regime.").

Indeed, international law has never adopted a specific intent requirement except with regard to specific intent crimes like genocide. The panel's application of a specific intent standard, in which the aider and abettor must share the intent of the principal, would transform aiding and abetting into something it is not, namely joint criminal enterprise. En banc review is necessary to clarify that the purpose standard previously articulated by this Court is not equivalent to specific intent.

B. En Banc Review Is Necessary to Determine Whether this Court Will Apply International Law's Well-Established Knowledge Standard, Adopted by Numerous Other Circuits, as the Mens Rea for Aiding and Abetting Liability.

If, as it did in *Khulumani* and *Talisman*, this Circuit continues to rely on international law to establish aiding and abetting liability, en banc review is also necessary to clarify the proper mens rea standard. When Judge Katzmann adopted

[5] These opinions clearly indicated that purpose could be inferred from conduct, *Khulumani*, 504 F.3d at 277 n.11, and that intent could be demonstrated by the circumstances, *Taliman*, 582 F.3d at 259, 264.

the purpose standard in *Khulumani*, on the basis that the Rome Statute's definition was "particularly significant," he noted that "it has yet to be construed by the International Criminal Court; its precise contours . . . thus remain uncertain." 504 F.3d at 275-76. He further cautioned "that this definition is not necessarily set in stone. International law, like our domestic law, can change, and the AT[S] was intended to change along with it." *Id.* at 277. In the intervening eight years, it has become crystal clear that knowledge is the international law mens rea for aiding and abetting violations, and the standard this Court should follow.

The Rome Statute requires that alleged perpetrators intend to facilitate the commission of a crime and act with the knowledge that the consequence will occur in the ordinary course of events. *See* Brief of Ambassador David J. Scheffer as *Amicus Curiae* in Support of Appellants, *Balintulo et al. v. Ford et al.* (Feb. 4, 2015) at 3-14. For example, a Pre-Trial Chamber of the ICC, which is an authoritative source for interpreting the Rome Statute, recently stated that aiding and abetting would be established if a defendant's actions:

> were intentional and were performed for the purpose of *facilitating* the commission of the crimes. In addition, they were performed in the *knowledge* that the crimes were committed as part of a widespread and systematic attack against the civilian population . . . .

Prosecutor v. Blé Goudé, Case No. ICC-02/11-2/11, Decision on the confirmation of charges against Charles Blé Goudé, ¶ 170 (Dec. 11, 2014) (emphasis added).

The aider and abettor need not share in the perpetrator's intent, and certainly not any specific intent, that the underlying crime be committed, but must merely assist while knowing that the crime may be facilitated as the consequence of such action. The international jurisprudence from the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as the Special Court for Sierra Leone, overwhelmingly confirms this knowledge standard.[6]

Consistent with international law and recent authoritative interpretations of the Rome Statute, numerous other Circuits have applied a knowledge standard. *See, e.g.*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023–26 (9th Cir. 2014); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Cabello v. Fernández- Larios*, 402 F.3d 1148, 1158–59 (11th Cir. 2005). En banc review is thus necessary to prevent the panel's specific intent standard from becoming the law in this Circuit and essentially

[6] *See, e.g.*, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 245 (Dec. 10, 1998) ("[I]t is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime."); *Prosecutor v. Taylor,* Case No. SCSL-03-01-A, Appeal Judgment, ¶¶ 403, 440, 483 (Sept. 26, 2013) ("Although the lending of practical assistance, encouragement, or moral support must itself be intentional, the intent to commit the crime or underlying offence is not required. Instead, the Accused must have knowledge that his acts or omissions assist the perpetrator in the commission of the crime or underlying offence. Such knowledge may be inferred from the circumstances. . . . [T]he aider and abettor need merely know of the perpetrator's intent—and need not share it.").

overturning, sub silentio, *Talisman*'s holding. En banc review is also warranted to determine whether this Court will now apply the well-established mens rea knowledge standard, which has been affirmed in the eight years since *Khulumani*.

III. EN BANC REVIEW IS NECESSARY TO CLARIFY WHETHER CORPORATE LIABILITY EXISTS UNDER THE ALIEN TORT STATUTE IN THE SECOND CIRUCIT.

The panel's conclusion affirming *Kiobel I*'s holding on corporate liability, *Balintulo II*, n. 28, conflicts directly with a previous opinion of this Court, *Licci*, 732 F.3d at 174, which recognized that *Kiobel II* reopened the question of corporate liability in the Circuit. The panel's conclusion also contradicts the decisions of all other appellate courts to have considered the issue. Finally, the panel's footnote cannot be squared with the Supreme Court's reasoning in *Kiobel II* and *Bauman*, 134 S. Ct. 746, which are not consistent with *Kiobel I*'s holding that corporate immunity exists under the ATS. For these reasons, en banc review is warranted to clarify this Circuit's position as to the status of corporate liability.

The panel only addressed the corporate liability question in a footnote, asserting that the Supreme Court's decision in *Kiobel II* left undisturbed this Court's ruling in *Kiobel I* on corporate liability. *Balintulo II*, n. 28. The binding nature of *Kiobel I*, however, was specifically questioned by the only Second Circuit decision to directly consider the issue. *Licci*, 732 F.3d at 174. By remanding to the district court in a case against only corporate defendants, the

Licci panel determined that there was an open question regarding whether *Kiobel I* was still good law.[7] Had the *Licci* panel viewed *Kiobel I*'s holding on corporate liability as binding, it could not have remanded; if *Kiobel I* is still the law in this Circuit, every ATS claim against a corporation must be dismissed for lack of subject matter jurisdiction. 621 F.3d at 120. To date, plaintiffs are aware of no case that has been dismissed since *Kiobel II* on this basis.[8]

Licci's holding that *Kiobel I* has been superseded by *Kiobel II* is the rule binding on this Court and is supported by other Circuits' jurisprudence as well as the Supreme Court's *Kiobel II* and *Daimler* decisions. Every other circuit—the Seventh, Ninth, Eleventh, and D.C. Circuits—to have considered the issue of corporate liability, both before and after *Kiobel II*, has explicitly held that

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[7] While *Kiobel II* was pending, the *Licci* panel stated "current law" in the Circuit mandated dismissal but noted "[s]hould the Supreme Court reverse our decision in *Kiobel [I]*," it would likely remand to the district court for further proceedings. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 673 F. 50, 73 (2d Cir. 2012). The panel noted that, if *Kiobel I* was affirmed, it would "likely be required" to dismiss the ATS claims. *Id.* This opinion confirms that the *Licci* panel remanded because it no longer considered *Kiobel I* binding.

[8] *See, e.g.*, *Mastafa*, 770 F.3d at 179 n.5 (explicitly noting that panel had "no need" to address corporate liability); *Sikhs for Justice, Inc. v. Nath*, No. 14-1724-cv, 2014 WL 7232492, at *2-3 (2d Cir. Dec. 19, 2014) (same); *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 746 F.3d 42, 55 n.2 (2d Cir. 2014) (noting corporate liability discussion "is not pertinent to our decision, and thus is dicta"). Corporate liability is not properly a question of subject matter jurisdiction. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel II*, 2011 WL 6425363, at *8-10 (Dec. 21, 2011).

corporations may be sued under the ATS.[9]

In *Kiobel II* and *Daimler*, the Supreme Court recognized that "mere corporate presence" alone is insufficient to overcome the presumption against extraterritoriality or to permit a court to exercise personal jurisdiction over an ATS case. By necessity, that recognition implies that corporate presence plus additional factors can suffice. *See Kiobel II*, 133 S. Ct. at 1669;[10] *see Bauman*, 134 S. Ct at 761-63. Language contemplating that certain factors in combination with corporate presence could overcome the *Kiobel* presumption makes no sense if a corporation is immune from an ATS suit as a matter of law. The full court should decide whether *Kiobel I* has been superseded by subsequent decisions. En banc review would clarify the question of corporate liability and should bring the Circuit in line with all other jurisdictions and Supreme Court precedent.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

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[9] *See Doe v. Nestle USA Inc.*, 766 F.3d 1013, 1049 (9th Cir. 2015); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019, 1021 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013); *Romero v. Drummond Co.,* 552 F.3d 1303, 1315 (11th Cir. 2008).

[10] In addition, in dismissing the *Kiobel II* claims under the presumption against extraterritoriality, the Supreme Court accepted jurisdiction over the corporation. *Kiobel II*, 133 S. Ct. at 1664. The Court thereby rejected *Kiobel I*'s holding that, under the ATS, courts lack subject matter jurisdiction over corporate defendants. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89, 94 (1998).

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