No. 06-4800 cv
No. 06-4876 cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARI NEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWI NEE, KPOBARI TUSIMA, individually and on behalf of his late father CLEMENT TUSIMA

Plaintiffs-Appellants-Cross-Appellees

v.

ROYAL DUTCH PETROLEUM COMPANY; SHELL TRANSPORT AND TRADING COMPANY, PLC

Defendants-Appellees-Cross-Appellants

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Defendant

On Appeal from the United States District Court
for the Southern District of New York
The Honorable Kimba Wood

BRIEF OF *AMICUS CURIAE* PUBLIC GOOD LAW CENTER IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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INTEREST OF *AMICUS*

Public Good Law Center is a newly formed public interest organization. Through *amicus* participation in cases of particular significance for consumer protection, freedom of speech, and civil rights, Public Good seeks to vindicate the proposition that all are equal before the law. Public Good has filed amicus briefs in the Supreme Court of the United States, as well as federal and state appellate courts, on questions of corporate and individual rights and responsibilities. The novel doctrine proposed in this case that private corporations are immune from liability for even the grossest violations of international human rights, while private individuals and government actors alike may be held liable, represents the sort of imbalance in the law that Public Good works to prevent.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

En banc review is urgently required in this case "to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). In holding that corporations may not be held liable under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, the panel decision departs sharply from previous decisions of this Court that have consistently assumed jurisdiction over ATS claims against corporate defendants. A court's well-established practice of assuming jurisdiction would ordinarily command respect even if the question had not previously been explicitly considered. *See Hibbs v. Winn*, 542 U.S. 88, 94 (2004). In this case, however, the

[1] No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or any other person—other than *amicus* and its members—contributed any money to fund the preparation or submission of this brief.

practice was grounded in this Court's decision in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), which established that certain human rights violations are of "universal concern" regardless of who commits them, and confirmed in numerous subsequent cases relying on *Kadic* to conclude that corporate defendants may be liable under the ATS. If those cases were for some reason all wrongly decided, a change of course would need to be directed by this Court sitting *en banc*—not *sua sponte* by a single divided panel, without benefit of any briefing on the subject.

En banc review is also appropriate under Fed. R. App. P. 35(a)(2), because "the proceeding involves a question of exceptional importance." The subject matter is a statute, nearly as old as the nation itself, of which this Circuit is the leading expositor. That the decision creates a split of authority with at least the Eleventh Circuit underscores the importance of ensuring that this Court's ultimate decision reflects the understanding of the entire Court rather than a small fraction of its judges.

ARGUMENT

I. *EN BANC* CONSIDERATION IS NECESSARY TO SECURE UNIFORMITY OF THE COURT'S DECISIONS.

En banc review of this case is "necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). *See*, *e.g.*, *United States v. King*, 276 F.3d 109, 112 (2d Cir. 2002) ("It is, of course, axiomatic that we will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court"); *accord United States v. Martinez*, 413 F.3d 239, 243 (2d Cir. 2005).

A. This Court's Assumption Of Jurisdiction Over Corporate Defendants In ATS Actions Constitutes Applicable Precedent.

Ever since this Court decided that some ATS claims could be brought against non-state actors in *Kadic v. Karadzic*, 70 F.3d 232, (2d Cir. 1995), jurisdiction over claims against corporate defendants has been largely unquestioned.[2] Here, without any party having raised the issue, two judges of the panel found that the question of corporate liability under the ATS nevertheless remained unsettled, because the question had never been explicitly addressed. Slip op. at 15-16.

However, consistent prior practice of tacitly assuming jurisdiction *does* constitute precedent. *See Hibbs v. Winn*, 542 U.S. 88, 94 (2004) ("Our prior decisions [assuming jurisdiction] command no respect, petitioner urges, because they constitute mere '*sub silentio* holdings.' … We reject that assessment.") The Court recognized that the case before it was the first "squarely to confront the issue" of jurisdiction. *Id.* at 93. The Court nevertheless found it relevant to review the history of assuming jurisdiction in similar cases, *id.* at 93-94, noting: "The alleged jurisdictional bar … was not even imagined by the jurists in … pathmarking civil-rights cases…." *Id.* at 94; *accord Levin v. Commerce Energy,*

[2] This court assumed jurisdiction over corporate defendants in *Abdullahi v. Pfizer, Inc*., 562 F.3d 163 (2d Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2000); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). *But see Khulumani*, 504 F.3d at 321-326 (questioning liability of corporate defendant for offenses committed before 1991, because questioning the existence as of that date of norms of international law recognizing corporate liability for human rights violations).

Inc., 130 S. Ct. 2323, 2332 (2010). Similarly, it is apparent that in pathmarking Second Circuit ATS cases earlier panels did not even imagine that corporations could not be held liable for offenses which had been found actionable against private parties. A concurring opinion in *Hibbs* also noted that "judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied." *Id.* at 112 (Stevens, J., concurring). Federal courts have been assuming jurisdiction over ATS claims against corporations for well over a decade; Congress has been silent.

The principal authority on which the panel majority relies to justify its disregard of earlier cases assuming jurisdiction over corporate defendants, *Hagans v. Lavine*, 415 U.S. 528 (1974), is far less applicable. In deciding that earlier cases did not control, the Court in *Hagans* contrasted the case before it, in which the jurisdictional issue was presented by the parties, with earlier cases, in which "the jurisdictional issue [was not] squarely raised as a contention in the petitions for certiorari, jurisdictional statements, or briefs." *Id.* at 533. Here, however, there is no such contrast with earlier cases. The jurisdictional issue in this case was *not* brought before the Court by the parties, and *not* briefed, any more than in earlier cases. Rather, the Court took up the issue *sua sponte*, thereby implicitly finding in error all the previous panels that had failed to do so.

Second, the question in *Hagans* was a more classically jurisdictional one: whether the constitutional question raised was sufficiently substantial to provide pendent jurisdiction over the claim principally at issue in the case. Therefore, it was unsurprising that earlier courts had decided the merits of similar cases without

serious consideration of the jurisdictional question. In ATS cases, by contrast, the jurisdictional issues are so intertwined with the merits (and the scope of the statute so uncertain) that it is implausible to view the question of jurisdiction over corporate defendants as "merely lurk[ing] in the record." *Webster v. Fall*, 266 U.S. 507, 511 (1925) (cited at slip op. at 16). *See Kadic*, 70 F.3d at 238 ("Because the Alien Tort Act requires that plaintiffs plead a[n actual and not merely colorable] 'violation of the law of nations' at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction"). Indeed, when this Court has considered ATS claims against corporations, it has typically engaged in extensive inquiry into whether subject matter jurisdiction is present, including asking whether claims could be brought against the type of defendant at bar. *See, e.g., Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 172-89 (2d Cir. 2009); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 145-72 (2d Cir. 2003); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-449 (2d Cir. 2001).

B. The Panel Decision Is Inconsistent With The Reasoning of Applicable Precedent.

The panel decision in this case reverses not only the practice of this Court, but also the reasoning of *Kadic*, 70 F.3d 232, establishing that ATS claims may be brought against private actors. This Court there distinguished two classes of violations of international law: offenses actionable only when committed by a state, and "offenses of 'universal concern,'" which are "capable of being committed by non-state actors." *Id.* at 240 (citing Restatement (Third) of Foreign Relations §§ 404, 702 (1986)). It is difficult to understand how an offense "of universal concern"

could be of no concern when committed by a business under a certain form of organization. Similarly, the conclusion that the proscription of genocide under international law "unambiguously" applies "equally to state and non-state actors," *id.* at 241-42, can be credibly read only as encompassing *all* non-state actors.

Given the context of "offenses of universal concern," it follows that the *Kadic* Court intended a broad reading of "private individuals" when it 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." *Id.* at 239. Such a reading is further supported by the fact that the Court spoke interchangeably of liability of "private individuals," *id.*, and that of "private persons," *id.* at 239, "non-state actors," *id.* at 242, or "those not acting under the authority of the state." *Id.* at 236. *Cf. Clinton v. City of New York*, 524 U.S. 417, 428 (1998) (context made clear that "individual" and "person" were used interchangeably and intended to encompass juridical persons, as confirmed by failure of alternative reading to occur previously to "able lawyers").

Kadic has been consistently understood in just this way. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 fn. 20 (2004) (citing *Kadic* on "genocide by private actors," and glossing "private actor" with: "such as a corporation or individual"); *Abdullahi*, 562 F.3d at 188 (2d Cir. 2009) (citing *Kadic* for when "[a] private individual will be held liable under the ATS," and concluding, corporate defendant "Pfizer meets this test"); *Flores*, 343 F.3d 140, 150 (2d Cir. 2003) (applying *Kadic* holding that certain offenses "of 'universal concern'" violate international law even when "committed by private individuals" to allegations

against defendant corporation); *Bigio*, 239 F.3d 440, 447 (2d Cir. 2000) (answering question "whether [defendant corporation] Coca-Cola can have violated 'the law of nations'" by applying *Kadic* holding that "certain forms of conduct by private individuals may violate the law of nations").

This Court has "repeatedly treated the issue of whether corporations may be held liable under the ATCA as indistinguishable from the question of whether private individuals may be." *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring). Indeed, it may be less correct to say that the Second Circuit "has never directly addressed whether … jurisdiction under the ATS extends to civil actions against corporations," slip op. at 15, than to say that earlier panels considered the question to be definitively settled by the decision in *Kadic*.[3] If *Kadic* was wrongly decided (or misinterpreted by subsequent panels), and previous panels' consistent assumption of jurisdiction over corporate defendants was error, that is a determination that can be made only by the entirety of this Court, and not by a single divided panel without briefing on the issue.

II. THE PROCEEDING INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE.

En banc consideration is appropriate when "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). The present

[3] The panel noted that for the first fifteen years of modern ATS litigation, actions were brought only against individuals, not corporations. Slip op. at 3-4. More telling is that courts began entertaining actions against corporations shortly after *Kadic* was decided. Indeed, of the nine "significant" Second Circuit ATS decisions since 1980 identified by the panel majority, slip op. at 4, fn. 8, *all* of the last seven involved corporate defendants.

proceeding is of exceptional importance, because of the Second Circuit's leading role in shaping ATS jurisprudence, and because it newly creates a circuit split.

A. The Second Circuit Plays A Unique And Crucial Role In Interpreting The ATS.

A major shift in this Court's ATS jurisprudence is of "exceptional importance," warranting *en banc* review, because the Second Circuit is widely looked to for guidance in interpreting the ATS. Much as the D.C. Circuit has been described as akin to "a mini supreme court" in administrative law, because of its "crucial role in deciding regulatory agency appeals," Christopher P. Banks, *The Politics of En Banc Review in the "Mini-Supreme Court,"* 13 J. L. & Politics 377, 379 (1997), so this Court plays a lead role in interpreting the ATS. *See, e.g., Sosa*, 542 U.S. at 730-31 ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga*"[4]); *Taveras v. Taveraz*, 477 F.3d 767, 775 (6th Cir. 2007) ("the majority of courts faced with ATS jurisdiction questions have employed the analysis set forth by the United States Court of Appeals for the Second Circuit"); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 498 (9th Cir. 1992) (ATS "has … been comprehensively analyzed by the Second Circuit"); *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996) (*Filartiga* is "[t]he leading case interpreting" ATS). Other courts regularly decide a variety of fundamental questions about ATS interpretation by deferring to the authority of this Court's decisions in *Filartiga*, 630 F.2d 876, and *Kadic*, 70 F.3d 232. *E.g.*, *Zubeda v. Ashcroft*, 333 F.3d 463,

[4] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

479-80 (3d Cir. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999); *Yousuf v. Samantar*, 552 F.3d 371, 375, fn. 1 (4th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824-25, 831, 846 (9th Cir. 2008) (*en banc*); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1316 (11th Cir. 2008); *Saleh v. Titan Corp.*, 580 F.3d 1, 14 (D.C. Cir. 2009).

B. The Panel Opinion Creates A Circuit Split.

En banc review is indicated also because the panel decision creates a split of authority between Courts of Appeal. For purposes of *en banc* consideration, a "proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Rehearing *en banc* is particularly called for when a decision newly creates a circuit split where, as in the present case, there was none before. Fed. R. App. P. 35 advisory committee note on 1998 amendments.

The panel decision has created a split of authority. *See Romero*, 552 F.3d at 1315 (11th Cir. 2008) ("the law of this circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants"); *accord Sinaltrainal v. Coca-Cola Co.*, 578 F. 3d 1252, 1263 (11th Cir. 2009). *See also Aguasanta Arias v. Dyncorp*, 517 F. Supp. 2d 221, 227 (D.D.C. 2007) ("It is clear that the ATCA may be used against corporations acting under 'color of [state] law,' or for a handful of private acts"). Other courts have implicitly assumed jurisdiction over ATS actions against corporate defendants. *E.g. Sarei*, 550 F.3d 822 (9th Cir. 2008); *see also Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1022 (S.D. Ind.

2007). *No* other Court of Appeals has held to date that ATS actions cannot be brought against corporations. Before the panel's decision in this case, there was no split of authority.

CONCLUSION

The panel decision has the effect of overruling every significant decision by this Court about the Alien Tort Statute since 1995. Such a drastic change in the law can be made only upon deliberation of this entire Court, informed by relevant briefing. The petition fo*r en banc* review should be granted.

DATED: October 21, 2010

Respectfully submitted,

s/ Thomas Bennigson
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 2680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 14-point typeface including serifs. The typeface is Times New Roman, prepared using Microsoft Word.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

October 21, 2010

s/ Thomas Bennigson

Thomas Bennigson

CERTIFICATE OF SERVICE

I, Thomas Bennigson, the undersigned, hereby certify that I reside in Oakland, California; I am over the age of eighteen; and I am not a party to this action.

I further declare under penalty of perjury that on this day I caused the foregoing Brief of *Amicus Curiae* Public Good Law Center in Support of Petition for Rehearing *En Banc* to be served on all parties of record by sending electronic PDF copies to the following recipients by electronic mail, and, except for those indicated as having waived paper service, by enclosing two true copies in sealed envelopes with first class postage fully prepaid thereon, and then placing those envelopes in a U.S. Postal Service mailbox in Oakland, California, addressed as follows:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 21, 2010, at Oakland, CA,

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