

DENNIS JACOBS, joined by JOSÉ A. CABRANES, REENA RAGGI, and DEBRA ANN LIVINGSTON, Circuit Judges, concurring in the denial of rehearing in banc.

I concur in the denial of in banc review of this case; rehearing would serve no purpose remotely commensurate with the effort it would entail.

The panel opinion grudgingly rejects plaintiffs' claim as barred by our decision in Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) ("Kiobel I"), which held that customary international law, as enforced by the Alien Tort Statute ("ATS"), does not regulate corporate conduct. The panel opinion goes on to attack Kiobel I, and says it is constrained unhappily to follow it. Hence the in banc poll initiated by the panel itself.

Although the seven other judges who voted against in banc review do not necessarily endorse Kiobel I (or reach the merits of it), there is consensus that intervening developments obviate any need to go in banc.

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Back in 2011, this Court rejected in banc review of this issue. See Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 379, 380 (2d Cir. 2011). The Supreme Court took up the case, but (after oral argument) required briefing on an alternative

ground: whether the ATS has extraterritorial effect. The Supreme Court then held that it does not. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1669 (2013) (“Kiobel II”).

Since the population of cases dismissible under Kiobel I is largely coextensive with those dismissible under Kiobel II, several conclusions follow:

- The principle of Kiobel I has been largely overtaken, and its importance for outcomes has been sharply eroded. See Flomo v. Firestone Nat’l Rubber Co., LLC, 643 F.3d 1013, 1025 (7th Cir. 2011) (Posner, J.) (“Deny extraterritorial application, and the statute would be superfluous . . .”).
- This present appeal was subject to two easy (alternative) dispositions: affirm on the basis of Kiobel I (without lamentation) or remand for the district court to consider the case under Kiobel II. See Kiobel II, 133 S.Ct. at 1669.
- There is no reason to consider or reconsider Kiobel I in banc in this appeal.

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This appeal could have been straightforwardly decided under Kiobel II, which held that the presumption against extraterritoriality can be displaced only

if the “claims touch[ed] and concern[ed] the territory of the United States”; that they must do so with “sufficient force”; and that “mere corporate presence” (for example) is not enough. Id. Kiobel II emphasizes that this must be a high hurdle, given the danger of judicial meddling in the affairs of foreign countries:

[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do . . . These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign . . . The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.

Id. at 1664-65.

In this case, the underlying offense against the law of nations is terrorism against citizens of Israel by four Palestinian terrorist groups. Arab Bank, PLC, which is headquartered in Jordan, is named as defendant because funds allegedly passed through its branches to other countries for distribution to terrorists.

The only contact with the United States mentioned in the Arab Bank opinion is that terrorist groups used branches of Arab Bank in a score of countries (including a single U.S. branch, in Manhattan) for, among other ordinary transactions, the conversion of funds from one currency to another. See

In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 149-50 (2d Cir. 2015)

(“Arab Bank then created individual bank accounts . . . often routing the transfers through its New York branch in order to convert Saudi currency into Israeli currency.”). The New York branch is not differentiated in any way from Arab Bank’s numerous other branches. This is no more than the “mere corporate presence” that is insufficient to displace the presumption against extraterritoriality. Kiobel II, 133 S.Ct. at 1669.

In the (unlikely) event that plaintiffs could somehow plead around Kiobel II, they would face a separate formidable barrier: the mens rea requirement. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009). As the panel opinion emphasizes, plaintiffs do allege knowledge. See Arab Bank, 808 F.3d at 150 (“According to the plaintiffs, Arab Bank *knew* that the donations were being collected for terrorist attacks . . . Again, responsible officials at Arab Bank purportedly *knew* that the accounts of these various organizations and individuals were being used to fund the suicide bombings and other attacks sponsored by the terrorist organizations.”) (emphasis added). However, the standard “for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.” Presbyterian Church, 582 F.3d at 259.

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It is thus evident that the Arab Bank panel opinion steered deliberately into controversy. That impression is confirmed by the slender pretexts advanced by the panel for refusing to consider extraterritoriality.

The panel considers it “unwise to decide the difficult and sensitive issue of whether the clearing of foreign dollar-denominated payments [in simpler terms, money] through a branch in New York could, under these circumstances, displace the presumption against the extraterritorial application of the ATS” Arab Bank, 808 F.3d at 158.¹ But it would have been simpler to remand for the district court to decide that easy question (as other circuit courts are doing) than to go in banc to decide a question that produced dueling opinions in Kiobel I. It is as though Sisyphus, seeing the hill, elected to push upward instead of just going around.

The panel decision notes that Kiobel II was “not the focus of either the district court’s decision or the briefing on appeal.” Id. But this need not boggle judicial ingenuity: the panel could have remanded in light of Kiobel II, or it could

¹ This is a kind of transaction that can be done at an automated airport kiosk.

have asked for supplemental briefing. It is not recommended appellate craft to avoid so easy a disposition and instead strain to revisit Circuit precedent in banc.

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The circuit split that so worries the Arab Bank panel is illusory. The panel opinion conjures up a circuit split from these cases:

- Two of the decisions pre-date Kiobel II; so those panels did not have the option of dismissal or remand on the ground of extraterritoriality. See Flomo, 643 F.3d at 1021 (issued almost two years before Kiobel II); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008) (issued more than four years before Kiobel II).
- The rest were decided on the basis of Kiobel II. See Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1027-28 (9th Cir. 2014) (“We decline to resolve the extraterritoriality issue, and instead remand to allow the plaintiffs to amend their complaint in light of *Kiobel II* . . . It is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law”); Doe VIII v. Exxon Mobil Corp., 527 F. App’x 7 (D.C. Cir. 2013) (“[I]n light of intervening

changes in governing law regarding the extraterritorial reach of the Alien Tort Statute, *see* [Kiobel II], . . . the Alien Tort Statute claims [are] remanded to the District Court for further consideration.”).

- As to Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014), cited by the Arab Bank panel as “see also”: the case was decided solely on the basis of Kiobel II: “[P]laintiffs’ ATS claims ‘touch and concern’ the territory of the United States with sufficient force to displace the presumption against extraterritorial application”.

All this is by way of saying that this appeal is insufficiently important or consequential to warrant review in banc.

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In sum, the panel’s angst in having to follow Kiobel I was self-inflicted. The appeal could have been resolved under Kiobel II; if the problem was lack of briefing, briefing could have been ordered; if finding the right answer under Kiobel II was a strain on the panel, it could have remanded; if the easiest course was to follow a precedent that the panel dislikes, it could have done what appellate judges must frequently do: swallow hard. The one course that makes

no sense is to force difficulties, reel off dicta criticizing our precedent, and seek in banc consideration of a doctrine that now has sharply reduced application.

Going in banc on this would do nothing but supply catnip for law clerks looking to teach.

A further consideration: Kiobel I was sharply contested within the panel; there was friction, heat and light in the Kiobel I panel opinions, and over panel rehearing and the (defeated) 2011 in banc initiative. There is even less reason now than then to reconsider in banc an issue so highly charged. More to the point, the Supreme Court will have two vigorous Second Circuit opinions to consider if that Court decides one day to revisit a question that will rarely again be asked.

In this Circuit, a case may one day arise that cannot be disposed of under Kiobel II, at a time when a circuit split has opened, and when the prospect looms of many such cases. If and when that comes to pass, it may be worth our time to consider the issue in banc. That time may never come; it has certainly not arrived.