

DENNY CHIN, *Circuit Judge*, joined by Judge CARNEY, dissenting from the denial of rehearing *en banc*:

I respectfully dissent from the denial of rehearing *en banc*, for the reasons set forth in Judge Pooler's dissent, the panel decision in this case, *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (2d Cir. 2015), and Judge Leval's concurrence in *Kiobel I*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010). As a member of the panel, I write to respond briefly to certain observations in Judge Jacobs's concurrence in the denial of rehearing *en banc*.¹

Judge Jacobs writes that the panel "steered deliberately into controversy" by deciding the appeal on the basis of *Kiobel I* when it could have affirmed "straightforwardly" on the basis of *Kiobel II*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), or on the basis that plaintiffs failed to sufficiently plead *mens rea*. Jacobs, *J.*, op. at 2, 4-5. Alternatively, Judge Jacobs contends that the appeal was subject to the "easy" disposition of a remand to the district court to consider the case under *Kiobel II*. *Id.* at 2, 5.

First, as to affirmance, the district court dismissed plaintiffs' claims under the Alien Tort Statute (the "ATS") solely on the basis of *Kiobel I*. The

¹ Because he is a senior judge, the author of the panel opinion could not vote on whether to rehear this case *en banc*. Had the active judges voted in favor of such a rehearing, however, he would have been entitled to sit on the *en banc* court.

district court ruled after *Kiobel II* was decided, but rather than apply *Kiobel II*, it ruled on the basis of *Kiobel I*, holding that "[t]he law of this Circuit is that plaintiffs cannot bring claims against corporations under the ATS." Pls.' Special App. at 1. It did not consider whether plaintiffs' claims touched and concerned the United States. Likewise, the district court did not consider the *mens rea* question,² nor did any of the parties brief the question on appeal. It did not make sense for the panel to delve into these factual issues in the first instance on appeal, see *Eric M. Berman, P.C. v. City of New York*, 796 F.3d 171, 175 (2d Cir. 2015) ("[I]t is this Court's usual practice to allow the district court to address arguments in the first instance." (quoting *Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 208 (2d Cir. 2003))), when the appeal could be disposed of as a matter of law. If *Kiobel I* is indeed good law, there is no reason why we should not have applied it as a precedential decision to obviate the need for factual inquiries and additional briefing and litigation.

Second, as to remand, if *Kiobel I* were correctly decided, this case would be over and there would be no reason to remand. If *Kiobel I* were correctly decided, there would be no reason to ask the district court and the parties to

² The district court in a similar case against Arab Bank held that the plaintiffs there met the *mens rea* threshold. See *Lev v. Arab Bank, PLC*, No. 08 CV 3251 (NG), 2010 WL 623636 (E.D.N.Y. Jan. 29, 2010) (Gershon, J.).

probe into the complex and fact-intensive issues of corporate presence and corporate intent, for there would be no subject matter jurisdiction under the ATS. If the bright-line rule is that corporations may not be sued under the ATS, there would be no reason to remand the case for further expensive and time-consuming litigation, including discovery and further motions. Moreover, if, on remand, the district court were to conclude that the claims met the requirements of *Kiobel II*, the corporate liability issue would still have to be decided, and all of the effort on remand would have been for naught.

Judge Jacobs also contends that there is no circuit split and that "[t]he panel opinion conjures up a circuit split." Jacobs, *J.*, op. at 6. The cases speak for themselves, and they are clearly at odds with our holding in *Kiobel I*:

- The D.C. Circuit has held that corporate defendants are subject to liability under the ATS, observing that "[t]here are a number of problems with the analysis in [*Kiobel I*]" and explicitly declining to follow it, *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 50, 54-55 (D.C. Cir. 2011), although the decision was later vacated for further consideration, in part because of *Kiobel II*, 527 F. App'x 7 (D.C. Cir. 2013).

- The Seventh Circuit has held that "corporate liability is possible under the [ATS]." *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011).
- The Ninth Circuit has held that "there is no categorical rule of corporate immunity or liability" under the ATS, relying on Judge Leval's concurrence in *Kiobel I. Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014).³
- The Eleventh Circuit has held that "[t]he text of the [ATS] provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants." *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (citation omitted).
- The Fourth Circuit has permitted ATS claims to proceed against a corporate defendant. In *Al Shimari v. CACI Premier Technology, Inc.*, the Fourth Circuit reviewed the district court's dismissal of the plaintiffs' ATS claims for lack of jurisdiction. 758 F.3d 516, 524 (4th Cir. 2014). Applying *Kiobel II*, the

³ While the Ninth Circuit did remand for the district court to consider *Kiobel II*, it noted that "the plaintiffs contend that part of the conduct underlying their claims occurred within the United States." 766 F.3d at 1028. The corporate liability issue was squarely part of its holding in the case. *Id.* at 1020-23.

Fourth Circuit held that "the district court erred in concluding that it lacked subject matter jurisdiction under the ATS" and vacated the dismissal of the ATS claims, remanding for further proceedings. *Id.* at 531. While the Fourth Circuit did not explicitly address the issue of corporate liability under the ATS, *see id.* at 525 n.5, the principal defendant was a corporation, *id.* at 520, 530, and clearly there would have been no reason to remand the case for further proceedings if jurisdiction over corporations did not exist under the ATS.⁴

While it is true, as Judge Jacobs notes, that some of these cases have been or could be resolved on *Kiobel II* grounds, there is no reason, again, why the courts and litigants in these cases should be litigating the complex, factual "touch and concern" issues if, indeed, corporations are not liable under the ATS as a matter of law.

Finally, the concurrence suggests that there is no reason for *en banc* review because "[t]he principle of *Kiobel I* has been largely overtaken, and its importance for outcomes has been sharply eroded." Jacobs, *J.*, *op.* at 2. This argument, it seems to me, assumes that no ATS case will present claims that

⁴ See also *Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999) (dismissing ATS claims against corporate defendants under Rule 12(b)(6), and to that extent appearing to implicitly assume that jurisdiction existed over ATS claims against corporate defendants).

touch and concern the United States. That is not so, as *Al Shimari* and *Doe I v. Nestle USA* show. There will be cases where plaintiffs can meet the requirements of *Kiobel II*. And in those cases, even assuming the claims are meritorious, in this Circuit the plaintiffs will be precluded from seeking relief under this Court's ruling in *Kiobel I* that corporations categorically are not subject to suit under the ATS. We are the only Circuit to reach that conclusion, and we should have taken this opportunity to reconsider the matter.

I would grant the petition for rehearing *en banc*.