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CORPORATE RESPONSIBILITY IN TRANSNATIONAL HUMAN RIGHTS CASES. THE U.S. SUPREME COURT DECISION IN KIOBEL V. ROYAL DUTCH PETROLEUM *

CONTENTS: I. Introduction on the «State of the Art» in Respect to Business-Human Rights Relationship. – II. The Questions of Corporate Liability and Extraterritorial Jurisdiction over Abuses Committed Abroad in the *Kiobel* Case. – III. The Governments Positions on Universal Civil Jurisdiction. – IV. Critical Evaluation of the European Union Member States' Arguments on the Extraterritorial Application of ATS. – V. Conclusion on the Exercise of Extraterritorial Civil Jurisdiction. – VI. *Addendum*: The April 17, 2013 Supreme Court's Decision. – VII. The Constraints in the ATS: A Comment. – VIII. After *Kiobel*.

I. While business activities play a fundamental role in generating economic growth, wealth, jobs, income, innovation and development, thus possibly contributing to the enjoyment of fundamental human rights, there is increasing recognition that non-state actors, such as transnational corporations and other businesses, can have significant negative impacts on a full range of human rights, including civil and political rights, economic, social and cultural rights, labour and environmental rights. The corporate responsibility and accountability for human rights violations is an issue firmly implanted in the global political agenda since the 1990s, which reflects a worldwide concern about the increasing role played by non-state actors in the process of globalization coupled with a corresponding decrease in the capacity of societies and governments to manage their negative impacts on the enjoyment by individuals, communities and indigenous people of their human rights. It is generally recognized that these «governance gaps» have created an environment in which business-related human rights abuses can occur with relative impunity.[1] Allegation of direct violations by business enterprises, as well as

* This article was subject to independent external peer review.

[1] *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, April 7, 2008, available at www.ohchr.org, para. 3.

corporate complicity in human rights violations committed by others, not limited to specific countries, industries or contexts, continue to be reported.[2]

Several efforts have been made at the level of United Nations to narrow these gaps, exploring ways for corporate actors to be legally accountable for the negative impact of their activities on human rights. The latest United Nations-based initiative is the result of a mandate established in 2005 for a Special Representative of the Secretary-General (Harvard Prof. John Ruggie) «on the issue of human rights and transnational corporations and other business enterprises». From the very beginning, Prof. Ruggie made clear that he would have abandoned the approach consisting in imposing on companies «directly under international human rights law the same range of duties that states have accepted for themselves». In 2008, the Special Representative presented to the Council a strategic policy framework for better managing business and human rights challenges, named the «Protect, Respect and Remedy» framework, organized around the three pillars of the State *duty* to protect against human rights abuses by third parties, including businesses; the corporate responsibility to *respect* human rights; and the need for more effective access to *remedies*.[3] The Human Right Council unanimously welcomed this framework and extended the Special Representative mandate with the task to operationalizing and promoting the framework.[4] In March 2011 Prof. Ruggie presented his final report (the culmination of six years of extensive and inclusive consultations) named «Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework»,[5] which

[2] Allegation of direct violations by business enterprises, as well as corporate complicity in human rights violations committed by others, not limited to specific countries, industries or contexts, continue to be reported. See U.N. doc. A/HRC/8/5/Add.2, 23 May 2008, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/136/61/PDF/G0813661.pdf?OpenElement. According to this report, near 60 per cent of cases reported featured direct forms of company involvement in the alleged abuses, where the company is alleged to directly cause the abuse through its own acts or omissions. Around 40 per cent of cases included indirect forms of company involvement in the abuse, where firms were generally alleged to contribute to or benefit from the abuses of third parties, such as suppliers, individuals, States or arms of a State, and other business.

[3] *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. doc. A/HRC/8/5, April 7, 2008 cit.

[4] Human Rights Council resolution 8/7, June 18, 2008, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf.

[5] *Guiding Principles on Business and Human Rights: Implementing the United Nations «Protect, Respect and Remedy» Framework*, U.N. doc. A/HRC/17/31, March 21, 2011, available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

was unanimously endorsed on 16 June 2011 by the U.N. Human Rights Council.[6]

These thirty-one *Guiding Principles* are organized into three sections corresponding to the same three core principles of the 2008 U.N. framework; each principle is accompanied by a commentary. In a nutshell, «States must protect; companies must respect; and those who are harmed must have redress».[7]

The *Guiding Principles'* approach to the human rights responsibilities of business entities makes absolutely clear that they are not legally binding and that they do not purport to create *new legal obligations for business*, thus reiterating the traditional view that international human rights instruments impose only *indirect responsibilities* on corporations (human rights obligations take effects as between non-state actors only under domestic law in accordance with States' international obligations). In conclusion, the *Guiding Principles* are another *voluntary code*, along with various others introduced over the years.[8] In absence of *effective* enforcement mechanisms,[9] it's unlikely that these *Guiding Principles* might usefully constrain corporate conducts.[10] Voluntary schemes and soft-law approaches alone cannot coerce unwilling business enterprises to adopt corporate responsibility policies, neither could they force companies to

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[6] UN doc. A/HRC/RES/17/4, July 6, 2011, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement.

[7] John Ruggie, *Opening Address at the United Nations Forum on Business & Human Rights*, Geneva, Switzerland, 4 December 2012, available at http://www.hks.harvard.edu/m-rcbg/CSRI/Ruggie_UN_Forum_4_December_2012.pdf.

[8] Among the most widely recognized and accepted are the U.N. Global Compact launched in 2000 by then Secretary-General Kofi Annan as a global platform for engaging companies in the support of universal values, as well as promoting and amplifying businesses' positive contributions to societies' needs; the Organization for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises; the ISO 26000 Guidance Standard on Social Responsibility; the International Labour Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

[9] Significantly, the U.N. Human Rights Council did not create any right to an effective remedy for addressing the corporate human rights. In July 20011, it merely established a «Working Group on the issue of human rights and transnational corporations and other business enterprises», consisting of five independent experts of balanced geographical representation, mandate *inter alia* to identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles; to continue to explore options for enhancing effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas. This Working Group was not given the authority to consider complaints of victims related to the violation of human rights, even if its mandate leaves open the possibility of country visits.

[10] Contrary, for the argument that the notion of human rights *due diligence* as framed by the U.N. *Guiding Principles* will lead to the cretion of binding legal duties for corporate actors under corporate law and corporate governance theory, see Muchlimski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation*, *Business Ethics Quarterly*, 2012, pp. 145-177.

abide by their corporate responsibility commitments.[11] This is why it is so important to reason upon the very first Principle which deals with the *State duty to protect.*[12] No doubt that States have the «primary» obligation to secure universal enjoyment of human rights and that they are the cornerstone around which the human rights regime is constructed.[13] However, frequently States fail to regulate the human rights impact of business and/or to ensure effective access to justice for victims of human rights abuses.

One might have expected, therefore, that in order to «bring back in» Governments which are nor «doing their job»,[14] the *Guiding Principles* put forward a more *progressive* attitude towards State obligations by strengthening their existing obligations and their capacity to address effectively the challenges of the lack of respect for human right laws. Instead, and again, the *Guiding Principles* adopted a non-expansive view of States duties in relation to business and human rights and potential avenues for redress for alleged victims of business-related human rights violations.[15] The Principles simply say that States must generally protect against human rights abuses by third parties «within their territory and/or jurisdiction», through appropriate and effective policies, regulations and laws. They do not provide any further guidance on the steps States should take to hold companies accountable in the particular areas where remains a lack of clarity (whether States should impose liability on companies themselves, in addition to natural persons acting on the entity's behalf; when States are expected to provide individuals with civil causes of action against companies, *i.e.* separate from criminal sanctions and going beyond administrative complaints mechanisms; and whether and to what extent States should hold companies liable for alleged abuses occurring overseas).[16] No promising approaches concerning *extraterritorial ju-*

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[11] KAMATALI, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Company: Is It Time for an ICJ Advisory Opinion?*, *Cardozo Journ. Int. Comp. Law*, 2012, at pp. 449-450.

[12] *Guiding Principles*, Principle 1: «States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication».

[13] KNOX, *Horizontal Human Rights Law*, *Am. Journ. Int. Law*, 2008, at pp. 1-47.

[14] *Remarks* by JOHN RUGGIE at the *Forum on Corporate Social Resposibility*, Co-sponsored by Fair Labour Association and the German Network of Business Ethics, Bamberg, Germany, June 14, 2006, available at http://198.170.85.29/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf.

[15] MASSOUD, RÖDL, *Waiting for the «Follow-Up»? – Guiding Principles for the Implementation of the United Nations «Protect, Respect and Remedy» Framework*, available at http://column.global-labour-university.org/2011/01/waiting-for-follow-up-guiding.html, at 2.

[16] *State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and de-*

risdiction and transnational litigations have been developed by the *Guiding Principles*.[17] As to the exterritorial dimension of the State duty to protect under international human rights law, Principle 2 simply prescribes that «States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations». The use of the «should» language in the Principle is reinforced by the Commentary affirmation that what is at stake are only «strong policy reasons» for home States to set out clearly «the expectation that businesses respect human rights abroad», like «ensuring predictability for business enterprises and preserving the State's own reputation».

Shortly, the *Guiding Principles* refuse to characterize the duty to protect as extending extraterritorially. The Commentary recognizes that: «At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis». The Commentary goes on recognizing that in this respect States have adopted «a range of approaches in this regard»: some are domestic measures with *extraterritorial implications*, like requirements on «parent» companies to report on the global operations of the entire enterprise; multilateral soft-law instruments, and performance standards required by institutions that support overseas investments. Other approaches amount to «*direct extraterritorial legislation and enforcement*», like «criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs». No indications in the Guiding Principles of which «extraterritorial measures» appear preferable and no further refinement of the legal understanding of the duty to protect and prevent human rights abuses abroad. The choice has been to leave the exterritorial responsibility to home States' discretion.

As regard to the *Access to Remedy*, the *Guiding Principles* recognize that: «Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless». Therefore the Foundational Principle 25 establishes that «As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy». But the Operational

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cisions, Addendum to the Report of the Special Representative, A/HRC/11/13/Add.1, May 15, 2009, http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.Add.1.pdf, at 3.

[17] Massoud, Rödl, *Waiting for the «Follow-Up»?* cit., at p. 3.

principle devoted to State-based judicial mechanism does not deal with the causes of States' incapacity, nor does provide suggestions on how States can effectively strengthen their judicial capacity to hear complaints and enforce remedies against corporations by reducing the legal, practical and other relevant barriers (such as costs and legal aid, the lack of support for public interest litigation or mass tort claims, time limitations, and provisions on evidence) that could lead to a denial of access to remedy.[18] In the case of abuses involving third-country subsidiaries or contractors, difficulties are further exacerbated: in his 2009 Report, Ruggie recognized that «Where the company is a subsidiary of an overseas parent, additional factors can compound these barriers. The parent company may use its own leverage with the host Government or mobilize the home Government and international financial institutions. The alternative of filing a suit in the parent company's home State for the subsidiary's actions, or for the parent's own acts or omissions, can raise jurisdictional questions about whether it is the appropriate forum, and may trigger policy objections by both home and host State Governments. Moreover, the standards expected of parent companies with regard to subsidiaries may be unclear or untested in national law. Such transnational claims also raise their own evidentiary, representational, and financial difficulties».[19]

Finally, there is no mention in the Guiding Principles of the State obligation under international law to provide access to remedy in cases involving «gross human rights violations»,[20] which included at least the following: slavery, and a slave-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race and gender.[21] It's important to underline that for such violations the United Nations Basic Principles provide for an individual right to remedy «irrespective of who may ultimately be the bearer of responsibility for the violation», thus extending to third party, including corporate-related abuses.[22]

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[18] *Guiding principles*, Operational Principle 26.

[19] *Business and human rights: Towards operationalizing the «protect, respect and remedy» framework*, A/HRC/11/13, 2009, available at www.ohchr.org, para. 95.

[20] See the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted in 2005 by the Commission on Human Rights and subsequently by the General Assembly in its resolution 60/147 of December 16, 2005, available at http://www.refworld.org/docid/4721cb942.html, annex, Principle 3(c).

[21] International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide*, 2006, at pp. 153-168.

[22] In his report on *State obligations to provide access to remedy for human rights*

II. It is undoubtedly the task for States to develop effective tools and measures to ameliorate or eliminate such human rights violations: national laws and their application by courts are a fundamental part of the States' response to the negative impacts of corporate activity on people's human rights. Domestic enforcement of binding rules of international law and domestic jurisdiction with the power to award civil damages against human rights violators are among the most efficient tools in promoting and securing effective compliance by non-state actors.[23] It is important to determine to what extent States think appropriate, or possible for them, to extend their powers beyond their own territory in order to combat human rights crimes committed by businesses, especially in the light of failure of the U.N. *Guiding Principles* to provide greater clarity on the «extraterritorial» dimension of the State duty to protect under international human rights law.

In this respect a very useful insight of the States' *opinio juris* on the issue of *extraterritorial jurisdiction*, as a tool to improve the accountability of transnational corporations for human rights abuses committed overseas, is provided by the discussions surrounding a landmark case under consideration by the U.S. Supreme Court, which concerns the involvement of foreign multinational corporations in overseas human rights violations. The case is *Kiobel v. Royal Dutch Petroleum Co.*,[24] brought under the ATS, a judiciary act enacted by the first U.S. Congress in 1789, which provides that «[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States».[25]

This statute, long dormant for nearly two hundred years, turned into «a crucial tool for human rights litigation» with the seminal 1980 case of *Filartiga v. Peña-Irala*,[26] which transformed the ATS into «the epitome of extraterritoriality» in U.S. law.[27] Since then, ATS has become «the fountainhead for human rights lawsuits», and in the last three decades more than 120 lawsuits have been filed in Federal Courts against 59 corporations for alleged wrongful acts in 60 foreign countries. Almost the majority of these suits have

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abuses by third parties, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.Add.1.pdf, at p. 34, Ruggie recognized that «The United Nations Basic Principles were intended as a restatement of existing State obligations. They indicate the international community's enhanced concern with access to remedy in cases involving gross violations, and may reflect increased expectations that individuals should be able to resort to national courts to vindicate their treaty rights in such situations».

[23] REINISCH, *The Changing International Legal Framework for Dealing with Non-state Actors*, in Philip ALSTON (ed.), *Non-State Actors and Human Rights*, 2005, at p. 89; KNOX, *Horizontal Human Rights Law*, at p. 45.

[24] No 10-1491 (U.S. 2012).

[25] 28 U.S.C.§ 1350.

[26] 630 F. 2d 876 (2d Cir. 1980).

[27] *Development in Law, Extraterritoriality*, *Harvard Law Rev.*, 2011, at p. 1234.

been over «aiding and abetting» abuses by foreign governments, rather than over direct offenses. Most of these corporate ATS cases have been dismissed or settled with very high damages awards.[28]

The Supreme Court in *Kiobel* had to deal with some of the hot issues not defined by the U.N. *Guiding Principles*, such as whether States are expected to provide individuals with civil causes of action against companies and whether and to what extent States should hold companies liable for alleged abuses occurring overseas. Nevertheless, the *Guiding principles* also featured in this case, as the Respondents placed significant reliance on a statement contained in a 2007 report of the Special Representative to argue that corporations cannot be held liable under international law for the human rights violations alleged by Petitioners, including torture, extrajudicial executions, and crimes against humanity.[29] The Special Representative felt obliged to file in this respect an *amicus* brief in support of neither party in order to correct the «mischaracterizations» of his mandate's findings and conclusions to be drawn by the U.N. Guiding Principles.[30]

Kiobel v. Royal Dutch Petroleum Co. is a class action suit filed in 2002 by twelve Nigerians plaintiffs against Royal Dutch Petroleum and British Shell Transport and Trading corporations. The Petitioners alleged that the Respondents and their agents aided and abetted, or were otherwise complicit in, widespread and systematic attacks committed by the Nigerian Government in the Ogoni region of Nigeria between 1992 and 1995 against the Ogoni population and directed, in particular, at people like the petitioners who opposed Shell's environmental degradation in the Niger Delta. Specifically, Petitioners alleged various human rights abuses, including torture, extrajudicial execution, prolonged arbitrary detention, extrajudicial killings and crimes against humanity. Respondents moved to dismiss the claim, arguing *inter alia* that the complaint failed to state a violation of the law of nations with the specificity required by the 2004 *Sosa v. Alvarez Machain* decision, in which the Supreme Court made clear that, at a minimum, «federal courts should not recognize private

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[28] Bellinger III, *Why the Supreme Court should curb the Alien Tort Statute*, February 23, 2012, at http://articles.washingtonpost.com/2012-02-23/opinions/35444954_1_kiobel-alien-tort-statute-human-rights.

[29] The sentence relied on states that: «it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations». *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/118/42/PDF/G0711842.pdf?OpenElement, para. 44.

[30] *Kiobel and Corporate Social Responsibility: An Issue Brief by John Ruggie*, September 4, 2012, available at http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20%283%29.pdf.

claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than (the three) historical paradigms» (that's to say: violation of safe conducts, infringement of the rights of ambassadors, and piracy).[31]

In 2006, the U.S. District Court for Southern District of New York dismissed several of the claims. Both parties appealed the decision to the U.S. Court of Appeal for the Second Circuit, which decided in 2010, by a majority of the appeals panel, that this ATS claim must be dismisses for lack of *subject matter jurisdiction*, as corporations could not be sued under the ATS. Particularly, the Second Circuit court held that «in ATS suits alleging violations of customary international law, the scope of liability – who is liable for what – is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and because no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernible – much less universally recognized – norm of customary international law that we may apply pursuant to the ATS».[32]

The plaintiffs brought the case in front of Supreme Court, which granted *certiorari* in order to resolve the split created between the Second Circuit and other three federal Courts of Appeals (the Seventh, District of Columbia and Ninth Circuits) which ruled differently on the issue that the ATS permits suits against corporations for universally condemned human rights violations.[33]

On February 28, 2012 the Supreme Court heard oral arguments for the case on the questions: (1) whether the question of corporate civil liability under the Alien Tort Statute («ATS») is a merits question or a question of subject matter jurisdiction; and (2) whether corporations may be sued in the same manner as any other private party defendant under the ATS. But, on March 5, 2012 the Court ordered briefing and re-arguments on the additional question of «whether and under what circumstances the ATS allows U.S. courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States».[34]

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[31] 542 U.S, 724, 732.

[32] United States Court Of Appeals For The Second Circuit, *Kiobel v. Royal Dutch Petroleum*, September 17, 2010.

[33] *Kiobel v. Royal Dutch Shell Petroleum Co., et al.*, 621 F.3d 11 (2d Cir. Sept. 17, 2010), cert. granted (U.S. Oct. 17, 2011) (No 10-1491).

[34] *Kiobel v. Royal Dutch Petroleum Co., et al.*, 621 F.3d 11, order for reargument (U.S. Mar. 5, 2012), available at http://www.supremecourt.gov/orders/courtorders/030512zr.pdf. See also KEITNER, *The Reargument Order in Kiobel v. Royal Dutch Petro-*

Simply put, the U.S. Supreme Court has been demanded to decide upon the two core issues of the corporate civil liability of corporations under the ATS and the permissibility of universal civil jurisdiction under the same Statute, making *Kiobel* one of the most important cases to be decided and one that could have profound implications for corporations accountability for gross human rights violations committed abroad.

III. One of the two core questions raised before the Supreme Court in *Kiobel* is whether corporations could be held liable in a federal common law action brought under ATS for human rights violations. In this respect, the U.S. Government filed an impressive *amicus curiae* brief, signed by the Legal Advisor to the State Department (Yale Law School Prof. Koh), explicitly supporting the petitioners.[35] In response to the Second Circuit affirmation that «It is inconceivable that a defendant who is *not liable* under customary international law could be *liable* under the ATS», the U.S. Government affirmed that the United States «is not aware of any international law norm... that distinguishes between natural and juridical persons. Corporations (or agents acting in their behalf) can violate those norms just as natural personas can. Whether corporations should be held accountable for those violations in private suits under the ATS is a question of federal common law». A District court, therefore «does not lack jurisdiction over an alien's otherwise colorable tort claim alleging a law-nations violations simply because the defendant is a corporations». Whether Federal Courts should recognize a cause of action in such circumstances «is a question of federal common law that, while informed by international law, is not controlled by it». The Government rightly asserted that the Court of appeals confused the threshold limitation indentified in *Sosa* (which requires violations of an accepted and sufficiently defined substantive international law norm) with the question of how to *enforce* that norm in domestic law, which does not require an accepted and sufficiently defined practice of international law. In other words, according to the U.S. Government, international law establishes the substantive standards of conduct but leaves the means to enforce those substantive standards to each State. «International law informs, but does not control, the exercise that discretion». In conclusion, according to the U.S. Government, nothing in international or in the text and history of ATS justifies «a categorical exclusion of corporations form civil liability for grave human rights abuses under this Statute».

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leum and its Potential Implications for Transnational Human Rights Cases, March 21, 2012, http://www.asil.org/insights120321.cfm.

[35] All the Briefs and other documents for the *Kiobel* Case are available at The Center for Justice & Accountability (CJA) website: http://cja.org/article.php?list=type&type=509.

Regarding the Respondents' argument that there is no corporate liability under international law for the human rights violations, including torture, extrajudicial executions, and crimes against humanity,[36] Prof. Ruggie's advanced good counter-arguments in his *amicus curiae* too, contesting the «misconstruction» of the central findings of one of the United Nations report he has authored. According to the Special Representative, his reports explicitly recognized that «corporations may be held directly liable for human rights violations that constitute international crimes such as genocide, torture, slavery, and crimes against humanity». Having examined the developments in the area of corporate responsibility for international crimes, Prof. Ruggie concluded that he found that the interaction between «the extension of responsibility for international crimes to corporations under domestic law» and «the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute» has created «an expanding web of potential corporate liability for international crimes». He further refuted the argument that the lack of a current international body for adjudicating corporate responsibility for international crimes excludes such responsibility: «just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today». For these reasons, the Special Representative concluded that «the most consequential legal development» in the «business and human rights constellation» is «the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards»; and that remedies for business-related human rights abuses may come in many forms, including «civil, administrative or criminal liability». The Special representative concluded also that the weight of international criminal law jurisprudence in cases involving individual perpetrators supports a «knowledge standard for aiding and abetting human rights abuses».

Prof. Ruggie further expressed his deep concern for the potential implications of this case, that may go well beyond the exterritorial reach of ATS over human rights abuses committed by foreign multinationals in countries other than the United States. He explicitly contested the Respondents strategy seeking to persuade the U.S. Supreme Court not only to dismiss the claims against them, but also «to negate the statutory basis making it possible to use U.S. courts as a forum to adjudicate civil liability for gross human rights violations committed abroad – even when

[36] For an analysis of the 20 U.S. Supreme Court cases that already recognized corporations liability under international law, see Paust, *Non-State Actor Participation in International Law and the Pretense of Exclusion*, *Virginia Int. Journ. Law*, 2011, at pp. 977-1004.

those violations are committed by U.S. nationals, and even if the Americans are natural persons». According to the Respondents not only ATS does not apply to corporations, including U.S. corporations, but its reach – even for natural persons – should be «pulled back» by the Supreme Court to cover only violations committed within the jurisdiction of the United States. Doing otherwise, according to them, would imply a violation of international law since customary international law does not support the existence of an express rule permitting the assertion of civil jurisdiction over human rights violations committed outside the United States. In this respect, Prof. Ruggie concluded that «had this view held all along, there would have been no *Filártiga*, no successful Holocaust survivors' claims, no statutory basis for civil action by foreign victims even against U.S. nationals for gross human rights violations abroad, whether committed by legal persons or natural persons. What is more, there might never have been the knock-on effects of ATS jurisprudence for legal developments in other countries, and also for the growth of voluntary corporate social responsibility initiatives at home and abroad, adopted by companies at least in part to avoid ATS-type liability».[37]

On this particular issue, *i.e.*, the second core question in front of the U.S. Supreme Court (that of the exterritorial reach of the ATS) the various Governments' positions expressed in their *amici curiae* are very illuminating on how little they are concerned to maintain and/or possibly enlarge the extraterritorial scope of civil jurisdiction in relation to human rights abuses.

The European Commission, on behalf of the European Union, filed a supplemental brief in support of neither party stating the concrete interest of the European Union «in ensuring that EU – based natural and legal persons are not at risk of being subjected to the laws of other States where extraterritorial application of laws does not respect the limits imposed by international law». The core argument of the European Commission's brief is that in order «To preserve harmonious international relations, States and international organizations such as the European Union must respect the substantive and procedural limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory». Therefore, the Commission submits that for extraterritorial application of the ATS to conform with the law of nations it must be confined to the limited bases for extraterritorial jurisdiction recognized by international law. These bases include also the exercise of universal jurisdiction to reach conduct and parties with no nexus to the United States «but only when the conduct at issue could also give rise to universal criminal jurisdiction». In conclusion, according to the Euro-

[37] *Kiobel and Corporate Social Responsibility: An Issue Brief by John Ruggie* cit., at p. 4.

pean Commission, the U.S. Federal Courts may exercise universal civil jurisdiction in relation only to the «narrow category of claims involving the most grave violations of the law of nations, such as genocide or torture, or conduct committed outside any nation's territorial borders, such as piracy». The internationally-recognized justification for universal criminal jurisdiction «also contemplate and support a civil component», but limited to the circumstances that could give rise to universal criminal jurisdiction. Within these limits, according to the European Commission, universal civil jurisdiction is consistent with international law principles of comity and equality of sovereignty. As to the procedural limitations imposed by international law, the Commission asserts that the plaintiffs must demonstrate that local remedies have been exhausted or that the local for a – *i.e.* those States with a traditional jurisdictional nexus to the conduct – are unwilling or unable to provide relief and no international remedies are available.

In conclusion, the extraterritorial reach of ATS is deemed by the European Commission consistent with international law, «provided that the statute's coverage of conduct occurring in the territory of another sovereign implements these constraints». In doing so, «extraterritorial applications of the ATS not only respect principles of comity but also ensure that courts remain open to claimants who might otherwise be subject to a denial of justice».

One might have expected that the European Commission's brief exhausted the opinion of the European Union's twenty-seven Member States. This is not the right conclusion, as European Union rarely succeeds in speaking with only one voice. A conflicting *amici* brief was submitted by two EU Member States, precisely the two Respondents' domiciliary States: the U.K. and the Netherlands. In their brief, jointly filed in support of the Respondents, these two Member States expressed a very strong opposition against the assertion of exterritorial civil jurisdiction under the ATS. These States asserted that «the right of the United States or any other sovereign to create and enforce such a domestic civil remedy depends on it being able to satisfy the *proper jurisdictional limits recognized by international law*». In relation to claims of a civil nature, «the basis for the exercise of civil jurisdiction under international law are generally well-defined. They are principally based on territoriality and nationality». The basic principles of international law «have never included civil jurisdiction for claims by foreign nationals against other foreign nationals for conduct abroad that have no sufficiently close connection with the forum State». The requirement of «a sufficiently close nexus to the forum asserting jurisdiction» is imposed by international law in order to minimize conflicts between States and to prevent forum shopping by plaintiffs and defendants rushing to obtain judgments in a forum that favors their own interests. According to the States submitting the brief, the

mere presence of a U.S. corporate affiliate is not «a sufficient basis» to establish U.S. jurisdiction over ATS claims against a foreign parent or affiliated corporation for unrelated activities that have no effect in the U.S. The only exception to the requirement of a sufficiently close nexus to the forum State is the so-called «universality principle», which allows each State to exercise jurisdiction over a limited category of crimes so heinous that every State has a legitimate interest in their repression, regardless of the absence of a sufficiently close connection to the perpetrator, the victim, or the crime itself. But «universal jurisdiction applies only in criminal cases and does not give rise to a corresponding basis for civil jurisdiction».

Also the Federal Republic of Germany filed an *amicus* brief in support of the Respondents expressing its opposition to «overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil», contrary to international law. Germany urged the Supreme Court to instruct the lower courts that the power to adjudicate should only be exercised in ATS cases brought by foreign plaintiffs against foreign corporate defendants concerning foreign activities «where there is no possibility for the foreign plaintiff to pursue the matter in another jurisdiction with a greater nexus». Germany also affirmed that permitting a broad exercise of jurisdiction without a specific nexus «would result in a legal and economic climate that would make it more difficult for corporations to engage in international business». Therefore, this Government concluded that the Supreme Court «as one of the world's most influential, should take this opportunity to ensure that the ATS is only used as a last resort for limited causes of action in cases that have no significant nexus to the United States».

In the light of the concerns expressed by foreign States on the extraterritorial scope of civil jurisdiction provided by the ATS in relation to human rights abuses, the U.S. Government (with an unsurprising development of its position) filed in June 2012 a supplementary brief in partial support of affirmance of the Second Circuit's decision. While the U.S. continues urging a reversal of this latter court's holding that the ATS does not apply to corporations, the new brief specifically deals with the question of whether and under what circumstances the ATS allows U.S. courts to exercise universal civil jurisdiction over human rights violations which have slight connections to the U.S., *i.e.* committed by foreign corporations against foreigners victims on foreign territory.

In its introductory Statement of Interest, the U.S. Government starts significantly explaining that «The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign relations, including the exposure of U.S. officials and nationals to exercises of jurisdiction by foreign States, for the

nation's commercial interests, and for the enforcement of international law». While the brief argues that the Supreme Court «should not articulate a categorical rule foreclosing the U.S. courts to exercise jurisdiction under ATS for conducts occurring in a foreign country», the U.S. Government concludes that U.S. courts «should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the sued party is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct». In cases like that, the United States «could not be faulted by the International community for declining to provide a remedy under U.S. Law especially when other more appropriate means of redress would often be available in other forums, such as the principal place of business or country of incorporation, and they choose not to provide a judicial remedy».

Even if a federal common-law cause of action is created under the ATS for extraterritorial violations of the law of nations in certain circumstances, according to the U.S. Government doctrines such as «exhaustion» and «forum non conveniens» should be applied «at the outset of the litigation» and with special force in cases «where the nexus to the United States is slight». In conclusion a U.S. court, applying U.S. law, should be a «forum of last resort, if available at all».

This brief, signed only by the Justice Department officials, and not by the State Department,[38] undoubtedly partially re-aligns the U.S. position with the various foreign Governments' position over the extraterritorial reach of ATS.

IV. Before evaluating the various European briefs filed in the *Kiobel* case, especially those of Germany, the United Kingdom, and the Netherlands, all in support of Shell, arguing that the ATS should not be applied to torts committed in foreign countries, a premise is necessary in order to clarify the differences in the way in which the international law rules on jurisdiction operate depending on whether criminal or civil jurisdiction is involved. When States assert extraterritorial criminal jurisdiction, they must be able to justified it by at least one of the internationally recognized bases for jurisdiction, such as the nationality of the offender, or the fact that at least part of the offence was committed within the territorial boundaries of the forum or because the victim of the crime was a national of forum State («passive personality» jurisdiction). Differently from extraterritorial criminal jurisdiction which is «constrained by interna-

[38] SANDER, *Kiobel: The U.S. steals the headlines in first round of supplemental brief on universal civil jurisdiction under the Alien Tort Statute*, published on June 26, 2012, available at http://www.ejiltalk.org/kiobel-the-us-steals-the-headlines-in-first-round-of-supplemental-briefs-on-universal-civil-jurisdiction-under-the-alien-tort-statute.

tional law», extraterritorial adjudicative jurisdiction remains largely a matter for domestic law,[39] which define it by «connecting factors» that precisely connect the dispute to the forum state.[40]

At the European Union level, including the European Free Trade Area, the rules of international jurisdiction in civil and commercial matters have been harmonized first by the Brussels and Lugano Conventions and then subsequently by the Brussels I Regulation;[41] this harmonized regime currently do not provide access to EU Member State courts for claims against third-country defendants, including corporations. The milder position of the European Commission in respect of the exercise of extraterritorial civil jurisdiction in comparison to those expressed by some European Union Member States in the *Kiobel* case can be easily understood by the fact that the Commission presented in 2009 a Draft Proposal,[42] which exactly aimed to bring radical changes in the current version of the Brussels I Regulation. Among the objectives of these radical changes developed by the Commission in its Draft there was also the expansion of the territorial scope of the European jurisdictional rules: currently, the territorial scope of most of the rules of jurisdiction provided for in the Brussels I Regulation, subject to certain noteworthy exceptions,[43] is limited to cases where the defendant is domiciled in a Member State.

The most groundbreaking amendment of the Commission's Draft Proposal consisted in eliminating such a limitation by extending all rules of jurisdiction to defendants domiciled in third countries. By removing the condition of Article 4 of the Regulation that the defendant be domiciled in the EU for the uniform rules of jurisdiction to apply, the Draft Proposal suggested the creation of additional grounds of jurisdiction in

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[39] McLachlan, *The Influence of International Law on Civil Jurisdiction*, *Hague Yearb. Int. Law*, 1993, 125, p. 126; Kahn-Freud, *General Problems of Private International Law*, *Recueil des Cours* 1974, at 139, pp. 165-196.

[40] Zerk, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas*. Corporate Social Responsibility Initiative Working Paper No 59, 2010, available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf, at p. 148.

[41] Regulation No 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), this *Rivista*, 2001, p. 815 ff.

[42] European Commission, *Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Brussels, April 21, 2009, COM(2009) 175; Weber, *Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation*, Max Planck Private Law Research Paper No 11/7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1804103, at pp. 17-18.

[43] The rules establishing the exclusive jurisdiction of specific courts and the rules regarding prorogation of jurisdiction are applicable even if the defendant is not located in a Member State.

order to balance the unavailability in the European Union of the forum of the defendant's domicile which would be applicable where no other rule of the Brussels I Regulation would confer jurisdiction to the courts of one of the Member States. Such rules would have applied by definition, in disputes involving non-EU domiciled defendants (since the courts of the Member State where the domicile of the defendant is located have, as a matter of principle, jurisdiction). Pursuant to the first rule, non-EU defendants could have been sued at the place where their moveable assets are located, provided that the value of such goods would not be disproportionate with respect to the value of the claim. The second rule for non-EU defendants provided that they could also be sued exceptionally before a *forum necessitatis* in cases where no other forum (outside the European Union) would guarantee the right to a fair trial.

It's worth noting that the Council of European Union rejected these proposals of the Commission, while accepting others not relevant for this discussion, and enacted in December 2012 a new *recast* of Brussels I Regulation according to which *only* defendants domiciled in a Member State can be sued in another Member State based on the rules set out in the Regulation.[44] By admitting an extraterritorial application of the European Regulation to non-EU defendants, the European Union would have been unable to complain about the exercise of universal civil – or criminal – jurisdiction by other countries, particular the U.S., over EU nationals and EU corporations; therefore, political reasons and fear of the reciprocity determined the rejection of the European Commission's Draft. The same reasons have undoubtedly inspired the Statement of Interest of the supplemental U.S. brief in *Kiobel*.[45]

The fact that the Brussels I Regulation currently does not provide for access to EU Member State courts for claims against corporations not domiciled in the European Union, does not mean that these corporations cannot be sued before the courts of the Member States: simply, the rules of international jurisdiction comprised in the domestic law of each Member State would be applicable.

Where these national rules of jurisdiction allow a plaintiff to suit a foreign corporations depends on the contents of the relevant jurisdictional rules which vary from country to country; however these rules have something in common: they are listed in Annex I of the Brussels I Regulation and do not apply in the relations between the Member States due to their «exorbitant» nature. They do only apply in respect of defendants

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[44] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *O.J.E.U.*, L 351 of 20 December 2012.

[45] Bellinger, *Reciprocity Dilemma for the Obama Administration in Kiobel: Will the Administration Serve up Sauce for the Gander?*, May 3, 2012, http://www.lawfareblog.com/2012/.

domiciled in third States. They are generally considered as «exorbitant fora» for they are based on «weak connecting factors», namely the nationality of the parties, the presence of the defendant within the territory of the forum, the location of assets, the doing business, and the domicile of the plaintiff.[46] The lack of available or appropriate forum abroad is an autonomous ground of jurisdiction (the forum of necessity/*forum necessitatis*) in 10 Member States. Where the *forum necessitatis* is currently recognized, its application is usually subject to two separate conditions. The first one is that there must be some kind of obstacle preventing the plaintiff from obtaining justice abroad; in the Member States where it is used, the required connection is usually not defined very precisely. The second traditional condition is that there must be some kind of connection with the forum. There is only one country where such requirement is entirely absent: the Netherlands, where the lack of available forum abroad is the source of a kind of universal jurisdiction since it is not subject to any connection with the Netherlands. It is traditionally considered that this jurisdiction «*of necessity*» is based on, or even is imposed by, the right to a fair trial under Article 6(1) of the European Convention on Human Rights and the prohibition of «denial of justice», which corresponds to a general principle of public international law.[47]

In the light of the above considerations, the argument advanced by the U.K. and the Netherlands Governments in their *amici* brief in *Kiobel* that their domestic courts would not allow the plaintiffs to bring «foreign cubed» tort case and that, rather, «their courts would generally insist on a sufficiently close nexus with the forum based on the territoriality or active personality principles», is quite deceptive. This argument was advanced in response to a question raised by Justice Kennedy (that came from a brief submitted for *amici curiae* Chevron and other corporations in support of the Respondents) asserting that «No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection» and asked «for the best authority you have to refute that proposition».

As to the U.K. residual rules on civil jurisdiction, while it is true that English courts will not take jurisdiction over civil claims that foreign individuals or foreign corporations committed in «violations of international law» outside the U.K.,[48] they may exercise residual jurisdiction on the

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[46] For a comparative law survey, see NUYTS et al., *Study on Residual Jurisdiction, European Commission Study*, General report, 2007, available at http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_residual_jurisdiction_en.pdf, at p. 7.

[47] NUYTS et al., *Study on Residual Jurisdiction* cit., at p. 64.

[48] *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26, para. 27.

traditional basis of the defendant *presence of the defendant* in the territory so that he can be served with the claim form within the jurisdiction.[49] As to tort claims against a U.K. incorporated parent company for acts committed by its foreign subsidiaries abroad, civil jurisdiction can be asserted where the parent company actively supervised or participated in the foreign activity giving rise to the claim. The Netherlands also recognize tort jurisdiction based either on active personality principles or on the *forum necessitatis*. An *amicus* brief filed by Law Professors at four leading universities in the Netherlands conclude, after a deep analysis of Dutch law and cases, not only that Dutch courts may exercise criminal and civil jurisdiction over both individuals and corporate actors for extraterritorial violations of the law of nations, but that «they have done so» over ATS-like, so-called «foreign cubed», civil claims in a number of recent cases against defendants that are not domiciled in the European Union, pursuant the tort law provisions of the Dutch civil code. Among the various examples of universal civil jurisdiction exercised by Dutch Courts, they mentioned the Hague District Court decisions in March 2012, where the Court assumed jurisdiction over and sustained a civil claim brought by a foreign plaintiff regarding his unlawful imprisonment and torture in Libya by Libyan officials not resident in the Netherlands.[50] In late 2009 and 2010, in interlocutory judgments relating to a number of tort claims brought by Nigerian farmers against Shell Nigeria and the current British parent company of Shell, for the damages caused by four specific oil spills in the surroundings of their villages in Nigeria, the same Court held that it had jurisdiction not only over the claims against the Netherlands-based parent company Royal Dutch Shell but also over claims against the Nigeria-based subsidiary. The court based its jurisdiction with regard to Shell's Nigerian subsidiary on Article 7 of the Dutch Code of Civil Procedure, which deals with related actions. In its final judgments of 30 January 2013, the Hague District Court maintained its jurisdiction, but dismissed on the substance claims in four out of five lawsuits finding that pursuant to the applicable Nigerian law, an oil company is not liable for oil spills caused by sabotage from third parties; Shell Nigeria has been sentenced to pay damages only in one of the five proceedings.[51]

The Dutch Professors concluded that «Dutch case law is therefore incompatible with any alleged rule of customary international law prohibiting

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[49] Nuyts et al., *Study on Residual Jurisdiction* cit., at p. 58.

[50] *El-Hojouj/Unnamed Libyan Officials*, The Hague District Court, March 21, 2012, LJN: BV9748.

[51] Dutch judgments on liability Shell, *Decision on oil spills in Nigeria*, at http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Pages/DutchjudgementsonliabilityShell.aspx.

the exercise of jurisdiction by domestic courts over claims» such as those pursued by the Petitioners in *Kiobel*. To the contrary, «recent Dutch case law suggests that such claims are indeed recognized by the courts».

The considerations above show that, actually, ATS is far from alone.[52] Many national laws and decisions of other countries, including the European Member States, recognize and have recognized extraterritorial civil jurisdiction over human rights abuses to which they have no more factual nexus than that required by the U.S. doctrine of personal jurisdiction.[53] It's also important to stress that under the current U.S. personal jurisdiction doctrine, «an essential element» of any lawsuit, «without which the court is «powerless to proceed to an adjudication»[54] a foreign defendant who lacks significant contacts with the United States is not subject to suit in U.S. courts: the Due Process Clause protects them in cases where there are no sufficient ties to the United States.[55] On the contrary, in *Kiobel*, an important nexus with the U.S. is provided by the fact that all the Nigerian plaintiffs are legal resident in the United States and all have received political asylum by the time the case was filed.[56] If the ATS is in violation of international law, then many other national laws are in violation as well.

Also deceptive is the Federal Government of Germany's line of reasoning, according to which claims against a German corporation for human rights abuses committed in a third country would be more appropriately heard in a German forum, as the Germany's legal system allows plaintiffs to pursue violations of customary international law by German tortfeasors, providing that the victims of those torts can enforce their rights simply and efficiently before the German courts. While the German Government recognized that it certainly «would be inappropriate to require plaintiffs to exhaust their legal remedies in countries which have

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[52] *Hathaway*, *Online Kiobel symposium: The ATS is in good company*, SCOTUSblog, July 17, 2012, available at http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-ats-is-in-good-company/.

[53] These statutes and cases are discussed in detail in the supplemental brief filed by the Yale law School Center for Global Legal Challenges and, as to the many national legislations of the European Union Member States that provide universal civil jurisdiction, by the brief of the European Commission, available at http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20%28Revised%29.pdf, at p. 24.

[54] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999).

[55] *Amici* brief of Center for Justice and Accountability (CJA) and survivors of gross human rights violations who have filed suit against the individuals responsible for perpetrating those abuses under the Alien Tort Statute, June 13, 2012, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner amcu14survivorsandCJA.authcheckdam.pdf, at 25.

[56] Petitioners Supplemental Opening Brief, available at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SuppOpeningBrief.pdf, at 2.

a proven record of human rights violations and no due process», it concluded that it is certainly «reasonable and appropriate to require a victim of a tort committed in a third country by a German tortfeasor to go to Germany and utilize the legal system of the Federal Republic of Germany to seek legal satisfaction». The members of German Bundestag, the highest legislative body of the Federal Republic of Germany in their *amici curiae* brief submitted in the *Kiobel* case, contended that these claims «are mere pretexts for a parochial interest in protecting German businesses from human rights liability». Significantly, the members of German Parliament accuse their Federal Government to simply and deceptively having omitted important details regarding the «openness of German courts» to such claims. Despite the government's claim that civil remedies exist in German law, the German Bundestag rightly recalled that German enterprises that committed some of the most serious and atrocious violations of human rights of the twentieth century, including the use of forced labor during the National Socialist regime, refused to accept responsibility for the exploitation of thousands of workers, and victims received no redress in the half-century that followed. The solution to this problem emerged only in the late 1990s, and only after victims prepared to initiate civil litigation against the corporate perpetrators under the ATS. «The prospect of ATS litigation induced German enterprises and the German government to cooperate with victims' associations to reach an extrajudicial agreement regarding compensation. A foundation was formed, and individuals were eligible to receive individual payments as redress for the abuses they suffered». The simply prospect of ATS litigation was crucial in creating the conditions for a comprehensive framework for compensating victims of forced labor in the Nazi era. Absent the ATS, «none of this would have been possible». The German Bundestag concluded that this «belated compensation of victims of Nazi forced labor» illustrates very well the difficulties faced by individuals who seek remedies for serious human rights violations. «When victims cannot bring claims in the States where the violations took place or the states where potential defendants are headquartered, the ATS may be the only effective form of redress available».

Finally, some comments deserve also the contention that extending ATS and federal common law to suits involving foreign parties and territories would also mean extending U.S. law outside of its borders. It's our understanding that this Statute does not allow the United States' courts to project abroad a totally «inappropriate» exercise of U.S. legislature, like it happened in recent years with respect to the U.S. effort to protect the interests of the international system by using means that have been perceived by the rest of world as inacceptable from the point of view of international law. ATS is not comparable, for example, to the U.S. unilateral economic sanctions that extend their reach to third countries and

third parties, objected by other nations that enacted the so-called «blocking-statutes», empowering their Governments and courts to prevent their nationals from complying with U.S. orders.[57] The ATS does not create new U.S. substantive law, but permits U.S. courts to enforce, specific, universal norms of international law, aiming at protecting internationally recognized human rights, which all States are in principle bound to comply with, and which it is, at least, in the interest of all States, to seek to ensure compliance with.

From a private international law point of view, this is the major difference with the European regime for «foreign cubed» civil claims involving foreign defendants: European States do not apply international law to extraterritorial tort-based disputes involving violations of the law of nations; instead they use common «choice of law» rules now harmonized by a Council Regulation known as «Rome II».[58] In relation to torts, the European general rule is that liability should be governed by the «law of the country in which the damage occurs», unless there are very strong reasons for applying the law of another country. In most cases, therefore, the law applicable will be the law of the place where the damage occurred, not the law of the forum state. For this reason, precisely, it has been maintained that choice of law rules can help mitigate concerns about extraterritorial jurisdiction in civil cases.[59] But the European system, according to which the international norms on human rights may become applicable only indirectly through the choice of law rules, is unable to ensure that human rights are always respected as it will depend on the applicable national law designated by the forum choice of law rules.[60] The 2013 decision of the Hague District Court in the Shell's Nigerian subsidiary case, which dismissed four out five of the lawsuits in application of the Nigerian Law, is instructive. The victims came in front of an European Court, precisely in the country where the parent company has its seat and where it takes its policy decisions, and they have

[57] *Developments in the Law, Extraterritoriality*, *Harvard Law Review*, 2011, at 1231, 1289.

[58] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), this *Rivista*, 2007, p. 1153 ff.

[59] ZERK, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas* cit., at p. 160.

[60] VAN DEN EECKHOUT, *Corporate Human Rights Violations and Private International Law. The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: a Facilitating Role for PIL or PIL as a Complicating Factor?*, July 26, 2011, available at SSRN: http://ssrn.com/abstract=1895690, at p. 15; see also NOLLKAEMPER, *Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands* in KAMMINGA, ZIA-ZARIFI (eds.), *Public International Law in transnational litigation against multinational corporations: prospects and problems in the courts of the Netherlands*, Den Haag/London/Boston, 2000.

been pushed back to the law of the developing country in which they have suffered damages and in which the company has decided to operate, taking advantages from human rights norms less stringent than in its «home country».[61]

V. The considerations above suggest the need for the adoption of a new international instrument, aimed at clarifying the obligations of States to protect human rights against any violations by the activities of transnational corporations.[62] This is also the indication of the Special representative, John Ruggie, whose consultations have indicated a broad recognition that this is an area where greater consistency in legal protection is highly desirable, and that it could best be advanced through a multilateral approach.[63]

To date, the only harmonized regime is that provided by the European Union law which governs also the three other European States members of the EFTA; but this regime too is not completely uniform, as it does not cover cases where the defendant is not domiciled within one of the governed States. National laws on jurisdiction currently still apply to these claims. Attempts to develop an international treaty globally harmonizing rules on civil jurisdiction, dating back to the mid-1990s, have brought States to negotiate the Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (the «Draft Hague Convention»).[64] Article 18, paragraph 3, of this Draft permitted grounds of jurisdiction which would have to be excluded from national law (because they do not represent a substantial connection between the State and the dispute) when a plaintiff applied to it for relief or damages for an infringement of his fundamental rights. In the end, though, the project proved to be too ambitious and it was abandoned as it was not possible to find uniform solutions that suited all the key States. On the specific Human Rights Exception provided in Article

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[61] For the suggestion that Rome II Regulation needs amendments in order to offer victims of human rights violations ensure a real possibility of recovering damages suffered by them in civil proceedings against European parent companies and/or their non – European subsidiary, see Van Den Eeckhout, *Corporate Human Rights Violations and Private International Law* cit., at pp. 16-19.

[62] De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, November 2006), at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

[63] Ruggie, *Recommendations on Follow-Up to The Mandate*, February 11, 2011, at http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf, at 4.

[64] Draft Hague Convention on Jurisdiction and Enforcement of Civil Judgments, draft Convention and related materials are available from http://www.cptech.org/ecom/jurisdiction/hague.html.

18(3), nevertheless, the United States affirmed that «A generally-acceptable provision that exempts existing civil suits to redress human rights violations from prohibition under Article 18 is necessary or there will be intense opposition to this convention in the United States».[65]

The current debate around the *Kiobel* case demonstrates that, years after, there is still a problem in deciding which rules should govern international civil jurisdiction in this field. Various European Member States pointed to «the risks of improper interference with the rights of foreign sovereigns» in ATS cases because «the U.S. has chosen to adopt plaintiff-favoring rules and remedies that other nations do not accept».[66] The attractiveness of the United States as a forum for foreign plaintiffs is indisputable, as this country accords private plaintiffs a set of advantages not provided by most of other countries, like the so-called «American rule» on litigation costs which requires each side to bear its own costs, the right to a jury trial in a civil case, the «opt out» class action system, and punitive damages generally not allowed elsewhere. Nevertheless, these advantages could well compensate the rarity of remedies for corporate human rights abuses and the great obstacle to the accessibility of effective remedies for victims of corporate human rights violations. Access to justice is a fundamental human right recognized in Article 6 of the European Convention on Human Rights.

The application of ATS is consistent with the growing recognition in the international community that an effective remedy for crimes in violations of fundamental rights includes, as an essential component, civil reparations to the victims, as the European Commission expressly recognized in its *amicus* brief. In this respect, it is at least contradictory for the European States that have unanimously supported the U.N. *Guiding Principles*, which precisely call upon States to recognize the need for effective judicial remedies for violations of human rights perpetrated by corporations, seek either to abolish or to restrain one of the most effective remedies in the business and human rights field to date. As the German Bundestag said in its *amicus* brief, in representation of the German people, every single nation should have a special interest in the right of victims of human rights to resort to any jurisdiction that provides an effective remedy, nor should be in the interest of either nation's foreign policy to grant businesses impunity, as the accountability of all persons – including business entities – for human rights violations is a high priority.

[65] U.S. comment on Preliminary Draft Hague Convention on Jurisdiction and the Enforcement of Civil Judgments, February 22, 2000, available at http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf, at p. 9.

[66] Supplemental brief of the UK and the Netherlands, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamcunetherlands-uk-greatbritain-andirelandgovs.authcheckdam.pdf, at 27.

It's impossible to predict what position would take the U.S. Supreme Court; due to the widespread critics to the extraterritorial application of ATS, it is probable that it will be sensible to the suggestion of the U.S. Government to constrain the most «exorbitant», aggressive, extraterritorial applications of the ATS deemed by other States inconsistent with international law limits; and that certain criteria must be fulfilled, before asserting extraterritorial jurisdiction directly over the foreign conduct of individuals and companies.

It may be that the U.S Supreme Court will take into account the landmark decision of the International Court of Justice of February 2, 2012 on the *Jurisdictional Immunities of the State* (*Germany v. Italy, Greece Intervening*), in which the I.C.J. condemned Italy, *inter alia*, for having violated «its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945».[67] Maybe, the U.S Supreme Court could derive from the I.C.J.'s affirmation of an absolute jurisdictional immunity of States for *acta jure imperii* the conclusion that permitting lawsuits based on corporate complicity in serious and egregious human rights violations committed by foreign States, like the *Kiobel* case, would contradict (substantively) the immunity enjoyed under international law by the main actors.[68] However, the I.C.J. did not rule on the question whether and to what extent individuals or corporate actors may be sued for damages instead of the foreign state; therefore, the Supreme Court should not rely on this decision, as the procedural bar of State immunity from jurisdiction is not at stake in *Kiobel* or in *Kiobel*-like cases. Thus, the possibility remains to base such lawsuits on the private law of torts which applies to civil and criminal liability of private (natural and legal) persons. Had the Italian and Greek victims of Nazi atrocities followed this path, perhaps they would have gained some form of redress.

If the U.S. Supreme Court decides to set new restrictive criteria over extraterritorial civil jurisdiction for the U.S. federal courts, the hope is that such limitations should be established at least in conformity with the reasonable suggestions of the European Commission: that civil jurisdiction over foreign wrongs should be limited to cases involving very serious

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[67] On the private international law's aspects of this I.C.J. judgment, see Boschiero, *Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: A Private International Law Evaluation of the Recent ICJ Judgment in Germany v. Italy*, in *International Courts and the Development of International Law. Essays in Honour of T. Treves*, Den Haag, 2013.

[68] Hess, *State Immunity, Violation of Human Rights and the Individual's Right for Reparations – A Comment on the ICJ's Judgment of February 2, 2012 (Germany v. Italy, Greece Intervening)*, available at http://conflictoflaws.net/2012/hess-on-italy-v-germany.

human rights abuses already covered by universal criminal jurisdiction, and where the victims would otherwise suffer a denial of justice or have no reasonable prospect of redress.

Undoubtedly, a finding by the U.S Supreme Court that United States' courts could not hold corporations accountable for extraterritorial abuses would represent a major setback for victims of human rights abuses in their quest for justice.[69]

My conclusion is that, if so, other domestic courts around the world, including those of European States, should start taking more seriously (than States currently do in respect of their primary duty to protect) their obligations to provide access to effective remedies to the victims of corporate-related human rights abuses.

VI. After the consignment of this article to the law review, the long-awaited U.S. Supreme Court decision in *Kiobel v. Royal Dutch Petroleum* was issued on April 17, 2013.[70] In its Opinion, the Supreme Court did not directly address the issue whether a corporation can be a proper defendant in a suit under the ATS and ruled solely on what it ordered on March 2012 for reargument, precisely on the question: «Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States». As largely predictable, the U.S. Supreme Court took into due account the auspice advanced by the U.S. Government in its supplementary brief of June 2012 that the Court «should not fashion a federal common-law cause of action» *in the circumstances of this case* (where the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country).

As requested by the U.S. Government, the Supreme Court affirmed (unanimously) the U.S. Court of Appeal for the Second Circuit's dismissal of *Kiobel* suit on the basis of the consideration that «all the relevant conduct took place outside the United States». Writing for the Court, Chief Justice Roberts stated that the question at stake here was not «whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign». Contrary to what asserted by the Respondents (who claim under the ATS that they do not rely primarily on a canon of statutory in-

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[69] Brief for the Government of the Argentine Republic as amicus curiae in support of Petitioners, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioneramcugovtofargentinerepublic.authcheckdam.pdf, at 14.

[70] The text of the decision is available at http://www.supremecourt.gov/opinions/12pdf/10-1491_8n59.pdf.

terpretation known as the presumption *against extraterritorial application*), the Supreme Court stated that ATS cases *too* are subject to the presumption against extraterritoriality, as recently articulated by the Supreme Court in its 2010 decision *Morrison v. National Australia Bank Ltd.*[71]

This presumption provides that «[w]hen a statute gives no clear indication of an extraterritorial application, it has none» and that «United States law governs domestically but does not rule the world»; it serves «to protect against unintended clashes between our laws and other nations which could result in international discord».[72] While the Court recognized that this presumption has typically been applied to discern whether an Act of Congress «regulating conduct» applies abroad (*i.e.* that the question of extraterritorially is a *merit question* and not a *question of jurisdiction*), it nevertheless affirmed that «the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS». Indeed, according to the Supreme Court, «the 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 the Congress has done but instead what courts may do». The concerns about the potential foreign policy implications of recognizing causes under the ATS, 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», and not diminished by the fact that federal courts may have recognized only limited causes of actions, precisely (quoting *Sosa*), for alleged violations of international norms that are «specific, universal and obligatory».[73]

Furthermore, according to the Supreme Court, nothing in the text, history and purposes of the ATS suggests that the Congress intended causes of action recognized under this statute to have extraterritorial reach. Out of the three principal offences against the law of nations originally covered by the ATS (violation of safe conducts, infringement of the rights of ambassadors and piracy), the first two «have no necessary extraterritorial application». As to the third (piracy), that typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country, the Court made clear that «applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy conse-

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[71] *Morrison v. National Australia Bank Ltd.*, 561 U.S. (2010) (slip op., at 6). See also *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007).

[72] *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*).

[73] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004), at p. 732.

quences». Finally, quoting Justice Story,[74] the Supreme Court ruled that «there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms». The Court explained that nothing about the historical context suggests that the Congress intended federal common law under ATS «to provide a cause of action for conduct occurring in the territory of another sovereign». Reasoning differently would imply the risk «that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world». The presumption against extraterritoriality would, according to the Supreme Court, «guard against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches».

In conclusion, the Supreme Court ruled that nothing in the ATS rebuts the presumption against extraterritoriality; that in order to rebut that presumption the ATS would need to evince a «clear indication of extraterritoriality»,[75] while «[T]here is no clear indication of extraterritoriality here»; and that «petitioners' case seeking relief for violations of the law of nations *occurring outside* the United States is barred». The Court concluded: «On these fact, all the relevant conduct took place outside the United States. And even where the claims *touch and concern* the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required».

VII. There is no doubt that, by its decision, the U.S. Supreme Court struck a blow to the ATS as we know it: a federal common-law action open solely to aliens, extensively used (after the Second Circuit's rediscovery of this Statute in its 1980 decision in *Filartiga v. Pena Irala*)[76] to challenge multinational corporations' extraterritorial conducts so heinous to violate the most fundamental norms of international law. The final outcome of this long case (two rounds of briefing and two oral arguments) can be depicted as a substantial victory for the defendants (Royal Dutch Petroleum and Shell Transport and Trading Company), and for all the big corporations allegedly tortfeasors in foreign countries, and a

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[74] «No nation has ever yet pretended to be the custos morum of the whole world»: *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (No 15, 551) (CC. Mass. 1822).

[75] Quoting again *Morrison v. National Australia Bank Ltd.*, 561 U.S. at 16.

[76] 630 f.2d 876 (2d Cir. 1980).

tough loss for the human rights advocacy community. Certainly, the tragic ultimate loser of this judgment are the Petitioners, a group of Nigerian nationals who have suffered atrocities amounting to violations of the law of nations in a third country (Ogoniland in Nigeria), primarily committed by the Nigerian military and police forces, (allegedly) aided and abetted by the Dutch, British corporations and their joint Nigerian subsidiary.

The very strict interpretation given by the Supreme Court of the ATS will drastically reduce in future the possibility for other victims of human rights violations in foreign – especially in developing – countries to seek redress and reparations against foreign corporations, holding them accountable and responsible for these abuses (either because they committed them or facilitated them).[77]

Nevertheless, the decision is far more complex and problematic to be simply reduced to this very clear-cut conclusion. As we will discuss immediately after, this decision leaves a number of questions open on what exactly the U.S. Supreme Court has still left of the ATS, as well as various uncertainties due to the substantive differences between the majority opinion and the various concurring opinions, difficult (from an European point of view) to be reconciled and matched together.

According to a pure private international law perspective, the most striking outcome of the Supreme Court's decision is undoubtedly the rejection of the exercise of the *universal civil jurisdiction* under this Statute, even in respect of what the Court itself defined in *Sosa* «a modest number of international law violations».[78] More precisely, due to the *peculiar circumstances* of this case, it is clear that the U.S. Supreme Court has definitely barred private (civil) claims for the so-called «foreign cubed» cases, *i.e.* involving human rights violations affecting aliens, committed in a foreign sovereign's territory, without a substantial connection to (or impact on) the United States. In this respect, the Court has clarified that the «mere corporate defendants' presence» on the territory of the United States will *no more* suffice to create a cause of action under the ATS. The U.S. Supreme court reached this conclusion adhering to the opinion expressed by the Governments of the United Kingdom and the Netherlands (the two States of incorporation of the defendants) in their *amici* brief, according to which the *exercise of civil jurisdiction* by a State *always* requires a *sufficiently close nexus* to the forum State; the only exception being the so-called «universality principle» which, according to these two States, rests confined to the very different context of *criminal jurisdiction*

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[77] MAES, *Kiobel: no Role for the United States as World Police*, posted April 19, 2013 at http.//conflictoflaws.net.

[78] We agree in this respect with KU, *Why Kiobel's Rejection of Universal Jurisdiction Matters*, posted April 22, 2013, at http://opiniojuris.org/2013/04/21.

(*universal criminal jurisdiction*). The U.S. Supreme Court has not consequently endorsed the European Commission's statement that a *limited* exercise of *universal civil jurisdiction* (to reach conducts and parties with no or insufficient *nexus* to the forum State) is permitted and consistent with international law; precisely when it is limited to conducts that give rise to *universal criminal jurisdiction* and when it satisfies certain other procedural constraints imposed by international law (exhaustion of local remedies or demonstration that other States with a nexus to the case are unwilling or unable to provide a forum).

As to the connecting factors *sufficiently close* to the forum State to establish civil jurisdiction under the ATS, the U.S Supreme Court, again, joined the opinion expressed both by the United Kingdom and the Netherlands in their brief, that the *presence* of a U.S. corporate affiliate «is not a sufficient basis to establish U.S. jurisdiction over ATS claims against a foreign parent or affiliated corporation for unrelated activities that have no effect in the U.S.».[79] And this, notwithstanding the fact that the two Respondents have been deemed to present sufficient contacts with the United States to establish *personal jurisdiction*. From a European private international law's point of view there are few doubts that the *mere presence* of the defendant in the territory of the forum State is a «weak» connecting factor (better, «exorbitant» and, as such, listed in Annex I of the Brussels I Regulation). Nevertheless, it's worth noting again that this *exorbitant rule of jurisdiction* (barred for defendants domiciled within the European Union) *is still* the *traditional* basis for *residual jurisdiction* (provided by the national laws) of the legal systems based on the English common law, *i.e.* for the cases where the defendant is domiciled outside of the European Union. Amongst the EU Member States, it is used today in England, Ireland, Scotland, Malta Finland, Poland and Slovenia.[80]

Interesting enough, is also the fact that the U.S. Supreme Court reached its conclusion without countervailing at all the other connecting factor present in the *Kiobel* case, *i.e.* the *residence* in the territory of the forum State of the plaintiffs in the class action: all the Nigerian plaintiffs are (and were at the time of the lawsuit) legally residing in the United

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[79] Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondentamcuthegovernments.authcheckdam.pdf, at 17.

[80] Nuyts et al., *Study on Residual Jurisdiction* cit., at 36, 59. Undoubtedly the mere presence of the defendant is a looser connecting factor compared to so called «secondary establishment» used by some other EU Member States over non-EU defendant, in close analogy with the rule embedded in Art. 7(5) of Brussels I Regulation Recast (ex Art. 5(5)) which provides that «as regards a dispute arising out of the operations of a branch, agency or other establishment» proceedings may be brought «in the courts for the place where the branch, agency or other establishment is situated».

States, after having been granted by the U.S. Government political asylum following the atrocities that they have suffered in Nigeria.[81] Notwithstanding the fact that the *forum actoris* is also traditionally regarded as «exorbitant» in Europe, undoubtedly this connecting factor is much stronger (in terms of *factual nexus* with the territory of the forum State) than the *mere presence* of the defendant. According to our understanding, the U.S. Supreme Court's decision not to countervail the two different connecting factors (and the corresponding opposite private interests present in *Kiobel*: the corporate ones versus the victims' interests) does not rest on a strict private international law analysis, but on the exercise of a very strong judicial restraint – and a high degree of deference (at least from a European point of view) – of the Justices to the legislative and executive branches of the U.S. Government. The ultimate reason, underling the Supreme Court's decision in *Kiobel*, is that it deemed opportune *to reserve* to the political branches of the U.S. Government the *right* to weigh the foreign policy consequences of its «federal common lawmaking authority» to fashion a private right of action challenging conduct occurring in a foreign sovereign's territory. By extending the presumption against extraterritoriality (as a canon of statutory interpretation) to the ATS, the Court made use of the «great caution» urged by the U.S. Government (in its supplemental *amicus curiae*),[82] exactly in order to «ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches».[83]

Does this mean that «the ATS wars over corporate liability are almost over»[84]? My understanding of the U.S. Supreme Court's decision is that

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[81] In tort matters, at least two European member States (Lithuania and Latvia) have a very protective jurisdictional regime to the victims who can bring tort proceedings at the place of his own residence (*forum actoris*) in respect to torts whatever committed (also abroad); see NUYTS et al., *Study on Residual Jurisdiction* cit., at 32, noting that in all the remaining jurisdictions the claim can be brought *both* at the place where the causal event occurred and at the place where damage is sustained and not at the place of the residence of the injured party, unless (of course) if this place of residence coincides with the place of the tort.

[82] Among the relevant considerations advanced by the U.S. Government to the Supreme Court there were «the danger of unwarranted judicial interference in the conduct of foreign policy»; the general assumption that the creation of private rights of action «is better left to the legislative judgment, including the decision whether to permit enforcement without the check imposed by prosecutorial discretion»; «the potential implications for the foreign relations of the United States»; concerns about «impinging on the discretion of the legislative and executive branches in managing foreign affairs»; and «the absence of a congressional mandate». See Supplemental brief for the United States, available at http://www.csrandthelaw.com/uploads/file/Kiobel-US-supp-amicus.pdf, at 3.

[83] Quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*).

[84] KU, *Votes 9-0 that Corporations Cannot Be Sued Under ATS for Extraterritorial Acts Without U.S. Interest At Stake* posted on April 17, 2013 at http://opiniojuris.org.

this conclusion is too far reaching. Particularly, in the light of the fact that the Court has also scrupulously followed the other suggestion of the U.S. Government, according to which «the Court should not articulate *a categorical rule foreclosing* any such application of the ATS».[85]

The conclusion that the Supreme Court has actually left open the possibility, in the future and in appropriate circumstances, to fashion a federal common-law cause of action based on the ATS for *certain* exterritorial violations of the law of nations, is reinforced by the Justice Kennedy's one-paragraph concurring opinion; according to this Justice: «The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute». Justice Kennedy noted that «Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation».[86] As to the circumstances in which it would be appropriate for a U.S. federal court to recognize a possible extraterritorial ATS suit, Justice Kennedy remained silent, but again clear indications might be inferred by the U.S Government's supplemental amicus brief: these are – at least – *Filartiga* or *Sosa*-like cases. The *Filartiga* case, for example, involved a suit by Paraguayan plaintiffs against a Paraguayan defendant, based on alleged torture committed in Paraguay, in which the individual torturer *was found residing* in the United States; circumstance that could give rise to the prospect that this country would be perceived *as harboring the perpetrator*.[87] In *Sosa* v. *Alvarez-Machain*,[88] the plaintiff was kidnapped in Mexico, but transported across the border to the U.S. against his will, allegedly under the direction of U.S. officials. In the circumstances presented in *Filartiga* or *Sosa*, U.S. federal courts have already either assumed, or expressly held, that violations of the law of nations arising in a foreign country could be brought under the ATS; and, as noted by the U.S. Government, «Congress has expressed no disagree-

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[85] Supplemental brief for the United States cit., at 4, 21, «the Court need not decide whether a cause of action should be created in other circumstances, such as where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas».

[86] According to one commentator «It doesn't take much reading between the lines to conclude that the limiting language of Part IV was necessary to get Kennedy (and thus a bare majority of the Court) to adopt Chief Justice Roberts' reasoning», see WHYTOCK, http://opiniojuris.org/2013/04/17/scotus-votes-9-0-that-corporations-cannot-be-sued-under-ats-for-extraterritorial-acts-without-u-s-interest-at-stake.

[87] Supplemental brief for the United States cit., at 4.

[88] 542 U.S. 692 (2004).

ment» with the view «that *some exterritorial causes of actions* may be recognized under the ATS». Allowing suits based on conduct occurring in a foreign country in the circumstances of *Filartiga* and *Sosa*-like cases, continues the U.S. supplemental amicus brief, «is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights».[89]

From a strict private international law's perspective the justification for asserting *extraterritorial civil jurisdiction* over cases like these rests on the fact that at least *some* of the events in question *occurred in/on the U.S. territory*, thus providing those *factual nexus* with the Unites States absent in the *Kiobel* case, or in other post-*Sosa* ATS cases decided by the U.S. courts. It is worth noting that, even in respect of the so called *universality principle* which justified the exercise of the *universal criminal jurisdiction*,[90] the *Institute of International Law* has adopted in 2005 a Resolution according to which this jurisdiction, based on customary international law, should also be premised on *some nexus* with the territory of the prosecuting States: particularly, on the *presence of the alleged offender in the territory of the prosecuting State.*[91]

The conclusion that the U.S. Supreme Court has left open the future possibility to fashion an *extraterritorial cause of action* under the ATS over a foreign corporation for conducts occurring in a foreign country (precisely when the claim presents some *factual nexus* with the *territory* of the Unites States), *i.e.* for *Filartiga* and *Sosa*-like cases (an exercise of civil jurisdiction considered permitted not only by the U.S. Government but also by the Governments of United Kingdom and the Netherlands), could nevertheless be put in doubt by the concurring opinion of Justice Alito – joined by Justice Thomas. These two Justices used their concurrence to reiterate that the claim's *territorial nexus* with the United States must relate «to event or relationship that *takes place within the United*

[89] Supplemental brief for the United States cit., at 10.

[90] The universal criminal jurisdiction is «universal» in the sense that it allows each State to exercise jurisdiction over a limited category of crimes «so heinous» that every State has a legitimate interest in prosecuting «the alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law». See the Resolution of Institute of International Law, *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Krakow Session, 2005, available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf, at 2.

[91] According to Art. 3 *litt. b* of the above mentioned Resolution: «Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the *presence of the alleged offender in the territory of the prosecuting State* or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender». According to the *litt. c* of the same article, the State wishing to commence a trial on the basis of universal criminal jurisdiction «must have the custody over the alleged offender».

States»; secondly, they asserted that a putative ATS cause of action will fall under the presumption against extraterritoriality «unless the *domestic conduct* is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations».[92] In other words, these two Justices interpreted Part IV of the Opinion as referred *only* to the *place of the relevant conduct*.

This interpretation of the final paragraph of the Court's Opinion is very problematic, since it would lead – if followed by the lower courts – to conclude that *even* a *Filartiga* or *Sosa*-like tort committed *abroad* by a *U.S. defendant* will always have *insufficient force* to displace the presumption against extraterritorial application of ATS. Against this unacceptable conclusion one might stress, first, that *only two* Justices – out of nine – agreed on this peculiar interpretation; what certainly might be inferred from the judgment is a quite different conclusion: that a *domestic conduct* that satisfies the Sosa's requirements «of definiteness and acceptance among civilized nations» would be sufficient to displace the presumption against ATS extraterritorial application.[93] Nothing more. Secondly, it's worth noting that four Justices (Breyer, Ginsburg, Sotomayor and Kagan) wrote a concurrence agreeing with the Court's conclusion on the dismissal of the *Kiobel* case (for lack of sufficient ties to the United States both of the parties and the relevant conduct) but not on its *reasoning*. Particularly, this minority of Justices challenged the Court's reliance on the presumption against extraterritoriality.[94] Justice Breyer, who wrote the concurrence, argued that the Supreme Court, instead of invoking this presumption, should have better based the dismissal of the case upon the «principles and practices of foreign relation law». Invoking the *Restatement (Third) of Foreign Relations Law of the United States* (1986) (precisely §§ 402, 403, 404) the Justice stated that the Court should have limited the jurisdiction under the ATS where either «(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind».

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[92] Italics added quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 255 (1991) and *Morrison*, 561 U.S. (slip op., at 17-18).

[93] LEDERMAN, *Kiobel Insta-Symposium: What Remains of the ATS?*, available at http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/.

[94] See BRADLEY, *Supreme Court Holds that Alien Tort Statute Does not Apply to Conduct in Foreign Country*, posted on April 18, 2013 on http://www.asil.org/pdfs/insights/insight130418.pdf; MEISE BAY, *Supreme Court Holds that Plaintiffs Must Overcome Presumption Against Extraterritoriality in Alien Tort Statute Cases*, posted on http://www.csrandthelaw.com/2013/04/supreme-court-holds-that-plaintiffs-must-overcome-presumption-against-extraterritoriality-in-alien-tort-statute-cases/.

The relevance of this minority's concurring opinion stays on the fact that *even* the four liberal Justices rejected the possibility to exercise *universal civil jurisdiction* under the ATS, limiting the jurisdiction under ATS to the international recognized bases for *prescriptive jurisdiction* over transnational conduct, namely: (1) territoriality, (2) nationality and (3) the protective principle which, according to these Justices, also includes the *distinct interest* in preventing the Unites States from becoming the *safe harbor* for today's pirates. Obviously, the fourth traditional base for jurisdiction, that of *passive personality* which gives jurisdiction where the victim is a national of the forum State, does not come into consideration due to the fact that the ATS provides a cause of action *solely* to *aliens*.

It is also important to underline that the minority's concurrence contested the majority's application of the presumption against extraterritoriality, arguing that ATS cannot be interpreted as limited to *domestic conducts*, as it was enacted precisely to open the federal court's doors to a limited class violation of the law of nations among which at least one, namely piracy, *normally takes place abroad* (on foreign-flagged vessels, that fall within the jurisdiction of the nation whose flag they fly). Quoting *Sosa*, in which the Supreme Court has defined what are the *today's pirates*, a category that certainly includes tortures and perpetrators of genocide («common enemies of all mankind» whose apprehension and punishment all nations have an equal interest in), Justice Breyer concluded that the Court's majority's reasoning on the presumption against extraterritoriality «does not work well» for ATS. Furthermore, this presumption offers only limited help in deciding the question presented in the *Kiobel* case, namely under what circumstances the ATS allows courts to recognize a cause of action for violation of the law of nations *occurring within the territory of a sovereign other than the United States*. The Supreme Court made it clear in the sentence that *some claims* may nevertheless «touch and concern the territory of the United States... with sufficient force to displace the presumption».

The answer to this question, according to the minority Justices, consists in interpreting the Statute «as providing jurisdiction only where distinct American interests are issue». One of those interests, they contended, is the «Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms», whoever these common enemies of mankind are (foreigners or nationals).

The principle of nationality of the defendant (or *active personality jurisdiction*) is definitely a proper basis of *prescriptive jurisdiction* upon which the U.S. courts may continue to apply the ATS extraterritorially in the future: this basis is very clearly asserted (and accepted) in State practice and well established in international law. It's hard to see how recognizing a federal cause of action for acts committed by American individu-

als, corporations, and other U.S. entities, in foreign sovereign territory would entail «potential implications for the foreign relations of the United States» and would risk «adverse foreign policy consequences». To the contrary, all the foreign Governments expressly stated in their *amici* briefs that this kind of extraterritorial application of ATS «would be consistent with international law».[95] The minority's concurrence concluded on this point correctly stating that «Nations have long been obliged not to provide safe harbors *for their own nationals* who commit such serious crimes abroad».[96] Quoting the brief for Government of United Kingdom and the Netherlands, the Justices recalled that «Many countries permit foreign plaintiffs to bring suits against *their own nationals based on unlawful conduct that took place abroad*»; in addition, according to the United Kingdom and the Netherlands, this *active personality jurisdiction* could also potentially be applied to acts committed *abroad* by an *alien U.S. resident* «so long as *a genuine connection* between the defendant and the U.S. could be established». The brief for the European Commission also stated that: «It is "uncontroversial" that the United States may... exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law».[97]

The uncertainties regarding this sound conclusion, shared at least by four Justices (Breyer, Ginsburg, Sotomayor and Kagan), stay – on the one hand – on the fact that two Justices (Alito and Thomas) clearly do not share this view: according to them, the presumption against extraterritorial application of ATS can be displaced *only* if the event or relationship that was «the "focus" of congressional concern» under the relevant statute «*takes place within the United States*».[98] On the other hand, it is unclear whether for the remaining three Justices such claims (brought against a U.S. *defendant* for conducts occurring *wholly outside* the United States) would *touch and concern* the territory of the forum *with sufficient force* to displace the presumption.

One might conclude, therefore, that the type of cases alleging Sosa-

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[95] See the Brief of the Governments of the Kingdom of the Netherlands et al. cit., at 15, quoting BRADLEY, *Attorney General Bradford's Opinion and the Alien Tort Statute*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063921; *Brief for European Commission*, http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20%28Revised%29.pdf, at 11.

[96] Italics added, BREYER, *concurring in judgment*, at 10, 11.

[97] Brief for European Commission cit., at 11.

[98] This conclusion is shared by CHILDRESS, *What will Kiobel's Impact be on Alien Tort Statute Claims?*, available at http://conflictoflaws.net/2013/what-will-kiobels-impact-be-on-alien-tort-statute-claims/: «it appears that escaping the presumption against extraterritoriality in the ATS context is not about "who" the defendant is but "where" the tortious conduct took place».

sufficient torts committed abroad by a *U.S. defendant* is one of the «significant» questions involving future ATS coverage left unresolved by the final *Kiobel* decision.[99] In my opinion, it is doubtful that a modern «U.S. pirate» may successfully invoke, in the future, in front of any U.S. court the presumption against extraterritoriality of the ATS for violations of the law of nations occurring within the territory of a foreign sovereign. This, primarily because of the *rational* of this presumption that, as recognized by the U.S. Government and the Supreme Court itself, is grounded in significant part on the concern that projecting U.S. law into foreign countries «could result in international discord»; rather, a categorical refusal to recognize a private cause of action when the perpetrator, or the alleged aider and abettor, is a *U.S. defendant*, trying to use the United States as a «safe harbor», could seriously damage the «credibility» of this country and its commitment to the protection of human rights. Secondly, Attorney General Bradford clearly opined, «there can be no doubt that those injured by the American citizens' acts of hostility have a remedy by a *civil* suit in the courts of the United States under the jurisdiction granted by the ATS».[100]

A second type of cases that are deemed to be remained «unresolved» by *Kiobel* are those where a foreign plaintiff wishes to sue either a *foreign defendant* or a *U.S. defendant* for conduct in violations of the law of nations *occurring in part* in the United States that lead to injuries in a foreign country. This is for example the case of a foreign corporate officer or a U.S. corporate official who either plans or instructs their affiliate corporate agents to commit, or to be accomplice in, overseas violation of international norms. Are these type of claims barred in the future by the Supreme Court? My answer is that they should not be barred: the Supreme Court has barred the possibility for plaintiffs to sue under the ATS a *foreign corporation* when «*all the relevant conduct took place outside the United States*», also stating that the *mere presence* of a corporation is *insufficient* to displace the presumption against extraterritorial application of the ATS. If the plaintiffs can demonstrate that the foreign defendant's conduct has occurred *in the United States* and has contributed materially to the violations, even according to the narrowest interpretation of the ATS coverage, we are in presence of what Justice Alito has qualified as a «domestic conduct». Therefore, a putative ATS cause of action will fall *outside* the scope of the presumption against extraterritoriality if this «domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance

[99] Lederman, *Kiobel Insta-Symposium: What Remains of the ATS?*, available at http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats/.

[100] Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795), at 59.

among civilized nations». As to the *U.S. defendant*, the minority Justices would assert jurisdiction under the *prescriptive nationality principle*, and the remaining Justices would probably say that this claim would *touch and concern* the territory with *sufficient force* to displace the presumption against extraterritorial application of ATS, at least if the plaintiff can demonstrate that *substantial activities*, leading to the tortuous conduct, took place *within* the United States.[101] The problem obviously concerns the *degree* of «territoriality» (*i.e.* of the unlawful conduct that occurs *partly within* and *partly outside* the United States) requested to displace the presumption: a general answer, available for all types of *domestic conducts* that could be the subject of future litigation, is not possible; much will depend on the concrete activities in respect of which the U.S. courts will maintain a discretion in interpreting the «touch and concern» language in section IV of the majority opinion in *Kiobel*.[102]

In conclusion, the ATS is not as dead as it might seem at first glance. What is absolutely settled is that in the future *foreign plaintiffs* will be barred to sue *foreign defendants* for violations of the law of nations occurring *wholly outside* the United States (*i.e.* foreign-cubed cases); by contrast, *foreign plaintiffs* will be able to proceed under the ATS against either *foreign or U.S. defendants* for acts or omissions occurring *wholly inside* the territory of the United States, sufficient to violate international norms that satisfy the Sosa's requirements. In between these extreme opposite cases, many circumstances in which the presumption against the extraterritorial application of ATS might be rebutted in the future still remain. Significantly enough, despite the 2010 decision of the U.S. Supreme Court in *Morrison v. National Australia Bank*, which substantially restricted the extraterritorial reach of American securities laws, the U.S. securities class actions against non-US companies have not fallen in number; rather, there has been an increase in litigation targeting foreign companies.[103] When a courthouse door closes, other doors inevitably open: according to some American professors many ATS cases are expected to be re-filed under State law in federal courts in conformity with the new

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[101] For the opposite conclusion, that these type of ATS claims will fail, see CHILDRESS, *What will Kiobel's Impact be on Alien Tort Statute Claims?* cit.

[102] See ALFORD, *Kiobel Insta-Symposium: Interpreting «Touch and Concern»*, available at http://opiniojuris.org/2013/04/19/kiobel-insta-symposium-interpreting-touch-and-concern/; ALFORD, *Kiobel Insta-Symposium: Degrees of Territoriality*, available at http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality/.

[103] See *Recent Trends in US Securities Class Actions against Non-US Companies*, available at http://blogs.law.harvard.edu/corpgov/2012/11/20/recent-trends-in-us-securities-class-actions-against-non-us-companies/. See, also LEE, *Kiobel Insta-Symposium: When Can the Presumption Against Extraterritoriality Be Rebutted?*, available at http://opiniojuris.org/2013/04/17/kiobel-insta-symposium-when-can-the-presumption-against-extraterritoriality-be-rebutted/.

Supreme Court's rule on *Kiobel*, or under State laws in State courts.[104] My personal auspice is that the European courts will start opening their doors to the victims of alleged international human-rights violations committed abroad by European corporations and their foreign subsidiaries; in order to offer the victims an effective right to remedy, instead of a powerful instrument in the hands of the stronger party, European private international law rules should be opportunely amended in order to reach for these conducts.[105]

VIII. In the immediate, the decisions expected in two other important cases in respect of which the U.S. Supreme Court has granted *certiorari* on April 22, 2013, following its *Kiobel* decision, will be fundamental for understanding the future application of the ATS. These two cases are *Rio Tinto* and *DaimlerChrysler AG v. Bauman et al.*

The *Rio Tinto* case concerns two foreign corporations (Rio Tinto plc, a British corporation, and Rio Tinto Limited, an Australian corporation), leaders in global mineral exploration and extraction, who entered an agreement in the 1960s – through a subsidiary of Rio Tinto based in Papua New Guinea (PNG) – with this Government to build a mine in Bougainville. These foreign corporations allegedly aided and abetted the PNG and the Australian Governments in committing genocide and war crimes against residents of Bougainville during the civil «dirty war» that took place in the 1990s between the militant rebels and the PNG military, which ended after a lengthy diplomatic process – with the active help of United States – with a peace accord signed by the two parties in 2002. In regard of this putative class action, initially brought by the residents of Bougainville in U.S. District Court for the Central District of California, not against the PNG and Australian Governments but against Rio Tinto plc and Rio Tinto Limited (collectively, Rio Tinto), the Ninth Circuit Court holds that there can be corporate liability under the ATS, specifically an aiding-and-abetting liability for violation of the law of nations; that this Statute may be applied extraterritorially; that prudential

[104] Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, *The Georgetown Law Journal*, 2012, at pp. 709-757; Whytock, Childress III, Ramsey, *After* Kiobel *– International Human Rights Litigation in State Courts and Under State Law*, *UC Irvine Law Review*, vol. 3, Issue 1, *Symposium Issue, Human Rights Litigation in State Courts and Under State Law*, February 2013, with various other articles and essays on the subject; more generally, on the «positive aspects» of the *Kiobel* decision, in terms of the necessity of rebuilding the legitimacy of international law and to reclaim international law and its institutions as the primary method of global governance, instead of unilateral domestic regulation, see Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, *Maryland Journ. Int. Law*, Vol. 28, 2013, at 101-122.

[105] Van Den Eeckhout, *Corporate Human Rights Violations and Private International Law* cit. at 19 ff.

exhaustion may be required in ATS but that the district court did not abuse its discretion in refusing the dismissal of the case for lack of exhaustion; that the political question doctrine, *international comity* and the *act of state doctrine* do not require dismissal; that where the purposeful alleged conduct of a corporation concerns claim for genocide and war crimes a claim under ATS is permissible; that, on the contrary, a simple claim of racial discrimination is not cognizable under the ATS, while it is a claim of apartheid.[106] The U.S. Supreme Court accepted the request advanced by the petitioners asking for a writ of *certiorari* (*Rio Tinto PLC v. Sarei*) and vacated the Ninth Circuit's judgment remainding the case back to the same Court «for further consideration in light of *Kiobel*».[107]

As the *Kiobel* decision dismissed a «foreign-cubed» lawsuit corresponding to *Rio Tinto*, it is unlikely that the Ninth Circuit might displace the presumption against extraterritorial application of the ATS as articulated by the majority in Kiobel. Even if the final decision in *Rio Tinto* might provide some useful indications on what was technically left unresolved (in Kiobel) and open regarding the reach and interpretation of the Alien Tort Statute (*i.e.*, for example, whether U.S. courts should recognize a federal common law claim under the ATS based on aiding-and-abetting liability) it seems that this is not the «appropriate case» where to consider the problem of the need of exhaustion of local remedies, due to the absence of any sufficient factual nexus with the U.S. of the specific claim at issue; exhaustion of local remedies should not, in principle, generate jurisdiction that would not otherwise exist in a U.S. court.[108]

In *DaimlerChrysler AG v. Bauman, et al.*,[109] the Supreme Court granted *certiorari* on the issue «Whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state». This case is another typical post-*Sosa* ATS case, that presents better opportunity to understand the future application of ATS litigation following the *Kiobel* decision. *DaimlerChrysler* is a German company that was sued in federal court in California for alleged human rights violations in Argentina for actions by a subsidiary in that country. The basis for suing this German

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[106] *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *pet. for cert. filed*, 80 U.S.L.W. 335 (Nov. 23, 2011) (No 11-649) («*Rio Tinto*»).

[107] Docket number 11-649, available at http://www.supremecourt.gov/orders/courtorders/042213zor_k5fl.pdf; all proceedings and orders on http://www.scotusblog.com/case-files/cases/rio-tinto-plc-v-sarei/.

[108] See, in this respect, the correct observation in the *Amici* brief of United Kingdom and the Netherlands cit., at 33.

[109] Docket number 11-965 available at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-965.htm; all proceeding and orders on http://www.scotusblog.com/case-files/cases/daimlerchrysler-ag-v-bauman/.

company in the U.S. was that it has another subsidiary which sells and distributes the company's manufactured vehicles in California. The *certiorari* was necessary to clarify the circumstances in which the Due Process Clause permits a U.S. court to exercise general personal jurisdiction over a foreign corporation based on a subsidiary's in-state conduct; a question upon which the Court of Appeals are divided. The original lawsuit against the German company that manufactures Mercedez-Benz autos in Germany was filed by former employees and representatives of deceased employees of the Gonzalez Catán plant of Mercedes-Benz Argentina, a wholly owned subsidiary of DaimlerBenz, for alleged human rights violations occurred during the war of terror perpetrated by Argentina's military dictatorship between 1976 and 1983. The petitioners contended that the Argentinian Daimler subsidiary (Mercedes-Benz Argentina) at that time identified workers at the plant as «subversives» or «agitators» to State security forces stationed in the Argentinian plant, knowing that they would be kidnapped, detained, tortured or murdered as a result. After the denunciation, some of them were arrested and «disappeared». According to the petitioners, Mercedes-Benz Argentina also hired the police chief, allegedly behind the raids of the plant, as its security chief and provided him with legal representation when he was subsequently accused of human rights violations. The petitioners originally attempted to serve process at *DaimlerBenz* headquarters in Stuttgart, Germany but, while a German trial court allowed services, its order was stayed pending an appeal. The victims then tried to file their claim in the United States in the light of the 1998 merger of *Daimler* with *Chrysler Corporation*, which formed *DaimlerChrysler AG*, and served process at the U.S. (dual) operational headquarter in Michigan. The German parent company moved to have the case dismissed, for lack of personal jurisdiction, and the district judge dismissed the case.

The Ninth Circuit Court overturned that result, finding that the company's continuous corporate activity within the State was substantial enough to justify general jurisdiction over it. The Court, further, determined that neither Argentina nor Germany was «an adequate alternative forum». As to Germany, the Court said that «although German courts have expressed some concern that this suit may impinge upon German sovereignty», the Court itself disagreed because what matters in the case at stake is «the presence or absence of connections to the United States in general, not just to the forum state». Due to the merger between *Chrysler* and *DaimlerBenz AG*, the extensive «relationships» and extensive «business» of the German company in the United States, it did not violate Germany's sovereignty by exercising jurisdiction to hear this suit «even though it involves a German citizen corporation». Secondly, the court observed that the German appellate court stayed the service so it could determine *whether the service of process would infringe on Germa-*

ny's sovereignty.[110] The Argentinian victims argued, moreover, that when *DaimlerBenz* was arguing before the German courts about the need to stay the plaintiffs' service of process, this corporation argued «that plaintiffs could not allege a cause of action in the German courts».[111] This is exactly what happened to thousands of Italian workers against whom German Companies committed crimes against humanity during World War II (as well as the case of thousands of Italian military internees, victims of war crimes and crimes against humanity, arbitrarily excluded by Germany from the scope of its national compensation scheme): they have never been allowed to proceed their suits in front of the German Courts in order to get reparation.[112] The Ninth Circuit Court also considered Argentina as a possible alternative and adequate forum (the most natural location in which to litigate the case as the place where the events at issue in the lawsuit took place) and concluded that Argentina was also not an «adequate» one: quoting the Argentinian Supreme Court, according to which human rights civil cases arising out of the Dirty War are subject to a two-year and three month statute of limitations, the U.S. Circuit Court ruled that this suit would be barred, making Argentina «unavailable as an alternative forum»; moreover the Ninth Circuit Court questioned in general the efficiency and integrity of the Argentinian legal system.[113]

The differences between *DaimlerChrysler v. Bauman* and *Kiobel* are relevant. In *Kiobel* the question of personal jurisdiction, which was raised during the oral argument, was not an issue in front of the U.S. Supreme Court as it was not raised by the defendants as a reason for dismissal of the case. First, the District court dismissed the Shell's Nigerian subsidiary from the case for lack of personal jurisdiction; second, the Shell's U.S. subsidiary (Shell-USA), which clearly would have been subject to personal jurisdiction, was not named as a defendant in the *Kiobel* case, presumably because the plaintiffs have had difficulties in providing evidences that Shell-USA possessed and exercised any control over Shall-Nigeria.[114] In *DaimlerChrysler v. Bauman*, the Supreme Court is expected to answer to

[110] See *Bauman v. Daimler-Chrysler AG (Bauman I)*, No C-04-00194 RMW, 2005 WL 3157472, *1 (N.D. Cal. Nov. 22, 2005); Appeal from the United States District Court for the Northern District of California, *Bauman V. DaimlerChrysler Corporation* No 07-15386, May 18, 2011, at 6561.

[111] *Bauman V. DaimlerChrysler Corporation*, No 07-15386 cit., at 6592.

[112] I.C.J., *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=143&code=ai&p3=4, paras 98-104 (dedicated to the «last resort» argument advanced by Italy in order to justify the exercise of Italian civil jurisdiction in proceeding brought by Italian claimant).

[113] *Bauman v. DaimlerChrysler Corporation*, No 07-15386 cit., at 6591.

[114] Ishai Mooreville, *Kiobel Insta-Symposium: Questions of Personal Jurisdiction Lurk Beneath the Surface*, available at http://opiniojuris.org/2013/04/19/kiobel-insta-symposium-questions-of-personal-jurisdiction-lurk-beneath-the-surface/.

the question whether a wholly-owned U.S. subsidiary can be used to create a *territorial nexus* between a foreign corporation and the United States, *sufficient* to justify the exercise of extraterritorial jurisdiction under the ATS. The decision will be highly relevant, as the U.S. Supreme Court will determine the level of contacts needed to justify the exercise of personal jurisdiction in ATS cases over a foreign corporation which, contrary to Royal Dutch Petroleum Company in the *Kiobel* case, presents significant financial, business, and administrative ties to the United States. According to its 2011 Opinion, issued in the *Goodyear Dunlop Tires Operations, S.A. v. Brown* case, «[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State».[115]

If the Supreme Court will resolve the *DaimlerChrysler* case purely on *personal jurisdiction grounds* it will clarify the Due Process limits on imputing a subsidiary's jurisdictional contacts to a parent corporation according to the *agency relationship framework* applied by the Ninth Circuit; an issue of increasing importance in transnational litigation.[116] From the point of view of the «number of significant questions regarding the reach and interpretation of the Alien Tort Statute» left open by the Supreme Court in Kiobel, a reasoning of the Court on the degree of corporate *presence* of a foreign company in the territory of the United States, necessary to displace the presumption against extraterritorial application of ATS, will be more interesting for its future application.

The answer to this question is again uncertain as this case concerns a foreign corporation upon which the U.S. jurisdiction has been based by the Circuit Court *solely* on the fact that its U.S. corporate subsidiary performs services on behalf of the defendant in the forum State, and because the claim refers to conducts unrelated to any activity of the subsidiaries in the forum State. There is little to be optimistic about the final outcome.

ABSTRACT: *With a decision based upon the consideration that all the significant conduct occurred outside the territory of the United States, in* Kiobel *the U.S. Supreme Court unanimously ruled that the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and that nothing in the statute refutes that presumption. However, in its decision the Supreme Court did not directly address the issue whether a cor-*

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[115] 131 S. Ct. 2846 (2011), at 2851.

[116] CHILDRESS, *Supreme Court to Hear Another ATS Case*, posted on April 22, 2013 at http://conflictoflaws.net/2013/supreme-court-to-hear-another-ats-case/.

*poration can be a proper defendant in a lawsuit under the ATS. In this article, the Author begins by providing a substantial «pre-*Kiobel*» analysis of the business-human rights relationship. Furthermore, in addressing – with reference to the* Kiobel *case – the issues of corporate liability and extraterritorial jurisdiction over abuses committed abroad, the Author provides a detailed description of the governments' positions on universal civil jurisdiction, also providing a critical evaluation of the arguments put forth by the EU Member States on the extraterritorial application of ATS. As the Author illustrates, this decision is far more complex and problematic than it may appear: it in fact leaves a number of questions open on what exactly remains of the ATS, as well as various uncertainties due to the substantive differences between the majority opinion and the different concurring opinions, difficult to be reconciled and harmonized, especially from an European standpoint.*