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### *KIOBEL* AND THE QUESTION OF EXTRATERRITORIALITY

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# ***KIOBEL* AND THE QUESTION OF EXTRATERRITORIALITY**

Francisco Javier Zamora Cabot\*

Translated by Sandra Kingery

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## I.-Introduction.

When the book that will contain these words is released, the Supreme Court of the United States may have reached a decision in the *Kiobel* case and, whatever that result, it will undoubtedly constitute a milestone in that country and in the rest of the world regarding transnational civil litigations on Human Rights violations. The case is already renowned for the significance of what is being decided: whether or not multinational corporations are subject to the well-known *Alien Tort Claims Act* (ATCA)<sup>2</sup> and the future of that Act. Enormous expectations have been created in the media and in the interested parties, resulting in any number of positions being made public in the most diverse forums including, of course, academic forums.<sup>3</sup>

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<sup>1</sup> \* Professor of Private International Law, Universidad Jaume I de Castellón. This text was developed within the framework of the Proyecto Consolider-Ingenio 2010, HURI-AGE, *The Age of Rights*, CSD2008-0007. This is a more developed version of my contribution with the same title in *Responsabilidad de las empresas multinacionales y derechos humanos: Estado de la cuestión*, Various Authors, Universidad de Alcalá, Cátedra de Derechos Humanos and Oficina del Defensor del Pueblo (forthcoming).

<sup>2</sup> 28 USC Sec. 1350. Also known as the *Alien Tort Statute* (ATS).

<sup>3</sup> One such example is the symposium paper, "A Tort Statute with Aliens and Pirates," *Northwestern University School of Law Review*, vol. 107, 2012. Voluminous information about the judicial vicissitudes of the case can be found, as well, e.g., <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulator/yaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>.

Meanwhile, *Kiobel* has been singled out as well by the *two staged* approach with which the Supreme Court has confronted it. Thus, after the Court agreed to hear the case, it was first argued in February 2012, addressing the question of whether multinational corporations are subject to the mandates of public international law and, therefore, to ATCA. The Court was convened on those terms, and that was how the case was understood by legal experts, including this author.<sup>4</sup> At the beginning of March, however, the High Court, contrary to habitual procedure, announced another hearing. The second hearing, held on 1 October 2012, focused on an analysis of the *extraterritorial application* of ATCA. It is also worth noting that the Supreme Court, *sua sponte*, raised this question, even though it was only addressed marginally in legal commentaries and the parties had not made special mention of it. This is not to suggest that the High Court exceeded the scope of its authority, since it enjoys practically limitless powers, but the manner in which the Court is exercising its authority in this case is certainly surprising. What is most surprising is the focus the Court has taken in a case that was originally, as I have said, presented on the basis of very different principles. ATCA and its application have suddenly been thrown into the murky and tempestuous ocean of the extraterritoriality of laws, and several Justices, in the aforementioned October 1, 2012 hearing, presented such fearsome creatures as *reciprocity* or the *exhaustion of local remedies*,<sup>5</sup> very rarely seen in litigations based on that statute.

In any case, this is the principal playing field as defined by the Supreme Court, so we must confine ourselves to it. Personally, this field is not unfamiliar to me; quite the opposite. For many years, this has been one of the primary focuses of my research, reflected in varied publications on diverse areas of legislation. But I must admit that, having focused the majority of my energies for more than a decade on the field of Human Rights, I did not expect to find myself precisely at this point, addressing the aforementioned extraterritoriality of laws. Having also dedicated a good deal of attention over the years to ATCA and its application, I must state that, in my opinion, it does not belong to the sphere of extraterritoriality. This will be the leitmotiv of my

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<sup>4</sup> See my “*Kiobel v. Royal Dutch Corp. y los litigios transnacionales sobre Derechos Humanos*,” *Papeles el Tiempo de los Derechos*, HURI-AGE, Consolidar-Ingenio 2010, número 4, 2011, 13 pp.

<sup>5</sup> See, e.g., CHILDRESS, T., “What Will the Supreme Court Do With the Alien Tort Statute?” <http://conflictoflaws.net/2012/what-will-the-supreme-court-do-with-the-alien-tort-statute/>. The question of local remedies had been raised in the *Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance*, June 2012, pp. 22-24.

modest contribution in this paper. Now that I have concluded my introductory remarks, I will move on to Section II, a brief sampling meant as a reminder of what we generally mean when we discuss problems of extraterritoriality. In Section III, I will focus my attention on the resolution of these types of torts from the point of view of private international law. Finally, Section IV will provide some brief conclusions. Let us begin.

## II.-*Aide-Mémoire* on Conflicts of Extraterritoriality.

If we think about the United States and the extraterritoriality of laws, the association of ideas is immediate: **conflicts** on multiple levels. Conflicts that reveal power plays, unilateral actions, hegemonic aspirations or, more starkly, the quest for *Empire*.<sup>6</sup>

One good example would be the attempt to defend the American market by influencing the regulation of free competition and securities. This particular example is well known,<sup>7</sup> in part because it provoked the extremely unusual *Blocking Laws*, whose

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This is addressed, for example, in the studies by MARGOLIES, D.S., "The 'Ill-Defined Fiction' of Extraterritoriality and Sovereign Exception in Late Nineteenth Century U.S. Foreign Relations," *Southwestern Law Review*, vol. 40, 2011, pp. 575-603 and RAUSTIALA, K., "Empire and Extraterritoriality in 20th Century America," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1831773](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831773), 19 pp. These imperialistic ambitions are rejected on the European side of the Atlantic; see, e.g., the study by GRISEL, G., "La protection des personnes privées des Etats européens contre l'application extraterritoriale excessive du droit américain," in DONGOIS, N. and KILLIAS, M. (eds.), *L'américanisation des droits suisses et continentaux*, Schulthess, Zürich, 2006, pp. 321-355. The number of studies about extraterritoriality is, simply put, enormous. Among the most recent, I will highlight, for example, the brilliant piece by STIGALL, D. E., "International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law," *Hastings International and Comparative Law Review*, vol. 35, 2012, pp. 323-382. Also, articles by BENNET, T. B., "The Canon at the Water's Edge," *New York University Law Review*, vol. 87, 2012, pp. 101-139; KNOX, J. H., "A Presumption Against Extrajurisdictionality," *American Journal of International Law*, vol. 104, 2010, pp. 351-396 and COLANGELO, A. J., "A Unified Approach to Extraterritoriality," *Virginia Law Review*, vol. 97, 2011, pp. 1019-1109. Relating Human Rights to the extraterritoriality of laws, see also, among others: AUGENSTEIN, D. and KINLEY, D., "When Human Rights 'Responsibilities' Become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations," *Sydney Law School, Legal Studies Research Paper*, n° 12/71, September 2012, 16 pp. Specifically regarding the Alien Tort Statute, see, e.g., KIRSCHNER, J. A., "Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritorialism, Sovereignty and the Alien Tort Statute," *University of Cambridge, Faculty of Law, Legal Studies Research Paper Series*, n° 16/2012, June 2012, 69 pp.; BELLIA, A. J. (Jr.) and CLARK, B. R., "*Kiobel*, Subject Matter Jurisdiction and the Alien Tort Statute," <http://ssrn.com/abstract=2008254>; BRADLEY, C. A., "Agora: *Kiobel*. Attorney General Bradford's Opinion and the Alien Tort Statute," *American Journal of International Law*, vol. 106, 2012, pp. 1-22 and FIECHTER, M. K., "Extraterritorial Application of the Alien Tort Statute: The Effect of *Morrison v. National Australia Bank, Ltd.* on Future Litigation," *Iowa Law Review*, vol. 97, 2012, pp. 959-979. Finally, to study on more aspects, see, e.g., ELLIS, J., "Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns," *Leiden Journal of International Law*, vol. 25, 2012, pp. 397-414 ; CLOPTON, Z. D., "*Bowman* Lives: The Extraterritorial Application of U.S. Criminal Law After *Morrison v. National Australia Bank*," *NYU Annual Survey of American Law*, vol. 67, 2011, pp. 137-194 and FAIRGRIEVE, D. and LEIN, E., *Extraterritoriality and Collective Redress*, Oxford U. Press, 2012.

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The literature on this matter is very extensive. Among the most recent regarding the Antitrust sector, see, e.g., the article by STIGALL, D. E., op. cit, pp. 341-347, and my article entitled "Sobre la *Internacional Comity* en el sistema de D° internacional privado de los Estados Unidos," *Revista Electrónica de Estudios Internacionales*, Vol. 19, 2010, 16 pp.;

enactment by various countries, natural economic partners of the United States, had no purpose other than to *thwart* the effects of the extraterritorial application of the laws of the United States, which is significant.<sup>8</sup> Perhaps, however, the paradigm of the type of extraterritoriality that blocks normal coexistence between nations and their legal mandates is to be found in the area of *international economic sanctions*. The United States is, once again, very strongly equipped with these legal weapons; there are few countries in the world that have not, at some point or another, suffered its fearsome consequences.<sup>9</sup> Let me mention three examples in various realms that will help clarify this point.

The first concerns commercial interests and the opening of foreign markets, according to Section 301 et seq. of the United States *Trade Act of 1974*, and the noteworthy reforms of the *Trade Act of 1988*.<sup>10</sup> It is important to remember that these measures led to the notorious “Super 301,”<sup>11</sup> supported by a series of lists establishing priorities regarding the identification of trade barriers and the countries responsible for them. If these countries failed to reach an agreement with the *United States Trade Representative* (USTR), they were exposed to a wide range of retaliatory measures, such as the suspension of concessions, the imposition of tariffs, and/or restrictions on importation, on goods and services. These measures were imposed on nations in an indiscriminate manner – whether or not they were responsible, regardless the economic sectors affected. This system, in force in broad strokes since 1974, was strengthened by the “Super 301,” which some people at that time classified as an “*atomic weapon in the commercial arena*.” It allowed for a transfer of the power that was generally controlled by the President of the United States to the aforementioned USTR and encouraged

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also the article by SRINIVASAN, A., “Redressing International Antitrust Agreements - An Analysis of Extraterritorial Antitrust Enforcement,” *Research Paper for the Competition Commission of India*, January, 2012, 38 pp., [http://www.cci.gov.in/images/media/ResearchReports/Adhitya\\_30Jan2012.pdf](http://www.cci.gov.in/images/media/ResearchReports/Adhitya_30Jan2012.pdf). Regarding the securities market and its regulation, among others, see, e.g., BRILMAYER, L., “The New Extraterritoriality: *Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law,” *Southwestern Law Review*, vol. 40, 2011, pp. 655-686; KNOX, J. H., “The Unpredictable Presumption Against Extraterritoriality,” *ibidem*, pp. 635-653; DODGE, W. S., “*Morrison’s* Effects Test,” *ibidem*, pp. 687-696 and FOX, M. B., “Securities Class Actions Against Foreign Issuers,” *Stanford Law Review*, vol. 64, 2012, pp. 1173-1276.

<sup>8</sup> On these issues, see, e.g., the study by LOWE, A. V., “Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act of 1980,” *American Journal of International Law*, vol. 75, 1981, pp. 257-282.

<sup>9</sup> In general, see, e.g., my study “Les sanctions économiques internationales: un essai de synthèse,” Various Authors, *Impérialisme et Chauvinisme Juridiques, rapports présentés au colloque à l’occasion du 20me. Anniversaire de L’Institut Suisse de Droit Comparé*, Schultess, Zurich, 2004, pp. 309-319.

<sup>10</sup> Codified in 19 U.S.C. 2411 et seq. (1988).

<sup>11</sup> 19 U.S.C. 2420.

action: measures were taken, the time frame for action was cut, authority was granted to monitor the concessions that foreign governments afforded the United States regarding the removal of trade barriers or the awarding of compensation, etc. This system was, in the end, a tremendous negotiating weapon because of its power to intimidate. Furthermore, it should not, in my opinion, be dissociated from the very genesis of the GATT/WTO system, with which it has maintained a complex relationship,<sup>12</sup> with milestones like the well-known *Kodak/Fuji* case.<sup>13</sup>

For my second example, I shift from commercial politics to international politics and strategic considerations. The crucial importance of the case to which I am referring, the *Siberian Gas Pipeline*, is reflected in the voluminousness of the literature.<sup>14</sup> In 1982, the United States directed powerful export control regulations at the Soviet Union as an apparent response to the imposition of martial law in Poland, placing an embargo on products and technology used for the construction of a natural gas pipeline between the Soviet Union and Western Europe. But the embargo also held hostage the European companies that, bound by previous contracts, *were using United States parts that carried no restrictions when they were acquired*. This was the heights of extraterritoriality and created enormous discontent on both sides of the Atlantic. On the European side, for example, the need to search for alternatives to the traditional methods of supplying energy, well established since the 1973 crisis, led them, not unreasonably, to see the goals of United States sanctions as completely foreign to their plans and interests. For the United States, on the other hand, Europe was preparing to hand their archenemy, the Soviet Union, enormous sums of money in exchange for gas supplies, money that could even be used to reinforce the Soviet empire's military strength. It also raised the underlying, non-trivial question of allowing European dependence on the Soviet empire in a matter as vital as energy supplies. In this situation, very costly in terms of the tensions created between allies, someone had to give in, and in the end it was the United States, which lifted sanctions and eased the

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Allow me to mention my text, *Las vías de solución de los conflictos de extraterritorialidad*, Eurolex, Madrid, 2001, pp. 176-184.

<sup>13</sup>

*Ibidem*, pp. 184-192. In addition, see, e.g., VÁZQUEZ, C. M., "Trade Sanctions and Human Rights: Past, Present and Future," *Journal of International Economic Law*, vol. 6, 2003, pp. 797-839.

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On all these matters, see, e.g., AUDIT, B., "Extraterritorialité et commerce international. L'affaire du gazoduc sibérien," *Revue Critique*, 1983, pp. 401-434.

penalties imposed against certain European subsidiaries of American corporations.<sup>15</sup> Following this situation, the United States seemed to reflect on the disadvantages of taking unilateral action and prioritized the reaching of agreements. For example, they revitalized a system regarding the transfer of strategic technology called COCOM which, after the fall of the Eastern Block, gave way to its successor, known as the *Wassenaar Arrangement*.<sup>16</sup>

Lastly, and also related to sanctions, we have a festering problem that has only been resolved in a partial and limited fashion by way of an agreement between certain countries. I am referring to the dense body of regulations and their application that constitute what is called the *Cuban Embargo*, always controlled by the United States and extensively rejected by the international community, as seen by the numerous condemnations supported by hefty majorities in the General Assembly of the United Nations. These condemnations have not, apparently, made much of an impression on the will of the United States. Within that body of regulations, we can take note of what is perhaps one of the most significant elements, the notorious *Helms-Burton Act*.<sup>17</sup> For now, I will simply emphasize the fact that, in spite of addressing various issues, as A. W. Lowenfeld has correctly pointed out, its true goal is to establish a secondary boycott, “to affect the behavior of persons in third countries who have done or are considering doing business in or with Cuba.”<sup>18</sup> It is important to remember that this, to a large extent, led to the European Union’s decision to announce a *Blocking Regulation*, Council Regulation 2271/96, and to initiate procedures for the establishment of a Special Group within GATT/WTO for solving controversies, even if they desisted after the April 11, 1997 Memorandum of Understanding with the United States.<sup>19</sup>

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<sup>15</sup> In light of what is called *game theory*, some people have interpreted this way the United States extricated itself from the problem as a typical manifestation of the *prisoner’s dilemma*; see, e.g., SCHUSTER, G., “Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts,” *Law and Policy in International Business*, vol. 26, 1994, p. 200.

<sup>16</sup> On this matter, see, e.g., my “Control de la transferencia de tecnología de interés estratégico en el ámbito de la defensa: Proyección del Derecho comunitario y español,” in Ministerio de Defensa, *Normativa reguladora del militar profesional en el inicio del siglo XX y otros estudios jurídico militares*, Madrid, 2001, pp. 791-804.

<sup>17</sup> Public Law 104-14, 110 Stat 785, 22 U.S.C. et seq., 6021-91. On this question, see, e.g., SOLÍS, A.M., “The Long Arm of U.S. Law: The Helms-Burton Act,” *Loyola of Los Angeles International and Comparative Law Review*, vol. 19, 1997, pp. 709-741 and my study, “Les sanctions...,” op. cit., pp. 318-319.

<sup>18</sup> See “Congress and Cuba: The Helms-Burton Act,” *American Journal of International Law*, vol. 90, 1996, pp. 419 and 427.

<sup>19</sup> On this question, see, e.g., SMITS, S. and VAN DEN BORGH, K., “The EU-US Compromise on the Helms-Burton and D’Amato Acts,” *American*

It is in the face of this common memory of the extraterritoriality of United States laws, of which I have made only the briefest and most superficial of mentions, that the adversaries of the *Alien Tort Claims Act* studiously mention the supposed legal imperialism to which its practice will lead. This is an attempt to get a rise out of people, placing the issue into a troubled environment that sparks numerous negative memories for many people. To my point of view, these actions are truly unusual. It is self-evident that through the practice we have mentioned, the United States has abandoned its notorious *exceptionalism* in the area of Human Rights to become champions of *universalism*.<sup>20</sup> Yet there are those here who critique them for it! In the face of this fact, I will conclude the present Section with a humorous note, if you will indulge me, echoing a rather caustic and skeptical notice that appears from time to time in academic circles: “*No good deed shall go unpunished.*”

### III.-*Special* Torts.

While the first of what I am calling the two *stages* of the *Kiobel* case was taking place, in other words, when the charge was to ascertain whether multinational corporations are subject to the mandates of public international law and, therefore, to ATCA, I believe it was logical for the law of foreign legal transactions to remain on the back burner. However, once the theme of the extraterritoriality of laws was raised, this was no longer the case. Still, based on most of what we have seen, private international law, unless I am missing something, continues to remain in the shadows of the case. I believe this makes it difficult to get a clear picture of the issue at hand. In extraterritoriality in general, both facets of international law converge, as is obviously the case in transnational civil litigations on Human Rights, such as *Kiobel*, where the discipline that is called *Conflict of Laws* also has a lot to tell us. This is my principal thesis in this article, which corresponds to the main themes of my Report to the “Group of Study on

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*Journal of International Law*, vol. 93, 1999, pp. 227 et seq. The formidable sanction apparatus of the U.S. continues to grow, although there are times when it is inscribed in the context of collective actions in the face of countries designed as offenders by the international community; see, e.g., Various Authors, 15 October 2012, *United States: Foreign Subsidiaries of US Corporations Now Fully Subject to Iranian Sanctions*, <http://www.stepto.com/publications-8440.html>. See also, Various Authors, 13 November 2012, *United States: Increasing “Extraterritorial” Application of U.S. Trade Control Laws to Non-U.S. Businesses*, <http://www.mondaq.com/unitedstates/article.asp?articleid=206122&print=1>.

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See, in general, BRADFORD, A. and POSNER, E. A., “Universal Exceptionalism in International Law,” *Harvard International Law Journal*, vol. 52, 2011, pp. 2-54.

Private International Law and Human Rights,” that was adopted by it and then published in the “Conflict of Laws.” blog<sup>21</sup>

I would like to emphasize that the practice of United States federal courts regarding ATCA and the procedures related to the consideration and resolution of cases match the practices that are generally followed regarding torts that come from heterogeneous legal environments or Sister States or, more pertinently to ATCA, those that have international elements, foreign plaintiffs *-sine qua non-*, a foreign locus of tort action, etc. There is nothing unusual, therefore, in litigations based on ATCA, and that is what the prestigious United States Court of Appeals for the Second Circuit observed when it gave new life to this venerable piece of legislation in its resolution of the famous *Filártiga* case: “It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.”<sup>22</sup> In support of this argument, the Court turned to noted precedents, such as the authority of Lord Mansfield in his sentence in *Mostyn v. Fabrigas* and, by extension, the established and very relevant practice under British jurisdiction when confronting the solution to international torts through private international law, the *Conflict of Laws*.

This is, I believe, a very logical way of addressing these matters. In what sense does federal court procedure imply a rebuke of public international law that would indicate, according to some people, an unacceptable extraterritoriality on the part of the United States? Are we talking about excesses in these litigations when it comes to exercising their *jurisdiction to execute*? This does not seem to be the case; in the already extensive number of litigations based on ATCA, that jurisdiction has not provoked greater controversies than those that sporadically arise in any other area. Is it a question, then, of problems regarding *jurisdiction to adjudicate* or *jurisdiction to prescribe*? I will discuss both issues.

Regarding jurisdiction to adjudicate, it seems like a stretch to present it according to the model of extraterritoriality and to give extraterritoriality the negative twist that is being attempted here. When we talk about extraterritoriality, we think *primarily* about

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<sup>21</sup> With contributions by the members of the Group. It can be found at <http://conflictoflaws.net/2012/ats-and-extraterritoriality-a-point-of-view/>.

<sup>22</sup> *Filártiga v. Peña Irala*, 630 F. 2d 876 (2d. Cir. 1980).

mandates to do or not to do, which are part of substantive law. There is an attempt to project these mandates – related, in this case, to serious Human Rights violations perpetrated in other countries - beyond the physical framework of power connected to state sovereignty, not to the assumption of jurisdiction on the part of its courts. In addition and without a doubt, ATCA is a *jurisdictional* statute, as was clearly established by the Supreme Court itself in its *Sosa* decision.<sup>23</sup> Regardless, there are those who criticize the United States for perpetrating an eventual *excess of jurisdiction* here, under the label of *universal jurisdiction*, assimilating it to extraterritoriality. This is the opinion of Germany, for example, when, in the *amicus curiae* it presented to the High Court in *Kiobel*, it claims that the Supreme Court should “instruct the lower courts that the power to adjudicate should only be exercised in ATCA 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.”<sup>24</sup>

For my part, I believe that Germany’s approach, with all due respect, is not consistent with private international law or with the Law of Nations. The fundamental historic development of private international law is based on the *diversity of systems* of international jurisdiction to adjudicate. Furthermore, as Horatia Muir Watt correctly indicates, touching specifically on *Kiobel*, the applicable law is based on “engineering windows within domestic law in order to import norms from other (foreign or international) legal systems.”<sup>25</sup> Therefore, the *jurisdiction to adjudicate* of the United States, exercised through its courts, does not have to coincide with the criteria of other countries or to cede jurisdiction to those who are supposedly more connected in this or any other matter. The only thing that can be demanded, whether we are discussing the jurisdiction of the United States or any other country, is that jurisdiction be *exercised in a reasonable manner* when there is *sufficient nexus* with the State claiming it, such as, for example, the criteria gathered in Section 421 of the *Restatement of the Law Third, The Foreign Relations Law of the United States*. If these or similar criteria are fulfilled and, of course, apart from conventional action, I believe that international law – which provided the basis for the establishment of the cited *Restatement III* – will be satisfied

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542 U.S. at 724 (2004).

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See *Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 2, 2012).

<sup>25</sup>

“Private International Law Beyond the Schism,” *Transnational Legal Theory*, vol. 2, 2011, p. 367.

as it stands now<sup>26</sup>. My belief on this matter is confirmed by the application of ATS in this area since, to the extent of my knowledge, there have been very few cases in which the defendants have fought the aforementioned jurisdiction to adjudicate of the United States courts, not including *Forum Non Conveniens*, which is based on other considerations.

Therefore, going a step further, taking into account United States jurisdiction to prescribe based on ATCA, it does not seem, in my opinion and in contrast to what some people claim, that applying this statute to foreign nationals for actions taken abroad without nexus to the United States violates international law. In the previous Section, we saw some examples of what truly can be considered expressions of legal imperialism and serious conflicts of extraterritoriality. Apart from all of that, with the development of litigations based on ATCA, we must not forget that the United States, with all the guarantees of one of the best judicial systems in the world, has sent to the international community very potent messages of an *active commitment* to the defense of Human Rights. One such example comes from the ruling made by the Court of Appeals for the Second Circuit in their September 14, 2000 decision regarding *Forum Non Conveniens* in *Wiwa*. By providing a forum for the victims of atrocities, which stir any conscience worthy of that name - as Justice Breyer revealed, much to his credit, in the first appeal hearing on *Kiobel* - and by upholding the mandates of international law through its own channels, the United States towers over its peers in the protection of the aforementioned rights. What we have here is not imposition, but an outstanding shouldering of responsibilities and leadership. They reveal not a desire to dominate, but to show solidarity with the human race. There is no selfishness, but a shining example of the preservation of inalienable rights and, therefore, of the supreme value of peace, the ultimate reason for the existence of an international order. Through ATCA, moreover, the United States provides an optimal example of *dédoublement fonctionnel* or *role splitting* that constitutes one of the fundamental contributions of the valuable legacy of the great Georges Scelle. The eminent Antonio Cassese, for example, saw the use that

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On this issue, see, e.g., *Supplemental Brief of Amici Curiae German Institute for Human Rights and International Law Experts in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co.* No. 10-1491 (U.S. June 13, 2012), pp. 4-12. In general, see also MICHAELS, R., *Public and Private International Law: German Views on Global Issues*, <http://ssrn.com/abstract=1259933>.

was being made of that piece of legislation in these precise terms.<sup>27</sup> What then remains of the critiques of imperialism and extraterritoriality? Little, in truth, in my opinion.

Let us, then, that private international law and its wisdom of many centuries do their work. This is what, in the end, the Court of Appeals for the Second Circuit of the United States advocated in *Filártiga*. All that, without ignoring that, in the case of ATCA, it is a question of *special* torts, to the extent, for example, to which the norm reserving federal courts' jurisdiction to adjudicate is supported by the Law of Nations and a reduced set of conducts contrary to *Jus Cogens*, just as the *Sosa* precedent established. Or that when it is time to determine the choice of law, these same courts, following the cited precedent, can always choose *federal common law*, which has been integrating the mandates of public international law. I say "choose," because they are allowed to apply, according to the conflict of laws or the choice of law to which they should be subject, a foreign law, e.g., the law where the action took place. Being a special tort does not, in the end, mean exclusion, but the opportunity to make public and private international law work together. Which always ennoble both of them.

#### IV.-*Final Reflections.*

As I said at the beginning of this document, which I am concluding before the start of calendar year 2013, I do not know if its publication in the site indicated will have been preceded by the *Kiobel* decision. I cannot, in any case, hazard a guess at the solution the High Court will take. This select group of people, who are among the most powerful and influential in the world, can surprise us; in fact, they do so with relative frequency. We can recall, for example, when Chief Justice Roberts broke with the solid conservative block to which he belongs, thus casting the deciding vote in favor of upholding President Obama's significant health care reform. I will not, therefore, make predictions, except one: if the United States Supreme Court decides in the end to damage or seriously undermine what I have until now qualified as a shining example in the fight for Human Rights, the fight regarding international litigations will, without a shadow of a doubt, continue. And it will do so before the courts of the aforementioned

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<sup>27</sup>

See Cassese's "Remarks on Scelle's Theory of 'Role Splitting' (*dédoulement fonctionnel*) in International Law," *European Journal of International Law*, vol. 1, 1990, pp. 230. In general, see, e.g., SCHNEEBBAUM, S.M., "What Is This Case Doing Here? Human Rights Litigation in the Courts of the United States," *Case Western Reserve Journal of International Law*, vol. 44, 2011, pp. 183-203.

*Sister States*<sup>28</sup> or the courts of the European nations, which are now generating relief jurisprudence<sup>29</sup> in order to create their own examples of what is occurring these days, seemingly increasing across the length and breadth of the globe. There is no choice in this matter. Leaving the field open to the excesses of multinational corporations can only bring us closer to the moment that is described in the unsettling, and hopefully not prophetic, poem that Sara Teasdale wrote about the supreme Holocaust, the one that unites all the holocausts that are continuously produced in the shadows of ignorance and forgetfulness:

*“There will come soft rains and the smell of the ground,  
And swallows circling with their shimmering sound;  
And frogs in the pools, singing at night,  
And wild plum trees in tremulous white,  
Robins will wear their feathery fire,  
Whistling their whims on a low fence-wire;  
And not one will know of the war, not one  
Will care at last when it is done.  
Not one would mind, neither bird nor tree,  
If mankind perished utterly;  
And Spring herself, when she woke at dawn,  
Would scarcely know that we were gone.”*

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<sup>28</sup>

See, e.g., PARRISH, A.L., *An Emerging Trend?: State Court International Human Rights Litigation*, found in <http://ssrn.com/abstract=2125574>.

<sup>29</sup>

On all these issues, see, e.g., the monumental work by ENNEKING, L.F.H., *Foreign Direct Liability and Beyond*, The Hague, Eleven, 2012.