



## Papeles el tiempo de los derechos

### TRANSNATIONAL HUMAN RIGHTS LITIGATIONS. KIOBEL'S TOUCH AND CONCERN: A TEST UNDER CONSTRUCTION

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**TRANSNATIONAL HUMAN RIGHTS LITIGATIONS.**  
**KIOBEL'S *TOUCH AND CONCERN*: A TEST UNDER CONSTRUCTION\***

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We have conceived this study to support the work of the teams responsible for developing some International Reports within the European project: *Business & Human Rights challenges for cross border litigation in the European Union. Action Grant of the EU*. More Information at: <http://humanrightsinbusiness.eu/>. At the same time, we think that this paper may be of interest in the study and monitoring of transnational litigation for Human Rights violations<sup>+</sup>.

*Abstract: In recent years the international debate on Transnational Human Rights Litigation has mainly focused, although not exclusively, on the role of the Alien Tort Claims Act as a way of redress for serious Human Rights violations. This Act has given the possibility of granting a restorative response to victims, in a Country, such as the United States of America, that assumes the defense of an interest of the International Community as a whole: to guarantee the access to justice to the aforesaid victims. The purpose of this article is to analyze the recent and restrictive position on this Act of the Supreme Court of the United States, in the Kiobel case, and especially when, as a means of modulating the limitative doctrine affirmed there, the Touch and Concern test was introduced. It has generated from its very inception a strong discussion amongst international legal scholars and also great repercussions concerning the practice of the U.S. District and Circuit Courts.*

**Summary: I. Introduction. II. A brief overview of the Alien Tort Claims Act. III. The *imbroglio* of *Kiobel*. IV. Federal Court's Debates about the Test. V. Post-*Kiobel* Consequences.** 1.-The future application of the ATCA *ratione personae*. 2.- Implications for the TVPA. 3.- On the creation of a Universal Jurisdiction Norm in civil matters. 4.- Consequences in other areas. **VI. Final Reflections. Table.**

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<sup>+</sup> We dedicate this work to the memory of Antonio Mosé Proietto Donato and Professor Alfred E. Von Overbeck.

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## I. Introduction

According to a study published a few years ago by three Swiss researchers<sup>1</sup> about more than 40,000 multinational companies and cross-shareholdings, that has had a significant impact on international debates, it can be deduced that something less than 150 of those multinational companies have absolute control or significant stakes in half the total number of the multinational companies analyzed. In other words, major multinational companies are super-connected and have control over a substantial percentage of the remaining companies: “The top holders within the core can thus be thought of as an economic “super-entity” in the global network of corporations”<sup>2</sup>.

The resulting accumulation of power is very noticeable. It has traditionally been in sectors related to energy, especially the extraction of gas and oil, with companies whose managements have marked and still mark our time and even in strategic areas also for human survival, such as water and food<sup>3</sup> this leads us to rethink what might be the consequences in terms of the global economy, financial markets and the implications that the advanced accumulation may have in the field of protection of Human Rights<sup>4</sup>.

Besides, there are other reasons to be concerned. For example, no one doubts about the impact of these companies on national governments and international organizations. Regarding their influence on the decisions of national governments, it is known the existence of the phenomenon of "revolving doors" between the executive, the industry and the financial sector<sup>5</sup>. Cases like that are very common in all latitudes and can have major impacts on the protection of Human Rights worldwide.

Propelled by the ideological ascendancy of neo-liberalism, TNCs dominate virtually the entire international legal order, influencing key international institutions and gaining inordinate structural control. It is well known that

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<sup>1</sup> Vitali S, Glattfelder JB, Battiston S (2011) The Network of Global Corporate Control. PLoS ONE 6(10): e25995. doi:10.1371/journal.pone.0025995.

<sup>2</sup> *Ibidem* p.6

<sup>3</sup> On this point see Francisco Javier Zamora Cabot and María Victoria Camarero Suarez, 2016: “En torno al derecho humano al agua y el saneamiento en la Carta Encíclica *Laudato Si'* del Santo Padre Francisco”, *Revista de Derecho, Agua y Sostenibilidad - REDAS* - ISSN 2444-9571 § V.2 – pg. Núm. 0, 2016, in: <http://redas.webs.uvigo.es>.

<sup>4</sup> On this issue it is important the contribution of Jernej Letnar Čerňič, “Obligaciones de las empresas en el marco del Derecho Humano al medio ambiente sano y al agua”, in Francisco Javier Zamora Cabot, Jesús García Cívico and Lorena Sales Pallares (eds.), 2013, Universidad de Alcalá, Servicio de Publicaciones, *La responsabilidad de las multinacionales por violaciones de derechos humanos*. In this article the author argues that corporations have a responsibility in the exercise of the human right to water and the environment, which can be derived from international and national laws. At the same time the author analyzes the consequences of the violations committed by multinational corporations, by not respecting and protecting this right.

<sup>5</sup> The phenomenon of "revolving door" implies an interconnection between the roles of legislator, the executive and the private sector affected by the national and international legislation and in some cases this connection is based on the granting of reciprocated privileges.

the power of some TNCs has, for some time, exceeded the power of many states [...] then, exercise immense influence over the material, economic and political lives of millions of human beings, and over the life chances of other species and ecosystems generally<sup>6</sup>.

Those circumstances make it almost impossible to hold those entities accountable for their acts. This raises, among others, a peculiar paradox, the same companies that claim, and get all kinds of rights, for example regarding the financing of their projects and the solution of their differences with host States with respect to investments<sup>7</sup>, refuse to respond in some way to the mandates of International Law, or incorporate in their obligations the respect of Human Rights in their activities, including those related to the protection of the environment.

In the situation described, multinational companies are shaping a world made for their exclusive benefit, where they have an immense capacity to influence governmental policies, enjoy an enviable status, have legal rights, are protected by a potent financial apparatus that allows them to plan and carry out their projects, respecting only the few obligations on Human Rights that they are willing to take.

Multinational corporations have succeeded in imposing an international legal system that is heavily weighted in their favor. International law respects domestic law definitions of the corporate structure, which permit international enterprises to incorporate multiple legally separate entities that, as a general rule, are not considered to be responsible for each other's debts and obligations, including compensation for the injuries they inflict<sup>8</sup>.

Besides, we can add that legal and procedural barriers, in the territory of the State in which the Human Rights violations were committed, make these conducts go unpunished. This problem is also present when cases have been carried out by International Courts in determining the criminal responsibility of those involved in unlawful acts. Spatial and temporal limitations, and the necessary cooperation with the States in whose territory the facts are verified, are just some of the boundaries that tie the hands of international bodies in the defense of Human Rights and the punishment of atrocities.

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<sup>6</sup> Anna Grear and Burns H. Weston, "The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape", *Human Rights Law Review*, 2015, 15, 21–44, p.25, in: <http://hrlr.oxfordjournals.org>.

<sup>7</sup> About the potential conflict between the protections that these agreements afford to corporations and the rights of natural persons, see Marc Jacob, "International Investment Agreements and Human Rights", *Inst. Dev. & Peace Research Paper Series*, 2010, pp. 26–31 in: [http://www.humanrightsbusiness.org/files/International\\_investment\\_agreements\\_and\\_human\\_rights.pdf](http://www.humanrightsbusiness.org/files/International_investment_agreements_and_human_rights.pdf).

<sup>8</sup> Beth Stephens, "Extraterritoriality and Human Rights after Kiobel", 28 *Md. J. Int'l L.* 256 (2013). Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/13>.

The situation is further complicated if the barriers mentioned above add a new variant. The violations may have been committed in whole or in part with the complicity of authorities, by multinational companies<sup>9</sup>. What is the regime of responsibility of multinational corporations for serious violations of international law and Human Rights? The responsibility of multinational companies, at national and international levels, now generates increased interest and remains an important issue in the international debate as demonstrated by the many doctrinal works in this area<sup>10</sup>.

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<sup>9</sup> The issue of legal and procedural barriers has been widely discussed in a recent study published by ICAR, CORE, ECCJ. This study was conducted by Professor Gwynne Skinner, Robert McCorquodale and Olivier De Schutter and refers to the analysis of the Third Pillar and access to judicial remedies. There It has been shown that the currently existing barriers prevent, all or in part, of the access to justice for victims of serious violations of international law perpetrated by multinational companies. The text of the document is available at: <http://accountabilityroundtable.org/wp-content/uploads/2013/02/El-Tercer-Pilar.pdf>.

<sup>10</sup> Among the recent doctrine see: Duncan French & Tim Stephens, *ILA Study Group on Due Diligence in International Law—First Report*, International Law Association, March 7, 2014 [http://www.ilahq.org/en/committees/study\\_groups.cfm/cid/1045](http://www.ilahq.org/en/committees/study_groups.cfm/cid/1045). James G. Stewart, “The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute”, 47 *N.Y.U. J. INT’L L. & POL.* 121-179 (2014). Among the existing broad doctrine about this issue, see: J. L. Cernic, “Regulating Corporations under International Law”, *Journal of International Criminal Justice*, vol. 8, 2010, pp. 725-743; P. Hunn, *Blaming the Parents: The Marginalisation of Corporate Liability for Transnational Human Rights Violations in Developing States*, L. B. Dissertation, U. of Southampton, 2010; C. González Posso, *La Responsabilidad Empresarial y los Derechos Humanos*, Indepaz, Bogotá, 2009; A. Gatto, *Multinational Enterprises and Human Rights*, Elgar, Cheltenham, 2011 ; C. de la Vega et alii, *Holding Businesses Accountable For Human Rights Violations*, Friedrich Ebert Stiftung, *Dialogue on Globalization*, July, 2011 ; P. Simons, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights”, en *Journal of Human Rights and the Environment*, 2012 (3), 51 pp. (en prensa) ; C. Van Dam, “Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights”, *Journal of European Tort Law*, vol. 2, 2011, pp. 221-254; E. De Brabandere, “Human Rights and Transnational Corporations. The Limits of Direct Corporate Responsibility”, *Human Rights and International Legal Discourse*, vol. 4, 2010, pp. 66-88 e *Idem*, “Non-State Actors and Human Rights. Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System”, en *Participants in the International Legal System, Multiple Perspectives on Non-State Actors in International Law*, J. d’Aspremont (ed.), Routledge, Abingdon, 2011, pp. 268-283. See also, I. Daugareilh, “Responsabilidad social de las empresas transnacionales: análisis crítico y prospectiva jurídica”, *Cuadernos de Relaciones Laborales*, vol. 27, 2009, pp. 77-106; A. Campos Serrano, “Derechos Humanos y empresas: un enfoque radical”, *Relaciones Internacionales*, 2011, pp. 41-65, With a strong criticism of the international institutional framework, see also, J.M.Woods, “The Evolution of Corporate Accountability for Human Rights Abuses: A Human Rights Framework for Corporate Accountability”, *ILSA Journal of International & Comparative Law*, vol. 17, 2011, pp. 321-334. About the specific issue of Business and Human Rights violations: A. Cortina Orts, *Empresa y Derechos Humanos*, Discurso a la Real Academia de Ciencias Morales y Políticas, 8-XI-2011, 21 pp. ; B. Sjaafjel, *Regulating Companies as if the World Matters: Reflections from the Ongoing Sustainable Companies Project*, en [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1964213](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964213) ; S-D Bachmann, “Terrorism Litigation as Deterrence Under International Law- From Protecting Human Rights to Countering Hybrid Threats”, *Amicus Curiae*, Issue 87, 2011 ; J. Konov, *Piercing the Veil’s Effect on Corporate Human Rights Violations & International Corporate Crime (Human Trafficking, Slavery, etc)*, en [http://mpira.ub.uni-muenchen.de/35714/1/Piercing\\_the\\_Veils\\_Effect\\_Joshua\\_Konov\\_2011.pdf](http://mpira.ub.uni-muenchen.de/35714/1/Piercing_the_Veils_Effect_Joshua_Konov_2011.pdf); S. Deva, *Regulating Corporate Human Rights Corporations-Humanizing Business*, Routledge, Abingdon, 2012 ; B. L. Mangalpaday, *Relationship Between Business Corporations’ And Human Rights: A Legal Analysis*, en [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1987032](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987032) y M. Pentikäinen, “Changing International ‘Subjectivity’ and Rights and Obligations under International Law-Status of Corporations”, *Utrecht Law Review*, vol. 8, 2012, pp. 145-154.

Anyway, as advanced by Pigrau Solé<sup>11</sup>: It is a common principle to all legal systems that operators must respond for any damages caused to third parties. But in the case of international system, it is almost impossible that the multinational corporations are directly responsible for violations of international legal rules, since the mediation of States has made those entities legally invisible.

For all these reasons, we must be aware that this phenomenon exists and we must find the way to implement existing mechanisms to redress those violations or create international and national instruments that can contribute to this purpose. The International Community has to seize this opportunity to eliminate all existing legal and procedural barriers at the national and international level and, in the same way, to formulate concrete measures, strategies and actions, starting from the existing international legal system or national systems, to make access to justice effective at all levels. In particular, we need to create the conditions to guarantee an appropriate *forum* to determine all the responsibilities of the actors involved in serious violations of Human Rights, even in the case of multinational corporations, and finally to guarantee an adequate compensation to victims for the damages suffered<sup>12</sup>.

When a company takes your land without compensation, pollutes your water, or brings in private militia to guard an oil well who start to rape and abuse the women of a local community, you should have the right to ensure it stops, and to get your livelihood restored. It should not matter whether you are rich or poor or in what country you live. Yet many victims of business-related human rights abuse have no access to judicial remedy in

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2 Vid., v. gr., M. Requejo Isidro, *Violaciones Graves de Derechos Humanos y Responsabilidad Civil-Transnational Human Rights Claims*, Thomson/Aranzadi, Pamplona, 2009; Idem, “Litigación Civil Internacional por Abusos Contra Derechos Humanos. El Problema de la Competencia Judicial Internacional”, *Anuario Español de Derecho internacional Privado*, Idem, “La Responsabilidad de las Empresas por Violación de Derechos Humanos: Deficiencias del Marco Legal”, *Scientia Juris* vol. 1, 2011; R. Meeran, *Demandas por Agravios Contra Multinacionales por Violación de los Derechos Humanos. Perspectiva General de la Situación Fuera de Estados Unidos*, en <http://www.business-humanrights.org/media/documents/richard-meeran-demandas-contra-mnacs-7-mar-2011.pdf> ; F. Gregor, *Principles and Pathways: Legal Opportunities to Improve Europe’s Corporate Accountability Framework*, ECCJ, November, 2010 y D. Augenstein, *et alii*, *Study on the Legal Framework for Human Rights and the Environment Applicable to EU Companies Operating Outside the European Union*, University of Edimburg, 2010 ; I. L. A., *Interim Report, Private International Law Aspects of Civil Litigation for Human Rights Violations, Committee on International Civil Litigation and the Interests of the Public, Report of the Hague Conference*, 2010, London, pp. 564-594 ; J.G. Dale, *Free Burma: Transnational Legal Action and Corporate Accountability*, U. of Minnesota Press, 2011, D. Weiss y R. Shamir, “Corporate Accountability to Human Rights: The Case of the Gaza Strip”, *Harvard Human Rights Journal*, vol. 24, 2011, pp. 155-183.

<sup>11</sup> Antoni Pigrau Solé “La responsabilidad civil de las empresas transnacionales a través de la *alien tort claims act* por su participación en violaciones de derechos humanos”, *Revista española de desarrollo y cooperación*, No 25, Madrid, 2010, Universidad Complutense de Madrid, 113-130, p.114.

<sup>12</sup> On this point Marullo, Maria Chiara, “Access to Justice and Forum Necessitatis in Transnational Human Rights Litigation”, January 11, 2016, *Papeles el Tiempo de los Derechos*, HURI-AGE, Consolider-Ingenio 2010. Available at SSRN: <http://ssrn.com/abstract=271374>.



their home country. [...]The majority of cases of abuse we see at Business & Human Rights Resource Centre occur in weak governance zones, which often do not have an independent judiciary, and sometimes lack fully functioning courts at all. Therefore these victims frequently do not have access to enforceable remedies in their home country. Some then seek legal remedy elsewhere, e.g., where the company is headquartered<sup>13</sup>.

In recent years the international debate has focused on the role of the Alien Tort Claims Act (hereinafter ATS or ATCA) as a means of redress for serious Human Rights violations. This mechanism has been used as one of the possible alternatives, as a useful response to repress, prevent and repair those conducts. In other words, this Act has given the possibility to grant a restorative response to victims, in a State which is not linked directly to the conduct, but responds to an interest of the International Community as a whole: the protection of Human Rights. Nevertheless, this system described above must be considered in light of a recent decision of the U.S. Supreme Court in the cases *Kiobel*<sup>14</sup> and *Daimler*<sup>15</sup>, which represents a setback in the defense of Human Rights and reparation for victims.

In particular, the object of this article is to analyze the test created by the Supreme Court of the United States in *Kiobel*, the “**Touch and Concern Test**” and the post *Kiobel* jurisprudence of the District Courts and the different Circuits on this field in the last three years. It is important to say that this Test is under construction and that many of the problems referred to in this article, related to its application, may be resolved by another ruling of the Supreme Court of the United States in the next years. For the time being, this Court has decided to allow Federal Courts to continue working and assessing a safe path that will define the future of the ATCA and its applicability in cases on international violations perpetrated by individuals and companies outside the United

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<sup>13</sup> Sif Thorgeirsson, Manager, Corporate Legal Accountability Project, Business & Human Rights Resource Centre, *Closing the courtroom door: Where can victims of human rights abuse by business find justice?* 5/12/2014. Available at: <http://business-humanrights.org/en/closing-the-courtroom-door-where-can-victims-of-human-rights-abuse-by-business-find-justice>.

<sup>14</sup> *Kiobel v. Royal Dutch Petroleum Co.*, Supreme Court of the United States 569 U.S. No. 10-1491. (Decided April 17, 2013). In this case, the plaintiffs alleged violations of international law under the ATS of some corporations: Royal Dutch Petroleum Co., Shell Transport and Trading Company, P.L.C. and Shell Petroleum Development Company of Nigeria, aiding and abetting the Nigerian government in killing, raping, torturing, and otherwise abusing residents of Nigeria’s Ogoniland, a region near the Niger Delta.

<sup>15</sup> *Daimler AG v. Bauman et al.*, Supreme Court of the United States No. 11-965. (Decided January 14, 2014). In this case In 2004, twenty people, residents in Argentina have sued the corporation Daimler-Chrysler AG before U.S. Federal Court, claimed that Mercedes-Benz Argentina, a subsidiary of former, had collaborated with security forces of that country during the "Guerra Sucia" (1976-1983) in the detention, torture, disappearance and death of employees of the company placed in Gonzalez Catan.



States, which have a relevant connection with the United States, sufficient to displace the presumption of extraterritoriality established in *Kiobel*.

In order to analyze the **touch and concern** test in *Kiobel*, it is essential, following these preliminary observations, to introduce in Section II a brief history of the Alien Tort Claims Act, and in Section III the “*imbroglio*” in *Kiobel*, on the interpretation of extraterritoriality; while Section IV is focused on the actual debates about this test before Federal Courts, Section V emphasizes the critical consequences of the actual interpretation of the concept of extraterritoriality and in Section VI some final reflections are presented.

## II. A brief overview of the Alien Tort Claims Act

The American Federal System consists of 13 Circuits, which are formed by District Courts and Courts of Appeal. As it is explained in our previous works<sup>16</sup>, contrary to the State Courts, Federal Courts have limited jurisdiction, but, instead it is exclusive and original over large areas of the US legal system. Due to its limited jurisdiction, the system requires a specific assignment through a constitutional mandate and other specifics given by the legislator, in the framework of the **Jurisdiction to Adjudicate**<sup>17</sup>, an issue still being debated by legal scholars<sup>18</sup>. We rely on the **Restatement (Third) of the Foreign Relations Law**, in which the different forms of jurisdiction are described, such as adjudicative jurisdiction, prescriptive jurisdiction and executive jurisdiction. Thus, the Federal Courts are competent to settle cases on serious violations of Human Rights by reference to a constitutional provision, or by a Congress’ mandate, as it did, for example, in the recent Torture Victims Protection Act<sup>19</sup> (hereinafter TVPA) and in

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<sup>16</sup> Zamora Cabot, Francisco Javier, “Los Derechos Fundamentales en Clave del Alien Tort Claims Act of 1789 de los EE.UU. y su Aplicación a las Corporaciones Multinacionales: The ATCA Revisited”, *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, 2006, p. 349.

<sup>17</sup> On this point, Colangelo, talking about the specific form of jurisdiction using in the courts language on ATS litigation: the subject-matter jurisdiction, affirmed that this type of jurisdiction is inserted in the area of adjudicative jurisdiction. Colangelo, Post-*Kiobel* procedure: subject matter jurisdiction or prescriptive jurisdiction? *UCLA Journal of International Law & Foreign Affairs*, 2015, University of California.

<sup>18</sup> On this point the international doctrine debates whether the applicable international law rules in case of the ATS are those governing a state’s jurisdiction to prescribe, to adjudicate, or to enforce by judicial means (or some combination thereof). On this topic, see e.g. the articles of Professor, Zamora Cabot, Francisco Javier, “Una luz en el corazón de las tinieblas: el Alien Tort Claims Act of 1789 (ATCA) de los EEUU”, en *Soberanía del Estado y Derecho Internacional*, Homenaje al Profesor J.A. Carrillo Salcedo, Tomo II., 2005 Universidad de Sevilla, Sevilla; Zamora Cabot, Francisco Javier, “Casos recientes de aplicación del Alien Tort Claims Act (ATCA) of 1789, de los EEUU, respecto de las corporaciones multinacionales”, en *Pacis Artes*. obra homenaje al Profesor Julio D. Gonzalez Campos, Tomo II, 2005, Derecho internacional privado, derecho constitucional y varia, Eurolex Editorial, Madrid

<sup>19</sup> Codified in section 1350 volume 28 of the United States Code. The *Torture Victim Protection Act* 1992, which would create an alternative forum, in many cases *necessitatis*, for victims of Torture crimes.

the ATCA; “(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”<sup>20</sup>.

The concept underlined by this act is simple: there is nothing unusual in the fact that a court can hear civil claims on a special tort, including serious Human Rights violations that occurred outside its territorial jurisdiction. It is a reservation of jurisdiction of U.S. Federal Courts, based on the law of nations, international treaties and on a reduced number of conducts contrary to *jus cogens*. In other words, this Act empowers the District Courts to hear cases in which a foreigner claims for violations of the law of nations and international treaties to which the United States is a party<sup>21</sup>. Since the famous case *Filártiga*<sup>22</sup> in 1980, the doors for the victims of one of these international illicit acts were opened; they have been able to file civil lawsuits against individuals and companies involved in such acts before federal courts. The ATCA has provided a *forum necessitatis*<sup>23</sup> for victims of such acts, from a civil perspective, in the case of international torts committed by individuals or multinational companies.

Since 1980 the Federal Courts have faced many issues concerning the nature of this act and its compatibility with other national and international rules granting immunities, amnesties and many other matters related to the scope of applicability of this type of jurisdiction. The first challenge that federal courts have had to overcome has been the

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This Act authorizes any individual to bring civil claim to an US court for committing acts of torture or extrajudicial executions, provided that the case has not had a solution in place of commission of such actions. As explained by Koebele, the underlying idea behind this rule is clear, with its creation: “It highlights the role of U.S. Courts in providing a legal forum for outrageous violations of human rights regardless of where they are committed” in order to “to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.” Michael Koebele, *Corporate Responsibility under The Alien Tort Statute, Enforcement of International Law through US Torts Law*, Leiden Martinus, 2009 NIJHOFF Publishers. P. 5.

<sup>20</sup> ATS, Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 77 (1789), codified in 28 U.S.C. §1350 (1976).

<sup>21</sup> A sector of scholars speaks in this context of a jurisdiction “almost” universal, Pigrau Sole, “La jurisdicción extraterritorial como vía para hacer responsables a las empresas por daños al medio ambiente causados en el extranjero: especial referencia al ATCA”, en Esteban Perez Alonso y otros, *Derecho, Globalización, Riesgo y Medio Ambiente*, Valencia, Tirant lo Blanch, 2012, 183-217.

<sup>22</sup> See The United States Court of Appeals for the second Circuit, *Filártiga v. Peña-Irala*, (630 F.2d 876 (2d Cir. 1980). In this case a Paraguayan citizen sued a former senior police of Stroessner dictatorship in Paraguay for acts of torture committed in Paraguay which led to the death of the son of the complainant.

<sup>23</sup> On this issue see the concept of Forum Necessitatis in Marullo, Maria Chiara: “La lucha contra la impunidad: el Foro Necessitatis”, in *InDret* 3/2015, available in: <http://www.indret.com/pdf/1154.pdf>

standards determining which international violation can be heard under this Act. They used five standards to determine what crimes can be prosecuted through the ATCA:

1. *Customary International Law-Standard*. Based on this criteria, the ATCA can be activated in the event that there is a claim for a harm arising out of a violation of international law or treaties to which the United States is a party. Under this rule, each violation of customary international law could be considered sufficient to trigger the protection provided by the ATCA.
2. *Universal and Obligatory Standard*. This criterion, widely used by the Courts, reduces the scope of the rule to only serious violations of international law.
3. *Jus Cogens Standard*. This approach allows, with some exceptions, to include in the list of violations that can be prosecuted under the ATCA only the rules that have become *Jus Cogens* norms.
4. An even more restrictive theory is the one proposed by Professor Modeste Sweeney who states that the ATCA should be activated only in cases of violations of the law of nations, as this concept was understood at the time this act was passed by Congress.
5. The last criterion is known as the *International Law Standard* which, contrary to the previous two ones, would expand the scope of the rule on civil jurisdiction. Indeed, it provides that the ATCA could be applied in all cases of violations of individual rights recognized by international law.

Despite the criticisms that have surrounded this Act since its inception, and the different interpretations of the criteria of its applicability, the history of ATCA has gone through different stages, some favorable, others more restrictive. We can identify four periods in its history<sup>24</sup>: the first one is the *pre-Filartiga* period, from 1789 to 1980, when this Act is not used, except in marginal cases, after *Filartiga* Federal Courts began to apply the ATCA more frequently; the second period is from 1980 to 2004, where the *Sosa case* was decided by the Supreme Court<sup>25</sup>, when the ATCA begins to be used in cases of torture, genocide or crimes against Humanity; a third phase after the *Sosa case*, in which the Supreme Court confirms the importance of ATCA, opens the debate on the

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<sup>24</sup> Marullo, Maria Chiara El Alien Tort Claims Act de 1789: Su contribución en la protección de los derechos humanos y reparación para las víctimas. ICIP WORKING PAPERS, número 34 de mayo 2014, available in: [http://icip.gencat.cat/web/.content/continguts/publicacions/workingpapers/2014/arxiu/wp\\_2014\\_-\\_03\\_cast\\_.pdf](http://icip.gencat.cat/web/.content/continguts/publicacions/workingpapers/2014/arxiu/wp_2014_-_03_cast_.pdf).

<sup>25</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Supreme Court decision in *Sosa* represents a breaking point with the past application of ATCA. The significance of *Sosa* is manifold. In fact, the Court clarified that the ATS is solely a jurisdictional statute and does not provide a cause of action and, at the same time, acknowledged that the causes of action that the ATS should recognize are judge-made.

criteria of the applicability of that rule in case of corporate responsibility for Human Rights violations and affirmed that this act provide jurisdiction over claims, but did not itself create any private right of action<sup>26</sup>; finally, a fourth phase, not yet completed, is characterized by two Supreme Court decisions in the *Kiobel* case, where there is a restrictive stance of the Supreme Court concerning the possibility of applying the ATCA to criminal behaviors committed by multinational companies abroad, and in the *Daimler* case, where the Court expressed the requirement that foreign corporations must be “essentially at home”, in other words, Federal Courts need to find the existence of more jurisdictional contacts to render those corporations “at home”, in the forum State. We are currently in the last stage, not completed until the Supreme Court does not intervene to dictate a “life or death” sentence on the ATCA, in future cases post *Kiobel* and *Daimler*<sup>27</sup>. It is extremely interesting, because those cases are considered by specialists as *F- Cubed cases*<sup>28</sup> in which, due to the implication of the economic interests of the U.S. in protecting multinational companies, the Supreme Court decided that the presumption against extraterritoriality applies to the ATCA and created the test “**touch and concern**” in order to limit **extraterritorial cases** that do not have a real connection with the US territory. On the basis of these two cases, it has to be noted that

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<sup>26</sup> On this point see *v.gr.*: Zamora Cabot, Francisco Javier, “Casos recientes de aplicación del Alien Tort Claims, *supra* note 18. Childress, D.E., “The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation”, Pepperdine U. School of Law, Legal Studies Research Paper Series, Paper Number 2011/9, April 2011 and CH. Keitner, “Kiobel v. Royal Dutch Corp., Another Round in the Fight Over Corporate Liability Under the Alien Tort Statute”, ASIL Insight, vol. 14, Issue 30, September 30, 2010. M. Requejo, Kenneth Anderson on Kiobel v. Royal Dutch Petroleum. in <http://conflictflaws.net/2010/kenneth-anderson-on-kiobel-v-royal-dutch-petroleum>. “Responsabilidad Civil y Derechos Humanos en EEUU: ¿El Fin del ATS?”, in Indret, Julio de 2011, 38 pp. y M. Theophila, “Moral Monsters Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After Kiobel v. Royal Dutch Petroleum Co.”, Fordham Law Review, vol. 79, pp. 2859-2908. J. M. Stanisz, “The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of Kiobel v. Royal Dutch Petroleum Co.”, Brooklin J. of Corporate, Financial & Commercial Law, 2011, pp. 573-599; M. Fasciglione, “Corporate Responsibility for Violation of Human Rights: Some Remarks on the US Court of Appeals Decision in the Kiobel Case”, in <http://igbusinessandhumanrights.files.wordpress.com/2011/12/m-fasciglione-corporate-responsibility-and-kiobel-decision1.pdf>. A. Walker, “The Hidden Flaw in Kiobel”, *Northwestern Journal of International Human Rights*, vol. 10, 2011, pp. 119-145 y A. J. Bellia y B. R. Clark, “Kiobel, Subject Matter Jurisdiction, and the Alien Tort Statute”, *Notre Dame Law School, Legal Studies Research Paper* No. 12-52. See also, CEHRD and Amnesty Int., The True ‘Tragedy’: Delays and Failures in Tackling Oil Spills in the Niger Delta, 2011, 50 the Memorandum of Amnesty International in <http://www.amnesty.org/en/library/asset/AFR44/010/2012/en/9ad11961-3899-4940-b374-4f8833e9918a/afr440102012en.pdf>.

<sup>27</sup> On this point, see Francisco Javier Zamora Cabot, “Decisión del Tribunal Supremo de los Estados Unidos en el caso Daimler AG v. Bauman et al: Closing the Golden Door”, *Papeles El Templo de los Derechos*, n. 2, 2014. <http://www.tiempodelosderechos.es/docs/wp2-14.pdf>.

<sup>28</sup> Liesbeth Enneking has explained that *F-Cubed Cases* o *Foreign cubed nature* theory has been used to refer to cases in which plaintiffs and defendants are foreigners and criminal behavior is performed outside the United States. Liesbeth Enneking, “Multinational Corporations, Human Rights Violations and a 1789 US Statute - A Brief Exploration of the Case of Kiobel v. Shell, *Nederlands Internationaal Privaatrecht*”, Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2204762](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204762), p. 399.

we are now facing a setback in the U.S. system for the defense of Human Rights and in the protection and reparation for victims when multinational companies are involved in such internationally wrongful acts.

Related to those cases, international attention has focused recently on two gaps that are normally found when this norm is applied in cases involving multinational companies, the first and most important one deals with the status of multinational corporations under International Law and the second one deals with a technical but very important nature: the extraterritorial effect of laws. In fact, as we have explained on different occasions<sup>29</sup>, the *Kiobel* precedent 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 on February 2012, addressing the question of whether multinational corporations are subject to the mandates of Public International Law and, therefore, to ATCA<sup>30</sup>.

However, at the beginning of March, the Supreme Court, contrary to its 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 does not suggest that the Supreme 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 approach of the Court in a case that was originally 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. For all those reasons, it

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<sup>29</sup> Francisco Javier Zamora Cabot, “*Kiobel* and the question of extraterritoriality”, in *Papeles El Tiempo de los Derechos*, n. 2/2013, available in: <http://www.tiempodelosderechos.es/materiales/working-papers.html>.

<sup>30</sup> On this point, we attended a dramatic change of position in the Court of Appeals for the Second Circuit Federal whereas, against its decision in *Rabi Abdullahi v. Pfizer* (Docket Nos. 05-4863-cv, 05-6768-cv), January 2009, in the *Kiobel v. Royal Dutch* states that international law does not impose obligations on multinational companies, so that they are not accountable for their actions under the ATCA. What turns out to be completely on the opposite view on this subject in the international order. The decision that we comment is a real backwards step which fortunately has been corrected by the other Federal Circuits in posterior years. As stated by Gear and Burns, the Court made this reasoning: “In 2010, a majority of the US Second Circuit Court of Appeals ruled that because of the scope of liability in an ATCA suit is determined by customary international law 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’, corporate liability ‘is not a discernable—much less universally recognized—norm of customary international law that we may apply pursuant to [ATCA]”. More information in Gear, Anna and Weston, Burns, “The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel* Lawscape”, *Human Rights Law Review*, 2015, 15, p.31, in: <http://hrlr.oxfordjournals.org>.

is important to analyze the *imbroglio* created by the Supreme Court in *Kiobel*, before advancing its critical consequences.

### III. The *imbroglio* of *Kiobel*

Recently, the concept of extraterritoriality has been associated in various ways with the international protection of Human Rights<sup>31</sup>. For this reason, it is, for example, linked to efforts to make the reparation mechanisms of the UN's Guiding Principles accessible<sup>32</sup>. Or, under the form of the States' Extraterritorial Obligations (ETOS), regarding obligations that put pressure on the States, based on the fulfillment, most particularly, of what was established in the International Convention on Economic, Social and Cultural Rights. In both cases, the volume and quality of the technical contributions that have been produced are remarkable and worth taking into consideration<sup>33</sup>. In those terms, we mean substantive obligations that can extend the protection of Human Rights beyond the national territory.

The field of extraterritoriality can be favorable for the defense of Human Rights, but on its own terms, without distorting it as the US Supreme Court did in the *Kiobel* case, which weakened that defense and, on the other hand, because of its decision in *Daimler*. These are both **F Cubed cases**, as mentioned above, that are having significant effects on the future of human rights litigation in the US. As explained in previous occasions, it is hard to believe that the Supreme Court of the US can revolutionize a system that has created the ATS, a jurisdictional act, thus limiting future important Human Rights claims, solely on the basis of those peculiar cases<sup>34</sup>.

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<sup>31</sup> Francisco Javier Zamora Cabot, extraterritoriality: outstanding aspects, forthcoming ISDC publications.

<sup>32</sup> *V. gr.*, Jennifer Zerk, *Corporate liability for gross human rights abuses, Towards a fairer and more effective system of domestic law remedies*, A report prepared for the Office of the UN High Commissioner for Human Rights, available at the web page: <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> and Erika George and Lisa Laplante *Commentary on the Office of the High Commissioner for Human Rights' study on domestic law remedies: Corporate Liability for Gross Human Rights Abuse*, available at: <http://business-humanrights.org/en/un-office-of-the-high-commissioner-for-human-rights-launches-study-consultation-on-domestic-law-remedies-for-corporate-involvement-in-human-rights-abuses>.

<sup>33</sup> In general, and regarding ETOS, see Jean Ziegler, *The Right to Food*, in: <http://www.righttofood.org/the-team/jean-ziegler/>; Aravind Ganesh, *The Right to Food and Buyer Power*, Available at SSRN: <http://ssrn.com/abstract=1699870> or <http://dx.doi.org/10.2139/ssrn.1699870>; Fons Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights", *Human Rights Law Review*, 2011, in: <http://www.corteidh.or.cr/tablas/r26506.pdf>. Fons Coomans and Menno, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, *Maastricht Series in Human Rights*, 2012, Intersentia, Ghent and Malcolm Langford *Global Justice, State Duties The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, 2014, University of Oslo.

<sup>34</sup> Francisco Javier Zamora Cabot, case *Daimler AG v. Bauman*, *supra* note 27.



In the US legal system the term extraterritoriality is used to describe the delineation of the reach of substantive federal statutes, as well as federal common law, which determine the conduct and behavior of individuals, in cases that have contacts with foreign countries. As we mentioned in Section II, the ATS is a jurisdictional Statute created to deal with cases of serious Human Rights violations, perpetrated abroad, as special torts. In accordance with this legal instrument, courts would have jurisdiction for a restricted number of conducts contemplated by treaties and international customary law. Furthermore, international law, through federal common law, or a state law designated by rules of conflict of laws, would provide the substantive content that would determine the outcome of the case.<sup>35</sup>

The *imbroglio* consists of the actual interpretation of the concept of extraterritoriality, applied to the substantive and jurisdictional aspects of the ATS<sup>36</sup>. The discussion started in 2012, when, after a federal appeal in *Kiobel I*, it was affirmed that corporations could not be liable under international law and under the ATS, in case of Human Rights abuses, so the plaintiffs sought Supreme Court review<sup>37</sup>. In the same year, in an unexpected move, the Supreme Court called for briefing and re-argumentation on a new issue: “Whether and under what circumstances the Alien Tort Statute, 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”. On April 2013, the U.S. Supreme Court issued its disappointing decision, holding that, as a general rule, the ATS does not provide an avenue to justice for victims who suffered Human Rights abuses outside the U.S. territory. Nevertheless, meanwhile, it left open the possibility that companies and individuals could still be liable for Human Rights abuses committed in a foreign country, if the case had a stronger connection to the United States.

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<sup>35</sup> Regarding the questions raised in this area by what is called the *cause of action*, and its use in the case by the US Supreme Court, see COLANGELO, A. J., *The Alien Tort Statute*, p. 1342 *et seq.*

<sup>36</sup> On this point, Professor Anthony Colangelo (Southern Methodist University) has carried out this analysis in a particularly brilliant manner in a recently published article entitled: “What is Extraterritorial Jurisdiction? Available at [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2363695](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2363695) (17.12.2014). Also by this author, see *International Law in U.S. State Courts*.

<sup>37</sup> As stated for Judge Leval, the reasoning behind this decision is clear: International Law takes no position on whether civil liability should be imposed on corporations but leaves that question to each nation to solve. This position was followed just by the Second Circuit in the case *in re Arab Bank* F.3d WL8122895 (2d Cir. Dec.8, 2015), in which the Court held that corporations could not be held liable under the ATS because customary international law did not recognize the concept of corporate liability. As explained by Symeonides page 10: “it is no surprise that six other Circuits that have considered this issue took the opposite view, explicitly or implicitly”. Symeonides, Simeon, “Choice of law in the American Courts in 2014: Twenty-Eighth Annual Surey”, in *63 AM. J. COMP. L.* (2015), the American Society of Comparative Law, Inc.

In fact, the Supreme Court, in *Kiobel II*, decided that the principles on which the presumption against extraterritoriality is based, apply to the ATS. Using the precedent of *Morrison v. National Australia Bank*<sup>38</sup>, it was established that the presumption against extraterritoriality applies to federal statutes unless these statutes clearly indicate otherwise and if those statutes only contemplate the **conduct** or the **relationship** that is the **focus** of the statute and not an ancillary activity, this Court created a critical general rule, but, aware of its rigidity, it tried to mitigate this rule by leaving the door open for cases that may have a strong connection with the United States<sup>39</sup>. For this reason, the Supreme Court introduced a test whereby lower courts can determine if in a specific case brought under the ATS, it is possible to overcome the presumption against extraterritoriality: **the touch and concern test**. This test is under construction, due the fact that the Supreme Court did not provide an adequate framework to apply it and lower courts are filling its contents on a case by case basis.

Recently, the Supreme Court has had a new opportunity to clarify the principles on which this canon operates, thus closing the door to all possible doctrinal and jurisprudential speculation of the past 3 years. However, this Court has decided not to enter in this matter. We are referring to the case *John Doe i; v. Nestle Usa, inc*<sup>40</sup>, where the Supreme Court decided that the lower courts must continue to work on this subject before entering into the subject and take a position permanently.

Before starting the test analysis under the different District and the Circuit courts, we have to stress that the presumption against extraterritoriality in *Morrison* became a standard of self-restraint in the exercise of the jurisdiction of States. The aim of this rule

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<sup>38</sup> 561 U.S. 247, 255 (2010); Federal Courts are divided on this point. Some Circuit are interpreted the general rule in *Kiobel* in a restrictive way, using the **focus test** established in *Morrison*, other Circuits use solely the **touch and concern** test established in *Kiobel* by the Supreme Court. The focus test states that a cause of action falls outside the presumption against extraterritoriality only if the events or relationships that are the focus of congressional concern in the relevant statute occur within the United States. On this point, see Edward Greene and Arpan Patel, “Consequences of *Morrison v NAB*, securities litigation and beyond”, *Capital Markets Law Journal*, 2016, Oxford University Press and Oona Hathaway, *Kiobel Commentary: The door remains open to “foreign squared” cases*, SCOTUSBLOG, April 18<sup>th</sup>, 2013.

<sup>39</sup> Commenting on a recent decision of interest in this matter, see, Richman, *et al.* United States: So Much for Bright-Line Tests. See also, Pell, O. C., and Herschman, S. E., *Loginovskaya v. Batratchenko. V.gr.*, Childress, D. E., *Escaping Federal Law*, p. 18 *et seq.*

<sup>40</sup> *John Doe i; v. Nestle Usa, inc*, Court of Appeals for the Ninth Circuit, No. 10-56739. In this case, the plaintiffs contended that the companies, Nestle, Archer-Daniels-Midland Co and Cargill Inc, aided and abetted human rights violations through their active involvement in purchasing cocoa from Ivory Coast. On January 2016, The Supreme Court in the case *Nestle Inc. v. John Doe*, U.S. Supreme Court, No. 15-349, petition for a writ of certiorari filed, denied the petition. The High Court rejected a bid by Nestle SA, the world's largest food maker, and two other companies to throw out a lawsuit seeking to hold them liable for the use of child slaves to harvest cocoa in Ivory Coast. More information at: <http://www.reuters.com/article/us-usa-court-nestle-idUSKCN0UP1L420160111>.

is to prevent clashes between US laws and other laws of different countries. Normally, US Courts had applied this rule in order to dismiss claims where the conduct had taken place outside of the United State. So, why is the *Morrison* precedent open to discussion?

The canon in *Morrison* is related to a specific substantive Statute, the Securities and Exchange Act of 1934, a particular Act that creates substantial rights and obligations. In *Morrison*, the analysis of the Court is limited to this specific context, does not create general rules applicable to other statute, and *a fortiori*, it cannot be applied to a jurisdictional statute such as the ATS<sup>41</sup>. Following the applicable principles of International Law, it is clear that we cannot apply a standard of self-restraint in the exercise of the jurisdiction to prescribe of the States, which is substantive in nature, to the field of jurisdiction to adjudicate. In fact, ever since the time of the Glossators (e.g. Jacobo Balduino), it is necessary to distinguish between the applicable law and judicial jurisdiction. Therefore, if there is a reasonable link between the facts of the case and the tribunal and the rights of the defense are also respected, courts can hear the case without problems.

In addition to this, we must understand that there is no extraterritoriality in the field of Human Rights. International Law creates some international obligations for States in case of certain International Law violations. In particular, there is a special obligation, generated by universal norms, treaties and *jus cogens* norms, and the State which is better placed to decide on certain issues related to the protection of Human Rights and to allow access to justice, must do it, especially if no other country is able to do so.

However, in *Kiobel*, the US Supreme Court, in spite of all what has been said, went further of what could be reasonable expected and gave rise to a stringent general rule. In fact, the Court held that the **principles on the presumption** mentioned above apply also to the ATS because, in its analysis, it is impossible to determine the intent of the US Congress at the time this act was passed, in particular if there was a consensus to apply it extraterritorially. So the aforementioned Canon against its extraterritorial application comes into force. Let us now summarize how this test is reflected within the *Kiobel* ruling:

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<sup>41</sup> In *Kiobel*, Chief Justice Roberts' majority opinion recognized that the presumption against the extraterritorial application of substantive U.S. statutes does not apply to the ATS because the ATS is a jurisdictional statute that applies federal common law causes of action based on the law of nations and U.S. treaties.

On these facts, 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<sup>42</sup>.

The Supreme Court affirmed that if enough part of the conduct occurs domestically, the allegation of this circumstance should be supported by a minimum of factual predicate. Starting with this general rule created by the Supreme Court, Federal Courts must examine the facts, case by case, to see if they touch and concern sufficiently the U.S. territory, because touch and concern with sufficient force means domestic conduct or conduct within the United States that violates international law. The element of conduct in this test, that connects the claims to the U.S. territory, is generic, and could include economic or financial links between the illicit behavior carried out by a corporation outside the United States, and the US territory. However, the Court added that corporations are often present in many countries and for this reason this presence alone is not enough to displace the presumption<sup>43</sup> Courts need to find other connecting points. For this reason, the most crucial issue after *Kiobel* is how the presumption would apply to different factual elements. Otherwise said, whether the lower Courts are interpreting properly the connecting elements that could displace the presumption against extraterritoriality.

Even those of us who only know the US legal system superficially, can guess that these few and generic words of the Supreme Court afford enormous leeway regarding interpretation, which is why this decision has spawned a strong debate amongst international legal scholars and with greater repercussions in the practice of US District and Circuit Courts. In fact, despite the short time that has gone by since *Kiobel*, it is generating a doctrinal body of case law that is very relevant to the matters that concern us here. Contributions like the aforementioned article by Professor Colangelo stand out, along with others that are also of great interest, including articles by Paul Hoffman,<sup>44</sup> Sarah Cleveland,<sup>45</sup> Uta Kohl,<sup>46</sup> Susan Simpson,<sup>47</sup> Jennifer Green,<sup>48</sup> etc.

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<sup>42</sup> 133 S.Ct. 1669 (2013).

<sup>43</sup> Agora: reflections on *Kiobel* Excerpts from the American Journal of International Law and AJIL UNBOUND. More information in: <https://www.asil.org/sites/default/files/AGORA/201401/AJIL%20Agora-%20Reflections%20on%20Kiobel.pdf>.

<sup>44</sup> Paul Hoffman, "The Implications of *Kiobel* for Corporate Accountability Litigation under the Alien Tort Statute", in Lara Blecher *et al*, (Eds.), *Corporate Responsibility for Human Rights Impacts*, ABA Publishing, 2014. See also Paul Hoffman and Beth Stephens, "International Human Rights Cases Under

It seems impossible to find a common pattern in the cases heard by the lower courts, which are using the very same interpretative elements, on one hand, to dismiss the claims because they don't overcome the presumption of extraterritoriality and, on the other hand, to accept them. It is totally contradictory. Based on this test, international law experts are trying to create this common pattern themselves. As stated by Timothy J. Coleman and Emily B. Holland<sup>49</sup>

Claims have been allowed to proceed in cases where conduct was fundamental to an alleged law of nations violation abroad, and where the action "touched and concerned" the United States because it (a) occurred domestically; (b) was committed by a U.S. citizen residing in the United States and occurred, was planned, and managed to a substantial degree in the U.S.; (c) was directed at the United States, and where overt acts in furtherance of a conspiracy took place domestically, even though the complaint was against foreign defendants for injuring foreign plaintiffs in a foreign territory; (d) transpired pursuant to a contract that forged "extensive" and "substantial ties" to the United States, and where managers in the United States approved the conduct and attempted to cover it up after the fact; or (e) impacted a lawful, permanent U.S. resident litigant.

However, as mentioned earlier, we are witnessing contradictory judgments based on case-by-case analysis by the Federal Courts in which we find a different interpretation

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State Law and In State Courts", 3 U.C. *IRVINE L. REV.* 9 (2013) and Paul Hoffman, Schonbrun DeSimone Seplow Harris Hoffman and Harrison LLP, Carey D'Avino, Berger and Montague, P.C., Published on: 31 August 2012, Kiobel litigation: Human rights implications of imposing limitations on Alien Tort Statute will reach beyond Nigeria, say activists, *Esther Kiobel, et al. v. Royal Dutch Petroleum, et al. - Petitioners' Supplemental Reply Brief*, available at: <http://business-humanrights.org/en/pdf-esther-kiobel-et-al-v-royal-dutch-petroleum-et-al-petitioners-supplemental-reply-brief>.

<sup>45</sup> Sarah Cleveland, "After *Kiobel*", *Journal of International Criminal Justice*, 2014, 12, Oxford University press.

<sup>46</sup> Uta Kohl, "Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute", 2014, 63, *International and Comparative Law Quarterly*. British Institute of International and Comparative Law.

<sup>47</sup> Susan Simpson, *Post-Kiobel, the Lower Courts Are Only Pretending to Apply the Presumption Against Extraterritoriality in Alien Tort Statute Cases*, available at <http://viewfrom12.com/2014/07/22/post-kiobel-the-lower-courts-are-only-pretending-to-apply-the-presumption-against-extraterritoriality-in-alien-tort-statute-cases/>; *The Trojan Horse in Kiobel: Royal Dutch Conflation of Prescriptive and Adjudicative Jurisdiction*, available at <http://viewfrom12.com/2012/09/30/the-trojan-horse-in-kiobel-royal-dutch-shells-conflation-of-prescriptive-and-adjudicative-jurisdiction/> (17.12.2014) and *The Presumption against Extraterritoriality vs The U.S.'s Jurisdiction over Invasions of its Neutral Rights: Can Chiquita and Balintulo Be Reconciled with the 18<sup>th</sup> Century Case Law on Extraterritorial Jurisdiction?* available at <http://viewfrom12.com/2014/08/29/the-presumption-against-extraterritoriality-vs-the-u-s-s-jurisdiction-over-invasions-of-its-neutral-rights-can-chiquita-and-balintulo-be-reconciled-with-the-18th-century-case-law-on-extra-ter-ritori/>(17.12.2014).

<sup>48</sup> Jennifer Green *The Rule of Law at a Crossroad: Enforcing Corporate Responsibility in International Investment through the Alien Tort Statute*, *University of Pennsylvania Journal on International Law*, 2014, 35.

<sup>49</sup> Touching and Concerning 'Kiobel': Continuing Implications, [http://www.freshfields.com/uploadedFiles/SiteWide/News\\_Room/Insgight/Freshfields\\_Coleman%20Holland%20NYLJ%20PDF%20Reprint.pdf](http://www.freshfields.com/uploadedFiles/SiteWide/News_Room/Insgight/Freshfields_Coleman%20Holland%20NYLJ%20PDF%20Reprint.pdf).

of the concept of conduct, as the activities or final result, and of the other connecting elements with the U.S. Territory.

#### IV. Federal Court's Debates about the Test

In *Kiobel*, the Supreme Court established that the ATS is subject to the general presumption against extraterritoriality. The Supreme Court judges have found that neither the initial approach adopted by Congress about the ATS nor the final text of the act can help to overcome that presumption, and referring to the Morrison's case: "when a statute gives no clear indication of an extraterritorial application, it has none". However, to mitigate this position, they have created a general rule to determine the scope of application of the ATS, in purely jurisdictional terms, which define the competence of federal courts: the **touch and concern** test that establishes the applicability of the ATS in cases where there is a connection between the conduct and the U.S. Territory.

The Supreme Court, with this test, has decided not to close the doors to all cases based on the ATS but, at the same time, has not clarified the real content of the connections established in it, which generates great uncertainty in the lower courts, which are therefore not rendering homogeneous judgments regarding the elements, features and limits of this test. This suggests that the lack of clarification can lead to the release of U.S. federal courts of the obligation to hear cases involving Human Rights violations which took place in another Sovereign State. In fact, lower courts have been left with the difficult task of interpreting the controlling language in the Court's opinion. What seems clear is that the ATS, as we were used to know it, no longer exists. The federal courts have jurisdiction in a residual way if it is established that the claim has a strong connection with the United States.

ATS cases involving extraterritorial actions are pending in several Circuits, and the cases that lead to the application of the **touch and concern** test are generating significant precedents, including a division among the district and federal courts. Lower Courts, as we have said before, have engaged in fact-intensive analysis. They are used to proving whether the presumption against extraterritoriality has been overcome. In other words, under the Supreme Court's instruction, all Federal Courts need to recognize if they are in front of foreign cubed cases, which prevents overcoming the presumption against extraterritoriality. However, to achieve this result, the courts have been left without a clear pattern by the High Tribunal, which makes it quite difficult to



discern trend lines on this issue. This test has been applied by four Circuits<sup>50</sup> and dozens of District Courts<sup>51</sup> that have disagreed on some specific and central elements about it.

The factors that the courts have used to prove whether this presumption has been overcome are the location of the **violation**, intended as the final result of the conduct; the location of the **relevant conduct**, in this case the Federal Courts disagree on the interpretation of the activities that can be taken as relevant conduct; the links between the claims and the U.S. territory and, finally, some courts have had to look at different factors such as the **nationality** of the defendant or at any **American interests** (economic or diplomatic factors). In fact, some circuits, in their analysis, use some factors such as the **nationality** or **citizenship** of the defendants but, in some cases, they maintain that these elements are not enough to overcome the presumption.

We have analyzed some relevant cases involving Federal Courts and after this analysis we can conclude that the Circuit Courts are divided on the applicability of the **touch and concern** test to the ATS context, and that the Courts that have adopted the *Morrison*'s **focus** test are more likely to rule in favor of U.S. corporations implicated in violations of International Law that occurred overseas. For these Courts, the defendant's corporate citizenship or its presence on US soil is irrelevant for the purposes of determining jurisdiction under the ATS.

In many of the cases heard by the Second, the Fourth, the Ninth and the Eleventh Circuit, it was ruled that the plaintiff did not rebut the presumption against extraterritoriality. Even if they achieve the same result, the dismissal of the claim, the assumptions and the factors taken into account by these courts do not happen to be the same. For this reason, the authors specialized on this Act are critical of this result and hope that the Supreme Court resolves the question without delay.

The Second Circuit dismissed the claims on the basis of an analysis of the location of the **relevant conduct** and it upheld the position of the Supreme Court in *Kiobel*: the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign State; for this reason, using the **focus test** set out in *Morrison*<sup>52</sup>, this Circuit affirms that the **relevant conduct** has to be closely connected

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<sup>50</sup> See the table at page 38

<sup>51</sup> *Ibidem*.

<sup>52</sup> See note 38.

with the territory of the United States. Opposite to this view, the Ninth Circuit has determined not to apply the **focus test** in *Morrison* to cases of ATS litigation because in *Kiobel* the High Tribunal did not explicitly adopted this test. The Ninth Circuit bases its reasoning on the **location of the alleged violation**.

In relation to the factual element of the conduct, we may add that the Supreme Court in *Kiobel* discussed the concepts of **conduct** and **claims**. Without firm guidelines, therefore, the lower courts can and do take opposite paths. Examples of this situation are shown in the decisions of the Fourth and Eleventh Circuit Courts of Appeals in the *Al Shimari*<sup>53</sup> and *Chiquita Brands Intl*<sup>54</sup> cases. In both cases, the defendants are American companies, therefore, in both cases there is an element of connection with the American territory, unlike in *Kiobel*, and they are accused of serious Human Rights violations; however, the way the two courts have applied the **touch and concern** test it is quite different.<sup>55</sup>

In the first one, the Fourth Circuit permitted an ATS suit to proceed against CACI employees who allegedly tortured the plaintiffs in Iraq. In fact, in this case, the Court used an approach where it stated that **claims** should implicate United States territory, but not **conduct**. Furthermore, upon evaluating the circumstances of the case in greater detail, through an analysis of diverse factors, it deduced sufficient contacts with the United States to deactivate the presumption against extraterritoriality and, therefore, retain jurisdiction on the basis of the ATS<sup>56</sup>. The Fourth Circuit gave several reasons supporting its interpretation of the Test in *Kiobel*. As stated by Mohamed Chehab<sup>57</sup>:

The Fourth Circuit highlighted that *Kiobel* “use the phrase “relevant conduct” to frame its touch in concern inquiry” and “broadly stated that the “claims”, rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force”. The court described this choice of language as “suggesting that courts must consider all the facts that give rise to ATS claims, including the parties’ identities and their relationship to the causes of action”.

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<sup>53</sup> *Al Shimari v. Caci*, No. 13-1937, US Court of Appeals for the 4th Circuit (2014). For comments on the decision of the District Court, see, Ellen Katuska, “Al Shimari v. Caci International, Inc.: The application of extraterritorial jurisdiction in the wake of *Kiobel*”, *South Carolina Journal of International Law & Business*. Available at: <http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1099&context=scjilb>.

<sup>54</sup> *Cardona v. Chiquita*, No.12-14898, US Court of Appeals for the 11th Circuit (2014).

<sup>55</sup> See Sarah Altshuler, “United States: Alien Tort Case Developments: Fourth and Eleventh Circuits Apply *Kiobel*’s ‘Touch and Concern’ Standard”, *Mondaq*, 01.08. 2014.

<sup>56</sup> See also Sarah Altshuler., *Alien Tort Development: The Second Circuit Assesses the Appropriate Focus of Jurisdictional Inquiries*, available at <http://www.csrandlelaw.com/2014/10/27/alien-tort-case-development-second-circuit-addresses-the-appropriate-focus-of-jurisdictional-inquiries/> (17.12.2014).

<sup>57</sup> Mohamed Chehab, “Finding uniformity amidst Chaos: A common approach to *Kiobel*’s Touch and Concern Standard”, *University of Detroit Mercy Law Review*, University of Detroit Mercy School of law, 2016, p. 14.

In contrast, in *Chiquita Brands*, a claim based on material support given to a group that calls itself the United Self-Defense Forces of Colombia, a terrorist organization, now disbanded, that is connected to thousands of crimes and victims<sup>58</sup>, the Eleventh Circuit rejects the need to carry out a detailed analysis of the circumstances, focusing instead on the foreign nature of the **conduct**, intended as the final result, which leads to the blanket application of the aforementioned presumption and, therefore, to a denial of jurisdiction under ATS. It is also noteworthy, as Judge Martin wrote in her dissenting opinion, how the Court refused to consider the many components of the aforementioned conduct that could be associated with a myriad of decisions taken at Chiquita's principal headquarters in the US, as well as the fact that, in 2007, the company admitted to federal authorities that it had supported the aforementioned terrorist organization, agreeing to pay a 25 million dollar fine for that support.

The Eleventh Circuit has reached similar conclusions in the case *Cardona v. Chiquita Brands International, Inc*<sup>59</sup> and in *Baloco v. Drummond Company*,<sup>60</sup> in which the Court reaffirmed a mechanical and restrictive application of the test of the Supreme Court in *Kiobel*<sup>61</sup>.

## V. Post-*Kiobel* Consequences

### 1.- The future application of the ATCA *ratione personae*

The *Kiobel* decision leaves many problems unresolved, and the Supreme Court will have to address, in the coming years, some aspects that could influence in a relevant way the future application of ATS, if something is left of this legal instrument after *Kiobel*. In fact:

For cases after *Kiobel*, any claim brought under the ATS can only be brought in United States courts if they “touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application.” This requirement is arguably the most controversial language of the opinion. *Kiobel's* holding begs the questions of what “touch and concern” means, and what constitutes sufficient force. Justice Kennedy admits the Court's decision left “open a number of

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<sup>58</sup> See Francisco Javier Zamora Cabot La Responsabilidad de las Empresas Multinacionales, *supra* note 4.

<sup>59</sup> 760 F.3d 1185 (11th Cir. 2014).

<sup>60</sup> 767 F.3d 1229 (2014).

<sup>61</sup> More information in Steven Cohen, “How Chiquita Bananas Undermined The Global War on Terror”, *Think Progress*, 2014. Available in: <http://thinkprogress.org/world/2014/08/02/3466915/chiquita-colombia-ruling/>.

significant questions” pertaining to the reach and interpretation of the Alien Tort Statute<sup>62</sup>.

One of the issues we want to emphasize in this paper is the Post-*Kiobel* applicability of the ATS *ratione personae*. It is unclear whether the test should be applied in cases of criminal conducts perpetrated by individuals or not, and if the elements, characteristics and limitations of this test will be the same that are already established for multinational companies.

As we saw in Section IV, lower courts disagree about the requirements needed to overcome the presumption against extraterritoriality and, for example, the fact whether the corporate citizenship of the U.S. corporations can displace it in cases where the claim involves conducts that took place out of the U.S. or not. Because of this, we have to ask if this status, the citizenship, if referred to individuals, would be enough to displace this presumption. The answer seems clear to us: in most of the cases, lower courts are applying the same standard established in *Kiobel* and, therefore, they are dismissing all cases where the conduct is verified **abroad**.

In cases where the plaintiff and the defendants are foreign citizens and the alleged conduct is exclusively a “foreign” conduct, the Federal Courts have decided to dismiss the cases because, in their opinion, they are *foreign cubed cases*. Examples of this are the cases that involve individuals from different nationalities alleging violations of the Law of Nations verified outside the U.S. The first case that we can mention is *Hua Chen, et al v. Honghui Shi*<sup>63</sup>, in which the plaintiff alleged that they were persecuted and tortured on account of their adherence to the *Falun Gong* movement, and they sued under the ATS and the TVPA. In this case, the Court affirmed not to have jurisdiction over the defendant because the **claim** had no connection with the U.S. Territory. In the same way, the second case in which the United States District Court of Connecticut reaffirmed the existence of a general rule after *Kiobel* is *Chen Gang v. Zhao Zhizhen*,<sup>64</sup> This case, brought before that Court, can be defined as a foreign cubed case that involves a foreign defendant, a foreign plaintiff, and exclusively a foreign conduct. In fact, in this case all parties were from China and the conducts were verified in that Country.

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<sup>62</sup> Ikegbunam, Chinyere Kimberly (2015) “Touching the Concerns” of *Kiobel*: Corporate Liability and Jurisdictional Remedies in Response to *Kiobel vs. Royal Dutch Petroleum*,” *American Indian Law Review*: Vol. 39: Iss. 1, Article 4. Available at: <http://digitalcommons.law.ou.edu/ailr/vol39/iss1/4>.

<sup>63</sup> No. 09 Civ. 8920 (2013).

<sup>64</sup> 04-cv-1146, 2013 WL 5313411, at \*3 (D. Conn. Sept. 20, 2013).

The third case is *Mamani, et al. v. Sánchez de Lozada / Mamani, et al. v. Sánchez Berzaín*<sup>65</sup>, a federal lawsuit that started in 2007 against the former president of Bolivia, Gonzalo Sánchez de Lozada and against the former Minister of Defense, Carlos Sánchez Berzaín. The suit seeks compensatory damages under the ATS and the TVPA, for extrajudicial killings, crimes against Humanity, and wrongful death and for their roles in the massacre of unarmed civilians, including children. The case is still pending before the Eleventh Circuit Court of Appeals. In 2008, the Bolivian government waived immunity for the defendants and the U.S. Government accepted it. On November 2009, the District Court allowed claims for crimes against Humanity, extrajudicial killings, and wrongful death to move forward against the defendants. On August 29, 2011, the Appellate Court rejected the immunity and political question arguments, but dismissed the complaint for failure to state a claim under the ATS. After that, the Plaintiffs presented a motion to reopen the case on June 6, 2013. On May 20, 2014, Judge James Cohn dismissed the new claims under the Alien Tort Statute but held that the claims under the Torture Victim Protection Act could proceed because the claimants had sufficiently alleged the facts and that defendants were responsible for the killings.

The Fourth one is *Warfaa v. Ali*,<sup>66</sup> where the Fourth Circuit affirmed the dismissal of Somali's Alien Tort Statute Claims against a former Colonel in the Somali National Army, Yusuf Ali, who served under the military dictatorship of Mohamed Siad Barre<sup>67</sup>. In this case, the plaintiff alleges violations of international law under the Alien Tort Claims Act, crimes against Humanity and war crimes, arbitrary detention, extrajudicial killing, and in two different claims under the Torture Victims Protection Act, it makes claims of torture and other cruel, inhuman or degrading treatments. Relying on *Kiobel* test of **touch and concern**, the District Court dismissed Warfaa's ATS claims and the Court of Appeal for the Fourth Circuit affirmed the dismissal because all of Ali's alleged conduct had occurred in Somalia. However, this Court did not dismiss the two claims based on the TVPA.

The fifth case is *Odilla Mutaka Mwani, et al v. Usama Bin Laden and al Qaeda*<sup>68</sup>, in which the Justices of the United States District Court for the District of Columbia were

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<sup>65</sup> No. 07-22459-CV-AJ, 08-21063-CV-AJ, more information in: <http://www.leagle.com/decision/In%20FDCO%2020140521B29/Mamani%20v.%20Berzain>

<sup>66</sup> *Warfaa v. Ali*, No. 14-1810 (4th Cir. 2016).

<sup>67</sup> On this case, more information in: <https://www.lawfareblog.com/warfaa-v-ali-fourth-circuit-affirms-dismissal-somalis-alien-tort-statute-claims> and <http://law.justia.com/cases/federal/appellate-courts/ca4/14-1810/14-1810-2016-02-01.html> .

<sup>68</sup> No. 99-125(2013).

unanimous in the result but differed on their reasoning. They held that the ATS could not provide jurisdiction for foreign plaintiffs seeking redress in United States courts for conduct that had occurred on foreign soil.

But what happens if the Court is able to find a minimum connection between the **claim** and the U.S. Territory, in cases in which the defendant is a U.S. citizen or a permanent resident? This connection is the **residence** and **citizenship**. Nevertheless, relying on the statutory canon against the extraterritorial application of federal statutes, the Federal Courts are divided on this point.

As we have shown in the above sections, in cases involving the liability of multinational corporations, Federal Courts indicated, in most of the cases, that this connection is insufficient to displace the presumption against extraterritoriality applied to claims brought under the ATS, if the conduct is verified outside the U.S. territory. These Courts based their reasoning solely on **extraterritorial activities**. If the conduct takes place entirely outside the United States, the presumption cannot be overcome by the residence or citizenship of the defendants.

In cases of individual's responsibilities, where the defendants are U.S. citizens or permanent residents, Federal Courts are divided. Some Tribunals affirmed their jurisdiction because the presumption against the extraterritorial application of the ATS is then overcome. In the case *Sexual Minorities Uganda v. Lively*<sup>69</sup>, brought by an Uganda organization against a U.S. **citizen**, alleging crimes against Humanity based upon the persecution of persons because of their sexual orientation and/or gender identity, the District Court of Massachusetts stated that the presumption against extraterritoriality was displaced because the defendant was a U.S. citizen and a U.S. resident, and a substantial part of his alleged wrongful conduct had occurred in the United States. The same result took place in *Ahmed v. Magan*<sup>70</sup>, where the plaintiff alleged torture; cruel, inhuman and degrading treatment; and arbitrary detention. The civil action was brought under the ATS and the TVPA. In this case, the Court held that, because the defendant was a **permanent resident** of the United States, the presumption against extraterritoriality set forth in *Kiobel* was overcome. On August 2013, the Court awarded Ahmed \$5,000,000 in compensatory damages and \$10,000,000 in punitive damages<sup>71</sup>.

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<sup>69</sup> *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013).

<sup>70</sup> No 2:10-cv-00342 (S.D. Ohio Aug 20, 2013).

<sup>71</sup> About this case, more information at: <http://www.cja.org/section.php?id=422>.



Contrary to this line of reasoning, in the cases *Jawad v. Gates*<sup>72</sup> and *Mwangi v. Bush*<sup>73</sup> the Courts held, in the first one, the lack of subject matter jurisdiction, and in the second one, that the plaintiff had failed under the *Kiobel* doctrine, given that the presumption against extraterritoriality was not overcome, and because the **conduct** had occurred outside the United States.

In *Jawad v. Gates*, the plaintiff was arrested in Kabul in December 2002 by Afghan security forces who abused and threatened him. Jawad was transferred to U.S. custody, where he was humiliated and tortured before being transferred to Guantanamo in 2003. However, due to the lack of evidence, in 2009 he was released and sent back to Afghanistan. In 2014, Jawad decided to bring six claims in the District Court for the District of Columbia under the ATCA, in connection with the TVPA and the Federal Tort Claims Act. In 2015, the District Court dismissed all the claims for lack of **subject matter jurisdiction**. Jawad is now appealing and the oral argument is scheduled for April 2016.

In *Mwangi v. Bush*, the plaintiff is a resident of Kentucky who in 2003 came to the United States and in 2008 became a naturalized citizen. He proceeded against the former President of the United States, George Bush, his family and the MIO University in Kenya and alleged violations of basic Human Rights perpetrated in 1993-1994. In this civil case, without entering into the merits of the case, the link between the claim and the tribunal exists. However, this Court based its reasoning in the **location of the violation**, a holding where the plaintiff failed under the *Kiobel*'s precedent to demonstrate that the presumption was overcome, because the **conduct** occurred outside the United States.

## 2.- Implications for the TVPA

In the coming years, the Supreme Court will also have to solve other problems. In fact, there are other questions following the contentious creation of this test by the Federal Courts. For example, what happens to the TVPA? The question is relevant in terms of the two norms, the ATCA and the TVPA, because they have been enacted at different historical moments and with different purposes, and at least in relation to the second one, it seems clear that the intent of the legislator was to give jurisdiction to Federal Courts for cases that take place abroad. Besides, it should be recalled that the Supreme

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<sup>72</sup> No. 14-00811. More information on this case in: Helen Klein, "Jawad v. Gates: Former Guantanamo Detainee Seeks Redress Under the Alien Tort Statute", in: <https://www.lawfareblog.com/jawad-v-gates-former-guantanamo-detainee-seeks-redress-under-alien-tort-statute>.

<sup>73</sup> No. 5: 12-373-KKC (2013).

Court in *Kiobel* did not deal with the conditions of the applicability of the TVPA. However, Federal Courts, in some cases, are extending the standard created in *Kiobel* for the purposes of ATCA, also to the TVPA, with the result of getting rid of all cases where the conduct takes place outside the United States.

In practice, the **touch and concern test** is also unsettled as regards the TVPA. As it was recalled by Justice Kennedy's opinion in *Kiobel*, with the TVPA the Congress created a detailed statutory scheme to address some Human Rights abuses committed abroad, unlike in the case of the ATCA<sup>74</sup>. To this we can add, as stated by Chehab<sup>75</sup> in his article on "finding uniformity amidst Chaos", that there are some differences between the TVPA and the ATCA:

First, while the ATS is merely a jurisdiction-conferring statute, the TVPA provides both jurisdiction and a cause of action for "torture" and "extrajudicial killing". Second, the TVPA is also broader than the ATS in that it permits claims brought by both aliens and United States citizens. Third, the TVPA is also narrower in other respects, only permitting suit against persons acting under the authority or color of law. Fourth, persons must also be acting under the authority of color of law of a foreign nation [...]. Finally, the TVPA also contains provisions governing the exhaustion of local remedies, tolling, and a ten-year statute of limitations.

In any case, we must say that it is not definitely settled that the TVPA may be applied in cases involving multinational companies<sup>76</sup>. The opposite opinion was followed by the Eastern District Court of Louisiana, in *Beanal v. Freeport-McMoRan*<sup>77</sup> that was the first TVPA case to consider corporate liability. In this case, an Indonesian tribesman brought suit under the ATS and the TVPA against an American-owned mining subsidiary operating in Indonesia, alleging Human Rights abuses that included torture and extrajudicial killings. That position was confirmed, *obiter dicta*, by the Supreme Court, in the case *Mohamad v. Palestinian Authority*<sup>78</sup>, stating that the TVPA does not apply to organizations, but that corporate officers could be subjected to its rules<sup>79</sup>. The Court

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<sup>74</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1669 (Kennedy, J., concurring)

<sup>75</sup> Mohamed Chehab, *supra* note: 57 p.5.

<sup>76</sup> As stated by Professor Andrea Bucher, the TVPA requires intervention or delegation of public authority position confirmed by the Supreme Court April 18, 2012 in *Mohamad v. Palestinian Authority* 132 S. Ct 1702 (2012): "A la différence de l'ATS, l'action est également ouverte aux ressortissants américains. Elle n'est cependant possible qu'à l'encontre des auteurs de tortures ou d'exécutions extrajudiciaires, ceux-ci pouvant être de toute nationalité. Ces actes doivent avoir été perpétrés par ou sous l'ordre d'une autorité étrangère. L'auteur doit être un individu".

<sup>77</sup> 197 F.3d 161 (5th Cir. 1999).

<sup>78</sup> No. 11-88 (2012).

<sup>79</sup> *Mohamad v. Palestinian Authority et al. Certiorari* to the United States Court of Appeals for the district of Columbia Circuit, in <http://www.supremecourt.gov/opinions/11pdf/11-88.pdf> More information about

based its decision on the definition of *individual* in the TVPA, taking a highly textual approach and a strictly literal interpretation of this provision:

Before a word will be assumed to have a meaning broader than or different from its ordinary meaning, Congress must give some indication that it intended such a result. There are no such indications in the TVPA. To the contrary, the statutory context confirms that Congress in the Act created a cause of action against natural persons alone. The Act's liability provision uses the word "individual" five times in the same sentence: once to refer to the perpetrator and four times to refer to the victim. See TVPA §2(a). Since only a natural person can be a victim of torture or extrajudicial killing, it is difficult to conclude that Congress used "individual" four times in the same sentence to refer to a natural person and once to refer to a natural person and any nonsovereign organization. In addition, the TVPA holds perpetrators liable for extrajudicial killing to "any person who may be a claimant in an action for wrongful death." See TVPA §2(a)(2). "Persons" often has a broader meaning in the law than "individual," and frequently includes non-natural persons. Construing "individual" in the Act to encompass solely natural persons credits Congress' use of disparate terms<sup>80</sup>.

We can see that there are only a few cases where the Federal Courts have extended the application of the TVPA to cases involving Human Rights violations by corporations, by adopting the meaning that is given, in other Acts, to the concept of **person**. In fact: "In determining the meaning of any Act of Congress, unless the context indicates otherwise [...] the word 'Person' [...] includes corporations, companies, and associations"<sup>81</sup>. An example of that is the Eleventh Circuit in the case of *Sinaltrainal v. Coca-Cola*<sup>82</sup>, where the Court had interpreted the word *individual*, included in the TVPA, as also applicable to companies<sup>83</sup>; the court recognized that Congress does not appear to have had the intent of excluding private corporations from liability under the TVPA. Nevertheless, this interpretation has not been free of criticisms<sup>84</sup> and has not been followed by most of the federal courts<sup>85</sup>. As Martin explains:

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the case: <http://www.csrandthelaw.com/2012/04/23/u-s-supreme-court-holds-that-the-tvpa-does-not-apply-to-organizations-but-corporate-officers-are-still-fair-game/>.

<sup>80</sup> See Certiorari, p.2.

<sup>81</sup> 1 U.S. Code, Title 1, Chapter 1, § 1 - Words denoting number, gender, and so forth, <https://www.law.cornell.edu/uscode/text/1/1>. In this way The Supreme Court of the United State, *Clinton v. City of N.Y.*, 524 U.S. 417 (1998) (holding that "individual" is applicable to corporations); In re Goodman, 991 F.2d 613, 619 (Cal. 1993) (holding that "individual" cannot encompass corporations.

<sup>82</sup> 578 F.3d 1252, 1263–64 (2009).

<sup>83</sup> The United States Court of Appeals for the Eleventh Circuit, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009).

<sup>84</sup> On 2012 the Supreme Court in the case *Bowoto v. Chevron*, 10-1536, 132 SCt1968, denied Certiorari due the textual approach in *Mohamad v. Palestian Authority*.

<sup>85</sup> The United States District Court for the Northern District of California, *United States, Bowoto v. Chevron Corporation, et al.*, --- F.3d - --, 2010 WL 3516437 (C.A. 9 (Cal.)). In that judgment the Court stated that: "Even assuming the TVPA permits some form of vicarious liability, the text limits such

Courts have relied upon case law to interpret “individual” to include corporations and to exclude corporations. Courts throughout American jurisprudence have interpreted “individual” in varying ways with respect to corporations. As a result, the word “individual” itself is not determinative of whether corporations are within the scope of the TVPA. It should, though, be very persuasive that the Supreme Court has held “individual” as applicable to corporations in other areas of the law. [...] Since there is no clear “ordinary usage,” courts must then look to the legislative history, public policy, and other contexts surrounding the statute in order to interpret “individual” in a way that avoids unjust results. In the context of the Torture Victim Protection Act, this would lead courts to interpret “individual” as applicable to corporations [...]. Interpreting the Torture Victim Protection Act any other way than to hold corporations liable for their actions abroad is to limit victims’ access to remedies and to relieve corporations of the weight of international and domestic law, and allows corporations to continue to cause destruction in the lives of workers and citizens<sup>86</sup>.

In terms of global justice, we need to evaluate if the strictly literal interpretation of the Supreme Court, in the cases mentioned above, is compatible with the international obligations ratified by the United States and what was the real and original intention of the US Congress for this act. As stated by Brad Emmons:

The intertwined history of the ATS and the TVPA demonstrates the congressional desire that some forum or foro exist for the litigation of civil actions brought against any entity that engages in torture or extrajudicial killings. However, the ambiguities in the existing text of the TVPA have allowed courts to create a circuit split that threatens to eliminate any and all avenues for recovering damages from corporate wrongdoers. Because this foreclosure of remedies would be contrary to congressional purpose and public policy the Supreme Court should recognize that nonnatural persons are liable under the TVPA [...]. Only then can we truly say that the United States is doing everything within its power to live up to its international obligations, provide appropriate forms of redress for the most horrendous abuses, and expand the rule of law and respect for human rights across the globe<sup>87</sup>.

### 3.- On the creation of a Universal Jurisdiction Norm in civil matters

Surely it is interesting to assess the impact of this test on pending trials before federal courts and future claims based on this type of jurisdiction. At the same time, we must look at the international consequences that could negatively influence the development

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liability to individuals, meaning in this statute, natural persons. The language of the statute thus does not permit corporate liability under any theory”.

<sup>86</sup> Martin, Emily, “Corporate Liability under the Torture Victim Protection Act”, *Northern Illinois University Law Review*, vol. 31/2010, pp. 175-209. page 209,

<sup>87</sup> Brad Emmon, “Tortured Language: “Individuals,” Corporate Liability, and the Torture Victim Protection Act”, *MINNESOTA LAW REVIEW*, P.710, in [http://www.minnesotalawreview.org/wp-content/uploads/2012/02/Emmons\\_Rev\\_MLR.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2012/02/Emmons_Rev_MLR.pdf)

of the principle of universal jurisdiction in civil matters. In fact, in recent years, the idea is emerging that even in civil matters there could exist a universal jurisdiction principle as a counterpart to the universal criminal jurisdiction principle that is based solely on the nature of the crime committed<sup>88</sup>.

The reasoning behind this type of jurisdiction is found in the fact that when it comes to such serious crimes that offend the very concept of Humanity and in case they stay into oblivion by the State in which the acts were verified, it is necessary to implement judicial and extrajudicial instruments to compensate the harm suffered by the victims, although we are in situations in which the crimes are committed abroad and against foreigners. Furthermore, it is important to say that the exercise of the principle of universal jurisdiction in civil matters is still being discussed at the international level and that its future is uncertain because of the difficulties to implement it. There are no rules of international law obliging States to exercise this type of jurisdiction in cases of violations of Human Rights norms<sup>89</sup>.

The Institute of International Law has taken a clear position on this matter: in its session of August 30, 2015, Professor Andreas Bucher, as Reporter, put forward a resolution on the measures that States should create to facilitate the reparation of harm resulting from international crimes and thus facilitate the implementation of universal jurisdiction in civil proceedings<sup>90</sup>. In the Report on civil universal jurisdiction for international crimes, Bucher has analyzed the Alien Tort Statute and its importance for the reparation of victims, but also recognizes that the current position of the Supreme Court in *Kiobel* is opposed to the creation of a universal jurisdiction in civil matters<sup>91</sup>.

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<sup>88</sup> On this point, Donovan, Donald Francis & Roberts, Anthea, "The Emerging Recognition of Universal Civil Jurisdiction", *American Journal of International Law*, Vol. 100, 2006, pp. 142-163.

<sup>89</sup> Antoni Pigrau Solé: «El derecho internacional no prevé expresamente ninguna forma de jurisdicción civil universal, ni para autorizarla ni para prohibirla», *supra* note 21, p. 215.

<sup>90</sup> More Information about the resolution of the Institute of International Law at: [http://www.andreasbucher-law.ch/images/stories/res\\_iil\\_en\\_universal\\_civil\\_jurisdiction.pdf](http://www.andreasbucher-law.ch/images/stories/res_iil_en_universal_civil_jurisdiction.pdf). See also the Course of Professor Bucher at the Hague Academy of International Law, where he explained that: «L'impression a pu se répandre que la Cour suprême se serait définitivement opposée à l'idée d'une compétence universelle en matière civile des tribunaux américains, même dans le domaine sensible des *human rights litigations*. A y regarder de plus près, une telle interprétation va au-delà de l'objet de l'arrêt *Kiobel*. Certes, la Cour suprême n'a fourni aucune « pratique des États » ni aucune *opinio juris* en faveur d'une telle compétence en termes de droit international coutumier. Cependant, les juges ne se sont pas exprimés non plus dans le sens opposé, puisque l'on ne trouve pas dans leurs opinions l'avis que le droit international ne permettrait pas l'acceptation d'une telle compétence universelle, par principe ou au regard des circonstances de l'espèce. En fait, les juges ne sont tout simplement pas parvenus à ce point d'un raisonnement auquel on aurait pu penser, puisque leur opinion unanime était que le Congrès n'avait pas l'intention d'attribuer à l'ATS un champ d'application aussi étendu qu'il aurait pu comprendre le cas litigieux».

<sup>91</sup> *Institut de droit international Commission I* La compétence universelle civile en matière de reparation pour crimes internationaux Universal civil jurisdiction with regard to reparation for international crimes

Due to the absence of an international treaty, it is necessary to look at other sources of International Law, in order to justify the existence and the elements of this principle, as it is the case of International customary law. The creation of a customary rule is accompanied by a rather slow process in which all states participate, in fact the practice and the *opinio juris* of States influence the creation, existence and the conditions of international customary norms, as it might be the principle of universal jurisdiction. A praxis contrary to this process can impact heavily on the generation of international rules.

If we think of the effects that praxis has, regarding the modification and creation of customary rules that can lead to the creation of conventional rules on a particular matter, it is easy to understand how the negative praxis can crystallize in a particular historical moment, the conviction (the *opinio juris*) of States on the requirements and the application of certain international standards. In the case of universal jurisdiction, the *opinio juris* about the need to prosecute crimes wherever they are committed and whatever is the nationality of the victims and the perpetrator, began to be shaken some years ago in criminal matters<sup>92</sup>, and now it is being endangered by state practice, such as that of the United States, demonstrating the unwillingness to establish a principle of universal jurisdiction in civil proceedings. In *Kiobel*, although the issue of universal jurisdiction itself was not addressed, the judges have established that the Congress, at the time of establishing the ATS, did not understand it as a mechanism of universal jurisdiction:

ATS litigation has the potential to play an important role in the development and enforcement of customary international law. Decisions of national courts can constitute state practice and evidence of *opinio juris*, the two

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Rapport par Andreas Bucher, p. 17. [http://www.andreasbucher-law.ch/images/stories/rapport\\_idi\\_comm\\_i\\_2015\\_final.pdf](http://www.andreasbucher-law.ch/images/stories/rapport_idi_comm_i_2015_final.pdf).

<sup>92</sup>See José Ricardo Prada Solaesa, “La justicia universal, pasado, presente y futuro”, en *Tiempo de Paz* No 112, Movimiento por la Paz, el Desarme y la Libertad, Madrid, 2014, pp 19-31. Regarding the Spanish controvertial reform: Rosa Ana Alija Fernández, “Crónica de una muerte anunciada: análisis de la Proposición de la Ley Orgánica para la reforma de la justicia universal en España”, *Blog de la Revista Catalana de Dret Público*, 05/02/2014, in <http://blocs.gencat.cat/blocs/AppPHP/eapc-rcdp/2014/02/05/cronica-de-una-muerte-anunciada-analisis-de-la-proposicion-de-ley-organica-para-la-reforma-de-la-justicia-universal-en-espana-rosa-ana-alija>; José Elías Esteve Moltó, “La Ley Orgánica 1/2014 de reforma de la jurisdicción universal: entre el progresivo avance de la globalización comercial y de la deuda y la no injerencia en los asuntos internos de China”, *Anuario Español de Derecho Internacional*, n.30, Universidad de Navarra, 2014, pp.139-201, And “Crónica de la impunidad anunciada”, *el país*, 2014, in: <http://elpais.com/autor/jose-elias-esteve-molto/a/>; Antoni Pigrau Solé, “Cap a la supressión de la jurisdicción universal a España: un avis sobre el futur dels drets humans en un món que ca a perdent els principis d'humanitat”, *Bloc de l'ICIP*, 2014, in: <http://blocs.gencat.cat/blocs/AppPHP/icip/>); Angel Sánchez Legido, “El fin del modelo español de jurisdicción universal”, *Revista electrónica de estudios internacionales*, 2014, No 27, in: <http://dialnet.unirioja.es/servlet/articulo?codigo=4738875>

requirements of customary international law. Thus, ATS cases are sometimes cited to show a customary international law norm of “civil universal jurisdiction”—which purportedly gives nations the power to apply their own law (known as “prescriptive jurisdiction”) to extraterritorial conduct of “universal concern” such as piracy and the slave trade. [...]The Kiobel opinions themselves thus provided no state practice or *opinio juris* evidencing a customary international law norm of universal civil jurisdiction, but they also did not provide evidence against such jurisdiction. That is, none of the justices reasoned that international law does not permit universal civil jurisdiction. Instead, they did not reach this question, because they unanimously decided that Congress did not intend for this statute to extend that far.<sup>93</sup>

In the same way, we must also ask ourselves what would be the impact of this test on the proposal to establish a *forum necessitatis*, advanced by some States, considering the US experience of the ATS<sup>94</sup>, as an exceptional mechanism created to prevent the growing impunity that, in particular, multinational corporations seem to enjoy. Such forum would allow States to intervene in an *actio popularis*<sup>95</sup> manner, fulfilling their international obligations in defense of the fundamental interests of the International Community and without evading the legitimate expectations of other subjects, i.e. their own citizens, which are generated by the ratified international treaties on Human Rights<sup>96</sup>. In fact, the different forms of jurisdiction over international torts, allowing compensation for harm sustained, would give rise to a *forum necessitatis*, from a civil perspective, in the case of international torts committed by individuals or multinational companies. A good example of this seemed to be, for a long time, the ATCA and the TVPA.

#### 4.- Consequences in other areas

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<sup>93</sup> Agora: reflections on Kiobel, see note 39, pp. 618-619.

<sup>94</sup> For more information about the *Forum Necessitatis* in international law see: Marullo, Access to Justice and *Forum Necessitatis*, *supra* note 12.

<sup>95</sup> *Ibidem* (2015: 3): “It was Roman law which first outlined the concept of *actio popularis* as a public action in defense of public interest. By analogy, this concept has been taken and used by International Law for the protection of the fundamental norms of the international community whose violation threatens peace and international security. The International Court of Justice defined the *actio popularis* as: “the right resident in any member of a community to take legal action in vindication of a public interest”[ International Court of Justice, South West Africa (Liberia v. South Africa)]. Voeffray gives a more detailed definition of this institution through which the *actio popularis* is a legal action that every member of a community can use in order to protect fully or partially common interest<sup>6</sup>. So, if we transfer this concept at the international level, where the main actors are the States, the latter should be enabled to defend a totally or partially common interest of the International Community as a whole, such as ensuring access to justice to victims of gross violations of human rights and which have appropriate mechanisms”.

<sup>96</sup> See also Beth Stephens, *supra* note 8, p. 274 “ATS human rights litigation represents a modest opportunity for a small number of victims and survivors of gross human rights abuses to seek a modicum of justice. The corporate campaign against such litigation should be recognized as yet another effort by multinational corporations to resist efforts to level the playing field of international justice”.



The *Kiobel* presumption against extraterritoriality is having effects even outside the sphere of Human Rights violations, *stricto sensu*. In fact, we should not underestimate the issue of extraterritoriality as it seems to be currently used as a justification to dismiss cases, even where the Plaintiffs, the Defendants, or both, are U.S. Citizens and where the conduct, in part or in whole, was verified in the United States, but the injuries occurred abroad. Examples of this are the next cases: *Hernandez v United States*<sup>97</sup>, *Mehal v. Higgenbotham*<sup>98</sup> and *OBB Personenverkehr v. Sachs*<sup>99</sup>.

The first case involves a claim for constitutional protection for an illicit action that was committed outside the United States: the shooting to death of a Mexican boy<sup>100</sup>. The United States Border Patrol Agent Jesus Mesa, Jr. standing on the United States territory, allegedly shot and killed Sergio Adrian Hernandez, who was in that moment on Mexican territory. The incident in this case is not an isolated act. Similar cases are registered and are currently being analyzed by Mexican and US Courts at national level and by the Inter-American Court of Human Rights. Hernandez's family filed eleven claims against the United States, the border patrol agent and the agent's supervisors. The first seven claims under the Federal Tort Claims Act, the next two claims under the Fourth and Fifth Amendment rights, the tenth claim against Agent Mesa for violating Hernandez's Fourth and Fifth Amendment rights through the use of excessive deadly force, and the eleventh claim, under the Alien Tort Statute, alleging that Hernandez was shot in contravention of international treaties, conventions and the Laws of Nations.

In 2014, the District Court dismissed all claims, notwithstanding the fact that the conduct had occurred on US territory or that the perpetrator had been a US agent. The Fifth Circuit Court of Appeal<sup>101</sup> affirmed the judgment in favor of the United States and the supervisors, but reversed the judgment as regards the border patrol agent. In relation to the Alien Tort Statute, the Appellants affirmed that the United States had violated the international prohibition against extrajudicial killings. On this point, the District Court established that the ATS has been interpreted as a jurisdictional statute and it has not

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<sup>97</sup> 785 F. 3d 117 (2015).

<sup>98</sup> 804 F.3d 417 (2015).

<sup>99</sup> 13–1067, 577 U.S (2015).

<sup>100</sup> See Symeon C. Symeonides, Choice of Law in the American Courts in 2014 and 2015. The American Journal of Comparative Law (2015) and (2016), *supra* note 37.

<sup>101</sup> 757 F3d 249 (5th Cir. 2014).

been held to imply any waiver of sovereign immunity and for this reason it dismissed the case<sup>102</sup>

In some of those claims, the District Court raised important issues concerning the applicability of the Fifth Amendment and the Fourth Amendment to the issue of extraterritorially. The Court found two elements that can contribute to extend the application of their protection outside the US territory: The first relevant factor is the citizenship and status of the claimant. The second is the nature of the sites where the alleged violation had occurred. In this concrete case, the Court examined the level of control of the United States outside the U.S. soil. Based on this analysis, the Court dismissed the case. Recently, the Mexican Government submitted a brief as *amicus curiae*, in support of the petition for a writ of *certiorari*, in which it stated that there are no practical or political difficulties in applying U.S. law regardless of which side of the border Sergio Hernández, the victim, was on.

The second case, *Mehal v. Higgenbotham*, is about a U.S. citizen secretly tortured by FBI ¿FBI o CIA? agents in African countries. The plaintiff alleged violations of his rights under the Fourth Amendment, and even in this case, the District Court dismissed the case stating that it is dubious whether the protection under the Fourth Amendment could be extended extraterritorially. The decision is clear: no civil remedies for U.S. citizens tortured abroad by national agents. In this case, there are specific connecting elements between the conducts and the *forum* State, as the nationality of the victim or that of the perpetrator, the fact that the victim is actually in the US territory and, finally, but not less important, the fact that in the countries where the crimes occurred, access to justice in conditions of fear would be most unlikely.

We can also emphasize that such an interpretation of extraterritoriality leads to an inexplicable result: no civil remedies, no protection in the US territory, if the conduct constituting the illicit action occurred abroad. We are making reference to the *OBB Personenverkehr v. Sachs* case, in which the respondent is Carol Sachs, a U.S. citizen and a resident of California, who purchased in the United States a Eurail pass to travel in Europe. When she was in Innsbruck, Austria, she suffered traumatic personal injuries after falling onto the tracks of a public train station. Due to her medical and physical conditions, she brought the case before a US Court to determine the civil

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<sup>102</sup> Even assuming that to be the case, the Appellants still must show that the United States has waived sovereign immunity for this claim. Other courts to address this issue have held that the ATS does not imply any waiver of sovereign immunity. See, e.g., *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011).

responsibilities for the injuries. She argued that the main conduct had occurred in the territory of the United States, when she bought a Eurail pass in an Austrian tourism office located in California. The respondent argued that, based on the “Act’s commercial activity exception”, a foreign State does not enjoy immunity when “the action is based upon a commercial activity carried on in the United States by the foreign State.” §1605(a)(2).<sup>1</sup>

On 2011, the District Court of California concluded that Sachs’s suit did not fall within the Act’s commercial activity and, therefore, granted OBB’s motion to dismiss. On 2012, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed the Lower Court’s dismissal. On rehearing *en banc*, the Ninth Circuit held that the sale of the Eurail pass provided an element that connected the **claim** to the U.S. Territory. However, under the Supreme Court’s analysis, the most important element was the **conduct**, understanding it as the tragic final event that constituted the gravamen of Sachs’s suit and, due to the fact that the **conduct** had occurred completely abroad, in Austria, the place where the ticket had been purchased was not relevant<sup>103</sup>.

We can conclude this section by using the words of Altman<sup>104</sup>: “if the United States makes its courts unavailable for claims against its citizens, for actions taken within a foreign country, the United States may be sending the other nations a message of its acquiescence in the alleged violations”.

## VI. Final Reflections

Corporate responsibility for the violation of Human Rights is a subject of interest from multiple perspectives, both nationally and internationally, due to its important consequences for Humanity. At State level, we can see how this issue is being subjected to analysis from the legislative and judicial perspective, as regards the creation of judicial mechanisms to enable victims to access the courts and assert their claims. In our previous works we analyzed the contribution of a U.S. norm, the *Alien Tort Claims Act*, to the protection of Human Rights and to the reparation of harm for victims. Since the well-known case *Filártiga*, in 1980, the doors for the victims of these internationally illicit acts seemed to be opening; they have been able to file civil lawsuits against individuals and companies involved in such acts, before Federal Courts. The ATCA

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<sup>103</sup> On this point See Francisco Javier Zamora Cabot, “Acceso de las víctimas a la justicia y conductas en el extranjero: El Tribunal Supremo de los Estados Unidos da otra vuelta de tuerca en el caso *OBB Personenverkehr v. Sachs*, sobre inmunidad de jurisdicción” (forthcoming).

<sup>104</sup> Ranon Altman, Extraterritorial application of the Alien Tort Statute after *Kiobel*, *University of Miami Law Review*, 01/01/2016, University of Miami Law School. P. 123, pp11-146.

provided a *forum necessitatis*<sup>105</sup> for victims of such acts and thus they have guaranteed access to justice for serious Human Rights violations.

Now, with this paper, we try to focus our attention on the characteristics and requirements for the implementation of the ATS and on the most relevant recent cases considered by Federal Courts on the basis of this Act. This paper has also evaluated this type of jurisdiction in light of a recent decision of the U.S. Supreme Court, *Kiobel*, in which the Supreme Court introduced the **touch and concern** test, which is in fact already limiting and will likely restrict the future use of this norm. Therefore, it has to be noted that we are facing a setback in the defense of Human Rights and in the protection and repair of the victims. In particular, we emphasize the negative implications of this case law on the establishment of a customary rule concerning universal jurisdiction in civil matters.

The *Kiobel*'s decision has also started an intense debate between the lower Courts, on the evidence, the characteristics and the limits of its test, in order to overcome the presumption against extraterritoriality. The debate about the aforementioned test has been born in a relatively short period of time and in the Appeal Courts. It should be remembered, in any case, that as a matter of fact, that the Supreme Court was skillfully pushed in the direction of the aforesaid presumption by the counsel for the *Kiobel* defendants, and agreed to unite two aspects of the ATS that should have remained differentiated, the **jurisdiction to adjudicate** and the **jurisdiction to prescribe**.<sup>106</sup>

However, we think that the statutory presumption against extraterritoriality is not truly being applied, since the Alien Tort Statute is a **jurisdictional mechanism, not a substantive rule**. Furthermore, the lawsuits that are connected to it are based on *federal common law*, rather than on a specific legal instrument. What is being applied instead, according to the Supreme Court, are the **principles underlying that canon**,<sup>107</sup> mainly the avoidance of conflicts with other nations. It makes no sense that conflicts would arise when it is a question of protecting the heart of *jus cogens* norms regarding Human Rights, something that should be imposed on all States. That is also why the U.S. Supreme Court, based on a very weak position, and because its doctrine explicitly

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<sup>105</sup>On this point see e.g. Marullo, Maria Chiara, *supra* note 12.

<sup>106</sup> See, Simpson *The Trojan Horse in Kiobel supra* note 47.

<sup>107</sup> *Kiobel case* 133 S.Ct.1664 (2013).

neglects the victim's access to effective remedies and reparations, found itself obliged to adjust it allowing some exceptions through the repeatedly cited test.

At some point, the US Supreme Court will have to review its doctrine. We hope that the Justices will do it in the manner that is most favorable to the defense of Human Rights, and not in the over protected interests of multinational corporations.

### Table

In our analysis we consider some of the most relevant cases conducted by the Federal Courts post *Kiobel* and *Daimler* decisions. This list has not the pretention to be exhaustive but to demonstrate the importance of the issue of **touch and concern** test.

CASES	COURTS
Adhikari v. Daoud & Partners	DISTRICT COURT S. D. OF TEXAS HOUSTON DIVISION
Ahmed v. Comm’r for Educ. Lagos State	DISTRICT COURT N.D. OF FLORIDA, GAINESVILLE DIVISION
Ahmed v. Magan	DISTRICT COURT S. D. OF OHIO EASTERN DIVISION
Ahmed-Al-Khalifa v. Minister of Interior Federal Republic of Nigeria	DISTRICT COURT N.D. OF FLORIDA, PANAMA CITY DIVISION
Ahmed-Al-Khalifa v. Obama	DISTRICT COURT N. D. OF FLORIDA GAINESVILLE DIVISION
Ahmed-Al-Khalifa v. Salvation	DISTRICT COURT FOR THE N. D. OF FLORIDA

Army	PENSACOLA DIVISION
Amir meshal v. chris higenbotham, fbi	DISTRICT COURT OF COLUMBIA COURT OF APPEALS
Balintulo v. daimler ag, ford motor co.	COURT OF APPEALS FOR THE SECOND CIRCUIT
Baloco et al. v. Drummond Company, Inc.	COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Cardona v. Chiquita Brands International	COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Chen Gang v. Zhao Zhizhen	DISTRICT COURT OF CONNECTICUT
Chowdhury v. Worldtel Bangladesh Holding	COURT OF APPEALS FOR THE SECOND CIRCUIT
Dacer v. Estrada	DISTRICT COURT N. D. OF CALIFORNIA
Daimler AG v. Bauman	SUPREME COURT OF THE UNITED STATES
Daobin v. Cisco Sys., Inc.,	DISTRICT COURT OF D. MARYLAND
Doe I v. Cisco Systems, Inc.	DISTRICT COURT N. D. OF CALIFORNIA SAN JOSE DIVISION
Doe I, Doe II, Ivy He, Doe III, Doe IV, Doe V, Doe VI, Roe VII, Charles Lee, Roe VIII, Liu Guifu, and those individuals similarly situated, Cisco Systems, Inc., et al.	DISTRICT COURT N. D. OF CALIFORNIA SAN JOSE DIVISION
Fotso v. Republic of Cameroon	DISTRICT COURT OF OREGON
Giraldo v. Drummond Co	DISTRICT COURT N. D. OF ALABAMA SOUTHERN DIVISION
Hernandez v United States	COURT OF APPEALS FOR THE FIFTH CIRCUIT
Hua Chen, v. Honghui Shi	DISTRICT COURT S. D. OF NEW YORK
Jane Doe v. Drummond Company	COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Jaramillo v. Naranjo	DISTRICT COURT S.D. OF FLORIDA
Jawad v. Gates	DISTRICT COURT OF COLUMBIA
Jesner v. Arab Bank	COURT OF APPEALS FOR THE SECOND CIRCUIT
John Doe v. Exxon Mobil Corp, et. al.	DISTRICT COURT OF COLUMBIA
John Doe v. Nestle Usa, inc	COURT OF APPEALS FOR THE NINTH CIRCUIT
Jovic v. L-3 Eervices, Inc.	DISTRICT COURT OF N.D. ILLINOIS EASTERN DIVISION
Kaplan v. Central Bank of Islamic Rep. of Iran	DISTRICT COURT OF COLUMBIA
Kiobel v. Royal Dutch Petroleum Co	SUPREME COURT OF THE UNITED STATES
Krishanti, et al., v. Rajaratnam, et al.	DISTRICT COURT OF NEW JERSEY
Licci ex rel. Licci v. Lebanese Canadian Bank, SAL	STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Mamani, et al. v. Sánchez de Lozada / Mamani, et al. v. Sánchez Berzaín	COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Mamani, et al. v. Sánchez de Lozada / Mamani, et al. v. Sánchez Berzaín	DISTRICT COURT OF S.D. OF LORIDA
Mastafav. Chevron Corporation	COURT OF APPEALS FOR THE SECOND CIRCUIT
Mohammadi v. Islamic Republic Iran	DISTRICT COURT OF COLUMBIA
Mujica v. AirScan Inc. 9 th circuit	COURT OF APPEALS FOR THE NINTH CIRCUIT
Muntslag v. Beerens et al	DISTRICT COURT S. D. OF NEW YORK
Muntslag v. D'leteren	DISTRICT COURT S. D. OF NEW YORK
Mwangi v. Bush	DISTRICT COURT E. D. OF KENTUCKY
OBB Personenverkehr v. Sachs certiorari	SUPREME COURT OF THE UNITED STATES
Odilla Mutaka Mwani, et al., v. Usama Bin Laden and Al Qaeda	DISTRICT COURT OF COLUMBIA
Oluwashina Kazeem Ahmed-Al-Khalifa, Plaintiff, v. Bashar Hafez Al-Assad	DISTRICT COURT N.D. OF FLORIDA, GAINESVILLE DIVISION
S. Afri. Apartheid lig	COURT OF APPEALS FOR THE SECOND CIRCUIT
Sarei, et al. v. Rio Tinto plc	COURT OF APPEALS FOR THE NINTH CIRCUIT
Sexual Minorities Uganda v. Lively	DISTRICT COURT OF D. MASSACHUSETTS
Sharon Ben-Haim v. Yaakov Neeman	COURT OF APPEALS FOR THE THIRD CIRCUIT
Sikhs for Justice Inc. v. Gandhi	COURT OF APPEALS FOR THE SECOND CIRCUIT
Simon v. Republic of Hungary	DISTRICT COURT OF COLUMBIA
Suhail Najim Abdullah Al Shimari; Taha Yaseen Arraq Rashid; Salah Hasan Nusaif Al-ejaili; Asa'ad Hamza Hanfoosh Alzuba'e v. Caci Premier Technology, Inc.; Caci International, Inc	COURT OF APPEALS FOR THE FOURTH CIRCUIT
Technomarine SA v. Giftports, Inc	COURT OF APPEALS FOR THE SECOND CIRCUIT
Tiangang Sun v. China Petroleum & Chem	DISTRICT COURT C. D. OF CALIFORNIA
Tymoshenko v. Firtash	DISTRICT COURT S. D. OF NEW YORK
United States v. Agrawal	COURT OF APPEALS FOR THE SECOND CIRCUIT
Warfaa v. Ali	COURT OF APPEALS FOR THE FOURTH CIRCUIT