

Developments in Extraterritoriality and Soft Law: Towards New Measures to Hold Corporations Accountable for their Human Rights Performance?

***Desarrollos respecto a la regulación extraterritorial
y al soft law: ¿hacia nuevas medidas para asegurar
la responsabilidad de las empresas por su desempeño
en materia de derechos humanos?***

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SUMMARY: I. *Introduction.* II. *Thinking Outside the Boundaries: Talking About Extraterritoriality.* III. *Enhancing the Role of Soft Law: From Guidelines to Obligations?* IV. *General Conclusions.* V. *Bibliography.*

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ABSTRACT: Two of the main topics that have been discussed in the field of corporate accountability for human rights abuses are the use of extraterritoriality and the role and scope of soft law. Limitations to the use of extraterritorial adjudication have been present since the start of the debate in the United States in the middle of the 1980s. The Kiobel Case supports the idea of limiting the availability of federal courts as forums for foreign cubed cases. On the part of soft law, doctrine has tried to push its scope forward and transform it into a binding obligation, without much success. However, some developments in the field of extraterritoriality have started to break the mold: recent judgments in the UK and the Netherlands have started to recognize the existence of the liability of parent corporations for the acts of their subsidiaries. These developments could eventually lead to the apparition of new perspectives in relation to binding standards and an effective judicial remedy and regulation in the field of business and human rights.

Descriptors: Kiobel, corporate accountability, human rights, extraterritorial adjudication, soft law.

RESUMEN: Dos de los principales temas que han sido discutidos en el área de la responsabilidad y rendición de cuentas empresarial por abusos en materia de derechos humanos han sido el uso de la extraterritorialidad y el rol y alcance del soft law. Diversas limitaciones respecto al uso de la adjudicación extraterritorial han estado presentes desde el inicio de la discusión en los Estados Unidos a mitad de la década de 1980. El caso Kiobel apoya la noción de limitar la facultad de las cortes federales para actuar como foros para casos que involucren partes de nacionalidad extranjera y situaciones ocurridas en territorio distinto al estadounidense. Respecto al tema del soft law, la doctrina ha intentado ampliar su alcance y transformarlo en una obligación jurídica vinculante, sin que haya habido éxito. Sin embargo, algunos desarrollos en el área de la extraterritorialidad han empezado a cambiar esa percepción: algunas sentencias recientes provenientes del Reino Unido y de los Países Bajos han comenzado a reconocer la existencia de una responsabilidad de las empresas matrices por los actos de sus subsidiarias. Estos desarrollos podrían eventualmente conducir a la aparición de nuevas perspectivas en relación a estándares vinculantes y a un remedio judicial efectivo y regulación en el campo de las empresas y los derechos humanos.

Palabras clave: Kiobel, responsabilidad empresarial, derechos humanos, extraterritorialidad, adjudicación, soft law.

RÉSUMÉ: Deux des principaux sujets qui ont été discutés dans le domaine de la responsabilité des entreprises en matière des droits de l'homme sont l'utilisation de l'adjudication extraterritoriale et le rôle et la portée du droit mou (soft law). Diverses limitations pour l'usage de l'adjudication extraterritoriale ont été présentes dès le début du débat aux États-Unis dans les années 1980. D'ailleurs, l'avis récent de la Cour Suprême de ce pays dans l'affaire Kiobel soutient l'idée de limiter la disponibilité des Cours fédérales américaines en tant que forums pour entendre des cas relatifs aux parties et situations d'origine étrangère. En ce qui concerne le soft law, la doctrine a essayé de pousser la portée de ces normes et de les transformer en une obligation juridique (contraignante), sans avoir eu du succès. Néanmoins, quelques développements dans le domaine de l'adjudication extraterritoriale ont commencé à changer le statu quo: certains jugements au Royaume-Uni et aux Pays-Bas ont déjà reconnu l'existence d'une responsabilité des entreprises mères pour les actions de ses subsidiaires. Conséquent, ces développements pourraient éventuellement entraîner l'apparition de nouvelles perspectives par rapport aux standards contraignants et à un recours judiciaire effectif, ainsi qu'à une régulation plus efficace dans le domaine des entreprises et les droits de l'homme.

Mots-clés: Kiobel, responsabilité des entreprises, droits de l'homme, extraterritorialité, adjudication, droit mou.

I. INTRODUCTION

Much has been said and debated over the question of corporate accountability¹ in the field of human rights, particularly in light of recent high-profile cases before domestic courts and the adoption and expansion in the use of the UN Guiding Principles on Business and Human Rights worldwide. This leads us to question whether certain developments, both of judicial and political nature, can lead to the creation of rules that will be applicable to corporations to at least ensure the respect of human rights, and in some instances, their reparation when they have been infringed.

New perspectives are required to ensure that the law can effectively regulate the phenomena that international reality poses on human rights, since classic approaches on which the foundations of international law are based seem to be insufficient to address them nowadays.

¹ Throughout this article, we will use the term ‘accountability’ to refer to the legal responsibility of corporations in the field of human rights. This term is preferred given the use of the term ‘responsibility’ in the context of business and human rights, which is understood—at least based on the definition used by the UN Guiding Principles on Business and Human Rights and throughout the mandate of John Ruggie—as a moral responsibility without direct legal consequences or implications (i.e. the responsibility to respect human rights) for corporations when they have directly affected or collaborated in a negative human rights impact. For Morgera, the concept of corporate responsibility implies corporate contributions beyond what is required by domestic law, while corporate accountability refers to procedural standards (transparency, reporting and disclosure of information) based on public expectations which may allow for the scrutiny of the performance of a given entity, and thus may allow for its calling into question. In this sense, she considers accountability as a “way in which public and private actors are considered *answerable* for their decisions and operations, and are expected to explain them when they are asked by stakeholders.” See Morgera, Elisa, *Corporate Accountability in International Environmental Law*, New York, Oxford University Press, 2009, pp. 19, 22-23 (Emphasis added). Bernaz shares a similar consideration on the definition of corporate accountability, where she conceives it as a “concept [that] encompasses the idea that those accountable should be answerable for the consequences of their actions and refers to [both non-legal risks and corporate liability]”. Cf. Bernaz, Nadia, “Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?”, *Journal of Business Ethics*, Nov. 2012, p. 2. Thus, it’s a broader concept that encompasses the regulation of corporate conduct through legal and non-legal means. However, we will focus on the obligation to respond for actions and omissions as a definition of accountability

From this perspective, two particular topics seem to be especially difficult to tackle: extraterritoriality and the role of soft law.² Both topics have been heavily discussed by doctrine and judiciaries in different countries, for their implications at the international level could be profound.

The question of extraterritoriality seems to be particularly important, since sovereignty —the basis of the Westphalian era of international law— is at stake and States have done everything they can to defend their right not to be subject to judicial or other type of intervention in their internal affairs. The case of *Kiobel* in the United States Supreme Court cautioned specifically that, arguing that States must exercise extreme caution when adjudicating claims that do not touch their interests or jurisdiction. However, other examples have shown exactly the opposite, if certain requirements —such as nationality or the lack of a reliable judicial recourse, thus the risk of denial of justice- are met.

On the other hand, the role of soft law under classic international law has also been given an interesting amount of consideration. Even though several States have expressed their opinion stating that soft law are merely guidelines and they have no binding force in any sense, some elements in the classic sources of international law could potentially lead to a re-interpretation of this notion. The question that surfaces is if some recent developments will be enough to trigger a revision of the limits of international law after some time, or if they will just be individual State efforts that won't have any full effect in favor of the promotion and protection of human rights, particularly in the highly complex area of business and human rights.

Under this guise, this article will largely focus on the question if these two different topics of international law, extraterritoriality and soft law, can each on its own field collaborate to strengthen the cause of human rights in cases in which corporations are involved, specifically when they have negative human rights impacts. Given that they are two different areas of international law, this article must be read as a comprehensive approach, basically as developments in two fields that may

² “We are seeing a gradual hardening of soft law and voluntary practice in the area of human rights, and some moves towards extraterritoriality.” See Harding, Mark, ‘Banking on Human Rights’, *The Business and Human Rights Review*, vol. 1, Autumn 2013, p. 4.

contribute to the protection of human rights from a holistic perspective, and not as an argument that the use of extraterritorial measures and the hardening of soft law are related. In this sense, the article will discuss the way that both of these topics can collaborate to develop stronger measures that may lead to a reinforced corporate accountability in the human rights field.

II. THINKING OUTSIDE THE BOUNDARIES: TALKING ABOUT EXTRATERRITORIALITY

Recent discussion has focused largely on the effects that extraterritoriality has, not just in legal affairs but also in politics and international relations. This discussion, at some points, has signaled the fact that extraterritoriality is at the intersection between public international law and private international law, taking aspects of both to justify efforts to fight against impunity, or on the other hand, to prevent from what could be deemed as intervention in internal affairs.

Before submerging in the content of this section, we must however define what is understood by extraterritoriality. The question of extraterritoriality is at least a two-faceted notion that includes measures such as regulation on the milder side, and adjudication on the provocative side.³ In this sense, the phenomenon of extraterritoriality appears when a State acts in relation to conduct that did not take place within its national boundaries. In this sense, a State may enact legislation that has extraterritorial effects, such as reporting requirements, which do not infringe on the sovereignty of a third State but nevertheless require certain subjects to comply with domestic measures even when their ac-

³ Globally, Deva refers to this question as follows: “Extraterritorial regulation refers to laws enacted, or other regulatory measures taken, by states beyond their territorial boundaries.” Thus, it is related to a wide concept of extraterritorial regulation, which then subdivides into two different species, as described above. See Deva, Surya, ‘Corporate Human Rights Violations: A Case for Extraterritorial Regulation’, in Luetge, Christoph (ed.), *Handbook of the Philosophical Foundations of Business Ethics*, Dordrecht Springer, 2013, p. 1078.

tivities take place abroad;⁴ or in some unusual cases, a State may decide to exercise adjudicative jurisdiction (“extraterritorial adjudication”) to judicially ascertain a case that did not take place within its borders, which may however infringe upon a third State’s sovereignty and create diplomatic or legal tensions.⁵

The following paragraphs will focus on recent examples from the American and Dutch judiciaries that have shown some interesting developments in both theory and practice, and which have had, to different degrees, an involvement with the question of extraterritorial adjudication. In the analysis of *Kiobel*, the opinion of the Supreme Court will be briefly analyzed under the light of international law practice. On the other hand, the *Friday Akan* case and the *El-Hajouj* case from the District Court of The Hague will serve as a counterweight to the decision in *Kiobel*, to show the differences of the interpretation of international law by two developed and independent judicial systems.

1. *Some comments regarding the US Supreme Court’s Kiobel Opinion*

Recent examples of extraterritorial adjudication have shown the extents to which this matter is controversial under international law, not just because of a supposed ‘invasion of sovereignty’ and ‘legal imperialism’ but due to a lack of clarity and certainty of international norms in this field. Indeed, the inexistence of an international legal framework or even specific guidance regarding extraterritorial adjudication raises doubts about what is permissible under international law and the effects that silence has on the possibilities of developing legal standards under national law based on international norms.

This has been particularly addressed in the high-profile case that was *Kiobel v. Royal Dutch Petroleum*⁶ before the United States Supreme Court,

⁴ “...home state extraterritoriality would mean that a state extends its laws to overseas subsidiaries of (parent) companies incorporated therein.” *Idem*.

⁵ “The exercise of extraterritorial jurisdiction over foreign subsidiaries of companies incorporated in a given state is likely to raise multiple concerns from other states competing to exert jurisdiction on such subsidiaries...”. *Ibidem*, p. 1086.

⁶ *Esther Kiobel et al. v. Royal Dutch Petroleum et al.*, No. 10-1491, Opinion (US Supreme Court, 17 April 2013)

which found a profoundly divided and hesitant High Court dealing with the issues of extraterritoriality and applicability of international law (particularly human rights law and international customary norms) to corporations for their involvement or participation in grave human rights violations.⁷

The case was brought under the Alien Tort Claims Act (also known as “Alien Tort Statute”), an ambiguous and ancient act, enacted in 1789, which sets forth that ““The 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.”⁸ This statute has been used since the 1980s as a judicial recourse to which victims of human rights violations worldwide have resorted to try to obtain reparation for the damages they’ve suffered abroad, regardless of the existence of a direct connection between the facts giving rise to the claims and the United States federal courts that would have jurisdiction.⁹ To date, no case brought under this act has reached a favorable verdict, although several cases have been settled between the alleged victims and the defendant companies.

The details of the case indicate the alleged aiding and abetting of the Nigerian Government by three corporations of different nationalities (Royal Dutch Petroleum Co., a Dutch company; Shell Transport and Trading Company, Plc, a British enterprise; and Shell Petroleum Development Company of Nigeria, Ltd., a Nigerian subsidiary), which helped the government commit different offenses under international law against environmental activists who accused the corporations of environmental damage caused by oil pollution in the Niger Delta, namely –and as stated by the plaintiffs in their merits brief- extrajudicial killings, crimes against humanity, torture and cruel treatment, arbitrary

⁷ While the case law of the United States under the Alien Tort Statute is extensive, we will only make detailed references to the two cases that have been analyzed by the Supreme Court, *Sosa* and *Kiobel*, since they have established the basic parameters under which the ATS has been interpreted.

⁸ 28 U.S.C. §. 1330. Originally, it recognized causes of action for offenses against ambassadors, for infringement of safe-conducts and for piracy.

⁹ In this sense, cases brought under the Alien Tort Statute have normally involved foreign plaintiffs bringing claims against foreign corporations, for acts that took place outside of the territorial jurisdiction of the United States.

arrest and detention, violations of the rights to life, liberty, security and association, forced exile and property destruction.

Of the allegations made in their suit, the District Court that heard the case determined that only the allegations of the plaintiffs related to crimes against humanity, torture and cruel treatment and arbitrary arrest and detention, which comply with the criteria set forth by the Supreme Court in its opinion of *Sosa v. Alvarez Machain* regarding definiteness and acceptance among civilized nations, would be examined in interlocutory appeal.¹⁰

However, the Court of Appeals of the Second Circuit that received the case dismissed the complaint in 2010 on the grounds that customary international law does not recognize corporate liability, based on three considerations: that the scope of liability is determined by customary international law; that the Alien Tort Statute (ATS) requires courts to apply 'specific, universal and obligatory' norms of international law to the scope of defendants' liabilities –as recognized under *Sosa*; and that corporate liability is not a universally recognized norm of customary international law. Nevertheless, the Supreme Court granted certiorari in 2011 to consider the question if corporations could be liable under the Alien Tort Statute, due to a diverging interpretation in several of the Circuit Courts (with the Second Circuit denying the existence of corporate liability¹¹ while the Seventh,¹² Ninth¹³ and DC Circuits¹⁴ affirmed it).

After the first round of oral arguments -in which the discussion shifted from the initial question that addressed if customary international

¹⁰ *José Francisco Sosa v. Humberto Alvarez-Machain et al.*, No. 03-339, Opinion (US Supreme Court, 29 June 2004), in which the Supreme Court established that the ATS would only provide a cause of action for torts that transgressed a norm of international law that is definite and accepted by civilized nations ('specific, universal and obligatory').

¹¹ *Esther Kiobel et al. v. Royal Dutch Petroleum et al.*, No. 10-1491, Opinion (US Supreme Court, 17 April 2013)

¹² *Boimah Flomo et al. v. Firestone Natural Rubber Co., LLC*, No. 10-3674, Judgment (US Court of Appeals for the Seventh Circuit, 11 July 2011).

¹³ *Sarei et al. v. Rio Tinto PLC et al.*, No. 02-56256, Judgment (US Court of Appeals for the Ninth Circuit, 25 October 2011)

¹⁴ *John Doe VIII et al. v. Exxon Mobil Corporation et al.*, No. 09-7125, Judgment (US Court of Appeals for the DC Circuit, 8 July 2011)

law recognizes corporate liability, to the question if the ATS applies extraterritorially-, the Supreme Court ordered the parties to provide supplemental briefing to address whether and under what circumstances the ATS 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, which was then addressed in a second hearing in October 2012.¹⁵ On 17 April 2013, the Supreme Court issued its opinion in *Kiobel*, affirming the decision of the Court of Appeals of the Second Circuit and dismissing the claim on the basis that customary international law does not recognize corporate liability for violation of the law of nations, while vaguely answering its question on what could allow the ATS to grant a cause of action for violations of international law that took place outside of American soil.

The Supreme Court's majority opinion in *Kiobel* focuses largely on the question of extraterritorial adjudication and the original intention of Congress when it enacted the Alien Tort Statute in the First Judiciary Act of 1789. In this sense, Chief Justice Roberts wrote that a presumption against extraterritoriality applies to claims under the Alien Tort Statute, and that nothing in the statute rebuts the presumption. While discussing both points, he relies on a grammatical interpretation of the text which obviously does not make any reference to extraterritorial application of the law,¹⁶ although it does clearly indicate that the statute

¹⁵ For a detailed reference of the allegations that were discussed during the second hearing in *Kiobel*, see Cantú Rivera, Humberto Fernando, 'Recent Developments in *Kiobel v. Royal Dutch Petroleum*: An Important Human Rights Forum in Peril?', *Cuestiones Constitucionales, Revista Mexicana de Derecho Constitucional*, No. 28, January-June 2013, pp. 245-250.

¹⁶ In this sense, the Supreme Court determined in *Morrison v. National Australia Bank Ltd.* (2010) that if a statute doesn't clearly indicate that it is intended to have extraterritorial application, it should not be presumed to have any. This same argument was reprise in the *Kiobel* opinion. Some authors, such as Colangelo, have been however hesitant about the decision made by the Supreme Court in *Kiobel*, considering it contradicts not only international and US law, but also its very own precedents: "*Morrison* explained that the presumption against extraterritoriality... did not operate upon the jurisdictional statute... and as the *Kiobel* Court openly acknowledged, the ATS is also a "strictly jurisdictional" statute". Cfr. Colangelo, Anthony J., "Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction", *Maryland Journal of International Law*, vol. 28, 2013, p. 2.

was crafted to deal with the situations that involved international law at the time.¹⁷

However, it is the interpretation of Blackstone's recognition of what constituted a violation of the law of nations in the late 1700s that allows for a discussion on this matter: piracy was regarded as a violation of the law of nations, where pirates were fair game wherever found for being a common enemy of all mankind, and where their actions took place in their vessels while sailing the high seas. In this sense, then as well as today, a vessel has the nationality of the flag of the country under which it sails, and thus it constitutes an extension of the territorial jurisdiction of a foreign sovereign; due to this, the adjudication of matters related to piracy unescapably would involve actions that would trespass into a foreign sovereign's jurisdiction, unless it was done only against vessels sailing under the nationality of the country that would bring procedures against it. Nevertheless, this idea seems unlikely, which leads us then to briefly analyze the arguments of the Supreme Court in its *Kiobel* opinion.

Even if the position of the majority is correct in cautioning the use of American law to solve disputes arising somewhere else in the globe,¹⁸ a few comments should be made. The Supreme Court held that United States law applies and governs domestically, but not globally; nevertheless, in using the Alien Tort Statute the United States would not be applying its laws to regulate conduct occurring within the territory of

¹⁷ The Supreme Court confirmed this in its *Sosa* precedent and stated that an analogy of what was the law of nations at that time could be equally brought before the judiciary under the Alien Tort Statute today: "In *Sosa v. Alvarez-Machain*, the Supreme Court held that the ATS allows U.S. courts to recognize federal common law causes of actions "based on the present-day law of nations [that] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." See Dodge, William S., 'Corporate Liability Under Customary International Law', *Georgetown Journal of International Law*, Vol. 43, 2012, p. 1045.

¹⁸ And this is even more important in light of the important procedural differences that exist between the American civil litigation system and those of other countries, as was pointed out by both the Netherlands and the United Kingdom in their amicus briefs in *Kiobel*. For further details, see *Esther Kiobel et al. v. Royal Dutch Petroleum et al.*, n° 10-1491, Brief of the Governments of the Kingdom of The Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, (US Supreme Court, June 13, 2012), at 27-28.

foreign sovereigns.¹⁹ It has been recognized by the Court itself that the ATS is a jurisdictional statute, therefore only providing jurisdiction and a forum to adjudicate claims in violation of the law of nations that satisfy the requirements set forth in *Sosa*, and not projecting its own laws into foreign soil. This jurisdiction would then constitute a forum to ascertain rights and duties of confronting parties, both rights and duties deriving directly from international law and not from domestic US law.²⁰ What is American is the *interpretation* of international law, which at least during the two hearings and the opinion in *Kiobel* seemed to be distant from what international law (and particularly international human rights law) is considered to be and the form that it is largely applied nowadays.

The extraterritoriality question goes way back in time. For example, the Permanent Court of International Justice stated in its well-known judgment in the *S. S. Lotus* case that unless international law specifically prohibited an extraterritorial use of domestic law, States could design and apply its laws outside its boundaries.²¹ This permission by what was the highest international tribunal at the time has remained a pillar of international law, which has not been challenged by a judgment in a different sense.²² Thus it should have been an important asset to the plain-

¹⁹ “When we talk about extraterritoriality, we think *primarily* about mandates to do or not to do, which are part of substantive law. There is an attempt to project these mandates beyond the physical framework of power connected to state sovereignty, not to the assumption of jurisdiction on the part of its courts”. Zamora Cabot, Francisco Javier, “*Kiobel and the Question of Extraterritoriality*”, *The Age of Rights*, No. 2, 2013, p. 9.

²⁰ “The fundamental historic development of private international law is based on the diversity of systems of international jurisdiction to adjudicate. Therefore, the *jurisdiction to adjudicate* of the United States, exercised through its courts, does not have to coincide with the criteria of other countries or to cede jurisdiction to those who are supposedly more connected in this or any other matter. The only thing that can be demanded... is that jurisdiction be *exercised in a reasonable manner* when there is *sufficient nexus* with the State claiming it...”. *Idem*.

²¹ *The Case of the S.S. “Lotus”* (France v. Turkey), Judgment, Permanent Court of International Justice, 7 September 1927. See in the same sense Bernaz, Nadia, *op. cit.*, p. 18, who argues that universal civil jurisdiction is lawful as it is not prohibited by international law; and Sloss, David, “*Kiobel and Extraterritoriality: A Rule Without A Rationale*”, *Maryland Journal of International Law*, vol. 28, 2013, p.2, where the author explains the presumption of permissibility under international law.

²² Even though it’s outside the scope of this article, attention should be paid to the ICJ judgment on the *Jurisdictional Immunities* case, passed in early 2012, by which the ICJ

tiffs in *Kiobel*, since it redirects the determination of the extraterritorial application of a law to domestic legislation and the legislative body that enacts it, and not to the question of the stance of international law regarding the extraterritorial application of domestic laws.²³

This argument would nevertheless have been irrelevant to the case due to the recognized adjudicative character that the Alien Tort Statute has. The *Lotus dictum*, on the other hand, was applicable only if the law in question was a substantive law –and therefore and exercise of prescriptive jurisdiction-, not a procedural act. The presumption of permissibility²⁴ could have been an interesting argument based on international law in opposition to the presumption against extraterritoriality that was supported by the Supreme Court.

If international law effectively permits substantive laws with extraterritorial effects, which has been supported by international tribunals for several decades, the choice of the United States Supreme Court not to allow an extraterritorial application of an adjudicative jurisdiction statute would also be a legitimate choice under international law, due to the voluntary and non-mandatory character of the presumption of permissibility. However, it would also undermine the universality of human rights and their protection, which has now left the victims in *Kiobel* without the possibility to seek redress in the forum that corresponds

determined that immunity applied to civil suits brought by Italian citizens in Italy against Germany, since the latter enjoyed a procedural immunity under international customary law. See *Jurisdictional Immunities of the State* (Germany v. Italy), Judgment, International Court of Justice, 3 February 2012.

²³ "... International law itself doesn't care about how it is conceptualized or implemented within any given domestic legal system... that's a matter for a nation's internal law, not international law". See Colangelo, Anthony, *op. cit.*, p. 5.

²⁴ "... the starting point for any jurisdictional analysis is a presumption of permissibility – a presumption that is only overcome by demonstrating that the action is otherwise prohibited by treaty or customary international law." See Stigall, Dan, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law', *Hastings International & Comparative Law Review*, vol. 35, no. 2, 2012, p. 331. This was also the position explained by the Government of Kosovo in its written contribution to the ICJ during the Advisory Proceeding regarding the unilateral declaration of independence of Kosovo. See Written Contribution of the Republic of Kosovo, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion, International Court of Justice, 17 April 2009, p. 138.

to their place of residence. Thus, the question that remains is what the Supreme Court could have done if it had interpreted the issued at hand from a more neutral perspective based on current global understanding of international law.

An interpretation of the Alien Tort Statute in conformity with current international law would probably observe that at least the core international human rights treaties, customary international law, *jus cogens* norms and general principles of international law constitute accepted norms for the international society.²⁵ This would normally comply with the standards of what was an accepted practice of international law in the 18th century. In the case at hand, the ratification by 167 countries of the International Covenant on Civil and Political Rights (ICCPR) would clearly demonstrate that it has been almost universally recognized by “civilized nations” that the norms contained therein are universal values.

Even more, those values are shared by the four countries that are intervening in the dispute (the United States as forum and place of residence of the plaintiffs; The Netherlands and the United Kingdom as the countries where the main defendants are incorporated; and Nigeria as home of the joint venture of both European companies and the country of nationality of the plaintiffs), which would provide an even stronger justification as to why at least some of the torts that the plaintiffs alleged in their claim should be recognized as specific, universal and obligatory. The fact that the International Covenant on Civil and Political Rights was ratified by the four aforementioned countries implies a common denominator, perhaps even a rule *inter partes* that would be applicable to all of them. Since all of the claimed rights are included in the Covenant, and the Member States have the international obligation to guarantee those rights within their territory in accordance with article 2.1 of the ICCPR, the judicial protection of those rights by the courts of any of the countries would be a *sine qua non* condition.

²⁵ A similar critique was directed to the UN Guiding Principles on Business and Human Rights, precisely on what was considered a “narrow view” of international law by their author, John Ruggie. See Decaux, Emmanuel, ‘Le projet de l’ONU sur la responsabilité des entreprises transnationales’, in Daugareilh, Isabelle (ed.), *Responsabilité sociale de l’entreprise transnationale et globalisation de l’économie*, Brussels, Bruylant, 2010, pp. 459-474.

Even though the Supreme Court stated in *Sosa* that the ICCPR does not establish a relevant and applicable rule of international law because of its non-self-executing character,²⁶ this position shows two things: first of all, the justification of the inapplicability of international law based on domestic considerations and legal systems (particularly a dualist position) despite a formally declared international commitment to the respect of fundamental human rights, which then leads to a lack of fulfillment of its *pacta sunt servanda* obligation. The existing silence under treaty-law regarding extraterritorial adjudication leads to a permissible use of jurisdiction to preserve and guarantee the rights of victims of human rights violations. The ratification by the American Congress of the International Covenant on Civil and Political Rights should confirm its adherence and commitment to the respect of international human rights norms, as well as the recognition of this treaty as a source of international law and binding obligations for the United States and for the rest of countries that ratified it.

On the other hand, a grammatical interpretation of the Alien Tort Statute could lead to the presumption that, if analogously compared to the arguments revolving around piracy made by Justice Breyer in his separate opinion, the law would still provide a cause of action. Most of the focus was centered on the ‘law of nations’; however, there was no mention whatsoever in the *Kiobel* opinion regarding the last part of the statute, which clearly states that courts can entertain a civil action by an alien for a tort “in violation of... a treaty of the United States.”

Given that the United States ratified the International Covenant on Civil and Political Rights in 1992, as well as the fact that at least torture and cruel treatment²⁷ and arbitrary arrest and detention are prohibited

²⁶ “And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” *José Francisco Sosa v. Humberto Alvarez-Machain et al.*, no. 03-339, Opinion (U.S. Supreme Court, June 29, 2004) at 41.

²⁷ This was recognized by the United States in its reservations to the ICCPR, where it stated “(3) That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

by the Covenant (crimes against humanity, on the other hand, have been dealt with in other international documents, such as the Rome Statute of the International Criminal Court, which the US has only signed but not ratified), the violation of those treaty-rights –and not the ambiguous concept that the ‘law of nations’ has become under the Supreme Court’s judicial perception- would have provided another justification that should have allowed the civil action to proceed. While the question of the facts taking place within the territory of a foreign sovereign still remains, at least the part of what constitutes the modern ‘law of nations’ could be set aside to pursue it from the perspective of the violation of a right contained in an international human rights instrument that is binding for the United States of America, as well as on the other three countries that have a direct interest in the case.

Two more arguments should be shared regarding the decision in *Kiobel*. The first one is related to customary international law, while the second one is in relation to the universality of human rights. These two arguments are important in light of the debate regarding the subjects of international law and the question of extraterritoriality, both of which were given some consideration by the Supreme Court during the two phases of *Kiobel*.

As mentioned by Dodge, “the norms that are actionable under *Sosa*... focus on acts without regard to the identity of the perpetrators.”²⁸ This normative characteristic is divergent from the classic notion of international human rights law under which the State will clearly and explicitly bear sole primary responsibility for human rights violations taking place within its jurisdiction. However, it must be noted that even though it is the State who will be found responsible for failure to prevent and protect against such type of conducts that are detrimental to human dignity, most international norms dealing with the type of conducts that are actionable in the United States under *Sosa* have nevertheless omitted to establish *who* is capable of committing such human rights violations.²⁹

²⁸ Dodge, Williams S., *op. cit.*, p. 1047.

²⁹ “... the question of corporate liability under customary international law does not depend on finding a norm of customary international law in the abstract, but rather on whether the particular norms at issue reach corporations”. *Ibidem*, p. 1050.

International human rights law, and particularly those conventions and treaties dealing with human rights violations that amount to infringement of customary law or *jus cogens* norms, have also focused on regulating the actions taking place, while leaving the question of the subject who committed the act largely unaddressed. That lack of indication can either be interpreted as an obvious and unnecessary remark in the text of an international treaty -given the already consolidated notion of the State as the only entity capable of violating human rights-, or specifically as the intention to not refine the subjectivity question under international law to allow judicial branches (both nationally and internationally) to develop a *corpus juris* in this regard.

The fact that the question of the subject who can violate a norm of international law is unaddressed can play an important role in determining corporate liability for human rights violations. International law does not categorize the actors who can be found liable or non-liable; it merely focuses on the determination of the lawfulness or unlawfulness of an act, regardless of who committed the act.³⁰ Therefore, the lack of a customary rule of international law determining that corporations enjoy immunity largely tends to indicate that in fact, they do not.³¹

This determination, replicated in the ICJ judgment on the *Jurisdictional Immunities* case, found that the States enjoy a procedural immunity that is entirely different from the existence of responsibility. "...a state that is immune from suit is still capable of violating international law and, despite its immunity, remains responsible for such violations. Corporations generally have no immunity under international law, much less benefit from a trans-substantive rule of non-liability that even states do not enjoy."³² Thus, the inexistence of a specific norm denying the determination of liability under international law for non-State actors, paired with the current treaty-law standards that are also silent on the subject to which they are addressed but focused on the lawfulness of a certain action, can largely constitute elements to conclude that a presumption of permissibility to find non-State actors liable for the violation of international law exists.

³⁰ *Ibidem*, p. 1046.

³¹ Although there is also no explicit indication that they can be found liable, thus constituting a normative silence.

³² Dodge, William S., *op. cit.*, p. 1047.

In relation to extraterritoriality, arguments have been directed to the characteristic of international law as an over-arching, binding framework that is to be applied everywhere and all the time.³³ Even though this idea particularly defends an idealistic position that largely ignores the question of international politics, an argument can be made regarding the universality of human rights, and specifically of non-derogable rights that have been largely recognized and ratified by most countries in the world.

The fact that universally-recognized rights cannot be enforced is a direct attempt against the foundations of international human rights law; thus, future decisions should not just look into the framework and scope of international relations and the question of comity, but into the permanence and strengthening of the universal human rights system, in order to guarantee the development of an internationally coordinated and coherent effort to battle corporate impunity.³⁴

Clearer indications and guidelines are needed in relation to the question of extraterritorial adjudication –especially in the field of human rights- at the international level; a lack of such a framework will just add to the known fragmentation of international law through which impunity can subsist, and let national efforts dictate the route through which these type of questions can be addressed, under the risk of an even greater polarization.

2. Extraterritoriality in the Dutch Judicial System: Recent Examples

Two recent cases, both from the judicial system of The Netherlands, have illustrated a different approach to the question of extraterritoriality, and shown signs, derived directly from private international law, on

³³ “International law... prescribes conduct-regulatory rules the world over, and thus its application is never really extraterritorial since it covers the globe, particularly with respect to universal jurisdiction violations”. See Colangelo, Anthony, *op. cit.*, p. 1.

³⁴ For a holistic approach to the question of corporate accountability for human rights abuses, and particularly for a multi-faceted model to tackle negative human rights impacts by corporations, see generally Deva, Surya, *Regulating Corporate Human Rights Violations: Humanizing Business*, London, Routledge, 2012.

extraterritorial adjudication of cases that comply with certain requirements.

The first case we will refer to is *Friday Alfred Akpan et al. v. Royal Dutch Shell PLC et al.*,³⁵ brought before the District Court of The Hague. Summarizing the facts of the case, it was brought due to the allegations of environmental and personal damages suffered by the plaintiff due to two oil spills occurred in 2006 and 2007 in the Ikot Ada Udo region in Nigeria, which were the result of a lack of diligence from the defendants in the maintenance of its oil-producing operations in the region, and that resulted in the loss of his means of livelihood.

After an interesting analysis from the District Court, in which it found that there was a causal link between the violation of a specific duty of care by the Nigerian subsidiary of the Dutch corporate group and the damages suffered by Akpan, and that the Nigerian subsidiary Shell Petroleum Development Company of Nigeria Ltd. committed a tort of negligence against the plaintiff for not sufficiently securing an oil-well to prevent the sabotage that was committed in a simple manner prior to the oil spills,³⁶ the Dutch District Court ordered the Nigerian defendant to pay compensation for the damages suffered by Friday Akpan.

Although it must be noted that the court at The Hague specifically indicated that the case could not be considered a human rights violation committed by the subsidiary company, particularly in light of the passive conduct of the defendant and the lack of a specific action³⁷ that would implicate a direct transgression of the plaintiff's fundamental rights, this case clearly has implications in the human rights field, particularly in regard to the liability of foreign subsidiaries. This becomes even more relevant after the *Kiobel* ruling in the United States, since ATS cases brought there have usually been filed against parent corporations and their foreign subsidiaries, and the Supreme Court recently decided not to engage in extraterritorial adjudication unless a corporate nationality link is present or the case at hand touches upon American interests with sufficient force.

³⁵ *Friday Alfred Akpan et al. v. Royal Dutch Shell PLC et al.*, Case C/09/337050/ HA ZA 09-1580, Judgment, The Hague District Court, 30 January 2013.

³⁶ *Ibidem*, at 4.45.

³⁷ *Ibidem*, par. 4.56.

This exact circumstance was taken into consideration by the Dutch court in its judgment of the *Friday Akpan* case. Since the multinational corporation that was defendant in the case is headquartered in The Netherlands, the District Court determined to exercise an analogy with other cases and international trends:

[F]or quite some time... there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasions.³⁸

Although this trend may be considered recent, it would support one of the arguments that can be inferred from the *Kiobel* opinion: if there is concluding evidence that there is a close relation between the parent company and the subsidiary, and that the actions that gave rise to the claim were ordered by the parent company –or as stated in the *Friday Akpan* judgment, that the parent company should have known of either a relevant aspect of the facts that originated the claim or of the unlawfulness of a specific action executed by the subsidiary-, both could be summoned to appear and face trial before the tribunals of the home State of the multinational.

The Dutch court found, however, that it would be less reasonable that a duty of care of the parent company existed because the proximity between both entities was not so relevant as if, for example, both of them operated in the same country. While relying in the *Chandler v. Cape PLC* judgment from the British judicial system, the court determined that under the circumstances of the case, it couldn't be assumed that the parent company would have had more specific local knowledge of the situation in the foreign country than its subsidiary, which led to the dismissal of the claims against the parent corporation.

Despite such dismissal, the District Court argued that

[T]he forum non conveniens restriction no longer plays any role in today's international private law. The District Court is of the opinion that the jurisdiction of

³⁸ *Ibidem*, par. 4.5.

the Dutch court in the matter against [the foreign subsidiary] based on Section 7 DCCP³⁹ does not cease to exist in the event that the claims against [the parent company] were to be dismissed, not even if subsequently, in fact, no connection or hardly any connection would remain with Dutch jurisdiction.⁴⁰

The judgment in the *Friday Akpan* case leads to several thoughts regarding the effects it has on the human rights field. First of all, the judgment was built based on national law, not international law. Even if this type of cases could be a clear indication that only through national law will any degree of corporate accountability be reached, it also shows that the lack of a binding international framework has led and will continue to lead to the exploration of national judicial avenues and causes of action, which will most likely lead to the development of a sphere of comparative law in cases dealing with corporate accountability and extra-territorial adjudication, as shown by District Court of The Hague in this case.

Secondly, the ruling by the District Court was based on substantive Nigerian law, as well as on common law from the British system, which was binding before the independence of Nigeria and continues to serve as reference after it. On the other hand, the jurisdiction of the Dutch courts is based on Dutch law, specifically if the nationality of the parent company is Dutch.

What these two characteristics show is that, based on private international law, conflicts of law and comparative law, an effort can be made to hold corporations accountable under national law independently of the place where the actions occurred, and as recognized by the Dutch court itself, may help to reduce the transcendence of the *forum non conveniens* restriction that usually has tried to be applied to this type of cases. Therefore, even foreign-cubed cases could potentially be extra-territorially adjudicated if a minimum link is found that could grant jurisdiction to a foreign judiciary (e.g. the place where the claim is filed).

³⁹ Dutch Code of Civil Procedure; Article 7.1. If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency.

⁴⁰ *Friday Alfred Akpan et al. v. Royal Dutch Shell PLC et al.*, par. 4.6.

On the third place, the *Friday Akpan* ruling was based on a reasonable duty of care –a measure of due diligence-, and therefore a tort of negligence, and not on a human rights violation. It is clear that cases based on torts have been more successful and more explored than human rights claims, and have been generally resolved in a more favorable manner because the rights disputed are more ascertainable judicially. However, independently of the denomination they are given, it is also clear that this type of judgments, despite being classified as torts, also have human rights implications.⁴¹

In this sense, exploring human rights through the tort angle may be an interesting solution to pursue and further in the national level the cause of human rights, particularly if corporations are headquartered or incorporated in countries whose national judicial systems have a liberal and global approach to the question of extraterritorial adjudication and the use of private international law.

Another interesting example that emerged recently from the Dutch judicial system, dealing with torture and extraterritorial adjudication, is that of *Ashraf Ahmed El-Hojoj v. Harb Amer Derbal et al. (Libya)*.⁴² This case saw the plaintiff, a Bulgarian-Palestinian national, file a claim in The Netherlands for having been illegally detained and tortured by the Libyan regime, which accused him of infecting 393 children with HIV. After having confessed under torture, the plaintiff was condemned to the capital punishment, but later granted pardon and released by the authorities. However, the plaintiff filed a complaint in The Netherlands (which gave him refugee status) for the commission of an international crime by the Libyan regime, despite the default of appearance of the defendants before the tribunal.

The District Court in The Hague that heard the case considered that it had international jurisdiction pursuant to article 9(c) of the Dutch

⁴¹ “Although by tort claims private parties may seek vindication of private interests, judgments in these cases affirm much wider interests manifested in the norms that the community is prepared to enforce.” *Vid.* Donovan, Donald Francis & Roberts, Anthea, ‘The Emerging Recognition of Universal Civil Jurisdiction’, *American Journal of International Law*, Vol. 100, 2006, p. 154.

⁴² *Ashraf Ahmed El-Hojoj v. Harb Amer Derbal et al. (Libyan Officials)*, Case 400882/HA ZA 11-2252, Judgment, The Hague District Court, 21 March 2012.

Code of Civil Procedure, which states that Dutch courts will have jurisdiction if it would be unacceptable to demand from the plaintiff that he submits the case to the judgment of a foreign court. Therefore, it constituted itself as a *forum necessitatis* —a forum by necessity— since denying jurisdiction to the plaintiff would risk an evasion of justice from the defendants.⁴³ Thus, ascertaining the claim brought by El-Hajouj would possibly implicate that the enforcement of the judgment, given the default of the defendants in the case, would turn into a political issue, while justice would have still been at least declared in favor of the claimant.

This decision by the District Court of The Hague implied therefore an act of universal civil jurisdiction to award reparations to the plaintiff against the Libyan officials involved in his torture (who, since acting as state agents, compromised the international criminal responsibility of the Libyan State), for the commission of a gross violation of human rights that amounted to an international crime. In effect, the non-derogable nature of torture and its recognition as a *jus cogens* norm would support the exercise of universal jurisdiction to defend the interests of the victim and to promote the respect of human rights, founded on the international duty of all States to prohibit and prosecute this type of conducts.

While both cases deal with very different scenarios and cannot be interpreted uniformly, they do suggest two interesting developments: first of all, that when a victim is facing a denial of justice based on a question of jurisdiction, a court may act to protect them or award them damages for the atrocities they suffered, if it deems that no contravention of international law would take place. On the second place, parent companies and their subsidiaries may be held accountable —even extra-territorially- for their careless or reckless behavior in the conduction of their operations, depending on the level of involvement and knowledge of the situation that they are expected to have, if that lack of diligence

⁴³ This figure was suggested by Justice Sotomayor in the second hearing of the *Kiobel* case before the Supreme Court of the United States, who indicated that to avoid a denial of justice, the American courts could become a last-resort forum. See *Esther Kiobel et al. v. Royal Dutch Petroleum et al.*, No. 10-1491, Transcript of Oral Argument (Supreme Court, 1 October 2012), at 13.

has an important negative effect on the livelihoods and rights of communities that were affected by their activities.

III. ENHANCING THE ROLE OF SOFT LAW: FROM GUIDELINES TO OBLIGATIONS?

Soft law has been a much debated topic in international human rights law, particularly due to the fact that doctrine and human rights activists have tried to give it a more binding nature than what it normally would have under the classic notions of general international law. In this sense, what has been recognized as the paradigm rule containing the sources of international law -article 38 of the Statute of the International Court of Justice- has remained unchanged since its adoption, thus being a helpful tool for powerful States that would prefer to maintain the binding character of international norms to a minimum. Nevertheless, recent developments in several areas in the human rights realm have shown that judicial interpretation and State practice can give soft law norms a semi-binding character, to say the least.⁴⁴

It is this idea which will be the focus of this second chapter: firstly, a brief analysis will be made of what the classic sources of international law are, which have nevertheless been interpreted in a progressive way by international courts, thus evolving the status of some international human rights declarations through its case law. Secondly, a brief review of the status of soft law under international law will be examined, trying to share some thoughts on its potential development –specifically of soft law norms such as the Guiding Principles on Business and Human Rights- into binding rules of customary international law through state practice and case law, particularly taking into consideration the basic elements for the formation of international custom.

⁴⁴ In this chapter, we identify the semi-binding character of soft law as the moment when a soft norm starts developing into a formal source of international law, be it through its metamorphosis into a general principle of international law or as a customary norm, thus acquiring a more formal and coercive value than it had when it was just a declarative statement (a soft norm).

1. The Classic Sources of International Law According to the ICJ Statute

According to the Statute of the International Court of Justice, the classic sources of international law are of two kinds: primary and secondary. Within the first group are found international conventions and treaties, both multilateral and bilateral; international custom, as evidence of a general practice that has been internationally accepted as law, and general principles of law recognized by civilized nations. The second group, which is specifically contained in article 38(d), are judicial decisions and doctrine from the most highly qualified publicists, with the exception stated in article 59 of the Statute, which provides that judicial decisions of the Court only have binding force between the contending parties and in respect to that specific case.

While these classic sources remain relevant and in force at the time of writing, and have basically not been contested but doctrinally,⁴⁵ some of them have been subjected to progressive interpretations by the International Court of Justice itself, as well as by some regional courts dealing with *lex specialis*, such as the Inter-American Court of Human Rights. A few examples will be used to illustrate this assertion.

Between 1969 and 1986, the International Court of Justice modified its assessment on the formation of a rule of customary international law. In 1969, in its judgment of the *North Sea Continental Shelf Cases*, the ICJ reasoned that State practice must reflect the belief that such practice is obligatory based on the existence of a rule of law requiring it.⁴⁶ Therefore, the Court determined that it was only through *opinio juris* that State practice could be confirmed, which would be the foundation of custom conceived through the traditional approach.⁴⁷

⁴⁵ See generally Cárdenas Castañeda, Fabián Augusto, “A Call for Rethinking the Sources of International Law: *Soft Law* and the Other Side of the Coin”, *Anuario Mexicano de Derecho Internacional*, vol. XIII, 2013, pp. 355-403.

⁴⁶ *North Sea Continental Shelf Cases* (Germany v. Netherlands; Germany v. Denmark), Judgment, International Court of Justice, 20 February 1969.

⁴⁷ “The traditional approach to identifying a rule of customary international law is to rely on *opinio juris* to confirm state practice, or even to infer *opinio juris* from state practice... [thus,] the traditional approach is to attach more value to what states do (physical acts) than what they say (verbal acts)”. Kamminga, Menno T., “Final Report on the Impact of

Nevertheless, in its judgment of the case of *Military and Paramilitary Activities in and Against Nicaragua*,⁴⁸ 17 years later, the Court determined that the existence of the rule in the *opinio juris* of States must be confirmed by practice.⁴⁹ Thus, the ICJ evolved its assessment on international custom to add a more important value to *opinio juris*, which had been secondary to State practice up to that point.⁵⁰

This evolution in the ICJ assessment on the formation of customary international law has been accompanied by the growth and development of the concept of universality of human rights. In this field, international actors —this is, international tribunals, multilateral organizations and publicists— have had an important role to achieve a result that is more favorable to their area of work, and have supported a transition from state practice to diplomatic action to prove the existence of an international custom.⁵¹ Even more, “[i]t is often argued... that the method of customary law formation in the field of human rights... would allow *opinio juris* to play a more important role than state practice.”⁵²

This has not just been the result of unequal state practice, but of a different set of values and principles that are required to face the reality of the challenges posed by human rights, which greatly vary from

International Human Rights Law on General International Law”, in Kamminga, Menno T. & Scheinin, Martin (eds.), *The Impact of Human Rights Law on General International Law*, Oxford, Oxford University Press, 2009, p. 7.

⁴⁸ *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Judgment, International Court of Justice, 27 June 1986.

⁴⁹ See generally Cançado Trindade, Antônio Augusto, ‘International Law for Humankind: Towards a New Jus Gentium (I)’, *Collected Courses*, Vol. 316, Leiden, Martinus Nijhoff, 2006, particularly Part III, Chapter VI.

⁵⁰ “[The ICJ in its Nicaragua judgment gave] the impression that, as long as *opinio juris* is not in doubt, the consistency of state practice, a cherished and arguably primordial element of a customary rule, is not to be the first consideration.” See Wouters, Jan & Ryngaert, Cedric, ‘Impact on the Process of the Formation of Customary International Law’, in Kamminga, Menno T. & Scheinin, Martin (eds.), *The Impact of Human Rights Law on General International Law*, Oxford, Oxford University Press, 2009, p. 113.

⁵¹ “...when identifying state practice, [human rights treaty bodies and international criminal courts and tribunals] emphasize what states say rather than what they do.” Kamminga, Menno T., *op. cit.*, pp. 7-8. See also Mariño Menéndez, Fernando M., *Derecho Internacional Público: Parte General*, 3a ed., Madrid, Trotta, 1999, p. 366, who refers to the validity of State practice in multilateral organizations for the formation of international custom.

⁵² Wouters, Jan & Ryngaert, Cedric, *op. cit.*, p. 111.

those posed in other fields of international law. Nevertheless, one of the standing paradigms of general international law has been that the key element for the formation and consolidation of international law is, in fact, the existence of a generally consistent state practice —that is, the widespread use and application of a certain behavior or norm—.

An important question that surfaces is what degree of application or use of a norm of conduct or behavior is required to determine the existence of a general international practice. One possible response would be that practice is not only reflected within national boundaries, but also within international action in multilateral fora; in theory —and following a quantitative approach to State action before international organizations—, actions carried out by States while participating in diplomatic activities would demonstrate a clear intent on their part (*opinio juris*) as to what they consider to be a common practice, usually within their jurisdictions.⁵³

Therefore, this would normally be an important step to the development of customary rules and of general principles of international law, based on the declarations and actions made by the States at the international level, and thus a confirmation of State practice. As well, the interpretation of international or regional courts regarding such State practice at the diplomatic level —reflected in declarations or non-binding resolutions— has in some cases lead to the evolution of those norms to acquire at least a semi-binding character, as is the case of the UN Declaration on the Rights of Indigenous Peoples.⁵⁴

In this sense, international law has also evolved under the wing of regional human rights tribunals. An interesting example is that of the Inter-American Court of Human Rights. Neither the American Convention on Human Rights, nor the Statute of the Inter-American Court

⁵³ “However, if verbal state practice in and *vis-à-vis* international fora is taken into account, another picture emerges. Modern positivism allows for the consideration of statements by states in international fora, of the (tacit) acceptance of international tribunals’ statutes and judgments, and of the widespread adoption of treaties dealing with the subject matter.” *Ibidem*, p. 125

⁵⁴ This document, a declaration of principles and rights, has been construed by the Inter-American Court of Human Rights to contain some dispositions that have reached the status of general principles of international law, which are binding on the States that have accepted its jurisdiction, given their recognition as basic prerogatives of the human nature.

of Human Rights or its Rules of Procedure established a taxonomic system of the sources of law under which it would base its rulings. As it has been understood, the sources of law applicable to the cases over which it has jurisdiction are those of general international law, contained in article 38 of the ICJ Statute. However, an exception was established recently through the Inter-American case law, specifically in regard to article 59 of the ICJ Statute, which set forth that the judicial decisions of the Court were only binding *inter partes* and not *erga omnes*.

Nevertheless, in its judgment of the *Radilla Pacheco* case, the Inter-American Court of Human Rights found that the defendant State had the obligation to implement not just what had been decided in the case at hand, but the developments and decisions contained in the case law of the regional court regarding military justice.⁵⁵ In this guise, what the Court specifically did was to broaden the legal horizon that imposed obligations on the State, which witnessed an evolution of the effects of the judgment that went from being *inter partes* to become an *erga omnes* obligation applicable to all the State parties in the hemisphere.⁵⁶ To the effects of clarifying this position, the corresponding parts of the judgment are transcribed:

... Within this task, the Judiciary shall take into consideration not only the treaty but also the interpretation the Inter-American Court, final interpreter of the American Convention, has made of it.

340. Therefore, it is necessary that the constitutional and legislative interpretations regarding the material and personal competence criteria of military jurisdiction in Mexico be adjusted to the principles established in the jurisprudence of this Tribunal, which have been reiterated in the present case...⁵⁷

⁵⁵ *Case of Radilla Pacheco v. Mexico*, Judgment, Inter-American Court of Human Rights, 23 November 2009, pars. 339-340.

⁵⁶ The Inter-American Court of Human Rights reached the same conclusion in the *Gelman* case, where it stated that even when some States are not parties to an international procedure, they are obliged to a certain extent by the precedents or case law that has been issued by that regional human rights body. *Case of Gelman v. Uruguay*, Monitoring Compliance with Judgment, Inter-American Court of Human Rights, 20 March 2013, pars. 67, 69.

⁵⁷ *Case of Radilla Pacheco v. Mexico*, Judgment, Inter-American Court of Human Rights, 23 November 2009, pars. 339-340 (emphasis added).

What the Court achieved through this judgment, which it has also done in previous cases, was the determination of the constitution of a general principle of international human rights law, applicable to the States that have agreed to its jurisdiction. Thus, reiterative criteria of international courts and tribunals have in some instances led to the development of both general principles of international law and international customary law, even if these apply only to a specific number of States.

What both examples show is that even though the sources of international law contained in the ICJ Statute have basically remained unchanged, new developments and interpretations have added more width to their scope, in some cases with the clear intention of better serving the interests of international justice in the field of human rights. Given that in particular human rights have shown to be a dynamic field of international law, it is necessary to adapt the applicable legal framework to the reality it is facing; in theory, this is at least the teleological use of law, to regulate human conduct to what should be, regardless of what it actually is.

Due to the enormous difficulties to conclude specific and binding hard international law (in the form of treaties), and on the uncertainty of what constitutes principles and customary rules of international law, *soft law* has gained a wider recognition as one of the initial steps to the development of general State practice. In this sense, a few comments will be shared in the following section, particularly in relation to the case of corporate accountability for its involvement in human rights abuses.

2. A Permanent Call for ‘Rethinking’ the Sources of International Law: the Role of Soft Law

In the opinion of Pierre-Marie Dupuy, *soft law* is a paradoxical term for defining an ambiguous phenomenon in the field of international law. First of all, because the rule of law is usually considered compulsory, something that soft law lacks. On the second place, because its legal effects vary widely depending on the field and situation at hand, which

makes them difficult to identify and classify.⁵⁸ While it is true that soft law has not been recognized as a formal source of international law, and is even doubted as having any effects other than declaratory, it has been a useful tool to engage States in the discussion and elaboration of declarations and other type of international documents that show the *status quo* of a particular question at that specific moment in time. Therefore, it has been relevant to advance questions that probably wouldn't have enough support to be discussed in a treaty-making process.⁵⁹

The multitude of soft law instruments attest to this reality, and are also a reflection of the decentralized nature of international law, of the lack of an international legislator or even a political-legal international structure resembling that of the national State. At its current state, the international arena has become an organized chaos in which hard law in the form of treaties, customary rules and general principles of international law are constantly challenged and interacting with each other and with soft law instruments, therefore blurring the thin lines that were used before to distinguish what state practice actually is and what the concept of 'general practice' means. It is therefore useful to share a few comments on the role soft law is currently having in some domains within the human rights field, and how it can be used in the context of business and human rights.

First of all, soft law is already incrusted in international law. It is an important tool used by States in international fora (thus, an international State practice) and a source for interpretation and consideration by –at least- regional human rights tribunals. In this sense, soft law is an international development that has helped States and other non-State actors face with varying degrees of success the effects that globalization has had worldwide. The main question related to this is whether

⁵⁸ Dupuy, Pierre-Marie, 'Soft Law and the International Law of the Environment', *Michigan Journal of International Law*, vol. 12, No. 2, 1991, p. 420.

⁵⁹ Cárdenas Castañeda, Fabián Augusto, *op. cit.*, p. 369: "... soft law... instruments... emerged as a response to the legal need faced by the international community. They are the result of reality modeling international law, of international practice modeling the sources!" See also Reisman, W. Michael, 'The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment', *Collected Courses*, vol. 351, Leiden, Martinus Nijhoff, 2012, pp. 132-135, where the author discusses the value of soft law as opposed to hard law.

soft law instruments can be of any use to develop and impose binding obligations on States and other international actors, in what has been labeled as the hardening of soft law.⁶⁰ Considering the current status of international law, the most likely option would be its hardening through the development of either a customary rule or a general principle of international law.⁶¹ For the purposes of this article, we will focus on the development of custom.

For soft law to turn into hard law, some of the classic elements of the formation of hard international law must converge, but given the differentiated approach with which declarations and guidelines are treated by States, some of them may be embedded already in their participation for the adoption of the instruments containing such soft dispositions.⁶² Clearly, any disposition that would eventually become at least a semi-compulsory obligation must enjoy the pre-requisite of State practice, for without a general use of its content, no possibilities of hardening would exist. On the other hand, the subjective element (*opinio juris*) must also be present for a rule of customary law to develop.⁶³

⁶⁰ For references to the hardening of soft law in the business & human rights context, see Bernaz, Nadia, *op. cit.*, note 1, p. 15; and Deva, Surya, 'Multinationals, Human Rights and International Law: How to Deal with the Elephant in the Room', Paper presented at the GLOTHRO Workshop on the Direct Human Rights Obligations for Corporations (Slovenia, January 2013; forthcoming), p. 9.

⁶¹ "... what is required for the establishment of human rights obligations *qua* general principles is essentially the same kind of convincing evidence of general acceptance and recognition... in order to arrive at customary law." Simma, Bruno & Alston, Philip, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', *Australian Yearbook of International Law*, no. 82, 1992, p. 105.

⁶² "... [UN] resolutions can themselves constitute practice of States, or express the *opinio juris*, so as to be creative of customary law". Thirlway, Hugh W.A., *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law*, Leiden, A.W. Sijthoff, 1972, p. 66. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, par. 70, where it states the following: "70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*... Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule".

⁶³ In relation to this, one author disagrees: "... although the traditional view of customary law is that it contains two constitutive elements, the material and the psychological, in fact

Discussions have been held for a long time in relation to one particular set of circumstances linked to *opinio juris*, particularly within the framework of multilateral organizations such as the UN. In this sense, the question of what unanimous adoption implies for a normative project (especially in non-binding instruments) has had particular relevance: "... if a resolution... is adopted by a sufficient majority to be regarded as generally representative... then it will probably be impossible to challenge the authority of the rules so stated on the ground that the *opinio juris* is lacking or unproved".⁶⁴ This assertion is particularly relevant if examined in light of the most recent set of rules adopted in the field of corporate responsibility, the UN Guiding Principles on Business and Human Rights.

The Guiding Principles on Business and Human Rights, the result of the six year mandate of Professor John Ruggie as the Special Representative on the issue of human rights and transnational corporations and other business enterprises, were unanimously adopted and endorsed by the UN Human Rights Council on 6 July 2011.⁶⁵ As a soft law development, they would normally only serve as guidelines for States in order to address the negative impacts that corporate activities may have within their national boundaries. However, the fact that they were unanimously adopted could very well also reflect a common concern and belief of States that the guidelines contained in the instrument are a globally accepted minimum for the respect of human rights by corporations. If this holds true, there is a strong case to be made that the unanimity in their adoption was the reflection of *opinio juris*, the subjective element that lies at the heart of customary rules,⁶⁶ which could eventually be the foundation for the development of a customary rule of international law.

the material element of usage is "purely evidentiary"... there is no need of any usage or practice provided that the *opinio juris* can be clearly established". D'Amato, Anthony, 'On Consensus', *Canadian Yearbook of International Law*, vol. 8, 1970, p. 111. In the opinion of the author, both *opinio juris* and State practice are interdependent and mutually reinforcing.

⁶⁴ Thirlway, Hugh W. A., *op. cit.*, p. 66.

⁶⁵ *Human rights and transnational corporations and other business enterprises*, UN Res. A/HRC/RES/17/4 (6 July 2011).

⁶⁶ "If *all* states subscribe to a declaration that a particular formula expresses an existing rule of law, then that is the end of the matter, for what states *believe* to be international law is international law common usage." D'Amato, Anthony, *op. cit.*, p. 106.

As well, a case can be made regarding the diplomatic activity of the States who participated in the adoption of the Guiding Principles, for “It cannot be denied that when a resolution is formally adopted in so universal an organization as the United Nations, the resolution is something more than the consistent statements or wishes of the member States...”⁶⁷ In this sense, as stated by Wouters and Ryngaert, verbal state practice –reflected through their statements in discussion of topics in multilateral organizations- usually is an evidence of both state practice and the belief of that particular State regarding the topic discussed, which would fulfill the material and psychological requirements for the formation of customary international law.⁶⁸

Despite the previous affirmation, which could be debatable, another set of State practices that are external to the United Nations or the Human Rights Council are clear indices that the Guiding Principles are being given consideration as at least, a developing rule of international law. This can be shown through the adoption of different plans of action and implementation of the Ruggie Principles throughout the world, as is the case of the European Union and its member countries (with the European’s Commission guidance projects on the oil and mining sector, on information and communications technology and on employment and recruitment agencies, as well as the development and implementation of national action plans), or of some countries in the Latin-American region.

In this regard, it’s important to keep in mind that State action may refer to the actions of any organs of the State, including for example the work of national human rights institutions, which may help in the implementation, diffusion and growth in the corresponding legal culture of the values contained in the UN resolution.⁶⁹ As well, its use by

⁶⁷ Thirlway, Hugh W. A., *op cit.*, p. 65.

⁶⁸ Wouters, Jan & Ryngaert, Cedric, *op. cit.*, p. 115.

⁶⁹ As is the case, for example, of the Casino Royale recommendation of the Human Rights Commission of the State of Nuevo Leon, Mexico, where it largely relied on the Ruggie Framework to determine the probable responsibility by omission of a corporation in a fire that took place in August 2011 and that killed 52 people. For a more detailed explanation of the case, see Cantú Rivera, Humberto Fernando, *Corporations and Compliance with International Human Rights Law: From a “Responsibility to Respect” to Legal Obligations and Enforcement*, Paper

national courts may reflect State practice,⁷⁰ useful for the development of a customary rule regardless of the effects that a series of judicial resolutions may have within the national legal framework.⁷¹ As has been discussed before, reiterative interpretation of soft law by courts (such as the Inter-American Court of Human Rights) has in some instances developed its status, at least regionally, as a compulsory criterion to which States under its jurisdiction are bound.

Therefore, a more consistent global practice could eventually lead to the development of an emerging rule of customary international law, if the *opinio juris* expressed in the Human Rights Council's resolution adopting the Guiding Principles of Business and Human Rights can be construed as the expression of the acceptance of the international community of a set of minimum standards that are expected from both States and corporations in relation to the effects and impacts that the activities of the latter can have in the enjoyment of human rights.

While it is expected that some States may oppose to the interpretation of this resolution as being the expression of a general belief of the international community, and would generally rely on the traditional approach to the formation of customary law requiring State practice primarily and *opinio juris* secondarily, it is true that international and domestic practice usually reflect legal developments that formal methods to ascertain international law may not be able to reach, given the different paces to which reality and law are bound.

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⁷⁰ “Just as judicial decisions of international tribunals can clarify certain questions of International Law and also of domestic law, judicial decisions of national tribunals can likewise do so when dwelling upon questions of International Law”. Cançado Trindade, Antônio Augusto, *op. cit.*, p. 159.

⁷¹ As would be, for example, the development of legal precedents that could make the Guiding Principles on Business and Human Rights binding under domestic law.

IV. GENERAL CONCLUSIONS

A few general conclusions can be drawn from the arguments exposed in the preceding paragraphs, particularly regrouped in the two broad fields that were discussed: extraterritoriality and the hardening of soft law.

1. On extraterritoriality: from the opinion given by the Supreme Court in *Kiobel*, it can be inferred that a particularly strict approach will be followed in the next ATS cases that are granted jurisdiction. Thus, a link with American interests or nationality will be required for their courts to have jurisdiction, while foreign-cubed cases seem to have been *prima facie* excluded from their reach. However, the fact that courts in other countries are dealing with cases in which extraterritorial adjudication is taking place will probably switch the focus of victims, who will continue resorting to forum shopping in order to find a jurisdiction that is more prone to analyzing the merits of their causes.

Under international human rights law, however, there is a need to develop a non-binding instrument on which States can rely to guide them in the processes involving extraterritorial adjudication. As has been discussed before, a soft law instrument will have a better opportunity to evolve into a binding obligation for States than creating an international treaty on this subject, and would normally have an interesting opportunity to develop standards if several States are adjudicating cases that involve extraterritorial elements. Given that there is already some practice in this field –although scarce–, it would appear that an international instrument conceived either through the machinery of the Human Rights Council or the Working Group on the issue of human rights and transnational corporations and other business enterprises could serve to determine international non-binding standards, and therefore offer guidance in one of the most politically difficult topics in human rights.

2. On the hardening of soft law: for soft law to become something more than just mere diplomatic or academic exercises and references with no binding character, frequent practice by the different actors of the international community is required. As has happened with a few

examples –such as the UN Declaration on the Rights of Indigenous Peoples, or with several environmental principles contained in UN Declarations-, practice and a general acceptance by States has elevated them to at least the rank of general principles of international law, which could be considered the weakest line in the hard sources of international law. However, continuous usage has the possibility of eventually becoming hard law, either through the traditional approach that emphasizes State practice, or as a confirmation of the general *opinio juris* that is more favored by the human rights approach, thus evolving into a customary rule. Even though some States –usually the most powerful- may be reluctant to accept their characterization as binding norms (given their source), the use and implementation by a growing number of States could eventually pressure those objectors to yield and accept them, in limited circumstances perhaps, as rules that would be considered and perceived as mandatory by the international community.

Even though these types of developments will not be easily achieved, we must bear in mind that this is a basic characteristic of general international law: long processes will be required for the community of States to eventually accept and try to regulate the challenges posed to them by a constantly changing reality.

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