Cuestiones Constitucionales
Revista Mexicana de Derecho Constitucional
Núm. 30, enero-junio 2014

THE *KIOBEL* PRECEDENT AND ITS EFFECTS ON UNIVERSAL JURISDICTION AND THE BUSINESS & HUMAN RIGHTS AGENDA: A CONTINUATION TO "A HUMAN RIGHTS FORUM IN PERIL?"

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I. Introduction

The United States Supreme Court issued on 17 April 2013 an important precedent that served as a culmination to the well-known case brought by Esther Kiobel and other Nigerian plaintiffs against the oil giant Shell, *Kiobel et al. v. Royal Dutch Petroleum et al*.[1] This case, on which large hopes were deposited by human rights activists worldwide to become a beacon of hope in relation to the involvement of corporations on human rights abuses, saw the plaintiffs file a civil case before U.S. federal courts under the Alien Tort Statute (ATS) for the alleged aiding & abetting by Shell of the Nigerian military in the commission of crimes against humanity, torture and arbitrary arrest and detention. This statute, passed in 1789 as part of the First Judiciary Act, sets forth that U.S. district courts 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."[2]

The issue of corporate responsibility for human rights violations, including their participation through aiding and abetting, saw lower courts divided

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[1] Opinion, *Kiobel et al. v. Royal Dutch Petroleum et al.*, Case 10-1491 (Supreme Court, 17 April 2013).

[2] 28 U.S.C. § 1350.

on the existing framework under international law in this regard. While the Court of Appeals of the Second Circuit dismissed the case under the premise that customary international law does not recognize corporate liability, the Supreme Court granted *certiorari* to hear the case. A first hearing was held on 28 February 2012, to analyze the question if corporations were immune from tort liability for violations of the law of nations. However, in a rare decision, the Supreme Court ordered the parties on 5 March 2012 to provide supplemental briefing on 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. Thus, a second hearing was held on 1 October 2012.

This note will analyze the opinion delivered by the Supreme Court in April 2013, and make some comments on the reasoning used by the Justices while treating the questions of extraterritoriality and corporate responsibility under international law. As well, some ideas will be discussed on the immediate effects the *Kiobel* precedent has already had in ongoing cases before U.S. courts, and some insight will be provided on what this decision may mean for the business & human rights movement. This note is a continuation to the comment[3] that appeared in the last issue of this law review, and thus they are to be read together for a full understanding and context of the *Kiobel* case.

II. The *Kiobel* Opinion: Extraterritoriality and Corporate Responsibility under International Law

The opinion of the Supreme Court, written by Chief Justice Roberts, dealt primarily with the question of the extraterritorial reach of the Alien Tort Statute, which was the underlying argument that was used by the Court to decide the case. In this sense, the Supreme Court unanimously determined that "the presumption against extraterritoriality applies to claims under the ATS, and… nothing in the statute rebuts that presumption."[4] To

[3] 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, at 243-254.

[4] Opinion, *Kiobel et al. v. Royal Dutch Petroleum et al.*, Case 10-1491, at 13 (Supreme Court, 17 April 2013).

arrive to this conclusion, the Supreme Court relied primarily on their recent *Morrison*[5] precedent, which stated that a clear indication of extraterritorial reach must be present in the jurisdiction-granting statute in order for its domestic law to be applicable to actions occurred outside the territorial boundaries of the United States. This presumption against extraterritorial application of the law, a canon of statutory interpretation, thus limits the reach of American law and the jurisdiction of its courts,[6] allowing them to govern domestic actions primarily, and only when the facts of the case touch and concern the territory and interests of the United States with sufficient force the presumption may be displaced in favour of jurisdiction.[7]

The *Kiobel* precedent considered several questions to arrive to its conclusion. Section II of the opinion, for example, dealt with issues of domestic interpretation of the Alien Tort Statute, where the Supreme Court set forth that Congress must make an explicit declaration —within its text— that any given law is meant to have extraterritorial effects for it to overcome the presumption against extraterritoriality. As well, the high court made a clear statement that lower courts must be cautious not to generate domestic clashes with the Executive and Legislative branches, in charge of foreign policy, nor create international tension with other sovereign States, while adjudicating cases with clear or probable foreign policy implications.

Section III of the opinion saw the Supreme Court analyze the text, history and purpose of the ATS, trying to observe from its context the possibility of its conception as a legal instrument aimed at having extraterritorial effects. However, the analysis made by the Justices did not find any concluding evidence in favour of granting an extraterritorial application to the statute. In this guise, the Court again touched upon the lack of a clear indication of extraterritorial application of the Alien Tort Statute, without which the presumption against extraterritoriality would be applicable. In relation to its history, the Court recognized that at the time when the statute was enacted, three main offenses to the law of nations were recognized, namely the violation of safe conducts, the infringement of the rights of ambassadors, and piracy. While the Court argued that the first two don't necessarily happen

[5] Opinion, *Morrison et al. v. National Australia Bank Ltd. et al.*, Case 08-1191 (Supreme Court, 24 June 2010).

[6] Opinion, *Kiobel et al. v. Royal Dutch Petroleum et al.*, Case 10-1491, at 6 (Supreme Court, 17 April 2013) ["The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS"].

[7] *Id.* at 14.

abroad, it recognized that piracy normally takes place outside the territorial boundaries of any state; nevertheless, it considered that a claim against pirates does not entail transcendent direct foreign policy consequences, and thus was not on equal ground as other causes of action.

Finally, while considering the possible purpose of the ATS in 1789, Chief Justice Roberts stated that there was no indication that the statute was passed to make the US a uniquely hospitable forum for the enforcement of international norms. Thus, the Court concluded in section IV that "[o]n 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."[8] The judgment of the Court of Appeals —which had dismissed the case based on the inexistence of corporate liability under customary international law— was therefore affirmed, and the claim against Shell was barred.

The Supreme Court of the United States, while being cautious in its approach to this case, left aside some interesting arguments and questions involving extraterritoriality and corporate liability for participation in human rights violations. For example, the Court determined that the extraterritoriality issue was the deciding factor in *Kiobel*, crafting an argument in relation to the inapplicability of the Alien Tort Statute to torts committed outside of the United States, based on the premise that it would be applying its laws beyond its borders and risking foreign policy implications. Nevertheless, the Supreme Court itself had already recognized in its *Sosa* precedent that the Alien Tort Statute was of a strictly jurisdictional nature,[9] thus not extending the laws of the United States —at least those of a substantive nature— beyond its territorial confines. In this sense, two important aspects should have been considered: first of all, the predecessor of the International Court of Justice, the Permanent Court of International Justice (PCIJ), determined in its emblematic 1927 *Lotus* judgment the existence of a presumption of permissibility[10] that would allow States to enact laws with extraterritorial

[8] *Id*.

[9] Opinion, *Jose Francisco Sosa v. Humberto Alvarez-Machain et al.*, Case No. 03-339, at 18 (Supreme Court, 29 June 2004).

[10] *The Case of the S.S.* "*Lotus*" (France v. Turkey), Judgment, Permanent Court of International Justice, 7 September 1927, at 19 ["Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves

reach, even those of a substantive nature, unless a specific prohibition bars such application.[11] This permissibility rule set forth by the PCIJ left for States to determine the way in which they enforce international law, establishing through its *dictum* an important characteristic: international law provides the substantive, conduct-regulating rule (normally a prohibition), while domestic law determines the procedures and remedies that would see that international rule applied.[12] However, through its bar of the *Kiobel* case on the premise of the presumption against extraterritoriality, the Supreme Court would not have only gone against this important international precedent, but also against its own case law, particularly the *Charming Betsy* canon,[13] which stipulates that U.S. courts shall construe its laws in conformity with international law.

In the second place, allowing American courts to hear foreign-cubed cases under the ATS would only imply that they are acting as a decentralized enforcer of international law through universal jurisdiction, given that the conduct that is being regulated would derive directly from international law and not arise from domestic law.[14] Also, since the action that is being adjudicated derives directly from the law of nations, it would be substantively in force everywhere around the globe, even more so if the case involves customary international law —applicable to every State— and not treaty law, which may be limited by the express consent of every single country. In this sense, even though the Supreme Court correctly interpreted that the conduct-regulating rule derives from international law and the ATS

them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules…]. See also Stigall, Dan E., "International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law", *Hastings International & Comparative Law Review*, vol. 35:2, 2012, at 323-382, especially 331 on the effects of the *Lotus* judgment; and Bernaz, Nadia, "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?", *Journal of Business Ethics*, vol. 4, November 2012, at 18.

[11] Sloss, David, "*Kiobel* and Extraterritoriality: A Rule without a Rationale", *Maryland Journal of International Law*, vol. 28, Issue 1, at 242.

[12] Colangelo, Anthony J., "*Kiobel*: Muddling the Distinction between Prescriptive and Adjudicative Jurisdiction", *Maryland Journal of International Law*, vol. 28, Issue 1, 2013, at 70 […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]."

[13] Opinion, *Murray v. Schooner Charming Betsy* (Supreme Court, 1804).

[14] Colangelo, Anthony J., "The Alien Tort Statute and the Law of Nations in *Kiobel* and Beyond", *Georgetown Journal of International Law*, vol. 44, 2013, at 1334.

would be its mean of domestic enforcement, the substantive character of the norms that would be adjudicated in *Kiobel* should impede the application of a presumption against extraterritoriality. Thus, if the norm was already applicable both in Nigeria and the United States because of its character as a customary rule of international law, and given that the ATS is recognized as a jurisdictional statute, federal American courts would not be extending the reach of their laws in any way, but merely enforcing international law in a manner compliant with the *Lotus* dictum (international law) and its own *Charming Betsy* canon (domestic law).[15]

In relation to the question of corporate liability under customary international law and its dismissal by the Court of Appeals of the Second Circuit that knew of the *Kiobel* case prior to the granting of *certiorari* by the Supreme Court, other questions appear. The Court of Appeals determined to dismiss *Kiobel* on the grounds that international law does not generally recognize corporate liability for violations of the law of nations;[16] to arrive to this conclusion, the Court made an examination of the position of international treaties, courts —basically of international criminal tribunals— and the work of publicists. In this sense, it argued that the ICTY and the ICTR, for example, did not have jurisdiction over legal persons, which it interpreted as a sign of an inexistent corporate liability under international law, a position that was repeated when reviewing the Rome Statute of the International Criminal Court, which also doesn't provide for jurisdiction over legal persons.

In relation to treaties, the Court of Appeals argued that no treaty related to the protection of human rights expressly impose obligations on corporations, which is also a sign of the inexistence of corporate liability under international law. And in relation to the work of publicists, it noted that there is an important disagreement in scholarly writing as to the extent of

[15] *Id*. at 1331-1332, 1340 ["The Supreme Court has explained that courts can consider "context" in determining the geographic scope of statutes. Here the context is that the statute authorises application of international, not domestic, law, and the relevant canon of construction is *Charming Betsy*, under which courts construe ambiguous statutes in conformity with international law].

[16] Opinion, *Kiobel et al. v. Royal Dutch Petroleum et al.*, Case No. 06-4800-cv, 06-4876-cv (Court of Appeals of the Second Circuit, 17 September 2010). See however Circuit Judge Pierre Leval's separate opinion, in which he sets forth why he believes the Court of Appeals erred in its reasoning, despite his joining of the judgment. Also, *cfr*. Leval, Pierre N., "The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court", *Foreign Affairs*, vol. 92, no. 2, March-April 2013, at 16-21.

the development of a customary rule that establishes corporate liability for human rights violations. While it holds true that looking at the statutes and case law of international tribunals or at the work of publicists would only be a sterile effort, for corporate liability has not been determined through such avenues in the case of tribunals, nor there is common consensus among scholars, a more interesting approach would be to look at international treaties. Some of them, particularly in the field of international crimes, have determined not to define who the perpetrator of an international crime may be, but rather what the prohibited conduct is: in this sense, treaties such as the Genocide Convention don't categorize the possible offenders, but rather exclude their identification in favor of a wider approach.[17] As Dodge explains, "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."[18] While it would be inconvenient to generalize the fact that some treaties make this apparently deliberate choice not to set out an exhaustive list of the subjects that may be held liable for certain international crimes, it could certainly add to the notion that corporations may be found liable under international law for gross human rights violations.

Another important point in this regard that was not considered by any of the courts involved in the *Kiobel* litigation is the work of the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. While he expressly stated in his Guiding Principles on Business and Human Rights[19] that corporations only have a responsibility to respect human rights, he also made clear that they may be held liable under international criminal law for their participation in gross human rights violations amounting to international crimes.[20] It is not to be taken lightly the fact that his work was

[17] Dodge, William S., "Corporate Liability Under Customary International Law", *Georgetown Journal of International Law*, vol. 43, 2012, at 1048 ["Article IV (of the Genocide Convention) provides who shall be punished, not who shall not be punished, and its purpose was to confirm that the prohibition against genocide applies to both government officials and private persons"].

[18] *Id.* at 1047.

[19] UN Doc. A/HRC/17/31, *Guiding Principles on Business and Human Rights: Implementing the United Nations* "*Protect, Respect and Remedy*" *Framework*, 21 March 2011.

[20] UN Doc. A/HRC/4/35, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, 19 February 2007, at 9, 15 ["Indeed, corporate responsibility is being shaped through the interplay of two

endorsed unanimously by the Human Rights Council, a validation that can only show the extent to which States agree on his position regarding corporate responsibility. While outside of the scope of this note,[21] the approval by the Human Rights Council and the community of States represented therein of the UN Guiding Principles on Business and Human Rights, as well as the subsequent dissemination and application at international, regional and national levels by multiple actors, States and organizations could in time help to shape the formation of a customary norm of international law in this regard, and are proof of a movement that may have profound implications for the business & human rights agenda in the near future.

An interesting approach which may well show the future road for claims brought under the Alien Tort Statute was the proposal made by Justice Stephen Breyer in his concurring opinion. While Justice Breyer and the female members of the Court agreed on the judgment of the Supreme Court[22] in *Kiobel* but not in its opinion, he laid out a test describing the factors he would consider to determine if American courts have jurisdiction for violations of the law of nations that took place outside of the territorial boundaries of the United States. In this sense, a more neutral approach to the question of extraterritorial jurisdiction was used; Breyer thus proposed that American courts would have jurisdiction under the Alien Tort Statute if the tort occurs on American soil, if the defendants are of American nationality, or if the defendant's conduct affects an American national interest. Nevertheless,

developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts." However, he also states a different view in the human rights realm: "In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations"]. See also Ruggie, John G., "*Kiobel* and Corporate Social Responsibility", 4 September 2012, available at *http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20(3).pdf*.

[21] For a more profound insight on the "hardening" of soft law, see Cantú Rivera, Humberto Fernando, "Recent Developments in Extraterritoriality and Soft Law: Towards New Measures to Hold Corporations Accountable for their Human Rights Performance?", *Anuario Mexicano de Derecho Internacional*, vol. XIV, 2014 (Forthcoming).

[22] Breyer considered in his concurring opinion that in *Kiobel*, the parties and the relevant conduct lacked sufficient ties to the United States. Concurring Opinion of Justice Stephen Breyer, joined by Justices Ginsburg, Kagan and Sotomayor, *Kiobel et al. v. Royal Dutch Petroleum et al.*, Case 10-1491, at 14-15 (Supreme Court, 17 April 2013).

given that the facts in *Kiobel* didn't have a strong connection to the United States and the accusation was not of a crime perpetrated by the defendants but rather a matter of aiding and abetting, the Justices joined the judgment of the Supreme Court. Some life still remains in the Alien Tort Statute,[23] although the *Kiobel* precedent drastically limited its possibilities to continue being a legal remedy available to victims of human rights abuses worldwide.[24] In this sense, only future lawsuits will clear the scenario under which corporations —which are not yet granted immunity under the Alien Tort Statute by a definite reading of the United States Supreme Court— may be brought to justice for contributing to negative human rights impacts, if at all.

III. The Effects of the *Kiobel* Precedent within U.S. Jurisdiction

The *Kiobel* opinion immediately became an important precedent and potentially a setback for the human rights movement. While the effects this Supreme Court decision will have at the international level cannot be fully grasped until more jurisprudential developments start to appear, it certainly marked a victory for foreign corporations doing business in the United States, generally putting them outside the reach of American courts and of the Alien Tort Statute.

[23] Concurring Opinion of Justice Anthony Kennedy, *Kiobel et al. v. Royal Dutch Petroleum et al.*, Case 10-1491, at 1 (Supreme Court, 17 April 2013), where he states that the presumption against extraterritoriality may yet be elaborated in future cases, and that there are some open questions regarding the reach and interpretation of the Alien Tort Statute.

[24] Some propose that the near-death of the ATS can actually be a beneficial situation for the human rights movement worldwide, since that would force activists to focus on the root of the problem —a matter of domestic policy and implementation of international standards— instead than on granting small-scale palliatives to those with enough resources to access US courts. *Vid*. Moyn, Samuel, "Why the Court Was Right About the Alien Tort Statute: A Better Way to Promote Human Rights", *Foreign Affairs*, 2 May 2013, accessed on 18 November 2013 at *http://www.foreignaffairs.com/articles/139359/samuel-moyn/why-the-court-was-right-about-the-alien-tort-statute* ["Far better would be to move on to other ways of protecting human rights —less centered on courts, less rushed for a quick fix, less concerned with spectacular wrongs to individuals and more with structural evils, and less disconnected from social movements abroad. And there are also better ways to protect humanity in the age of powerful multinational corporations, notably regulatory schemes that connect far more clearly to the originally welfarist meaning of human rights]."

Within the American judicial system, it had direct effects in two cases so far. The first one, *Sarei et al. v. Rio Tinto, PLC et al.* before the Court of Appeals for the Ninth Circuit, was a case brought under the Alien Tort Statute on allegations that the operations of the Rio Tinto mining group on the island of Bougainville, in Papua New Guinea, had resulted in many deaths following demonstrations and uprisings in the late 1980s that were appeased with the use of military force. The context, which allegedly involved the aiding and abetting of Rio Tinto in the military operation against the demonstrators, was similar to the facts in *Kiobel*. Nevertheless, Rio Tinto did have important operations in North America, which could bring it before American jurisdiction since personal jurisdiction was not disputed.[25]

The District Court that knew of the case held that the claim for racial discrimination, crimes against humanity, genocide and war crimes was dismissed, based on three considerations: first, that the court lacked jurisdiction because claims arose outside of the territorial boundaries of the United States. Second, that the claims were inadmissible because they were brought against corporations; and third, that aiding and abetting liability is outside the scope of international law. The Court of Appeals, however, decided to analyze those jurisdictional issues raised by the District Court.

Regarding the issue of extraterritoriality, the Court of Appeals held that when enacting the Alien Tort Statute, Congress intended to provide jurisdiction for certain violations of international law that took place outside of the United States, and that there were no indications to the contrary; as well, it mentioned that there was no extraterritorial bar applicable to the facts in Rio Tinto.[26] On corporate liability, the Court stated that the ATS, its language and its legislative history did not exclude corporate liability from its scope, which would them provide them with jurisdiction over the defendants.[27] Finally, the Court determined that the ATS does not bar aiding and abetting liability, thus ordering that the dismissal of the claims for genocide and war crimes was reversed, and that the case was to be remanded to the district court for proceedings on such claims.[28]

What was an apparent provisional victory for the plaintiffs turned out to be just a temporary relief, when in 22 April 2013, the Supreme Court or-

[25] Opinion, *Sarei et al. v. Rio Tinto, PLC et al.*, Case No. 02-56256, at 19334 (Court of Appeals for the Ninth Circuit, 25 October 2011).

[26] *Id.* at 19339.

[27] *Id*. at 19341.

[28] *Id*. at 19380.

dered the decision of the Court of Appeals to be vacated and remanded for further consideration in light of the *Kiobel* precedent. After another round of consideration, the majority of the Court of Appeals determined to affirm the judgment of dismissal by the District Court.[29] Thus, the first victim of the presumption against extraterritoriality were the plaintiffs in the case, which then saw upheld an indirect presumption against corporate liability under the Alien Tort Statute.

A second case which is now being considered before the United States Supreme Court is *Bauman et al. v. DaimlerChrysler AG et al*. Considered to be the continuation to *Kiobel* because of the facts of the case and its history in the lower courts, it was granted *certiorari* by the Supreme Court after a judgment of the Court of Appeals saw DaimlerChrysler AG (DCAG) subjected to personal jurisdiction in California under the Alien Tort Statute and the Torture Victims Protection Act through its American subsidiary, Mercedes-Benz USA (MBUSA), a decision that was deemed "reasonable, fair and just" given the importance of the Californian market to the German vehicle company.[30]

The plaintiffs in the case, 22 Argentinean residents, alleged that one of DaimlerChrysler AG's subsidiaries, Mercedes-Benz Argentina, collaborated with State authorities and security forces to kidnap, detain, torture and kill plaintiffs during the military dictatorship in Argentina. Initially, the District Court that heard the case dismissed the claim for lack or jurisdiction, since there was no agency between the German DCAG and its American subsidiary MBUSA, and because exercise of jurisdiction in California would be unfair and unreasonable to the foreign parent corporation based on the activities of its U.S. subsidiary.

On 28 August 2009, the Court of Appeals upheld the District Court judgment, stating that it did not have personal jurisdiction over DCAG;[31] however, it granted a rehearing to the plaintiffs on 06 May 2010, withdrawing its 2009 opinion.[32] In a rare turnaround, the Court of Appeals then determined on May 18, 2011 that DCAG was subject to personal jurisdiction,[33] reversing the

[29] Order, *Sarei et al. v. Rio Tinto, PLC et al.*, Case No. 02-56256, at 4 (Court of Appeals for the Ninth Circuit, 28 June 2013).

[30] Opinion, *Bauman et al. v. DaimlerChrsyler Corporation et al.*, Case No. 07-15386 (Court of Appeals for the Ninth Circuit, 18 May 2011).

[31] *Id.*, 28 August 2009.

[32] *Id.*, 6 May 2010.

[33] *Id*. at 6560 (18 May 2011) ["DCAG was subject to personal jurisdiction in Califor-

judgment of the District Court and remanding the case for further proceedings. A rehearing was denied on 9 November 2011,[34] which thus paved the way for DaimlerChrysler AG to request certiorari to the Supreme Court.[35]

Before briefly reviewing the questions before the Supreme Court in *Daimler*, it is important to note that the analysis made by the Court of Appeals had some interesting arguments that may contribute to the determination of a corporate human rights responsibility within the domestic context. To exercise general jurisdiction over a defendant, a court must find that a cause of action does not arise out of or relate to the foreign corporation's activities in the forum State.[36] In *Bauman*, the Court of Appeals examined whether its granting of general jurisdiction over DCAG in California respected the constitutional Due Process clause; to determine it, the Court relied on two tests: agency and control.

In relation to the agency test, the examination was in relation to the importance of services provided by the subsidiary. The panel determined that a subsidiary acts as an agent if the parent company would perform the service itself if it had no representative to act for them.[37] As well, the control test aimed at considering if the parent company controls substantial aspects of its subsidiary's operations.[38] After analyzing its conclusions from both tests, the Court determined that DCAG effectively controlled MBUSA, which acted as its agent, focusing then on pondering if the courts in California would constitute a fair and reasonable forum to DaimlerChrysler AG. Since Germany —according to the Court— apparently wouldn't recognize a human rights action against corporate defendants, and Argentinean law had established a statute of limitations of two years and three months, where no redress against corporations for their actions during the military dictatorship could be granted, the Court of Appeals determined that Daimler AG could therefore be sued in California for alleged human rights violations committed in Argentina by an Argentinean subsidiary against Argentine residents.

nia through the contacts of its subsidiary MBUSA. We hold that MBUSA was DCAG's agent, at least for personal jurisdiction purposes, and that exercise of personal jurisdiction was reasonable under the circumstances of this case"].

[34] *Id.*, 9 November 2011.

[35] *Daimler AG v. Bauman et al.*, Case No. 11-965 (Supreme Court).

[36] Opinion, *Bauman et al. v. DaimlerChrsyler Corporation et al.*, Case No. 07-15386, at 6574 (Court of Appeals for the Ninth Circuit, 18 May 2011).

[37] *Id.* at 6578.

[38] *Id.* at 6583.

The question before the Supreme Court, which granted a hearing on this case barely a few days after issuing its *Kiobel* opinion at the request of Daimler AG, is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

During oral argument on 15 October 2013, some interesting issues were raised. Justice Kennedy asked to Daimler's attorney if the creation of a subsidiary would not mean that the parent corporation avails itself of jurisdiction, particularly more so if the parent company was of dual nationality (German and American at the time when the conduct happened).[39] Justice Ginsburg, on the other hand, asserted that the legal thought on issues of jurisdiction has changed enormously since 1898, when the Court resolved a case (*Barrow Steamship Company v. Kane*) of general jurisdiction that also involved foreign corporations and their subsidiaries in the United States.[40] Hints of how the Supreme Court may rule in *Daimler AG* were provided by both Justices Breyer and Ginsburg: Breyer, for instance, suggested the case may be sent back for consideration in light of the Supreme Court's *Goodyear*[41] and *Kiobel*[42] precedents —dealing with the issues of general jurisdiction over foreign corporations and the presumption against extraterritoriality, respectively—, thus setting a double standard to be overcome if courts are to have jurisdiction over foreign corporate defendants. Justice Ginsburg also pointed to the fact that *Goodyear* established a benchmark as to where corporations may be sued: either at its place of incorporation, or at its principal place of business.[43] While the Supreme Court will not decide this case until mid-2014, it is possible that it may look to reduce even further

[39] Transcript of the hearing, *Daimler AG v. Bauman et al.*, Case No. 11-965, at 13 (Supreme Court, 15 October 2013).

[40] *Id.* at 32. This affirmation, however, seems somehow incoherent in light of the *Kiobel* precedent; could the Court not have asked the same question in *Kiobel v. Royal Dutch Petroleum*? While it is true that in *Kiobel* there was no American subsidiary involved (which would touch and concern the territory of the United States with more force than just a representation office), the apparent departure in the reasoning is notorious.

[41] Opinion, *Goodyear Dunlop Tires Operations, S.A. et al. v. Brown et ux., Co-Administrators of the Estate of Brown, et al.*, Case 10-76 (Supreme Court, 27 June 2011).

[42] Opinion, *Kiobel et al. v. Royal Dutch Petroleum et al.*, Case 10-1491 (Supreme Court, 17 April 2013).

[43] Opinion, *Goodyear Dunlop Tires Operations, S.A. et al. v. Brown et ux., Co-Administrators of the Estate of Brown, et al.*, Case 10-76, at 7 (Supreme Court, 27 June 2011).

the scope of the Alien Tort Statute, as well as the exercise of jurisdiction over foreign corporate defendants,[44] while at the same time trying to define a clearer picture of when a civil action by an alien for a tort, committed in violation of the law of nations, may be actionable before American courts.

IV. Final Remarks

As the United States Supreme Court clearly expressed in its *Kiobel* precedent, the American Congress would need to legislate in order for its courts to have jurisdiction over extraterritorial human rights abuses. The same would be required for them to find jurisdiction over corporations, given the inexact wording and little history known in relation to the Alien Tort Statute, and the perpetual indefiniteness of customary international law. The *Kiobel* ruling limited to a great extent the use of the Alien Tort Statute. An opportunity for the United States Supreme Court to define what type of actions "touch and concern the territory of the United States" is before them; however, it may yet again incline to maintain a conservative stance on the issue of corporate responsibility for human rights abuses, shying away from an international trend that is polarized on this issue, but that appears to be in desperate need for guidance and leadership.

[44] Despite the fact that the German Institute for Human Rights, Germany's national human rights institution (NHRI) in accordance with the UN Paris principles, contended that Germany is not a reasonable alternative forum (which would comply with the *Goodyear* precedent on where a corporation may be sued). This position is due to the fact that courts in Germany would apply *lex loci damni*, substantive law that was applicable at the place where the wrong was committed. In this sense, German courts would apply Argentinean substantive law as it was in force when the abuses were committed; such law (Argentine Civil Code) refuses to recognize these types of claims, while also having a strict statute of limitations that would effectively bar claims against the German parent company arising out of human rights abuses. In addition, procedural obstacles would also be present, such as language and litigation costs, which are extremely high for non-European plaintiffs. Another important point argued by the German NHRI is the fact that when claims were filed, Daimler was jointly headquartered and continuously and systematically doing business in the United States: "In substance, this is a case of United States courts exercising jurisdiction over a United States company for the conduct of one of its subsidiaries abroad." It must be noted also that Germany did not object to the exercise of jurisdiction over Daimler Ag. *Cfr.* Brief of *Amici Curiae* German Institute for Human Rights and Other German Legal Experts in Support of Respondents, *Daimler AG v. Bauman et al.*, Case No. 11-965, at 3-13 (Supreme Court, 26 August 2013).