

GROUP OF STUDY ON PRIVATE INTERNATIONAL LAW AND HUMAN RIGHTS: NOTES ON *KIOBEL* AND THE QUESTION OF EXTRATERRITORIALITY*

After, so to speak, certain procedural maneuvers at dark (described by M.D. Goldhaber, *Corporate Counsel*, 1-V-2012), the USSC implemented the fifth of March 2012, a particular shift of scenery as far the review of *Kiobel* case is concerned. So far the discussion lied on the chance of suing on the basis of ATS to legal entities, on that date the High Court arose a different problem for discussion: “If and under what circumstances the ATS, 28 U.S.C. Sec. 1350, allows the courts to admit a cause of action for the breach of the law of nations taken place within the land of a sovereign state different from the United States”.

After this date and as how it was expected a wide debate has arisen different from the already live existing one concerning the above cited question related to legal entities and recognized in an extensive way by the specialized media as *the question of extraterritoriality*. Our Group just in case it could shed some light on it poses in this note some ideas to this respect selecting among a wide range of ways of facing the problem on the terms on which the USSC has raised it.

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In this way, in the first place, it could be believed that it is a matter of conducting a research about the historical basis of the ATS, to the effects of answering the existing question. Notwithstanding, and in the spite of the great importance of many of the studies devoted to those effects, as for example, the recent one by A.J. Bellia and B.R. Clark (*Geo. J. Int'l L.*, 2012), the legal controversy and the lights and shadows surrounding them do not seem to provide with a solid base to the above-cited effects. So as not to speak of the extemporaneous character of arising the problem through a return to the origins on which the doctrine contrary to the ATS makes a point of it. And, above all, when the already mentioned text is being applied along decades, in which the extraterritoriality question considered in its origins has not been a relevant one.

From now on, then we consider that the intention of the USSC is to analyze the ATS within what it is known since long time ago as the *debate over the extraterritoriality of laws* with landmark lawsuits such as *Alcoa* (1945) and the one the High Court is focusing on lately from different perspectives along its well-known decision as it is *Morrison*, with respect to the rules on values where it has maintained a strict canon of territoriality - J.H. Knox would prefer to speak about a presumption against the *extrajurisdictionality* (*A.J.I.L.*, vol. 104, 2010) - following the well settled argument in *Aramco*.

As a matter of fact, there are studies as the one published by M.K. Fiechter (*Iowa L. R.*, 2012) where the impact on the decision is scrutinized in that case - being answered in the negative by the authoress - over the disputes based on ATS and judicial approaches, such as that of Judge Kleinfeld, of the Court of Appeal of the prestigious Ninth Federal Circuit, who, on the contrary, and such as it was revealed by him in *Sarei*, would be in favor of extending *Morrison* as a precedent over the above mentioned lawsuits.

At the same time, on their part, the Governments of Germany, the United Kingdom and Holland have arisen the question of extraterritoriality in their respective *amicus curiae* briefs submitted to the High Court in the pending procedure over *Kiobel* case. Germany, for example, requires it “an instruction to the lower courts on the base that the *power to adjudicate* (sic) should only be applied in lawsuits filed by foreign plaintiffs versus foreign corporations in the case of foreign concerns when there is not any possibility that a foreign plaintiff might file a suit before another jurisdiction most related to the case”. United Kingdom and Holland, on their part, are against the application of the ATS with respect to nationals of other country by acts abroad without any connection with the United States because this fact infringes upon International Law. With all our respects we disagree with both positions and before putting an end to this paper it is our intention to reveal our own arguments against them.

We understand, in the first place, in connection with the German point of view that its opinion is not consistent either with Private International Law or with the *Jus Gentium*. The basic historic development of the first one has been envisaged from the *diversity of the systems* of international jurisdictional competence and, as, in respect of the applicable rules of law reveals in the right direction H. Muir Watt, dealing precisely in relation with *Kiobel* case (*PIL: Beyond the Schism, From Closet to Planet, PILAGG*, 2012) throughout “engineering *windows* within domestic law in order to import norms from other (foreign or international) legal systems”.

So, the *jurisdiction to adjudicate* of the United States exercised through its courts has not necessarily to agree as for the application of its criteria with the rest of the countries or to retreat itself before others which are apparently most related to this particular subject or any other matter. The only requirement to be asked for, in the case of the transatlantic country or within the competence of any other, is to act *in a reasonable way* wherever there is a *sufficient link* between the State exercising it, as it can be, for instance, following the criteria compiled in Section 421, *Restatement of the Law Third, The Foreign Relations Law of the United States*. Once these criteria or other definitive ones have been fulfilled and independently, of the course of action based on conventions, we understand that international legislation - on what it is based the above mentioned *Restatement III* - at the

present stage of its evolution does not involve further duties to comply with. The own practice on ATS in this particular field as far as our knowledge is concerned, to the extent that in very few cases defendants have put into doubt -aside from the application of the doctrine *Forum Non Conveniens* - the jurisdictional competence of the American judicial venues, serves to ratify us in our argumentative allegations.

With respect to the pleas from the Governments of Holland and the United Kingdom, right on the hard core of the *debate over extraterritoriality* and what it is defined in the *Restatement III* as legislative competence or *jurisdiction to prescribe*, far more exact term than the controversial *subject matter jurisdiction*, we also have a different opinion. We do not think at all that the practice of the United States in the exercise of that legislative competence on ATS infringes upon International Law. If we address this *debate* properly, we are referring to a certainly complex nub of issues with particular perspectives and foundations which are rather different from this body of law for us. Extraterritoriality, following the terms arisen by these Governments means imposition, conflict, unilateral intention, a sort of power game related to hegemonic objectives or according to the widely recognised analysis by K. Raustiala and D.S. Margulies (both in *Southwestern L.R.*, 2012), with *empire* .

All of this is very well-known and it has been expressed into abundant and hard litigation above all but not only in areas related with defense matters, foreign policy, transfer of strategic technology, international sanctions or those concerning basic subjects about economic systems such as free competition (see the interesting study by D.E. Stigall in *Hastings Int'l & Comp. Law Rev.*, 2012) or about securities market regulation (see L. Brilmayer, in *Southwestern L.R.*, 2011). The potentiality for distortion of such lawsuits including even among those countries proclaimed as allied is wide as it shows the fact that, on some occasions, have cropped up in the international arena unusual rules of law such as the *blocking laws* or the *clawback statutes*.

Far from all of this, with its developed practice on ATS, we cannot forget, with all the warranties of one of the best judicial systems in the world, the United States sends to the international community - and so it has been adopted on occasions by judicial venues such as the Court of Appeal of the Second Federal Circuit in its ruling in respect of FNC in the *Wiwa* case, 14th of September 2000 - a powerful message of *active compromise* with the defense of Human Rights. When it comes to opening a forum to victims of atrocities which stir any conscience worthy of such a name - as it has been underlined by *Justice* Breyer what it speaks volumes for him at the first hearing of the appeal against *Kiobel* - and conducting through own channels the mandates of International Law- the transatlantic Country outstands

among its peers as far as the protection of the above mentioned Rights is concerned.

There is not any imposition but a scrupulous assumption of duties under its leadership. There is not will to rule over but to show solidarity with human kind. There is not egoism at all but a brilliant example towards the preservation of rights that cannot be waived and, into the bargain, of the supreme value of the peace, the ultimate reason of legal order. Throughout the ATS, besides, the United States are a perfect exponent of the *role splitting* or *dédoublement fonctionnel* that it constitutes one of the basic contributions of the valuable legacy of G. Scelle. In this way it was envisaged, on those exact terms and referring to the practice it was taking shape on that piece of legislation by the eminent A. Cassese (*EJIL*, 1990). We share his opinion and in order to put an end to these notes reaffirming our thought over the need of putting the *Alien Tort Statute* aside of the battlefield of the extraterritoriality of the laws. Nothing really binds it with what it is happening in this scope so markedly hostile and diverse to its purposes.