



## Papeles el tiempo de los derechos

### DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE DAIMLER AG V. BAUMAN ET AL CASE: CLOSING THE GOLDEN DOOR

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*"Give me your tired, your poor, your huddled masses..."*

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DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE *DAIMLER AG V. BAUMAN ET AL* CASE:  
***CLOSING THE GOLDEN DOOR***

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Key Words: Transnational Civil Litigation on Human Rights; *Daimler* Case; United States - *In Personam* Jurisdiction; *International Shoe* and *Goodyear* Cases; Responsibility of Multinational Corporations; *Sosa* and *Kiobel* Cases.

I.- INTRODUCTION.

This article will set forth some preliminary and brief points about a new decision by the Supreme Court of the United States

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that falls within the area of transnational civil litigation on Human Rights violations. Not long ago, in April 2013, the High Court published its very anticipated and important decision in a case that is already well-known, *Kiobel*,<sup>1</sup> a true watershed in the being and the practice of the American system. Upon agreeing a few days later to review the case I am now addressing, *Daimler*,<sup>2</sup> it became clear, and was widely interpreted in this way, that it was a good opportunity for the Court to address details and/or elucidate some of the loose threads that, as I indicated at that time, the Court had very carefully left in its resolution of *Kiobel*.<sup>3</sup> I should say now that, in my opinion, even assuming the background of *Kiobel*, the solution given in *Daimler* goes beyond it and presents new perspectives of analysis and will, very possibly, become another key component for the comprehension of the system of

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<sup>1</sup> 569 U.S. (2013). October Term 2012, No. 10-1491, Decided April 17, 2013.

<sup>2</sup> No. 11-965, decision found at [http://www.supremecourt.gov/opinions/13pdf/11-965\\_1qm2.pdf](http://www.supremecourt.gov/opinions/13pdf/11-965_1qm2.pdf), listed as *Daimler Decision* from here on out. See exhaustive documentation on the case, viz, at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/Lawsuits/Selectedcases/DaimlerlawsuitreArgentina>. And at <http://scotusblog.com/case-files/daimler-chrysler-ag-v-bauman/>. Also, among the studies prior to its resolution, see viz, D.E. Childress, “General Jurisdiction and the Transnational Law Market,” *Vanderbilt Law Review En Banc*, vol. 66-67, 2013, pp. 67-80; H.M. Erichson, “The Home-State Test for General Personal Jurisdiction,” *Ibid*, pp. 81-94; Id., “Why the Supreme Court Should Give the Easy Answer to an Easy Question: A Response to Professors Childress, Neuborne, Sherry and Silberman,” *Ibid*, pp. 179-184; B. Neuborne, “General Jurisdiction, ‘Corporate Separateness’ and the Rule of Law,” *Ibid*, pp. 95-109; S. Sherry, “Don’t Answer That! Why (and How) the Supreme Court Should Duck the Issue in *DaimlerChrysler v. Bauman*,” *Ibid*, pp. 111-122 and L. J. Silberman, “Jurisdictional Imputation in *DaimlerChrysler AG v. Bauman*: A Bridge Too Far,” *Ibid*, pp. 123-134. Also, see viz, T. W. Noelle, “At Home in the Outer Limits: *DaimlerChrysler v. Bauman* and the Bounds of General Personal Jurisdiction,” *Duke Journal of Constitutional Law And Public Policy Sidebar*, vol. 9, 2013, pp. 17-41; L. Hoffman, “Further Thinking About Vicarious Jurisdiction: Reflecting on *Goodyear v. Brown* and Looking Ahead to *Daimler AG v. Bauman*,” *University of Pennsylvania Journal of International Law*, vol. 32, 2013, pp. 765-785; L.S. Mullenix, “Due Process, General Personal Jurisdiction, and F-Cubed Litigation: The Extraterritorial Reach of American State Courts Over Foreign Nation Corporations for Alleged Human Rights Violations,” *The University of Texas School of Law, Public Law and Legal Theory Research Series Number 525*, found at <http://ssrn.com/abstract=2335510> and V. Winship, “Personal Jurisdiction and Corporate Groups: *DaimlerChrysler Ag v. Bauman*,” *Journal of Private International Law*, vol. 9, 2013, pp. 431-448. In general, see as well, viz, S.E. Sterk, “Personal Jurisdiction and Choice of Law,” *Iowa Law Review*, vol. 98, 2013, pp. 101-144.

<sup>3</sup> See my study, “Las Empresas Multinacionales y su Responsabilidad en Materia de Derechos Humanos: Una Visión de Conjunto,” en *Papeles El Tiempo de los Derechos*, Número 6, Año 2013, p. 7.

the United States, and that in a general sense, beyond the aforesaid transnational civil litigation.

Following these preliminary observations in Section I, I will introduce the *Daimler* decision in Section II, in three epigraphs, respectively: History, Justice Ginsburg’s Opinion and Justice Sotomayor’s Opinion. Then I will assess the decision in Section III, concluding these pages with some Final Reflections, Section IV. I believe the decision touches on very technical matters that are of great practical transcendence in the system of the United States, and the specialized literature will undoubtedly give it well-deserved and much more meticulous study than I have proposed for this task. Because of this, I must ask for indulgence for my small contribution, with the hope that it has, at least, the virtue of being a well-reasoned and pressing update about what is, as I have said, a major new reference point within the oft-cited system.

## SECTION II. DECISION IN THE *DAIMLER* CASE.

### 1. HISTORY.

In 2004, twenty-two residents of Argentina filed suit against Daimler/Chrysler AG – a German public stock company, predecessor of DaimlerBenz AG, also a Germany corporation, before the Northern California Federal District Court, Ninth Circuit. The plaintiffs claimed that Mercedes-Benz Argentina, a subsidiary of the first corporation, had collaborated during the execrable “*Dirty War*” (1976-1983) with that country’s security

forces in the detention, torture, disappearance and death of employees at the corporate plant in González Catán. These events are the basis for their claim under the *Alien Tort Claims Act of 1789*<sup>4</sup> and the *Torture Victim Protection Act of 1991*,<sup>5</sup> both U.S. federal laws. They also referred to other laws from California and Argentina. The plaintiffs invoked California's general jurisdiction over the defendant based on the *long arm statute* of that State,<sup>6</sup> which authorizes *in personam* jurisdiction to the full extent permissible under the *Due Process Clause* of the United States Constitution, that is to say, within the terms that Supreme Court legal doctrine specifies. During the case, the claim was made that the intense contacts of MBUSA, a subsidiary of the German corporation, with California, for which it was, for instance, the largest provider of luxury automobiles, justified jurisdiction over DaimlerChrysler, for which it was an agent.<sup>7</sup>

The District Court, accepting Daimler counter-arguments instead, rejected the suit, on the basis that the cited contacts were insufficient for the desired effects and the plaintiffs were unable to demonstrate that MBUSA acted as an agent for Daimler.<sup>8</sup> On appeal, however, the Ninth Circuit Court of Appeals first confirmed the decision of authority but, granting another legal

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<sup>4</sup> Also called *Alien Tort Statute*, 28 U.S. C. 1350.

<sup>5</sup> 106 Stat.73, note following 28 USC 1350.

<sup>6</sup> See, in general, viz, Vedder Price: "Long-Arm Statutes: A *Fifty States Survey*," at <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf>. Also, viz, F. Guasch de la Guardia, "Foreign Corporations and Florida's Long Arm Statute," *Daily Business Review*, Feb. 4-2014.

<sup>7</sup> MBUSA was constituted in Delaware, and its principal base is in New Jersey. It distributes Daimler AG vehicles throughout the United States, by means of independent dealers.

<sup>8</sup> *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472 (N.D. Cal. Nov. 22. 2005.

review before the same court, found in favor of the plaintiffs, since: “MBUSA’s business was *sufficiently important* to DCAG [Daimler] that without MBUSA or another representative, DCAG would have performed those services itself.”<sup>9</sup> After the Court denied, with strong internal disagreement, the possibility of a new *en banc* review, Daimler presented a writ of certiorari before the Supreme Court. Two years later (April 22, 2013), the Supreme Court communicated its intention to hear the case based on: “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.”<sup>10</sup> It is important to emphasize the fact that from the moment in which the Ninth District Court of Appeals ruled until the Supreme Court announced their decision, there were two other decisions by the Supreme Court that would weigh decisively on the solution to the *Daimler* case, the aforementioned *Kiobel* case and, even more significantly, the *Goodyear Dunlop Tires Operations S.A. v. Brown* case.<sup>11</sup>

## 2. Justice Ginsburg’s Opinion.

This opinion reflects the High Court’s unanimous judgment on the case, although Justice Sotomayor dissented as to the reasoning followed. Justice Ginsburg’s Opinion is not very

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<sup>9</sup> *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920 (2011).

<sup>10</sup> *Petition for a Writ of Certiorari at Daimler A.G. v. Bauman*, No. 11-965 (U.S. Feb 6, 2012).

<sup>11</sup> 131 S. Ct. 2846 (2011).

extensive and, in the first place, the majority of the Opinion develops precisely and, one might note, with a didactic purpose that is very much in line with common-law jurisprudence, the U.S. system of *in personam* jurisdiction in the light of state and constitutional legal findings, and the diverse precedents established by the Supreme Court.

In this way, after summarizing the history of the case, Justice Ginsburg delves into a historical statement that begins with the quote from the well-known *Pennoyer v. Neff* case,<sup>12</sup> emphasizing how the strictly territorial version that it embodied regarding the courts' jurisdiction over people, is substituted by another no less notorious precedent, *International Shoe Co. v. Washington*,<sup>13</sup> in which: "The relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."<sup>14</sup> In addition, the Opinion<sup>15</sup> indicates how the requirement of "fair play and substantial justice" (toward the defendant) in *International Shoe*, presaged the future development of **two categories of personal jurisdiction**. The first category, *specific jurisdiction*, is linked to activity developed in the territory of the forum, and gives rise to the forum's

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<sup>12</sup> 95 U.S. 714 (1878).

<sup>13</sup> 326 U. S. 310 (1945).

<sup>14</sup> See *Daimler Decision*, p. 7 of Justice Ginsburg's Opinion, taking the quote from the *Shaffer v. Heitner* case, 433 U.S. 186, at 204 (1977).

<sup>15</sup> Pages 7-.



jurisdiction based on the contacts the defendant has with it.<sup>16</sup> The second category, *general jurisdiction*, is independent of such activity; Justice Ginsburg, who also wrote the High Court's Opinion in *Goodyear*, claimed there and repeated in *Daimler*: "(a) court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."<sup>17</sup>

The eminent Justice then emphasizes how the majority of Supreme Court jurisprudence on personal jurisdiction has focused on specific jurisdiction, while the number of times when the ruling has depended on general jurisdiction have been very scarce. She then goes on to briefly introduce the principal aspects of the most relevant cases,<sup>18</sup> although she spends more time on *Goodyear*, which should not be surprising since it was a very recent case and one in which, as I mentioned, Justice Ginsburg wrote the High Court's decision. It is worth recalling that it dealt with an accident in Paris in which two boys from North Carolina died. Their parent brought suit in North Carolina against *Goodyear*, an Ohio corporation, as well as a number of its foreign subsidiaries, alleging that the accident was caused by the defective manufacturing of a tire. The Supreme Court denied that

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<sup>16</sup> *Ibid.* She quotes *Helicópteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n.8, (1984).

<sup>17</sup> *Ibid.*, p.8.

<sup>18</sup> She does so on pages 10-14 of her Opinion, listing the aforementioned *Goodyear* and *Helicópteros* and the decision in the *Perkins v. Benguet Consol. Mining Co.* case, 342 U.S. 437 (1952).

North Carolina courts had general jurisdiction over the subsidiaries because, even though a small percentage of their production had been distributed there: the subsidiaries were “in no sense *at home* in North Carolina.”<sup>19</sup> Ruth Bader Ginsburg, in short, concludes this first part of her Opinion with a reminder of how the High Court declined to stretch general jurisdiction beyond traditionally recognized limits and that, therefore: it has come to “occupy a less dominant place in the contemporary scheme.”<sup>20</sup>

After exposing what we could call *the state of the question* on general personal jurisdiction, Justice Ginsburg then proceeds to address the solution to the case at hand, following some technical clarifications.<sup>21</sup> Thus, in the first place, she addresses how the finding of the Ninth Court of Appeals relied on a particular *theory of agency* in order to attribute to Daimler, for the purpose of sustaining the aforementioned jurisdiction, the contacts MBUSA, Daimler’s subsidiary, maintained with California.<sup>22</sup> In summary, and after emphasizing that the High Court has still not addressed whether a foreign corporation may be subjected to the general jurisdiction of a U.S. state court based on the contacts that its subsidiary has with the state, she rejects the need to pass judgment on any theory of agency for this case because she states, in very critical terms: “in no event can the

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<sup>19</sup> See Justice Ginsburg’s Opinion, p. 13. My italics.

<sup>20</sup> *Ibid*, p.14.

<sup>21</sup> *Ibid*, p.15.

<sup>22</sup> *Ibid*, pp.15-17.

appeals court’s analysis [on agency] be sustained.” The Ninth Court ruling—based on the *important* services that MBUSA performed for Daimler—is completely without warrant—because that outcome “would sweep beyond even the ‘sprawling view of general jurisdiction’ rejected [by the Supreme Court] in *Goodyear*.”<sup>23</sup>

In the second place, Justice Ginsburg develops what we might call the core of her Opinion. Thus, after noting that, regardless of MBUSA and its contacts with California, Daimler’s slim contacts with that State: “hardly render it at home there,”<sup>24</sup> she recalls that, as sustained in *Goodyear*: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”<sup>25</sup> Place of incorporation and principal place of business would be very relevant in this regard, because of their clearness and predictability, *although we should not deduce from this that they are the **only** bases* on which jurisdiction can be established over a corporation.<sup>26</sup> In any case, Justice Ginsburg rejects the plaintiffs’ assertion that general jurisdiction should be approved in all States in which a corporation: “engages in a *substantial, continuous, and systematic course of business*,”<sup>27</sup> and that, since “continuous and systematic” were used in *International Shoe* to justify the exercise

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<sup>23</sup> *Ibid*, end of p. 17.

<sup>24</sup> *Ibid*, p.18.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*, p.19.My italics.

<sup>27</sup> *Ibid*. My italics.

of *specific* personal jurisdiction, namely: “jurisdiction can be asserted where a corporation’s *in-state* activities are not only ‘continuous and systematic’, but also *give rise to* the liabilities sued on.”<sup>28</sup> In the end, as expressed in previous pages, regarding general jurisdiction and according, again, to *Goodyear*: an outside—foreign or sister-state—corporation’s “affiliation with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”<sup>29</sup> Justice Ginsburg asserts that neither MBUSA nor Daimler have such affiliations in this case. Therefore the Appeals Court erred when it found Daimler subject to adjudication in California: “...on claims by foreign plaintiffs having *nothing to do with anything that occurred or had its principal impact in California.*”<sup>30</sup> In the end, the core of Ginsburg’s Opinion concludes with a wide-ranging reflection in an extensive footnote, number 20. In it, it is affirmed, among other things, that: “General jurisdiction ... calls for an appraisal of a corporation’s activities in their entirety, *nationwide [e.g., in the United States] and worldwide.* A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”<sup>31</sup>

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<sup>28</sup> *Ibid*, p. 19 and 20. My italics.

<sup>29</sup> *Ibid*, p.20.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*. My italics.

Justice Ginsburg finalizes her Opinion with some reflections *outside* of the U.S. system, which she calls, “*the transnational context of this dispute.*” In the first place, she negates the Appellate Court’s criteria that federal or state courts should have a strong interest in settling international Human Rights cases. She bases her argument on the recent decisions in *Kiobel*—regarding the ATS, denying extraterritorial application—and in the *Mohamad v. Palestinian Authority* case,<sup>32</sup> that rejects the application of the *Torture Victims Protection Act* (TVPA) when those responsible are legal entities, not natural persons.<sup>33</sup> She then presents a series of considerations that range from International Comity, based on comparative law, to emphasizing similarities between the criteria followed in *Daimler* and those in effect in the European Union, and continuing through the impact of an expansive vision of international jurisdiction on the part of the United States on the process of international codification, or the foreseeable negative effect of that vision on foreign investors. She concludes with a return to the foundations of the U.S. system: “...subjecting *Daimler* to the general jurisdiction of courts in California would not accord with the ‘fair play and substantial justice’ due process demands.”<sup>34</sup>

### 3. Justice Sotomayor’s Opinion.

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<sup>32</sup> 566 U.S. (2012).

<sup>33</sup> See Justice Ginsburg’s Opinion, p.22.

<sup>34</sup> *Ibid*, p. 23.

Somewhat shorter than the first Opinion and also very meticulous and technically elaborate, one can note, if you allow me to say so, a degree of contained emotion that I do not find in the Opinion by Ginsburg. It is worth noting that both of these Justices belong to the progressive wing of the Supreme Court, in its current composition. And I certainly recommend an in-depth analysis of Sotomayor’s Opinion but, since it is an individual Opinion and because I do not want to go on too long, I will summarize its principal points very briefly.

As I said, Justice Sotomayor concurs in the judgment – the upholding of Daimler’s appeal and the reversal of the Appellate Court decision, but not in the reasoning that led to it. Therefore, for example, in her preliminary reflections, she criticizes the majority because the criteria for not allowing jurisdiction over Daimler is ultimately an evaluation, which Sotomayor denounces as foreign to *due process*, of the corporation’s contacts with California and with all the other States of the Union and, even, those it has on a worldwide basis.<sup>35</sup> In her words, just as it seems there are multinational corporations that are “*too big to fail*; today the Court deems Daimler ‘*too big* for general jurisdiction.’”<sup>36</sup> According to Sotomayor, this conclusion is wrong regarding both procedure—the parties did not discuss it nor was it passed on below—and substance, since it ignores the foundation of personal jurisdiction, given that: “A State may

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<sup>35</sup> See *Daimler Decision*, Justice Sotomayor’s Opinion, pp 1 and 2.

<sup>36</sup> *Ibid*, p.2.

subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State’s laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.”<sup>37</sup> For Justice Sotomayor, in addition, the errors committed were unnecessary given that in such a case and given the particular characteristics of this case—foreign plaintiffs, foreign defendants, and conduct on foreign soil—the exercise of jurisdiction on Daimler *would have been unreasonable*.<sup>38</sup>

Sotomayor later details what should have been an evaluation of reasonableness and the procedural breakdowns that, in her understanding, took place in the case because of the way the High Court reached its decision.<sup>39</sup> She also criticizes the core of the decision at length, when MBUSA’s contacts with California are dissociated for the purposes of general jurisdiction over the German corporation and, even, that Daimler in practice *never* finds itself “*at home*” before United States courts, whether they are federal or the courts of individual States. The Justice sustains, for example, that: “What has changed since *International Shoe* is not the due process principle of fundamental fairness [to the defendant] but rather *the nature of the global economy*. Just as it was fair to say in the 1940’s that an out of state company could enjoy the benefits of a forum State enough to make it ‘essentially

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, pp. 3-8. She emphasizes what she points to as the lack of coherence between what was decided and the terms under which certiorari was granted, p. 6.

at home' in the State, it is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is 'essentially at home' in each one."<sup>40</sup> In the same way, she reminds us that in addition to the evaluation of reasonableness, the case could have been resolved based on the federal change of venue statute, or the *Forum Non Conveniens* doctrine and that, if that does not sufficiently protect the interests of multinational businesses, it is up to the **legislators** to see whether there is a need to amend federal or state *long-arm statutes*, in accordance with the democratic process ... without "enshrining today's narrow rule of general jurisdiction as a matter of constitutional law."<sup>41</sup>

Finally, Sotomayor presents four types of questions in which the Supreme Court decision may produce "*deep injustice*":<sup>42</sup> the curtailing of State jurisdiction; diverse standards for measuring small companies and large conglomerates regarding general jurisdiction; that an individual would be subject to general jurisdiction for something like an occasional visit to the forum State; and the lack of protection for the victims of multinational corporations and for small U.S. corporations that, having entered into a contract with a foreign multinational company in a foreign country, would not be able to seek relief in any U.S. court, no matter how much business the company has in corresponding

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<sup>40</sup> *Ibid*, p. 15. My italics.

<sup>41</sup> *Ibid*, pp. 15-.

<sup>42</sup> *Ibid*, pp. 16-19.



States.<sup>43</sup> These objections that the Justice presents are certainly not small, but her position in this case remains like a *vox clamantis in deserto*.<sup>44</sup>

### III.-ASSESSMENT.

I will not address in my commentaries what the *Daimler* decision may signify *within* the U.S. system. For example, regarding the authority of the States to legislate regarding personal jurisdiction or, even, for example, alongside other recent Supreme Court decisions, and the decisions of certain state tribunals, that the *Due Process Clause* could limit State authority on taxes regarding corporations with activities in multiple states.<sup>45</sup> Also, regarding the impact on questions of process, like carrying out judicial decisions in what are called turnover proceedings, which tend to be connected to the general jurisdiction of the court over a debtor or a third party,<sup>46</sup> or in the complex universe of discovery,<sup>47</sup> etc. I believe we may need years to evaluate the full extent to which *Daimler* affects all this.

On the other hand, and this will be my first order of assessment, I am surprised by the way in which the High Court

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<sup>43</sup> *Ibid*, p.18.

<sup>44</sup> John the Baptist replies *Ego vox clamantis in deserto* to the Pharisees when they ask him who he is. Fray Antonio de Montesinos makes this his own, according to the story told by Father De las Casas, in the famous sermon of 1511, dedicated to denouncing the colonizers' abuses against the natives. How many things have changed over the course of 500 years, and yet, how many things, such as oppression and injustice, remain the same in large areas of the world!

<sup>45</sup> See, viz, Various Authors, "The U. S. Supreme Court Limits Jurisdiction Over Foreign Companies," *Lexology*, 1-29-2014.

<sup>46</sup> See, viz, Various Authors, "Recent Supreme Court Decision Limits the General Jurisdiction of U.S. Courts Over Foreign and Out-Of-State Corporations," *Ibid*, 1-21-2014, p.4.

<sup>47</sup> See, viz, D. Healy and O. C. Pell: "*Daimler AG v. Bauman*, The US Supreme Court Significantly Limits Where Companies May Be Sued for Claims Unrelated to Their Activities in A State," *ibid*, 1-24-2014, p.4.

has barged into a topic like general personal jurisdiction, which is basic and preliminary to any type of lawsuit, including Human Rights cases like *Daimler* and, in practice, *changed the rules of the game* for foreign companies, of course, but also for domestic ones.<sup>48</sup> Did this need to be done, I wonder, making use of a lawsuit with these characteristics specifically regarding Human Rights and what are called Foreign-Cubed cases, in other words, cases with foreign plaintiffs, foreign defendants, and foreign activities? If we think about *Kiobel*, for example, close in time and regarding the same material, we may find the beginning of a response. *Kiobel* produced a marked change as well, when the new doctrine drastically limited recourse to the ATS, and in another scenario in which the parties as well as the activities leading to the suit were foreign. There seems to be, then, on the part of the Supreme Court, a certain haste, if not opportunism, in the sense of discouraging recourse to United States courts, when dealing, and this is the note that I believe needs special emphasis, *with activities carried out on foreign soil*. They have made use of these cases to send a clear *word of warning*, even at the cost of changing the terms of review, for instance, as was done as part of the process in both cases,<sup>49</sup> which led the Court to settle questions neither argued nor passed on below, in a prime example of the

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<sup>48</sup> See, viz, S.M. Pearson and C.P. Price: “Goodbye *International Shoe*: Supreme Court Deals Massive Blow to Plaintiffs with New Standard for General Jurisdiction,” *Ibid*, 1-24-2014.

<sup>49</sup> Regarding *Kiobel*, see viz, my study: “*Kiobel* and the Question of Extraterritoriality,” *Papeles el Tiempo de los Derechos*, , 2013, (2), p. 2.

very broad authority the High Court gives itself to carry out its mission.<sup>50</sup>

But, considering the importance and implications of a question of general jurisdiction, does it make sense to make use of a case like *Daimler* that appears to be a *prima facie* paradigm of *forum shopping*, to establish new doctrine? Well-known specialists strongly advised against it, with what appears to be a reasonable understanding that “hard cases make bad law.”<sup>51</sup> They also suggested that there were multiple paths for resolving *Daimler* without particular difficulties, including using criteria of reasonableness, as Sotomayor indicates, or technical questions of venue, or rejecting the concept of *agency* used by the Court of Appeals, or dismantling the case based on the weakening of the causes of action based on ATS and TVPA, and consequently and with great probability, the weakening of the jurisdiction of federal courts, following, respectively, the *Kiobel* and *Mohamad* decisions, etc.<sup>52</sup> But the Supreme Court had other things in mind, and it does not seem to be a coincidence that, two years later, as I said, they would grant *certiorari* in *Daimler* just a few days after their decision on *Kiobel* was made public.

I would also like to note that what I have called the core of the *Daimler* decision does not seem free from criticism either. If, for example, the fundamental purpose was to establish doctrine

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<sup>50</sup> See, viz, W. Baude: “Opinion Recap: A Stricter View of General Jurisdiction,” *Scotus Blog*, 1-15-2014, where it is noted that: “*The Court ultimately resolves the issue it wants to, which may not be the one the parties focused on.*”

<sup>51</sup> See, viz, the studies, respectively, of S. Sherry and L.J. Silberman, listed in note 2, *supra*.

<sup>52</sup> In the studies cited in the previous note, there is an analysis, among other questions, of these paths.

regarding parent corporations, it would have been more natural to wait until the case concerned them *directly*, rather than raising it through intermediaries. Similarly, the evaluation proposed between contacts with the forum, on the one hand, and the corporation's other contacts, within the United States and the rest of the world, seems misguided and excessive and may lead to unequal treatment based on the size of the entity. If that evaluation, on the other hand, is secondary to rigid bases of jurisdiction like the place of incorporation or the principal place of business, we would have to question its effectiveness since it is likely to generate confusion. Furthermore, it leads to uncertainty, also, the fact that the cited bases are **not** the only criteria to assume general jurisdiction, without there being any clues about what criteria could be considered in another case.<sup>53</sup>

Regarding Ginsburg's reflections about what she calls the "*transnational context of this dispute*," I must express even greater disagreement with the manner in which they have determined the *Daimler* decision. I find the first reason particularly unfortunate, for example, dismissing the Court of Appeal's sense that U.S. courts have a strong interest in resolving international Human Rights violations and without further argument than the recollection of the High Court's decisions in *Kiobel and Mohamad*, repeatedly cited here. A purely

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<sup>53</sup> See, viz, Clifford Chance: "U.S. Supreme Court Limits U.S. Courts' Jurisdictional Reach over Foreign Corporations with U.S. Subsidiaries," at [http://www.cliffordchance.com/publicationviews/publications/2014/01/u\\_s\\_supreme\\_courtlimitsuscourts.html](http://www.cliffordchance.com/publicationviews/publications/2014/01/u_s_supreme_courtlimitsuscourts.html). On page 4, it states: "It is unclear what additional factors might establish connections that are sufficiently systematic and continuous to render a corporation 'at home' in a particular state."

authoritarian blow, a command and control mindset that ignores the lively debate that is taking place in the judicial branch of the United States and its reflection in relevant sectors of civil society. Surely the victims, past, present, and future, deserve some greater explanation on this point. More explanation than, in practice and in reference to the United States, the need to accept what was written on the gateway to Dante's Inferno: "*Abandon all hope.*"

Continuing in order and without ignoring the importance of *comity* for the U.S. system,<sup>54</sup> I must admit to feeling some impatience when Ginsburg brings it up in a Human Rights context. We have seen that the Justice shows much more sensitivity toward foreign States than toward victims but, again, it is very questionable that *comity* can serve as the basis for criticizing the United States for taking the responsibility to act as representatives of the international community in support of these Rights. We must point out that, except for the self-interested claims of some of the home states of multinationals, which begin by broadly ignoring their international obligations and, notably, their responsibility to *protect and remedy*,<sup>55</sup> other Nations, for

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<sup>54</sup> See, viz, my study: "Sobre la *International Comity* en el Sistema de Dº Internacional Privado de los Estados Unidos," *REEI*, 2010, vol. 19, 16 pp.

<sup>55</sup> And to which it would be worth opposing, for the same reason, the *nemo audietur* principle. See in general, viz O. Martín-Ortega, "La Diligencia Debida de Las Empresas en Materia de Derechos Humanos: Un Nuevo Estándar para una Nueva Responsabilidad," in *La Responsabilidad de las Multinacionales por Violaciones de Derechos Humanos*, F.J. Zamora Cabot, Jesús García Cívico and Lorena Sales Pallarés (Eds.), *Cuadernos Democracia y Derechos Humanos*, Universidad de Alcalá y Defensor del Pueblo, Alcalá de Henares, 2013, pp. 167-192. Also, regarding Germany in general, which should ideally be a *convenient forum* in the *Daimler* case, see my study: "Acaparamiento de Tierras (Land Grabbing) y Empresas Multinacionales: El Caso *Mubende-Neumann*," in *Papeles el Tiempo de los Derechos*, 2013, nº 5, 2013, 23 pp. and, regarding *Daimler*, Various Authors: "Brief of Amici Curiae German Institute for Human Rights and Other German Legal Experts in Support of Respondents," at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/11-965-bsac-German-Institute-for-Human>

example, are specifically making an effort these days to ensure that these obligations are strengthened under the terms of an international convention. In this way, these Nations are clearly supporting what has, until now, been the exemplary practice of the United States, especially regarding the ATS.<sup>56</sup>

For its part, the support Ginsburg finds in the EU for assimilating U.S. criteria on jurisdiction regarding corporations with the criteria established in EU law, if it is reasonable in traditional areas of activity,<sup>57</sup> is not as reasonable when it comes to transnational lawsuits regarding Human Rights where, as is very well known, that EU law, in substance and in practice, leaves a lot of room for improvement.<sup>58</sup>

I will conclude this Section with various observations. The first deals with the apparent ease, the concise manner, with which the High Court, in the role of a liquidator, rejected in this case and in *Kiobel* a very relevant collective area of jurisprudence and scientific doctrine. It must have contained some wisdom, some *raison d'être*, for many long decades, one might think. *It did little good*. In addition, as a second observation, it is clear that sophisticated legal corporate engineering is achieving its

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[Rights-and-other-German-Legal-Experts.pdf](#), which raises serious doubts about the fairness of considering the case in question as *forum shopping*.

<sup>56</sup> See *viz*, the initiative presented by Ecuador and a group of States before the Human Rights Commission of the United Nations, September Session, 2013, found alongside other relevant documents at <http://www.business-humanrights.org/Documents/LegallyBindingInstrument> **Business Human Rights**.

<sup>57</sup> Although, in reality, the Europeans can be quite expansive in some *specific* contexts, like, *viz*, consumer protection. See *viz*, G. Dennis and S. Faber: "European Union: Suppliers Who 'Direct Their Commercial Activities' To A Foreign Jurisdiction Risk Being Sued There," *Lexology*, 2-12-2014.

<sup>58</sup> See, for all of them, *viz*, M. Requejo Isidro: "Access to Remedy. Abusos Contra Derechos Humanos en Terceros Estados, ¿Justicia Civil en Europa?" in *La Responsabilidad de las Multinacionales...*, *cit.*, pp. 79-107. And in general, *viz*, A-M Bernal: "¿Moribunda Europa? El Proyecto Europeo, Más Allá de la Economía y de la Crisis," *Revista de Libros*, Febrero de 2014, p.14.

objective. Large companies, which continually ask for and do receive all types of rights, use their complex networks, among other things, to avoid state regulations, avoid paying taxes, localize and delocalize their activities without paying attention to the types of consequences that are often involved and, what is frankly intolerable, **increasing their impunity** in the face of responsibilities arising from the terrible Human Rights abuses continuously perpetrated by many of them throughout the length and breadth of the planet.<sup>59</sup> Endorsing this reality could not have been a conscious goal of the Supreme Court in its *Daimler* decision but, with all due respect, I am afraid that in practice, that is where that decision, alongside *Kiobel*, takes us.

#### IV.- FINAL REFLECTIONS.

I wonder about the state of mind in the progressive wing of the Supreme Court in recent times. *Kiobel* surely reflects a previous negotiation in which they, alongside the conservative wing, agree to reject a response to what was, in principle, being asked, the submission of multinational corporations to the demands of the Law of Nations. A difficult question because a negative, for example, would have been hard to accept after the very controversial and recent (2010) decision in *Citizens United*.<sup>60</sup> With all that, one can certainly observe some vigor in the Opinion

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<sup>59</sup> In general, see viz, S. George: “State of Corporations-The Rise of Illegitimate Power and the Threat to Democracy,” in TNI, *State of Power 2014*, 8 pp., found at [http://www.tni.org/sites/www.tni.org/files/download/state\\_of\\_corporation\\_chapter.pdf](http://www.tni.org/sites/www.tni.org/files/download/state_of_corporation_chapter.pdf).

<sup>60</sup> 558 U.S. 310 (2010), a 5-4 decision, in which the High Court prohibited the Government from establishing limitations on corporations, associations, and unions to finance political parties. See viz, K. Barker and T. Meyer: “How *Citizens United* Gave Rise to A New Breed of Power Brokers,” at [http://www.huffingtonpost.com/2014/02/14/citizens-united-koch-brothers\\_n\\_4789826.html](http://www.huffingtonpost.com/2014/02/14/citizens-united-koch-brothers_n_4789826.html).

in *Kiobel* by Justice Breyer who led the concurring opinion of the progressive wing, regarding the result, but not the reasoning that the majority employed. But in *Daimler*, only Sotomayor seems to realize what is in play, although she remains in *splendid isolation*. After these notable decisions, it is undeniable that businesses and their advisors are overjoyed or, to use the High Court's expression in *Daimler*, "*essentially at home*."<sup>61</sup> The victims, on the other hand, are thrown out into external darkness.

Visitors to the Statue of Liberty can find in the museum at its base a plaque with a poem by Emma Lazarus, *The New Colossus*, that strikes me as extraordinarily moving, specially the part in which the imposing image raises her voice to the old countries that are sending her countless wretched souls:

*"Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore, send these, the homeless, tempest-tost to me, I lift my lamp beside the Golden Door."*

The High Court is decisively closing the door it had left "*slightly ajar*" en *Sosa*<sup>62</sup> in the face of the worst Human Rights violations. This does not, in my opinion, bestow any honor on the United States nor does it deserve to serve as an example for the world. However, other more hopeful approaches are possible and

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<sup>61</sup>For all, see viz, E. Wildman Palmer. "Where Can Your Company Be Sued? The Supreme Court Steps Back From General Jurisdiction," *Lexology*, 2-7-2014.

<sup>62</sup> 542 U.S. 692, at 729 (2004).



are, in fact, being produced. In the United States itself,<sup>63</sup> in its neighbor to the north,<sup>64</sup> in the United Kingdom,<sup>65</sup> in the European Union<sup>66</sup>... I believe, and I will conclude here, that we must persevere resolutely with these approaches, in open defense of dignity and the future of humankind.

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<sup>63</sup> See viz, the recent and historic adoption of a legislative text against land grabs in Ethiopia, found at the Oakland Institute: “US Congress Takes a Historic Stance Against Land Grabs-Related Forced Evictions in Ethiopia,” <http://www.oaklandinstitute.org/press-release-us-congress-takes-historic-stance-against-land-grabs-related-forced-evictions-ethiopia>.

<sup>64</sup> Canadian forums are hearing about violations committed on foreign soil by the formidable multinational domestic extraction industries; see viz, A. J. Gray and J. R. Lambert: “Further Cause for Alarm for Canadian Corporations with Foreign Operations,” *Lexology*, 1-27-2014.

<sup>65</sup> Where they are discussing the *Modern Slavery Bill*, found at <https://www.gov.uk/government/publications/draft-modern-slavery-bill>.

<sup>66</sup> With the establishment of controls to end food speculation through activities carried out by banks and other financial companies; see viz, Triodos Bank: “Ending Food Speculation,” found at <http://www.triodos.co.uk/en/about-triodos/news-and-media/colour-of-money/ending-food-speculation/>.