Kiobel – Amicus Brief of Comparative Law Scholars

A group of U.S. French and German comparative law scholars have filed an amicus brief in *Kiobel* under the lead of Professor Vivian Grosswald Curran.

The brief summarizes the argument as follows:

> *Understanding other countries' domestic legal systems and practices is necessary to determining if United States law is in conflict with theirs, and more specifically if the United States would be unique in the world by allowing extraterritorial civil jurisdiction under the Alien Tort Statute ("ATS"). This brief will argue that universal criminal jurisdiction for jus cogens violations in civil-law States is analogous to extraterritorial civil jurisdiction under the ATS.*
>
> *Unwarranted similarities between "criminal" and "civil" law in both legal orders have been assumed erroneously because both civil- and common-law systems have the same two classifications. They have significantly different meanings and functions in the different legal orders, however. United States tort law is more similar to civilian criminal law than to civilian civil law in many ways. "Civilian" in this brief denotes legal systems, such as those of Continental Europe, emanating from Roman law and organized around a Civil Code. Civilian criminal law and United States civil law have comparable functions because of the roles of judges, prosecutors, and lawyers in the respective legal orders and societies, and because of the methods for victims to initiate legal actions in the criminal courts of civilian States, and in tort lawsuits in the United States.*
>
> *Civilian judges specialize in either criminal or private law, with criminal-law judges in civilian States having a more didactic, public role than their private-law counterparts. Civilian prosecutors traditionally are non-partisan, neutral figures. Criminal trials, which include those that arise under universal jurisdiction, are public, and organized around a concentrated, oral event. Tort trials in civilian States, on the other hand, often take place exclusively in writing, with no oral testimony, and giving the public no opportunity to witness them. Where victims in civilian States join criminal trials as civil parties, they benefit from the State's resources and can be compensated financially. By*

contrast, in a tort suit, they would be barred from contingency fee arrangements and class action suits, so civil actions would not be an effective option for many.

Conversely, the aspects of criminal trials in civilian States which render extraterritorial or universal criminal jurisdiction appropriate in those legal systems do exist in United States tort law: both are aired in public; both allow victims effective access to the court system; and both allow victims financial compensation. Although civilian States traditionally have rejected prosecutorial discretion, they have tended to adopt it to varying degrees for universal jurisdiction cases in the interests of international harmony. Similarly, in ATS cases, the Act of State and Foreign Sovereign Immunities Act restrain undue ATS extraterritorial jurisdiction.