Conference on State Insolvency and Sovereign Debts

Mathias Audit, who is a professor of law at the University of Paris Ouest – Nanterre La Défense, will organise a conference in Paris on November 10th, 2010, on State Insolvency and Sovereign Debts.

Here is the programme:

Colloque, le 10 novembre 2010
Palais du Luxembourg – Salle Monnerville

Insolvabilité des Etats et dettes souveraines

Programme

8h30 : Accueil des participants

9h : Ouverture du colloque par M. le sénateur Philippe MARINI

9h15 : Introduction générale aux travaux

Matinée placée sous la présidence de M. Hubert DE VAUPLANE, *Directeur juridique et Conformité au Crédit agricole et professeur associé à l'Université Paris II – Panthéon Assas*

- 9h30 : **Un Etat peut-il faire faillite ? – Le point de vue économique**
  par M. Jérôme SGARD, *directeur de recherches à Sciences Po/CERI et professeur associé à l'Université Paris-Dauphine*
  10h : **Un Etat peut-il faire faillite ? – Le point de vue juridique**
  par M. Michael WAIBEL, *British Academy Postdoctoral Fellow, Lauterpacht Centre for International Law and Downing College, University of Cambridge*

10h30 : Pause

- 11h : **La dette souveraine appelle-t-elle un statut juridique particulier ?**
  par M. Mathias AUDIT, *professeur de droit à l'Université Paris Ouest – Nanterre La Défense*
- 11h30 : **Incidence des Credit Default Swaps sur les dettes des Etats : bilan et prospective**
  par Me Jérôme DA ROS, *avocat à la cour*
- 12h : **Les « fonds vautours » sont-ils des créanciers comme les autres ?**
  par M. Patrick WAUTELET, *professeur à l'Université de Liège*
- 12h30 : Discussion générale

13h : Déjeuner libre

Débats placés sous la présidence de M. Christian DE BOISSIEU, *professeur d'économie à l'Université Paris I – Panthéon-Sorbonne*

- 14h30 : **Agence de notation : responsabilité, régulation ou *laissez-faire* ?**
  par M. Norbert GAILLARD, *docteur en économie (Sciences Po/Princeton), consultant auprès de la Banque mondiale*
- 15 h : **La régulation de l'information sur le marché des dettes souveraines**
  par M. Alain BERNARD, *professeur à l'Université de Pau et des Pays de l'Adour*

15h30 : Pause

Débats placés sous la présidence de M. Jean-Bernard AUBY, professeur des universités à l'Ecole de Droit de SciencesPo, directeur de la chaire « Mutations de l'Action Publique et du Droit Public » (MADP)

- 16 h : **Les instruments de droit international public pour remédier à l'insolvabilité des Etats**
  par M. Mathias FORTEAU, *professeur à l'Université Paris Ouest – Nanterre La Défense*
- 16h30 : **Les instruments de droit de l'Union européenne pour remédier à l'insolvabilité des Etats**
  par M. Francesco MARTUCCI, *professeur à l'Université de Strasbourg*

- 17h : Discussion générale
- 17h30 : **Conclusion générale**
  par Mme Horatia MUIR WATT, *professeur des universités à l'Ecole de Droit de SciencesPo*

It is free of charge. Registration, however, is compulsory (michele.dreyfus@u-paris10.fr).

Gerrit Betlem

Professor Gerrit Betlem, a close friend and colleague to many of us and a leading scholar in European Private Law, passed away on 26th July 2010. There is an obituary on Southampton's website.

Conference Announcement: Extraterritoriality in US Law

Beyond Borders: Extraterritoriality in American Law

Southwestern Law School, Nov. 12, 2010

On Friday, November 12, 2010, Southwestern Law School in Los Angeles, California is hosting a symposium titled *Beyond Borders: Extraterritoriality in American Law*.

This one-day symposium will bring together leading legal figures from throughout the country to analyze critical issues related to transnational litigation and extraterritorial regulation. Do U.S. law stop at the border? If not, when do they – or when should they – govern the conduct of people abroad? From the

controversial extraterritorial application of U.S. domestic law, to the contentious uses of universal jurisdiction in the human rights context, to debates over the extent to which the U.S. Constitution applies outside U.S. territory, a flurry of recent scholarship has involved disputes over the geographic reach of domestic law.

The symposium will bring together leading scholars to discuss the history, doctrine, and current issues related to extraterritoriality. The proceedings will be published in the *Southwestern Law Review* and distributed widely. The following professors are participating in the symposium (listed alphabetically):

- Jeffery Atik, Professor of Law, Loyola Law School, Los Angeles
- Hannah Buxbaum, Professor of Law, Indiana Univ. Maurer School of Law
- Lea Brilmayer, Professor of Law, Yale Law School
- William Dodge, Professor of Law, University of California, Hastings College of the Law
- Stephen Gardbaum, Professor of Law, UCLA School of Law
- Andrew Guzman, Professor of Law, University of California, Berkeley School of Law
- Max Huffman, Associate Professor of Law, Indiana Univ. School of Law
- Chimene Keitner, Associate Professor of Law, University of California, Hastings College of the Law
- John Knox, Professor of Law, Wake Forest Univ. School of Law
- Caleb Mason, Professor of Law, Southwestern Law School
- Daniel Margolies, Professor of History, Virginia Wesleyan College
- Jeff Meyer, Professor of Law, Quinnipiac Univ. School of Law
- Trevor Morrison, Professor of Law, Columbia Law School
- Austen Parrish, Professor of Law, Southwestern Law School
- Tonya Putnam, Assistant Professor of Political Science, Columbia University
- Kal Raustiala, Professor of Law, UCLA School of Law
- Bartholomew Sparrow, Professor of Government, University of Texas at Austin
- Peter Spiro, Professor of Law, Temple Univ. Beasley School of Law
- Christopher Whytock, Acting Professor of Law, University of California, Irvine School of Law

Roosevelt on Choice of Law in US Courts

Kermit Roosevelt III, who is a professor of law at the University of Pennsylsvania Law School, had posted Choice of Law in Federal Courts: from Erie and Klaxon to Cafa and Shaddy Grove on SSRN.

> *The article offers a new perspective on choice of law in federal courts. I have argued in a series of articles that ordinary choice of law problems are best understood through application of a particular conceptual framework, which I call the two-step model. Rather than thinking of choice of law as some sort of meta-procedure, this model takes it to address two substantive questions: what are the scope of the competing states' laws, and which should be given priority if they conflict?*
>
> *My previous articles have explored the utility of this framework for tackling some perennial problems in choice of law. This one moves to a different context: choice of law in federal courts under the Erie doctrine. It argues that Erie is best understood as a straightforward application of this two-step model and that the model consequently offers a useful guide for Erie analysis. It shows how thinking about the Erie question in this way offers novel and satisfying solutions to a number of puzzles that have troubled courts and commentators in the wake of Erie. These puzzles include the effect that federal courts must give to state choice of law rules (the Klaxon issue), how Klaxon should interact with the Class Action Fairness Act of 2005, and the Court's most recent venture into the Erie arena, Shady Grove v. Allstate. These issues have received substantial attention in the scholarly literature, but never from the two-step perspective.*

Keitner on Kiobel and the future of the Alien Tort Statute

The following post, cross-posted on Opinio Juris, continues to analyze the import of the Second Circuit's recent decision in Kiobel v. Royal Dutch Petroleum, holding that corporations may not be sued under the Alien Tort Statute for violations of customary international law. Our thanks to Professor Keitner for sharing her thoughts.

Not Dead Yet: Some Thoughts on *Kiobel*
Chimène I. Keitner, UC Hastings College of the Law

The Second Circuit's recent panel opinion in *Kiobel v. Royal Dutch Petroleum* has justifiably spurred much talk in the blogosphere, including posts by Trey Childress https://conflictoflaws.de/2010/is-it-the-end-of-the-alien-tort-statute/, Ken Anderson http://opiniojuris.org/2010/09/17/extra-thoughts-on-todays-2nd-circuit-ats-decision/, Julian Ku http://opiniojuris.org/2010/09/17/goodbye-to-ats-litigation-second-circuit-rejects-corporate-liability-for-violations-of-customary-international-law/, and Kevin Jon Heller http://opiniojuris.org/2010/09/18/a-tentative-thought-on-kiobel/. Here are my preliminary thoughts.

First, it is premature to hail the "end of the ATS." It may be true that some plaintiffs have sought to hold corporations accountable for their complicity in human rights abuses under the ATS's jurisdictional grant. But not all ATS litigation is about corporate liability. To the contrary, the Second Circuit's landmark opinion in *Filartiga v. Pena-Irala* involved an individual human rights violator, and cases against individuals continue to be filed under the ATS and the Torture Victim Protection Act of 1991. It is important not to lose sight of these cases, which the Supreme Court explicitly approved in *Sosa v. Alvarez-Machain* (2004).

Second, whether or not the ATS is good policy, the jurisdictional grant it embodies must be interpreted within the context of U.S. law. This does not mean that U.S. law governs all aspects of ATS litigation—in my 2008 article on

Conceptualizing Complicity in Alien Tort Cases http://uchastings.edu/hlj/archive/vol60/Keitner_60-HLJ-61.pdf, I argued that international law provides the "conduct-regulating" rules applied under the ATS, whereas U.S. law governs other aspects of ATS litigation. Although I focused on the standard for aiding and abetting, I also suggested that "the most coherent approach would look to U.S. law on the question of personal jurisdiction, including the type of entity against which a claim can be asserted, [while] international law would supply the substantive, conduct-regulating rules that apply to private actors" (p. 72).

Kiobel misconstrues language in *Sosa* about whether private actors can violate international law to conclude that corporations cannot be held liable for certain conduct in U.S. courts. In terms of my proposed framework, *Kiobel* miscategorizes the question of whether corporations can be named as defendants as a conduct-regulating rule akin to aiding and abetting. This is wrong because aiding and abetting liability, unlike corporate liability, does not involve the attribution of the principal's conduct to the accomplice by virtue of a preexisting legal relationship. Rather, it prohibits the *accomplice's conduct* in providing substantial assistance to the principal. Consequently, under the ATS, the accomplice's (and the principal's) conduct is governed by international law. By contrast, whether or not the accomplice's (or the principal's) conduct can be attributed to a corporate entity is governed by U.S. law. Corporate liability is thus possible under the ATS whether or not corporate entities have themselves been subject to the jurisdiction of international tribunals or found liable for international law violations by such tribunals.

Kiobel indicates that "[t]he singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law—*i.e.*, those with international rights, duties, and liabilities—now include not merely *states*, but also *individuals*" (p. 7). In fact, this is not such a novel development: the paradigm violations of piracy, violations of safe conducts, and offenses against ambassadors identified in *Sosa* also would typically have been committed by private actors, rather than by states (see Conceptualizing Complicity http://uchastings.edu/hlj/archive/vol60/Keitner_60-HLJ-61.pdf, p. 70). The ATS's jurisdictional grant should be understood in this context. In an *amicus* brief filed on behalf of professors of federal jurisdiction and legal history in Balintulo v.

Daimler AG (2d Cir., No. 09-2778-cv), my colleague William Dodge documents that "[l]egal actions for violations of the law of nations were not limited to natural persons in the late-eighteenth and early-nineteenth centuries" (p. 15), and that "no distinction would have been drawn between individual and corporate defendants" (p. 14) in these early cases. Any serious consideration of jurisdiction under the ATS needs to grapple with these historical foundations, and with the relationship between the law of nations and U.S. law, not simply "international law" in the abstract.

Looking at the big picture, there certainly need to be—and are—robust mechanisms to contain cases that are non-meritorious or vexatious, that impinge excessively on the Executive's conduct of foreign relations, or that should be heard in a non-U.S. forum that is willing and able to provide redress. At the front end, I would hazard that, although the increasing involvement of plaintiffs' law firms (as opposed to human rights lawyers associated with non-profits, or attorneys working strictly *pro bono*) in bringing ATS cases may have some benefits in terms of reaching a greater swath of deleterious conduct, it may foster less coherence and restraint in case selection. At the back end, certain judges may be tempted to overcompensate by creating doctrinal barriers to entire categories of cases. This impulse might be understandable, but it does not justify judicial rewriting of the ATS.

A Study on the Private International Law Aspects of International Surrogacy Agreements

A message from Paul Beaumont and Katarina Trimmings:

In July 2010, the Nuffield Foundation awarded a grant of £112.000 to Professor Paul Beaumont and Katarina Trimmings to conduct a study into private

international law aspects of international surrogacy arrangements. The work on the project commenced on 1 August and the award is tenable for two years. The ultimate goal of the research is to explore possible types of international regulation of surrogacy arrangements, and to prepare a document that would serve as a basis for a future international Convention on aspects of surrogacy arrangements. The project is carried out in collaboration with the Hague Conference. A website detailing the project will be set up in the near future, and a note with the link to the website will then be posted. The research team is very much interested in getting input from interested parties. Therefore, if you have any relevant information about international surrogacy, please do not hesitate to contact the research team (see contact details below). Your assistance will be very much appreciated!

Summary

Recent developments and research in the area of reproductive medicine have resulted in various treatment options becoming available to infertile couples. One of them is the use of a surrogate mother in cases where the female partner of a couple is unable to carry a child. National laws governing surrogacy differ widely between jurisdictions. The variety of domestic responses to surrogacy has led to a situation where infertile couples seeking to have a child through surrogacy travel from one country to another, purposely choosing "surrogacy – friendly" jurisdictions as their destinations. In doing so, they effectively avoid restrictions imposed on surrogacy in their jurisdiction. Cross-border travel for the purpose of hiring a surrogate mother has been termed as "procreative tourism". By and large, the majority of "procreative tourists" are childless Western couples attracted by "low-cost" surrogacy services and a ready availability of surrogate mothers in places like India, Eastern Europe and South America.

It is usually the case that the law lags behind medical advances and corresponding social developments. Unfortunately, international surrogacy is not an exception. Indeed, there is a complete void in the international regulation of surrogacy arrangements, as none of the existing international instruments contains specific provisions designed to regulate this emerging area of international family law. In the absence of a global legislative response, highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the question of legal parenthood and the

nationality of the child. Classic practical examples are cases such as in re X and another (Children) (Parental Order:Foreign Surrogacy) [2009] Fam. 71; CA Paris, 25 October 2007 (France); and RDGRN 2575/2008, 18 February 2009 (Spain).

Another great worry springing from the unregulated character of "procreative tourism" is the potential for a "black market" preying on peoples' emotional or economic needs.

It has been widely recognised that there is an urgent need for legal regulation of surrogacy agreements at the international level. The problem was identified as an emerging international family law issue that requires further study and discussion in August 2009 at the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions. Thus far, however, no study has been conducted to assess the practical aspects of legal regulation of international surrogacy arrangements but this project will do so. ((It is recognised that some commentators have questioned whether, given ethical questions surrounding surrogacy, regulation is the right way forward, as it might have the unintended consequence of encouraging more international surrogacy arrangements. It is, however, submitted that in the increasingly globalised world, all attempts to impose a complete prohibition on cross-border surrogacy arrangements are doomed to failure. The only way forward is to regulate international surrogacy, especially for the sake of children born through these arrangements.))

The research will take the form of a combined empirical and library-based study. The empirical part will involve a statistical survey of international surrogacy arrangements. The aim of the survey is to map the magnitude of the problem and current patterns in international surrogacy. The empirical element of the research will also include personal interviews with surrogacy specialists from selected jurisdictions. ((Jurisdictions selected for the purposes of the empirical part of the project are India, Ukraine and the US state of California. The main reason for choosing these particular jurisdictions is their liberal approach to surrogacy. As a result of this approach, these jurisdictions have become highly popular destinations of "procreative tourists". This in turn guarantees availability of large amounts of empirical data.)) The interviews will examine practical private international law problems arising in cases of international surrogacy arrangements.

Contact details: Katarina Trimmings, e-mail: law553@abdn.ac.uk

Third Preliminary Draft of the CLIP Principles

The European Max-Planck Group for Conflict of Laws in Intellectual Property has recently published the Third Drat of their Principles for Conflict of Laws in Intellectual Property, which is available for download here. This version contains amended and supplemented rules contained in the First Draft of April 2009 (reported here), and the Second Draft of June 2009. The initial rules were exposed to the scrutiny of the scholars and practitioners outside the Group and the Third Draft is partially the result thereof.

Compared to the Second Draft, the Third Draft introduces changes, some just redrafts and some more substantial modifications, with respect to following issues:

Scope
General jurisdiction
Jurisdiction for infringements
Jurisdiction for multiple defendants
Jurisdiction for declaratory actions
Jurisdiction for preliminary and protective measures
General provisions on jurisdiction
Scope of injunction
Cooperation in multistate proceedings
Congruent and preliminary proceedings
Law applicable in the absence of choice
Law applicable to security interests in IP
Law applicable to ubiquitous infringements
General rule on recognition and enforcement

It is interesting to note that the Group is having profound doubts as to the choice of the choice-of-law rules for security interests in IPRs, and three versions are currently being considered.

The CLIP website still contains the invitation for all to make suggestions or

advance critical remarks to the members of the Group. However, any such comments wishing to have an effect on the text of the Principles would probably be appreciated sooner rather than later since the Group has announced the plan to publish the final version of the Principles together with comments in 2011.

Surrogate motherhood and Spanish homosexual couple (III)

You might remember my last post on surrogate pregnancy, where I informed about a 2009 decision of the Spanish Dirección General de los Registros y el Notariado ordering registration of a birth certificate issued in the USA. The document concerned the parenthood of two children born in San Diego to a surrogate mother and a homosexual Spanish couple; the entry listed the couple as father of the twins. The saga goes on: on Friday, the Tribunal de Primera Instancia No. 15 of Valencia, at the request of the Public Prosecutor, declared the entry null.

In its ruling, the judge states that children are the result of a pregnancy by substitution, which is not allowed by Spanish law; and that their filiation has to be determined by birth. In what is quoted as his own words, «La ley española prohíbe expresamente que la filiación en estos casos no se inscriba a favor de la persona que los ha parido».

With regard to the discrimination statement put forward by the lawyer of the couple, the judge points out that the children can not be registered as hers not because both parents are men, but because they were born to another person: “This legal consequence would equally apply to a homosexual- male and female- couple, man or woman alone, or a heterosexual couple, because the law does not distinguish gender in such cases”. From the Spanish legal point of view, the crucial fact in order to determine filiation is the giving of birth.

As for the argument that registration must be allowed in the best interests of the children, the court admits it is not irrelevant, but states that “the end does not

justify the means, and the Spanish legal system has sufficient instruments to achieve consistency".

The couple has decided to appeal the ruling before the Audiencia Provincial.

Kenneth Anderson on Kiovel v. Royal Dutch Petroleum

Many thanks to professor Kenneth Anderson for authorizing this post, meant as a suite of Trey's.

As both Trey and professor Anderson state, the most important holding of the Court seems to be that the ATS does not embrace corporate liability at all:

Plaintiffs assert claims for aiding and abetting violations of the law of nations against defendants—all of which are corporations—under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, a statute enacted by the first Congress as part of the Judiciary Act of 1789. We hold, under the precedents of the Supreme Court and our own Court over the past three decades, that in ATS suits alleging violations of customary international law, the scope of liability—who is liable for what—is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States inter se, and because no corporation has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernable—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS. Accordingly, plaintiffs' ATS claims must be dismissed for lack of subject matter jurisdiction

Being very much interested myself on this subject, I reproduce here under a comment by professor Anderson in The Volokh Conspiracy blog and Opinio Iuris – where you will find also comments from Kevin Jon Heller and Julian Ku.

"I've now had a chance to read a little more closely the decision, majority and concurrence, in Kiobel v. Royal Dutch Petroleum (issued today by a 2nd Circuit panel of Judge Cabranes writing for himself and Judge Wood, and a concurrence in the judgment by Judge Leval). On second reading, it still looks to me like a blockbuster opinion, both because of the ringing tone of the Cabranes decision and the equally strong language of a concurrence that, on the key point of corporate liability, amounts to a dissent. With circuits having gone different directions on this issue, this perhaps tees up a SCOTUS review that would revisit its last, delphic pronouncement on the Alien Tort Statute in Sosa v. Alvarez-Machain. Here are a few thoughts that add to, but also partly revise and extend, things I said in my earlier post today.

Let me start by trying to sum up the gist of the majority opinion and its reasoning. (I am reconstructing it in part, in my own terms and terminology, and looking to basic themes, rather than tethering myself to the text of the opinion here.) The Cabranes opinion sets out the form of the ATS, that single sentence statute, as having a threshold part, which is established by international law (treaties of the United States and the law of nations, or customary international law), and a substantive part, which is the imposition of civil tort liability as a matter of US domestic law. It does not use quite those terms, but it seems to me to set up the statute in a way that I've sometimes characterized as a "hinge," in which something has to "swing" between the threshold and the substantive command once the threshold is met. The question has been whether the threshold that serves as a hinge to swing over to connect and kick start the substantive part of the ATS, so to speak, the US domestic tort law substance, must be international law.

The ATS cases in various district courts and circuit courts have gone various directions on this, and indeed some of the early cases did not seem to recognize that there is a threshold part and a substance part. One sizable group of more recent cases have gone the direction of saying that even if the threshold has to be the law of nations or treaties of the United States, it is satisfied if there is some body of conduct that constitutes a violation of it (and further meets the requirements under Sosa). Call this conduct the "what" of this threshold requirement in the ATS. But what about the "who" of the conduct? Do the legal qualities of the alleged perpetrator of the violative conduct matter? Two possible answers are:

One is: if there is conduct, then the status under international law of whoever is alleged to have done it is not relevant. The existence of a "what" is enough, and the "who" is merely to show that this named defendant did it; further consideration of the juridical qualities of the defendant is irrelevant.

Alternatively, but to the same result of allowing a claim to go forward, even if it does matter, it is answered by looking to US domestic law in order to determine that it is an actor that can be held liable under the ATS. Thus, under this latter view, a corporation could be such a party alleged to have engaged in conduct violating international law (and further meeting the Sosa standard). Why? Because it is enough that US civil law recognizes that a corporation is a legal person that can be held to legal accountability. So, for example, Judge Weinstein declared flatly in the Agent Orange litigation that notwithstanding weighty opinion that corporations are not subjects of liability in international law, well, as a matter of policy, they are so subject in US domestic law and that fact about US law will be enough to meet the threshold of the ATS international law violation. Put in my terminology, the "hinge" to an ATS claim can be met by an actor determined to be liable under US, rather than international law, standards. If there is conduct — the "what" under international law, such as genocide or slavery, meeting the Sosa standard — the question of "who" is subject to the ATS will be determined by the rules of US domestic law. The US domestic rules accept the proposition of a corporation being so subject, hence a claim will lie under the ATS.

The Second Circuit majority sharply rejects that view. It says that in order for the threshold of the ATS to be met, there must be a violation of international law. Conduct might very well violate international law, but for there to be a violation, it must be conduct by something that is recognized as being subject to liability in international law. If it is not something that is recognized or juridically capable of violating international law and being liable for it, then the conduct — whatever else it might be — is not actually a violation of international law by that party. States can violate international law, are subjects of international law, and can be liable under international law. Individuals under some circumstances can violate (a relatively narrow list of things in) international law, can be subjects of it, and can be liable under international law. But what about juridical persons, artificial persons — corporations? The opinion says flatly that corporations are not liable under international law — not even to discern a rule, let alone a rule that would

meet the standards of Sosa. To reach this conclusion, the opinion walks through the history of arguments over corporate liability since WWII, ranging from Nuremberg to the considered refusal of the states-party to include corporations in the Rome Statute of the International Criminal Court.

By that point, the court has done two things. One, it has rejected the view that it is enough to find that US domestic law accepts corporate liability, and that it can be used to satisfy the threshold of an international law violation in the ATS. The hinge has to be international law; the threshold must answer both "what" and "who" as a matter of international law, with no reach to US domestic law. Hence, given that you can't rely on US domestic law to reach it, then to satisfy the threshold, you have to show that it exists in international law as a treaty or customary norm (and then add to that the further burden of Sosa). Two, then, as to that latter requirement, the court says, no, it is not the case that a corporation meets the requirements of liability under the current state of customary international law or treaty law. The majority opinion accepts that if the international law threshold is met, then US domestic law in the ATS itself flips into civil tort mode. But you can't get there without an international law violation on its own terms — and that means that there must be a "what" of conduct that violates international law and a "who" in the sense of an actor that, on international law's own terms, is regarded as juridically capable of violating it.

It is important to note that this is all logically prior to Sosa's requirements. What the Second Circuit has held here regarding corporate liability is not driven by Sosa at all. Sosa says that even if a claim satisfies the requirement of a violation of international law, the nature of the violation must meet a set of additional criteria — criteria that are established not as a matter of international law, but as matter of US Constitutional law imposed by the Court upon international law as considered in US courts to ensure, for domestic law reasons, that these ATS claims are, so to speak, really serious ones. The Second Circuit holding on corporate liability does not rest on the Sosa criteria; it never gets to them because it says that, quite apart from being "really serious" kinds of international law violations, the party alleged to have violated them must in the first place be a party capable in international law itself of violating them, in the sense of bearing legal liability. Only if the "who" is met, in other words, do the Sosa requirements come up as a further, domestic-law burden on the "what" of the claims.

This leaves an important point, however — one that is not so relevant to this case,

but which will presumably be deeply relevant in other settings, perhaps in a SCOTUS case on this. On this I am somewhat less certain as to the court's meaning, and will re-read the case and perhaps revise my views. At this point however, I'd say this. As the opinion observes, the nature of the ATS is to create in US domestic law a civil action in tort, premised upon meeting an international law threshold. However, it is a liability in tort — a remedy in tort — for violations that have to be international law violations themselves. We are now back at the "what." The violations have to be international law violations (done by a "who" capable of being liable); once those violations of international law are met (and then further meeting the Sosa burdens as a kind of further threshold requirement in domestic law), then a tort remedy is available.

Even if the "who" is an individual person — capable of violating at least some actionable things in international law, including meeting the Sosa standard — as a matter of international law today, all the violations are criminal. They are all international crimes. International law recognizes no regime of civil liability in international law imposed upon persons; the violations that exist are such criminal acts as war crimes, crimes against humanity, genocide, and a few others that would meet the Sosa requirements.

To cut to the chase, the point is that nowhere in this list is there anything that looks like an environmental tort, because there is no international law of tort. And what many ATS cases seek to do is create out of the putty of American tort law a regime of international civil liability that, alas, does not exist. The court seems to recognize this implicitly, I think, although the holding about corporate liability does not turn on it. Let me step beyond the case, however, to the implication of this second point in practical terms.

Where ATS plaintiffs seek to state a claim (and even leaving aside the question of "who") there is a large and logically independent problem, in many instances, of how plaintiffs can succeed in plausibly pleading a "what," given the short list of things for which individuals can be liable. First off, they are all criminal. Particularly following Sosa, they are all criminal and all at the approximate level of serious war crimes and genocide. Whereas the actual substantive acts that plaintiffs wish to sue over, if they could be honest about it in the pleadings, are environmental torts — perhaps very serious ones, but not genocide or war crimes. The only way into the ATS, given that the threshold "what" are all the most serious international crimes in the canon, has the perverse result that plaintiffs

or, anyway, their lawyers, today utterly and routinely submit pleadings alleging war crimes, genocide, crimes against humanity, etc., at every turn.

Speaking for myself, anyway, this is not a good thing from the standpoint of convincing anyone outside the US civil tort process that the US is serious about these crimes. Trying to leverage the ATS into a global civil liability system in a sort of jerry-rigged, spliced together, bits of US and bits of international law, arrangement that has precedential value only in US District Courts, and only by citing each other — well, it seems like a bad idea. I'm no fan of creating such a global system of civil tort liability, heaven knows, but if I were, I'd think this perhaps the worst of all worlds as a way of going about it.

But given the "whats" that can be plead, the result is inevitably a form of defining deviancy down. Defendants in these suits from outside the United States in particular seem often stunned that American courts so freely entertain allegations of the most serious crimes possible. In my personal experience, corporate defendants, in particular, often believe that they must fight to the wall even for things that in other circumstances they might be willing to negotiate as "ordinary" issues of labor rights, environmental claims, etc. Part of it is simply calculation — if they settle, they risk being forever characterized as having settled claims of … genocide, crimes against humanity, etc., in what was actually a fairly routine labor rights dispute in the developing world. But part of it, again in my experience, is that senior executives take this really personally; it is a slur on them and they won't settle, not if the claims are war crimes rather than argument over ground water contamination. I agree with them and think that those who see the ATS as somehow promoting the universal rule of law should consider the many ways in which it instead promotes cynicism about international human rights claims in their most serious form, or at least the meaning of human rights claims in US courts.

That said on my own part, the Cabranes opinion is careful to emphasize that the Second Circuit has accepted that in appropriate cases, there can be aiding and abetting and secondary liability. The standard is a demanding one, to be sure, under the Second Circuit's own holdings. In addition, the opinion emphasizes that individuals are, of course, liable in international law for certain serious crimes. Which goes to a question that Kevin Jon Heller posed in the comments, and on which I do not regard myself as expert. What is the big deal about this decision on corporate liability, if the same claims can simply be refiled against corporate

officers and executives and other individuals? Why is the loss of corporate level liability such a big deal? I don't regard myself as sufficiently expert in litigation to say definitively, and I welcome expert answers. However, for what it is worth, everyone I've dealt with with — plaintiff side or defendant side — in these cases thinks it is a very big deal, in terms of what has to be proved as well as damages. I leave this to those more knowledgeable than I — but I have never had any sense that anyone in this practice area thought it was a red herring, although perhaps people will re-think it.

The majority opinion as well as Judge Leval's concurrence both say quite a lot about the parlous issue of authority in answering the vexed questions of what constitutes customary international law. The role of experts, scholars, and "publicists" in the traditional term is discussed in both opinions. Certainly in the majority, professors do not come off so well, despite the fact that the Cabranes opinion leans heavily on declarations by Professor James Crawford and then-Professor (now Justice) Christopher Greenwood in speaking to the content of customary international law. Without saying so in so many words, it seems clear that the court took into account that these are both globally important defenders of "international law" in its received sense, and not merely American academics; the court seemed implicitly to use them as an anchor for suggesting that international law needed to be tested, not merely within the parochial precincts of the US District Courts, citing each other in a gradually upward cascade of precedents, increasingly sweeping but also increasingly removed from sources of "international" law outside themselves, but against something genuinely international.

One can, of course, dispute whether Crawford and Greenwood are the right sources for that. But the opinion perhaps seemed to sense that ATS doctrines are increasingly sweeping but increasingly issued in a hermetically sealed US ATS system with less and less recourse to international law as the rest of the world sees it. I don't know how else one takes a magisterial declaration by Judge Weinstein that it would simply be against public policy not to have corporate liability in a US court, irrespective of the authority for the proposition, or not, in actual international law. Maybe that is just me seeing what I want, to be sure; I think it is a correct concern, in any case.

Ironically, then, for those who would argue that the Cabranes opinion undermined "international law," I would say that a view held more widely than one might

guess (looking only to the sympathies that often lie with these claims) among international law experts outside the United States is that ATS jurisprudence actually undermines international law by contributing to its fragmentation among "communities of authority and interpretation," as I've sometimes called it. International law is fracturing into churches and sects that increasingly do not recognize the existence or validity of others. The existence of more and more courts and tribunal systems contributes greatly to this fragmentation, I believe, because unlike the traditional ways of seeing international law as a pragmatic fusion of diplomacy, politics, and law in a loose sense — with the implied ability to see other points of view and accept them in a pluralist way — tribunals thrive in large part by asserting their own authority, on their internal grounds, in ways that achieve maximum authority inside their own systems precisely by denying the validity of other views. After all, if you're going to lock up some defendant at the ICC, you have maximum claims to legitimacy for the holding if you take zero account of any other community of interpretation that thinks there is no ground to do so. The authority of courts, by contrast to the authority of Ministries of Foreign Affairs, is very much one that maximizes legitimacy by going "inside." I've talked about this a lot in my own work — the fractious question of "Who owns international law?"

I do not want to try and characterize Judge Leval's eloquent and passionate opinion; I don't understand it as well at this point, and being less sympathetic to its point of view, I fear that without more careful study, I would characterize it unfairly. But I would note that the disputes between his opinion and that of the majority over experts and professors might best be settled by getting rid of us professors pretty much in toto. I am pleased to say that I said so in my own expert declaration in the Agent Orange case; I thought it incumbent on me to tell Judge Weinstein that I didn't think that professors' opinions merited much weight if any, including my own.

And now a final thought, one that reaches far outside the case. It seems to me that this Second Circuit opinion is moving toward a much more confined ATS. There were other ways in which the court reserved on ways in which it might be curtailed still further — in passing, the court noted but declined to take a view on whether the ATS might have no extraterritorial application, limiting it to conduct within the United States. Once corporations were understood as targets, once everyone understood that neither plaintiff nor defendant required any traditional

connection to the United States, as parties, in conduct, nothing, and once the plaintiffs bar saw opportunities to join forces with the NGOs and activists, the trend of the ATS has been to turn into a kind of de facto tort forum for the world. Whatever else it might be legally, politically this is a role suited for a hegemonic actor able to make claims against corporations stick on a worldwide basis. What happens if the hegemon goes into decline?

What happens, that is, when plaintiffs in Africa decide to start using the ATS to sue Chinese multinationals engaged in very, very bad labor or environmental practices in some poor and far away place? Does anyone believe that China would not react — in ways that others in the world might like to, but can't? Does anyone believe that the current State Department would not have concerns — or more precisely, the Treasury Department? So let me end by asking whether a possible long run effect of this Second Circuit opinion, if followed in other circuits, and by SCOTUS, and perhaps other things that confine the ATS, is not over the long run an ATS for a post-hegemonic America?

Update: An international lawyer friend in Europe sent me an email commenting on this. This lawyer, who preferred not to be identified, said that despite agreeing with the opinion on corporate liability, both majority and concurrence once again exhibited that peculiarly American tendency to rely far too much on Nuremberg cases. Even if a Nuremberg panel had held that some German firm could be held liable, international lawyers generally would not take that as very weighty evidence of the content of customary international law today. Rather, one should look to the way in which things had evolved over a long period of time to see what states did as a customary practice from a sense of legal obligation. A finding that a court long ago had ruled this or that was a peculiarly American way of re-configuring an inquiry into the content of customary international law into a common law inquiry.

Americans thought that was okay; not very many international lawyers outside the US agreed with that, said my friend, as a method of inquiry into customary international law. And they thought that American lawyers almost always overemphasized Nuremberg cases, treated them as hallowed ground — rather than looking to the path of treaties and state practice in the sixty years since. Even if a Nuremberg case had held there was corporate liability, nothing else since then supported the idea, and far more relevant, this lawyer friend concluded, was the affirmative consideration and rejection of the proposition in

the ICC negotiations."

Is it the End of the Alien Tort Statute?

Today, the United States Court of Appeals for the Second Circuit entered an important decision in *Kiobel v. Royal Dutch Petroleum* regarding whether corporations may be sued under the Alien Tort Statute. The upshot of the opinion is that corporations cannot be sued under the Alien Tort State for violations of customary international law because "the concept of corporate liability . . . has not achieved universal recognition or acceptance of a norm in the relations of States with each other." Slip op. at 49.

The impact this decision will have cannot be understated. First, the decision comes out of the Second Circuit–the same circuit that started the modern era of ATS litigation in 1980 in the Filartiga case. Second, the opinion provides the most clearly articulated view, backed up with international legal analysis, concluding that corporations cannot be sued as a matter of international law. This analysis will likely be incredibly influential throughout the federal courts. Third, corporations now have the support of caselaw to dismiss ATS cases filed against them.

Given the fact that the majority of ATS litigation in recent years has been directed at corporations, this case may prove to be the end of the expansive use of the ATS. Rest assured, plaintiffs will likely seek en banc and Supreme Court review, and thus we will have to wait and see whether the Second Circuit has fired a warning shot or sounded the death knell for modern ATS litigation.