# A Judgment of the ECHR at the Intersection between International Child Abduction, Parental Responsibility and Migration Law

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By a judgment of 30 July 2013 (available only in French), a Chamber of the European Court of Human Rights found that Switzerland had violated its obligations under Article 8 of the European Convention on Human Rights in a cross-border case concerning the return of a minor and his custody (application No. 33169/10, *Polidario* v. *Switzerland*; a press release in English may be found here).

Article 8 of the Convention enshrines the right to respect for private and family life. It provides that there shall be "no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

In 2001, the applicant, Catherine Polidario, a national of the Philippines, had a child with a Lebanese man who had acquired Swiss nationality. A few months later, Ms Polidario, then an illegal immigrant, was ordered to leave the country. She returned to the Philippines with the child. In 2004 she signed an *affidavit* authorising the father to have his son back in Switzerland. The father did not return his son to the Philippines, although the affidavit made clear that he was to keep the child just "for the holidays".

Despite the fact that Ms Polidario held custody rights and parental authority in respect of the child, her attempts with the Swiss authorities to obtain his return to the Philippines were unsuccessful (the State of Philippines, by the way, is not a party to the Hague Convention of 25 October 1980 on the Civil Aspects of

International Child Abduction).

While proceedings were pending in Switzerland concerning the custody of the child, Ms Polidario asked the Swiss immigration authorities for leave to remain in the country, as a means to exercise her parental rights and to maintain a relationship with her son.

Finally, from 2010, custody of the child was awarded to the father and Ms Polidario was granted access rights which had to be exercised in Switzerland, whereas she had no authorisation to stay in the country.

In its judgment, the Court recalled at the outset that, pursuant to Article 8 of the European Convention, States must not only refrain from interfering with an individual's private and family life. Positive obligations arise from the said provision along with negative ones, requiring States to adopt measures aimed at ensuring the actual enjoyment of family rights. This implies, *inter alia*, that the rights relating to the relationship between a parent and his or her child should be determined by the competent authorities on the ground of the legally relevant elements, and not on the ground of the mere fact that a *de facto* situation has eventually consolidated over time ("et non par le simple écoulement du temps").

Thus, the Court added, where the custody of a child is disputed, appropriate measures (including those preparatory measures as may be necessary in order to allow a parent and a child to reunite) should be taken rapidly, since the passage of time may entail irreparable consequences for the family relationships at stake. This was particularly true in the circumstances, in view, among other things, of the age of the child, of the fact that the proceedings in respect of return were brought by the applicant while residing in the Philippines and of the limited financial resources available to the applicant herself.

The Court conceded that, starting from 2010, measures had been taken by the Swiss authorities with a view to ensuring the effective exercise of the applicant's right to entertain regular contacts with the child, although this right – failing an authorisation to reside in Switzerland – had to be exercised by Ms Polidario as an illegal resident, thereby in the absence of a full legal entitlement ("sans bénéficier d'un statut juridique"). The Court further conceded that, in the meanwhile, notably after the procedure in Strasbourg had been initiated, the situation had improved thanks to a temporary permit of stay issued in favour of Ms Polidario.

Yet, according to the Court, the fact remains that the Swiss authorities, by failing to proceed rapidly in respect of the return of the child and his custody and by refusing to issue the applicant with a residence permit, have in fact prevented Ms Polidario to effectively exercise her rights as a parent for six years, *i.e.* from the time of the abduction of the child, in 2004, until 2010.

In the Court's view, this amounted to a violation of Article 8 of the Convention.

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# Swedish Conference on Civil Justice in the EU

On 17-18 October 2013, the Swedish Network for European Legal Studies, the Faculty of Law of Uppsala University and the Max Planck Institute Luxembourg will organize a conference in Uppsala: Civil Justice in the EU – Growing and Teething? Questions regarding implementation, practice and the outlook for future policy.

Conference Day 1: October 17th

9.00 Opening of the Conference
Prof. Antonina Bakardjieva Engelbrekt, Stockholm University, Chairman of the Swedish Network for European Legal Studies

9.15 Keynote Address – The State of the Civil Justice Union
Prof. Burkhard Hess, Max Planck Institute Luxembourg

9.45 Avoiding "Torpedoes" and Forum Shopping
*Does the jurisdiction framework work in practice?*
*What about third country litigants and the EU legal order?*
*Has the ECJ:s case law added predictability?*
Chair Docent Marie Linton, Uppsala University
Prof. Gilles Cuniberti, University of Luxembourg
Prof. Trevor Hartley, London School of Economics

Prof. Michael Hellner, Stockholm University
Deputy director Erik Tiberg, The Government Offices of Sweden

11.00 Coffee

11.30 Alternative Dispute Resolution
*Are the new rules for consumer ADR and ODR the right approach?*
*Can mandatory mediation ensure access to justice?*
*Is further and deeper regulation the way forward?*
Chair Prof. Bengt Lindell, Uppsala University
Prof. Antonina Bakardjieva-Engelbrekt, Stockholm University
Dr. Jim Davies, University of Northampton
Dr. Cristina Mariottini, Max Planck Institute Luxembourg

12.45 Lunch

14.15 Simplified Procedures and Debt Collection – Much Ado About Nothing?
*Has an additional small claims mechanism added anything in practice?*
*Enforcement and payment orders – Has the removal of exequatur been successful?*
*Attachment of bank accounts – First step to harmonization of execution measures?*
Chair Prof. Torbjörn Andersson, Uppsala University
Dr. Mikael Berglund, The Swedish Enforcement Authority
Dr. Carla Crifò, University of Leicester
Prof. Xandra Kramer, Erasmus University
Dr. Cristian Oro, Max Planck Institute Luxembourg

15.30 Coffee

16.00 Track 1 – Family Law
*Choice of law in divorce matters not for all Member States –First step in civil justice fragmentation?*
*How will the new Regulation on Succession change the landscape of civil justice?*
Chair Prof. Maarit Jänterä-Jaareborg, Uppsala University
Dr. Björn Laukemann, Max Planck Institute Luxembourg
Other speakers pending confirmation

Track 2 – Collective Redress

*Can it provide additional guarantees for European consumers?*
*Is it a necessary step in private enforcement of competition law?*
*Observations on the Commission Recommendation*
Chair Dr. Eva Storskrubb, Roschier
Prof. Laura Ervo, Örebro University
Prof. Michele Carpagnano, University of Trento
Dr. Rebecca Money-Kyrle, University of Oxford
Dr. Stefaan Voet, Ghent University

Conference Day 2: Friday, October 18th

9.00 The Quest for Mutual Recognition
*Are the current network initiatives and e-justice measures enough?*
*Balancing efficiency in civil justice against procedural human rights*
*How are the national courts coping with mutual recognition?*
*Is complete abolition of exequatur possible?*
Chair Prof. Antonina Bakardjieva-Engelbrekt, Stockholm University
Prof. Torbjörn Andersson, Uppsala University
Docent Marie Linton, Uppsala University
Prof. Marta Requejo-Isidro, Max Planck Institute Luxembourg
Dr. Eva Storskrubb, Roschier

10.15 Future Measures and Challenges
EU Commission (Representative to be confirmed)
Legal Counsellor Signe Öhman, The Permanent Representation of Sweden

11.30 End of Day 2

The conference is free of charge. For registration, see here.

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# Latest Issue of "Praxis des

# Internationalen Privat- und Verfahrensrechts" (4/2013)

Recently, the July/August issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Bettina Heiderhoff***: "Fictitious service of process and free movement of judgments"

*When judgments or court orders are to be enforced in other member states, it is an essential prerequisite that the defendant was served with the document which instituted the proceedings in sufficient time (Article 34 Nr. 2 Brussels I Regulation).*

*When the service was conducted in a fictitious manner, the issue of service "in sufficient time" causes friction. It is acknowledged that the measure for timeliness – or, in such a case, more accurately for rightfulness – is not set by the state of origin, but by the recognising state. However, if the criteria are taken from the autonomous procedural rules of the recognising state, as has occasionally happened, minor differences between national laws can cause unreasonable obstacles to the recognition of titles.*

*In order to fulfill the aim of the Brussels I Regulation, to improve the free movement of judgments and strengthen mutual trust, the criteria must, therefore, not be taken from the national rules of the recognising state, but ought rather to resemble the standards valid for breaches of public policy. Only such a "mildly Europeanized" standard for fictitious services may avoid a trapping of the claimant who, trusting in the decision of the court of origin, is then surprised by the differing measures of the recognising state.*

- ***Haimo Schack***: "What remains of the renvoi?"

*The renvoi is one of the main principles of classic private international law. The renvoi doctrine aims for the conformity of decisions in different jurisdictions, which may also facilitate the recognition of the decision abroad. With this goal in mind the following article gives an overview of the acceptance of renvoi in different national jurisdictions. In addition, the article evaluates and criticizes*

*the tendency to push back the doctrine of renvoi in international treaties and in EU private international law. Especially in the former domain of renvoi, i.e. the law of personal status, family and inheritance law, the European conflict rules are dominating more and more and preventing the conformity of decisions in relation to third countries. As a means to achieve this decisional harmony the renvoi remains useful, it shows the cosmopolitan attitude of classic private international law.*

- ***Hannes Wais***: "Hospital contracts and Place of Performance Jurisdiction under § 29 ZPO (German Code of Civil Procedure)"

*This article comments on a recent decision of the German Federal Supreme Court, in which the court ruled that, for payment claims from a hospital contract, § 29 ZPO conferred jurisdiction upon the courts in the locality of the hospital. The Court decided that, not only for the purposes of § 29 ZPO, the place of performance of the monetary obligation from a hospital contract is the creditor's seat and not that of the debtor (in contrast to what is generally accepted for monetary obligations). This article will discuss the implications of this decision, and will consider the possibility of a conceptual "reversal" of § 29 ZPO.*

- ***Markus Würdinger***: "Der ordre public-Vorbehalt bei Verzugsaufschlägen im niederländischen Arbeitsrecht" – the English abstract reads as follows:

*The substantive ordre public rarely plays a role when it comes to recognition and enforcement of foreign legal decisions. This article deals with such a case. It is about the declaration of enforceability of a Dutch court decision in Germany. The judgment in question decided the applicant's claim for unpaid wages plus a statutory increase of 50% as a penalty for late payment in his favour. The Higher Regional Court of Düsseldorf (OLG) rightly interpreted Art. 34 EuGVVO (Regulation (EC) No 44/2001) narrowly and refused to consider this decision as being comparable to an award of punitive damages.*

- ***Urs Peter Gruber***: "Die Vollstreckbarkeit ausländischer Unterhaltstitel – altes und neues Recht" – the English abstract reads as follows:

*For a maintenance creditor, the swift and efficient recovery of a maintenance obligation is of paramount importance. In the Brussels I Regulation – which until recently was also applicable with regard to maintenance obligations – and in various conventions there are procedures for the declaration of enforceability of decisions. In these procedures, the courts have to ascertain whether there is a maintenance claim covered by the Regulation or the convention and whether there are reasons to refuse recognition of the foreign decision. In the new Regulation (EC) No 4/2009 on maintenance obligations however, a declaration of enforceability of decisions is no longer required, provided that the decision was given in a Member State bound by the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations. In this case, a decision on maintenance obligations given in a Member State is automatically enforceable in another Member State. The article discusses recent court decisions on the declaration of enforceability in maintenance obligations. It then examines the changes brought about by the Regulation (EC) No 4/2009 on maintenance obligations. Weighing the interests of both the creditor and the debtor, it comes to the conclusion that the abolition of the above-mentioned procedures is fully justified.*

- ***Wolf-Georg Ringe***: "Secondary proceedings, forum shopping and the European Insolvency Regulation"

*The German Federal Supreme Court held in a recent decision that secondary proceedings according to Article 3(2) of the European Insolvency Regulation cannot be initiated where the debtor only has assets in a particular country. The requirements for an "establishment" go beyond this and require an economic activity with a "minimum of organisation and certain stability". This decision stands in conformity with the leading academic comment and other case-law. Nevertheless, the decision is a good opportunity to stress the importance of secondary proceedings and their function to protect local creditors. This is particularly true where the secondary proceedings are initiated (as here) in the context of a cross-border transfer of the "centre of main interests" (COMI) of the debtor. The ongoing review of the European Insolvency Regulation should respond to this problem in one of the regulatory options provided.*

- ***Moritz Brinkmann***: "Ausländische Insolvenzverfahren und deutscher Grundbuchverkehr" – the English abstract reads as follows:

*Art. 16 EIR provides for the automatic recognition of insolvency proceedings which have been commenced in another member state. The recognition of insolvency proceedings pertains not only to the debtor's power with respect to the estate, but also to his procedural position as well as to questions regarding company law or the law of land registries. The decision rendered by the OLG Düsseldorf (March 2, 2012) illustrates that these consequences are easily ignored in the routine of everyday legal life as long as courts and parties have difficulties in accessing reliable information as to the status of foreign proceedings. The existing deficits in terms of access to information regarding foreign insolvency proceedings may thwart the concept of automatic recognition. Hopefully, the coming reform of the EIR will address this issue (see proposed Art. 22 EIR in COM (2012) 744 final).*

- ***Kurt Siehr***: "Equal Treatment of Children of Unmarried Parents and the Law of Nationality"

*A child of unmarried parents acquires nationality of Malta only if the child is recognized by the Maltese father and legitimized by marriage or court decision. The European Court of Human Rights decided that this provision violates the European Convention of Human Rights, especially Article 8 on the right of family life and Article 14 on non-discrimination. There are doubts whether the decision is correct. A more careful phrasing of Maltese law could avoid the violation of the Convention. Or is the decision of the European Court of Human Rights its step further towards a human right for nationality?*

- ***Fritz Sturm***: "Forfeiture of the choice of surname: The European Court of Human Rights compels the Swiss Federal Court to set aside its former judgment"

*The Swiss Federal Court, 24 May 2005, did not authorize foreign husbands to have their surname governed by their national law (s. 37 ss. 2 Swiss Private International Law Act) when they have previously chosen to take the wife's surname as the family name, situation which could not have occured if the sexes had been reversed. In fact, in this case the husband's surname would*

*automatically become the family name and the wife could choose to have her surname governed by her national law. For the Court of Strasburg this difference in treatment is discriminatory (violation of art. 14 in conjunction with art. 8 ECHR). The Swiss Federal Court has therefore been compelled to set aside its former judgment.*

- ***Dirk Looschelders:*** "Jurisdiction of the Courts for the Place of Accident in case of a Recourse Direct Action by a Social Insurance Institution against the Liability Insurer of the Tortfeasor"

*In the present judgement the Austrian High Court (OGH) deals with the question whether a social insurance institution can sue the liability insurer of the tortfeasor in the courts for the place where the harmful event occurred. The OGH comes to the conclusion that such a jurisdiction is granted at least by Article 5 no 3 Brussels I Regulation. The problematic issue whether the priority provision of Article 11 (2) read together with Article 10 s. 1 Brussels I-Regulation applies, is left undecided. In the decision Vorarlberger Gebietskrankenkasse the European Court of Justice has held that the social insurance institution cannot take a recourse direct action against the liability insurer under Article 11 (2) read together with Article 9 (1) (b) Brussels I Regulation. According to the opinion of the author, jurisdiction in such cases shall generally not be determined by Chapter II Section 3 of the Brussels I Regulation. Therefore, Article 11 (2) read together with Article 10 s. 1 Brussels I Regulation is inapplicable, too. In consequence, contrary to the opinion of the OGH, the social insurance institution cannot be regarded as an injured party in terms of Article 11 (2) Brussels I-Regulation.*

- ***Michael Wietzorek***: "On the Recognition of German Decisions in Albania"

*There is still no established opinion as to whether the reciprocity requirement of § 328 Sec. 1 No. 5 German Civil Procedure Code is fulfilled with regard to Albania. A decision of the High Court of the Republic of Albania dated 19 February 2009 documents that the Court of Appeals of Durr?s, on 5 December 2005, recognized two default judgments by which the Regional Court of Bamberg had ordered an Albanian company to pay two amounts of money to a German transport insurance company. One single court decision may not be*

*sufficient to substantiate that there is an established judicial practice. Yet the reported decision appears to be the only one available in the publicly accessible database of the High Court dealing with the recognition of such foreign default judgments by which one of the parties was ordered to pay an amount of money.*

- ***Chris Thomale***: "Conflicts of Austrian individual labour law and the German law of the works council – intertemporal dimensions of foreign overriding mandatory provisions"

*The Austrian Supreme Court (Oberster Gerichtshof) recently held that the cancellation of an individual employment contract between a German employer and an Austrian employee posted in Austria was valid despite the fact that the employer failed to hear his German works council properly beforehand. The case raises prominent issues of intertemporal conflicts of laws, characterization of the mentioned hearing requirement and the applicability of foreign overriding mandatory provisions, which are discussed in this article.*

- ***Sabine Corneloup: "***Application of the escape clause to a contract of guarantee"

*The French Cour de cassation specifies how to apply the escape clause of Art. 4 n° 5 of the Rome Convention to a contract of guarantee. The ancillary nature of guarantees leads national courts often to the application of the law governing the main contract, on the basis of a tacit choice of law or on the basis of the escape clause. The latter is to be used very restrictively, according to the Cour de cassation. It is necessary to establish first that the ordinary connecting factor, designating the law of the habitual residence of the guarantor, is of no relevance in the examined case. Only after this step, the courts can examine the connections existing with another State. This restrictive interpretation adds a condition to the text that seems neither necessary nor appropriate.*

- ***Oliver Heinrich/Erik Pellander***: "Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an beweglicher Ausrüstung"
- ***Stefan Leible***: "Hannes Unberath † (23.6.1973–28.1.2013)"

# Land Grabbing in Mubende-Neumann (article)

Professor Zamora Cabot continues his line of research on the subject of multinational enterprises liability with this article (ckick here to download), where he raids into a field of the out-most concern, such as that of land grabbing, over the very significant case *Mubende-Neumann*.

After an introduction, Section I highlights some of the most relevant aspects of the subject matter; at the same time it indicates the working plan. Then, in Section II, the author implements a definition of the land grabbing phenomenon, together with the trends over which an exponential growth has been based. Also, some basic questions such as those of property titles on lands and their surrounding problems, together with the influence of the right to food and the right to land, are developed. This Section concludes by referring to regulatory approaches based on non-committal attitudes when it comes to facing land grabbing, and the special scrutiny it should undergo in connection with countries either submerged or suffering from conflict situations, i.e., weak environments where land grabbing problems may develop into human rights questions.

Section III states the facts and legal consequences of the case *Mubende-Neumann,* a procedure of massive eviction that took place in Uganda in 2001, where the Government, after signing an agreement with a firm of German origin, expelled in a particularly brutal and violent way more than two thousand people from the lands they occupied, and delivered them to a branch of the above-cited corporation. These facts prompted a legal proceeding in Uganda, on the one hand, and another one based on the OECD Guidelines for multinational companies, on the other; both are exposed in the article in a synthetic way. The author ends this Section by setting off the report drawn up by GI-ESCR on this

case before the United Nations Human Rights Committee, and the notes addressed by the Committee to Germany (October 2012) in its Concluding Observation nº 16.

Section IV deals with the subject of the so-called "extraterritorial obligations" of the States, explaining their precedents, the main actors implied in their development, their legal framework (the Covenant of Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as the most outstanding among them). It also adresses the issue of how to conciliate these obligations with extraterritorial laws.

The study ends up in Section V with some concluding reflections, critical remarks adressed to the German authorities performance in the case under consideration and, more generally, in all cases arising out of human rights violations on the part of the German multinational corporations. Still, as a note of hope, the autor underlines the increasing number of occasions in which the countries hosting companies and investments are reacting in favour of the affected communities through their institutional framework. As exemple, the Instance decision issued by a judge of Kampala in the case *Mubende-Neumann* or, just as well very recently, that of the Supreme Court in India, *Comunidad Dongria Kondh, of Orissa*, in face of the mining colossus Vedanta. Two cases in which the fight both affected communities undertook in defence of their rights turned to be decisive, thus constituting a most important pattern and a valuable element for reflection towards the future.

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# First Issue of 2013's Rivista di diritto internazionale privato e processuale

*(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)*

The first issue of 2013 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features two articles and two comments.

In her article *Costanza Honorati*, Professor of European Union Law at the University of Milano-Bicocca, addresses the issue of International Child Abduction and Fundamental Rights ("Sottrazione internazionale dei minori e diritti fondamentali"; in Italian).

> *In several recent decisions on cases concerning the international abduction of minors the European Court of Human Rights set the requirement of an "in-depth examination of the entire family situation" in order to comply with Article 8 ECHR. The present article considers the effects of such principle on the role and on the proceedings of both the court of the State of the child's habitual residence and of the court of the State of his refuge after abduction, especially when acting in the frame of Brussels II Regulation. While the requirement of «in-depth examination» seems overall synergetic to the role of the court of habitual residence, also when such court is judging on the return of the abducted minor pursuant to Article 11(8) Reg. 2201/2003, deeper concerns arise with reference to the role of the court of the State of refuge. When such a court is asked to enforce a decision for the return of the abducted child, the possible violation of the child's fundamental right in the State of origin might raise the question of opposition to recognition and enforcement. The article thus endeavours to find a solution balancing the child's fundamental rights and EU general finality to strengthen the area of freedom, security and justice.*

In their article *Paolo Bertoli* and *Zeno Crespi Reghizzi*, respectively Associate Professor at the University of Insubria and Associate Professor at University of Milan, provide an assessment of "Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes" (in English).

> *The relationship between State regulatory measures and the international standards of protection for foreign investments has proved to be a critical issue in investor-State arbitration. Normally, two legal systems are involved: the legal order of the State hosting the investment is competent to govern economic activities (including those of foreign investors) carried out on its territory, and the international legal order sets forth the duties of States in respect of foreign*

*investors. After having discussed the basis for, and the law applicable to, investment claims (both in treaty and in contract claims), this article examines the interplay between regulatory measures and the international standards of protection for foreign investments, i.e., indirect expropriation and fair and equitable treatment. The authors also analyse the influence on the arbitrator's evaluation of the presence of a stabilization clause in the agreement between the State and the investor.*

In addition to the foregoing, the following comments are also featured:

*Fabrizio Vismara* (Associate Professor at the University of Insubria), "Assistenza amministrativa tra Stati membri dell'Unione europea e titolo esecutivo in materia fiscale" (Administrative Assistance between EU Member States and Enforcement Order in Fiscal Matters; in Italian)

*The Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, issued under Articles 113 and 115 of the TFEU, was implemented in Italy by Legislative Decree No 149 of 14 August 2012. The Directive introduces a uniform instrument to be used for enforcement measures to recover claims in another Member State, and realizes a system of implementing decisions in tax matters typically excluded from judicial cooperation on civil matters. Directive 2010/24/EU provides that enforcement in other Member States is permitted by means of a uniform instrument which is automatically valid in the requested Member State. The automatic recognition provided for by Directive 2010/24/EU is different from the abolition of exequatur in the field of judicial cooperation in civil matters provided by, respectively, Regulation No 805/2004, Regulation No 1896/2006, Regulation No 861/2007, and Regulation No 1215/2012. Directive 2010/24/EU sets out a new instrument, named uniform instrument, which is subject to automatic recognition and it is formally distinct from the initial instrument permitting enforcement issued in the applicant Member State.*

*Lidia Sandrini* (Researcher at the University of Milan), "La compatibilità del regolamento (CE) n. 261/2004 con la convenzione di Montreal del 1999 in una recente pronuncia della Corte di giustizia" (Compatibility of Regulation (EC) No 261/2004 with the 1999 Montreal Convention in a Recent Judgment by the Court of Justice of the European Union; in Italian)

*This article addresses Regulation (EC) No 261/2004 in so far as it deals with delay in the carriage of passengers by air, as interpreted by the Court of Justice of the European Union in the joined cases Nelson and TUI Travel. It considers whether this recent judgment is consistent with the Montreal Convention of 1999 reaching the overall conclusion that it is not. This unsatisfactory result is due to purpose of ensuring a level of protection for passenger higher than that provided by the international uniform rules. This aim has been achieved affirming the interpretation of the Regulation provided in the Sturgeon case, in which the Court went far beyond the wording of the Regulation, and in the IATA case, in which the Court advanced an untenable and ambiguous construction of the relationship between the Montreal Convention and Regulation No 261/2004. Conversely, in deciding the joined cases, the Court neglected its duty to interpret according to the proper criteria provided by international law the treaties ratified by the EU, and failed to ensure that the EU respect its duty as contracting party.*

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

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# AJIL Agora on Kiobel

The American Journal of International Law has issued a call for submissions for an agora on "Transnational Human Rights Litigation After *Kiobel*." Here's the call:

*The American Journal of International Law is calling for short submissions (maximum 3000 words, including footnotes) for a forthcoming agora on "Transnational Human Rights Litigation After Kiobel." Contributions must not have been previously published in whole or in substantial part (on the web or elsewhere). Some of the chosen contributions will be published in the October 2013 issue of the Journal. Other selected contributions may be published electronically in a special ASIL online publication. All contributions must be*

*submitted no later than June 15 in order to be considered. Contributions on U.S. law issues, and on comparative and non-U.S. dimensions, are welcome. The editors aim to publish a set of distinctive contributions, rather than many making similar points. All selections for publication in AJIL or in the ASIL online publication will be peer reviewed by a committee of the AJIL editorial board consisting of Carlos Vázquez (chair), Curtis Bradley, and Ingrid Wuerth, in consultation with Co-Editors in Chief José Alvarez and Benedict Kingsbury. Decisions on publication (including requests for revisions) will be made on a rolling basis, but in any case no later than June 30. Submit contributions toajil@asil.org with "Kiobel Agora" in the subject line.*

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# Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2013)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Christopher Selke***: "Die Anknüpfung der rechtsgeschäftlichen Vertragsübernahme" – the English abstract reads as follows:

*More than fifty years after Konrad Zweigert's essay on the applicable law to the assignment of contracts, some issues are still unsettled. The following article gives an overview of previous comments and focuses on the scope of application. It further emphasizes the crucial question, how to determine the applicable law in the case of a cross-border assignment of a contract. In this connection, the role of the principle of party autonomy shall be challenged more carefully than it has been in the past – which does not inevitably mean that it has to be completely dismissed. There just has to exist a subsidiary objective international private law rule in the case that the parties' choice of law leads to difficulties. Therefore, this article concludes with a proposal for*

*such a rule.*

- ***Wulf-Henning Roth:*** "Jurisdiction and Applicable Law in Cross-Border Defamation and Breach of Personality Rights"

*The article discusses the judgment of 25 October 2011, C-509/09 and C-161/10, eDate Advertising, in which the European Court of Justice clarifies two important issues of European private international law concerning cross-border injunctions and damages claims with regard to defamation and breach of personality rights on the internet. The first issue concerns the interpretation of Article 5 no. 3 of the Brussels I Regulation 44/2001/EC which establishes a special concurrent jurisdiction of the courts of the Member States in matters of tort liability. According to the Court, an applicant may bring an action before the court where the publisher is domiciled or before the courts of all Member States where the internet information is accessible, however restricted to the infringement of the personality rights in the relevant territory ("mosaic principle"). Alternatively, the applicant may also bring an action for an injunction or for all damages, incurred worldwide, before the court where he or she has his or her centre of interests. As for the applicable law concerning tort liability, the Court clarifies the intensely discussed meaning of Article 3 (1) and (2) of the e-commerce Directive 2000/31/EC. The Court holds that both provisions do not contain conflict of law rules. Rather, Article 3 (1) contains an obligation of the Member State where the internet provider has its seat of business to ensure that the internet provider complies with the national provisions applicable in that Member State. And Article 3 (2) allows that the Member States where the internet information is accessed may apply their own substantive law applicable to the infringement of personality rights, but not in such a way that the interstate provision of internet services is restricted.*

- ***Karl-Nikolaus Peifer: "***International Jurisdiction and Applicable Law in Trademark Infringment Cases"

*The German Federal Court had to deal with questions of international jurisdiction and applicable law in a trademark infringement case based upon the broadcasting of an Italian game show which was available in Germany. The Court found that German courts had jurisdiction upon the case and might apply national trademark law because trademark interests were affected in Germany.*

*The result is arguable. However, it demonstrates that even codified rules in IP-Law leave substantial insecurities with regard to international harmony as long as IP-laws have territorial reach only.*

- ***Oliver L. Knöfel***: "The European Evidence Regulation: First Resort or Last?"

*In Continental Europe, treaties and other devices of judicial assistance in the obtaining of evidence abroad have traditionally been understood as tools to prevent intrusions into another State's authority and territory. Today, there are diverging views as to whether or not the relevant legal instruments designed for civil and commercial matters, such as the Hague Evidence Convention and the European Evidence Regulation (Council Regulation [EC] No 1206/2001), have the quality of being exclusive, that is, the effect of barring any other means of gathering evidence abroad. The article reviews a judgment of the European Court of Justice (First Chamber) of 6 September 2012 (C-170/11), dealing with the mandatory or non-mandatory character of the European Evidence Regulation. The question at stake is whether a judge in a Member State must have recourse to the Regulation on each occasion that she wishes to take evidence that is situated in another Member State. The ECJ declared a Member State's court free to summon a witness resident in another Member State to appear before it in accordance with the lex fori processus, that is, without recourse to the Evidence Regulation. The author analyses the relevant comity issues, explores the decision's background in international law and in international procedural law, and discusses its consequences for the relationship to Third States, as well as for the traditional concept of judicial sovereignty.*

- ***Gerald Mäsch:*** "The "Equitable Life" 2002 Scheme of Arrangement in the German Federal Court of Justice"

*The German Federal Court of Justice's IVth Senate, in its decision of 15 February 2012, took the view that the High Court sanction of the English Insurance Company Equitable Life's 2002 voluntary solvent scheme of arrangement has no binding effect on a dissenting policy holder residing in Germany on the ground that art. 35 (1) and 12 of the Brussels I Regulation prevent its recognition. In this article, the author argues that, based on the*

*European Court of Justice's ruling in "Group Josi Reinsurance", the Brussels I Regulation pro-visions on insurance contracts should instead be interpreted as not applying to collective procedures aiming at the financial redress of an insurance company where the individual policy holder's inferior knowledge of insurance issues is irrelevant. The same interpretation applies – mutatis mutandis – for the consumer contract provisions (art. 35 (1), 15 Brussels I Regulation), whereas the position of the IVth Senate would make the restructuring of any English company by way of voluntary agreements under English law nearly impossible if a significant number of dissenting private investors from Germany is involved. The author calls upon German courts confronted with the issue of recognition of English solvent scheme of arrangements not to follow the IVth Senate but rather to seek a preliminary ruling by the ECJ.*

- ***Herbert Roth***: "Problems concerning the certification as a European Enforcement Order under the regulation (EC) No 805/2004"

*The reviewed order of the German Federal Supreme Court (BGH) is dealing with the revocation of a German decision fixing costs of an interim prohibition procedure, which was certified as an European Enforcement Order by German authorities. Both the result as well as the legal reasoning must be criticized for the excessive requirements concerning the information on legal remedies and the wrongfully denied cure of non-compliance with minimum standards. On the other hand the order of the local Augsburg trial court (Amtsgericht) is rightfully based on prevailing opinion of scholars and courts demanding only the formal service of the foreign judgement to the debtor in accordance with § 750 German Civil Procedure Code as a prerequisite of the execution of an European Enforcement Order. By contrast the formal service of the certification as an European Enforcement Order itself is no mandatory requirement of the later execution.*

- ***Kurt Siehr:*** "Foreign Certificate of Succession for Estate in Germany?"

*A Turkish citizen passed away in Turkey. The deceased had a bank account with a German bank in Munich. The plaintiff, a son adopted by the deceased, presented to the bank a Turkish certificate of succession and asked for payment*

*of the account. The certificate of succession mentioned the plaintiff as the only heir. The defendant bank declined to pay and asked for a German certificate of succession (§ 2369 BGB) which may be granted for that part of the estate which is located in Germany. The County Court of Munich gave judgment for the plaintiff. The Turkish certificate of succession has to be recognized under § 17 of the German-Turkish Succession Treaty of 1929 and the defendant is not allowed under principles of good faith to insist on the presentation of a German certificate of succession by the plaintiff.*

*The County Court decision has to be criticized. Certificates of succession in continental European law are quite different. The most advanced certificate is the German one which also served as a model for the European certificate of succession as adopted by the European Union in Articles 62 et seq. of the Succession Regulation of 2012. The Turkish certificate, as the Swiss one (as the model for the Turkish Civil Code), are not very well regulated and many questions are left open and have not yet been settled by the courts of these countries. Open is still the question whether a debtor of the estate can validly pay his debt to the person mentioned as heir in the Turkish certificate. This is different according to German law. The German certificate is issued by the probate court after diligent examination of the facts and, if issued, guaranties that the debtor may validly pay his debt to the person mentioned in the German certificate [§ 2367 BGB; similar Article 69 (3) Succession Regulation]. If it is not established without any doubt that a foreign certificate of succession has the same effect of a German one, the debtor in Germany of any claim of the estate of a foreigner may insist that a German limited certificate of succession (§ 2369 BGB) be presented by the collecting heir.*

- ***Götz Schulze/Henry Stieglmeier***: "The State's Right to succeed in shares of the inheritance – Qualification, Subrogation and ordre public"

*The State's Right to succeed to shares of the inheritance asserted by the KG in the context of Russo-German relations has already been the subject of comment by Dörner (see: IPRax 2012, 235–238). As an additional point of analysis, in question here is the qualification of an undivided joint-inheritance of co-heirs (Miterbgemeinschaft) of an estate. It is our opinion that the portion of the estate subject to co-inheritance should share the conflict-of-law judgement applied to the whole estate. In the case of sale, this also applies to the*

*subrogation of revenues accruing on the estate. Otherwise, the choice-of-law decision depends upon chance factors such as the number of heirs or the date of alienation of the estate. The portion of the estate subject to co-inheritance is therefore to be considered immovable property, which in the case of the KG would have led to a partial renvoi to German law. Furthermore, the KG's judgement leads to the strange outcome that the USSR's legal successor can exercise a State's Right to succeed that it would not enjoy in either of the present-day jurisdictions. A nephew's subjective right of inheritance, as that of an heir of the third order, is eliminated by an intertemporal referral to an earlier and then already controversial legal situation in the USSR. Ordre public can be set against an entrenchment of outdated judgements and ensure application of laws governing relatives' inheritance rights in line with all the legal jurisdictions involved at the time of judgement.*

- ***Arkadiusz Wudarski/Michael Stürner***: "Unconstitutional EU Secondary Legislation?"

*For the first time the Polish Constitutional Court had to decide whether it is competent to hear a complaint based on the alleged unconstitutionality of a provision of European secondary legislation. The claimant had contested as unconstitutional the procedure of exequatur in which a Polish court had declared enforceable a Belgian judgment in ex parte proceedings pursuant to Article 41 Brussels I Regulation. The Constitutional Court admitted the request in principle, but held that in the present case there was no violation of the relevant provisions of the Polish Constitution. The article explores whether there are other examples where EU secondary legislation in the field of international civil procedure might conflict with national constitutional law.*

- ***Brigitta Lurger:*** "The Austrian choice of law rules in cases of surrogate motherhood abroad – the best interest of the child between recognition, European human rights and the Autrian pro-hibition of surrogate motherhood"

*In the first decision reviewed in this article the Austrian Constitutional Court (VfGH) held that a child born by a surrogate mother in Georgia/USA after the implantation of the ovum and sperm (embryo) of the intentional parents, an Austro-Italian couple living in Vienna, was the legal child of the intentional*

*parents and not of the surrogate mother. The same result was achieved by the second VfGH decision reviewed here, in the case of a surrogate motherhood in the Ukraine. The intentional and genetic parents of the twins born by the Ukrainian surrogate mother were Austrians living in Austria.*

*This outcome is surprising, considering the Austrian legal provisions which forbid surrogate motherhood and determine that the legal mother is always the woman who gives birth to the child. In the first decision, the reasoning of the court focusses on the supposedly limited competence/scope of the Austrian rules which could not apply to "foreign" artificial procreation cases, the internationally mandatory character of the laws of Georgia and on the best interest of the child. In the second case, the court recognizes the Ukrainian birth certificate of the twins which was purportedly based on Ukrainian family law and argues that the application of Austrian substantive law to this case would violate Art. 8 ECHR and the principle of protection of the best interest of the child. In both cases, the Austrian Constitutional Court unjustifiedly avoids addressing the issue of non-conformity of the Austrian substantive rules on motherhood with Art. 8 ECHR.*

*The article tries to show that the result achieved by both decisions is correct, albeit the reasoning is flawed in many respects. It analyzes the conflict of laws problems arising in cases of Austrian intentional parents causing foreign surrogate motherhood on a general basis, and discusses the implications of European primary law (Art. 21 TFEU) and European human rights (Art. 8 ECHR). Even though present Austrian choice of law rules lead in most cases to the application of the Austrian "birth-motherhood rule", the constitutional protection of private and family life by Art. 8 ECHR requires Austrian authorities to somehow "recognize" the legal family status acquired by a child and its intentional Austrian parents under the law of Georgia or the Ukraine where surrogate motherhood is legally permissible. The conformity of the birth-motherhood rule in domestic cases of surrogate motherhood (or in international cases where no "real" conflict of laws is present) with Art. 8 ECHR is questionable and should be re-viewed thoroughly by national courts and the ECHR.*

- ***Yuko Nishitani:*** "International Jurisdiction of Japanese Courts in Civil and Commercial Matters"

*This paper examines the 2011 reform of the Japanese Code of Civil Procedure (CCP), which introduced new provisions on international adjudicatory jurisdiction. After considering the salient features of major jurisdiction rules in the CCP, the author analyzes the regulation of international parallel litigations. The relevant rules of the Brussels I Regulation (Recast) are taken into consideration from a comparative perspective. In conclusion, the author points out that the basic structure of Japanese jurisdiction rules is in line with that of the Brussels I Regulation (Recast), whereas some important jurisdictional grounds clearly deviate from the latter.*

- ***Erik Jayme***: "Glückwünsche für Fritz Schwind – Der Schöpfer des österreichischen Internationalen Privatrechts wird 100 Jahre alt"
- ***Simon Laimer***: "Richterliche Eingriffe in den Vertrag/L'intervention du juge dans le contrat"

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# First Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* was just released.

*Reid Mortensen,* Woodhouse Reprised: Accident Compensation and Trans-Tasman Integration

*Australia and New Zealand have created a single civil judicial area, which gives all courts in each country a complete adjudicative jurisdiction and a barely qualified enforcement jurisdiction throughout the whole trans-Tasman market area. The risk of concurrent proceedings and incompatible judgments is minimised only by the power of courts to stay proceedings on the ground of forum non conveniens or when enforcing a choice-of-court agreement. The scheme rests on the 'strikingly similar' quality of the two countries' legal systems. However, New Zealand's Accident Compensation Act 2001 maintains a*

*unique, comprehensive no-fault compensation scheme for accidents which also prohibits all court-based claims for compensation for personal injuries. It is 'strikingly dissimilar' to the common law systems of personal injuries compensation found in the Australian states. And, given that the Australian common law systems are often much more generous in the awards given for personal injuries, the New Zealand scheme has been a significant motivation for New Zealanders' forum shopping in Australia. This does not appear to have been addressed well by the new trans-Tasman scheme for civil jurisdiction. The article considers the confounding role that the Accident Compensation Act may continue to play in trans-Tasman civil jurisdiction, and its implications for the principles of forum conveniens, choice-of-law and the enforcement of personal injuries awards between Australia and New Zealand.*

*Samuel Zogg,* Accumulation of Contractual and Tortious Causes of Action under the Judgments Regulation

*This article examines jurisdictional issues under the Judgments Regulation in cases where a claimant alleges to have, from one and the same incident, a contractual and a tortious cause of action, both providing for full compensation. It analyses the relationship between Article 5(1) and 5(3); particularly, whether and to what extent these provisions are mutually exclusive and whether they provide for accessory jurisdiction for related claims. Furthermore, the question is raised whether the claimant is free to "choose" the jurisdictional rule by skilful drafting of his claim.*

*As far as the claimant is free to pursue his claims in different fora, questions of how to deal with such parallel proceedings are discussed; namely, whether lis pendens exists (Article 27) and whether Article 28 applies. After termination of such proceedings, delicate res judicata issues arise; particularly whether and to what extent a judgment on one claim precludes judgment on the other and, if not, how double satisfaction may be prevented.*

*Rita Matulionyte,* Calling for Party Autonomy in Intellectual Property Infringement Cases

*This article discusses the possibility of parties choosing the applicable law for intellectual property (IP) infringements. Although party autonomy in IP cases*

*has been explicitly denied in the Rome II Regulation, the recent worldwide academic proposals, such as ALI, CLIP, Transparency and the Joint Japanese-Korean proposal, have suggested a party autonomy rule in IP infringement cases. This paper demonstrates that, as a general matter, this approach is reasonable. It further discusses the most suitable scope and limitations of party autonomy for IP infringements.*

*José Velasco Retamosa,* International Protection of United Nations System Emblems: Private International Law Issues

*This article deals with the international protection that national and international Law grants to the United Nations system emblems. The study is carried out from a multidisciplinary perspective due to its relation with the different areas of Law, with special reference in each case to questions referred to in Private International Law. The intervention of the rules of public as well as private law supposes that the symbols and emblems that represent the international Organization and, more specifically, their protection, comes from the observation of the different areas of the legal system which range from Public and Private International Law in general to the specific regulations on industrial property rights. In this regard, when the protection transcends borders and the interest is located in more than one State, the rules of International private Law find their importance in the protection of these types of symbols and emblems.*

*Laurens Timmer,* Abolition of *Exequatur* under the Brussels I Regulation: Ill Conceived and Premature?

*On the 6 December 2012, the Council of EU Justice Ministers adopted a recast of the Brussels I Regulation. Among other changes, the recast provides for the abolition of the exequatur procedure. The changes had been proposed by the Commission in 2010, but have been significantly revised before being adopted by the European Parliament and the Council. This article examines and criticises both the adopted changes and the claims made in the political arena in regard to the necessity of these changes. The author favours the use of less radical measures to achieve the goal of abolition, which is avoiding unnecessary costs and delays in cross-border procedures within the European Union.*

*Martina Melcher,* (Mutual) Recognition of Registered Relationships via EU Private International Law

*An ever growing number of bi-national couples and increased population mobility together with highly heterogenous national substantive and conflict rules regarding couple relationships, such as same-sex marriage or registered partnerships, inevitably lead to limping relationships, different legal effects and disparate decisions. In addition to practical difficulties for such couples, the non-recognition of already registered relationships likely infringes their fundamental freedom of movement and human rights. For these reasons, the current article argues that registered relationships with cross-border effects should be recognised as such outside their state of origin. An analysis of several options to recognise those relationships shows that unified conflict rules are best suited to achieve this purpose. Whereas automatic recognition appears to be particularly attractive as it would not require the Member States to adopt new rules, such an instrument could not replace conflict rules altogether, but would only add to the legal complexity. In contrast, an EU regulation on the law applicable to registered relationships would create a comprehensive set of unified rules, thus guaranteeing an equal legal treatment of the relationship independent from the location of the competent court within the EU.In order to ensure the recognition of an already registered, or somehow formalised, relationship in another Member State, the article favours the place of registration as the main connecting factor for questions on the establishment, the personal legal effects and the dissolution of such couple relationships. Other possible connecting factors, such as domicile, nationality or habitual residence, are discussed as well. Furthermore the potential necessity to limit the registration of aliens in order to confine system shopping and fraus legis is assessed. Finally, the article also tackles the problem of a possible refusal of recognition based on grounds of public policy and evaluates some arguments that have been brought forward in this context in national legal systems.*

*Fabrício Bertini Pasquot Polido,* Review Article: How Far Can Private International Law Interact with Intellectual Property Rights? A Dialogue with Benedetta Ubertazzi's book *Exclusive Jurisdiction in Intellectual Property*

# Kiobel: no Role for the United States as World Police

*Many thanks to Elise Maes for this reflection on the Kiobel decision. Elise Maes is research fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law.*

After more than a decade of awaiting and predicting the final outcome in the case of Kiobel v. Royal Dutch Petroleum Co., the United States Supreme Court reached a decision on April 17, 2013.

The case is a class action suit brought by Esther Kiobel on behalf of Nigerian residents against Royal Dutch Petroleum and its affiliates "Shell Transport and Trading Company" and "Shell Petroleum Development Company of Nigeria" (hereinafter referred to as "Shell"). The defendant companies are incorporated in the Netherlands, the United Kingdom, and Nigeria, respectively. They have been engaged in oil exploration and production in the Ogoni region of Nigeria. A group of Nigerian citizens protested against the environmental destruction caused by Shell's oil exploration in the region. The plaintiffs claim that Shell has been complicit in the torturing and killing of the protestors by the Nigerian military. In other words, Shell allegedly aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.

None of the relevant facts of the case seem to point towards the United States. The unlawful conduct took place in Nigeria, the victims are Nigerian citizens (who are now legal residents of the United States) and the companies who allegedly took part in the crimes are incorporated in European and African countries. Nonetheless, in 2002 the plaintiffs filed their claim with a United States District Court. The suit was brought under the Alien Tort Statute (ATS), 28 U.S.C. §1350, enacted in 1789, which states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

At issue in the *Kiobel* case was the proper interpretation of the Alien Tort Statute. Originally, the Supreme Court was only asked to rule on the matter whether corporations can be held liable for international human rights violations under the

ATS.  But the Court broadened the scope of its judgment and also answered the question whether and under what circumstances US courts may hear a case brought under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.

Last Wednesday (April 17, 2013), the Supreme Court rendered its judgment and ruled unanimously. Four justices concurred with the Chief Justice's opinion. The other four justices concurred in the outcome of the decision, but followed a different reasoning. Succinctly put, the Court decided that the plaintiffs were not entitled to damages under the ATS. More broadly, the Court ruled that the ATS is not applicable to actions committed on foreign soil. The justices stated that "the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and nothing in the statute rebuts that presumption". *T*his judgment seems to put an end to the extraterritorial jurisdiction of the United States for claims brought under the ATS for human rights violations that were committed on foreign territory and that have no sufficient link to the United States. From now on, one cannot file a claim for human rights violations against a corporation in the USA, simply because they have a presence in the USA. Chief Justice Roberts justly wrote that "corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." An additional connection to the United States is required. Justice Kennedy wrote in his concurrence that the Court's opinion leaves open a lot of significant questions regarding the reach and interpretation of the ATS. One of these remaining questions would indeed be what would constitute an additional sufficient connection. Professor Childress' recent blog post provides several hypotheses and possible answers to that question (https://conflictoflaws.de/2013/what-will-kiobels-impact-be-on-alien-tort-statute-claims/).

Even though the Kiobel case turned out to be a substantial victory for the defendant corporations, they did not get their most favorable outcome. When it comes to the first question regarding the interpretation of the ATS, the Supreme Court has not closed the door to all cases of human rights violations committed by corporations. The Court did not decide that corporations are immune from the ATS.

The reactions to the judgment are – as expected – divided. Multinational companies read the judgment with a sigh of relief. Human rights lawyers on the other hand state that this judgment is not only a disaster for the Nigerian citizens,

but the narrow interpretation of the ATS also drastically cuts down on the means and odds to seek redress for other future victims of international human rights violations in foreign and especially in developing countries. The USA are said to be turning their back on a global trend towards human rights enforcement. Some argue that the Supreme Court has interpreted the ATS in a way that is inconsistent with decades of use of the ATS. For over thirty years, the ATS has been used to bring human rights cases before federal courts.

Nonetheless, the judgment has its merits. From a human point of view, it is an understatement to say that it is tragic that the plaintiffs in this case will not be compensated. However, one cannot bend the law as far as one would like it to reach. The text of the ATS does indeed grant the United States jurisdiction for certain international law violations, but it does not explicitly state that this is the case for conduct on foreign soil. By clearly bringing the presumption against extraterritoriality to the fore, the Supreme Court restores the guiding principle that a nation does not have jurisdiction for causes of action that occur outside their borders. And even for foreign victims of human rights violations committed on foreign territory, the Supreme Court left the door to the US courtrooms ajar. The Chief Justice's words "and even where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application" indicate that in limited cases there is still the possibility to set aside the presumption against extraterritoriality. In other words, a case that concerns human rights violations committed on foreign territory but which nonetheless shows a greater nexus to the United States, may still fall under United States jurisdiction. Whereas professor Childress argues that in the end the possibilities for foreign victims to file ATS claims in federal court will be very limited, in my view the Supreme Court has left the US courts just the right amount of space to rule in cases of international human rights violations concerning foreign victims. A too far reaching extraterritorial jurisdiction for the United States in international human rights cases would establish a type of legal colonialism. It is not up to the United States – or any other country for that matter – to become the world police when it comes to human rights violations and to rule on these violations, regardless of where they occur. Or as Justice Story puts it: "No nation has ever yet pretended to be the custos morum of the whole world…" (*United States* v. *The La Jeune Eugénie*). In the Kiobel case, it would be up to Nigeria to choose their own means to deal with the conflict in their own way.

In conclusion, it may be said that the Supreme Court has found the right balance in the Kiobel judgment: the Court does not claim the United States to be "a uniquely hospitable forum for the enforcement of international norms" irrespective of where the violation takes place, but leaves room to rule on such cases and to give redress to the victims, as long as these cases show a sufficient connection with United States territory.

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# What will Kiobel's Impact be on Alien Tort Statute Claims?

What follows is also posted at SCOTUSBlog:

After two rounds of briefing, two oral arguments, and a significant wait for an opinion, what do we know about the future of Alien Tort Statute (ATS) litigation in light of the *Kiobel* decision? I think at least three things: (1) plaintiffs' ability to file ATS claims in federal court is now substantially limited; (2) plaintiffs will likely try to file such cases under U.S. state and foreign law, in some cases in U.S. state and foreign courts in the first instance; and (3) this will help usher in a brave new world of transnational litigation where federal, state, and foreign courts compete to regulate international human rights claims.

*First*, according to the Court in the *Kiobel* decision, ATS cases are subject to the presumption against extraterritoriality recently rearticulated in *Morrison v. National Australia Bank*. For an ATS claim to survive a motion to dismiss, it must "touch and concern" activities occurring in the "territory of the United States." ATS claims that seek relief for violations of the law of nations occurring wholly outside of the United States are now barred. Note that *Kiobel* is an easy case for the Court to apply this rule because "all the relevant conduct took place outside of the United States." The federal courthouse doors are now shut for these cases.

However, the keys may still be in the door if plaintiffs can creatively plead around the presumption. For instance, a plaintiff might argue that a major portion of the tortious activity occurred in the United States even though the injury was caused

in a foreign country. Yet, according to the Court, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritoriality. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." But, what would such cases be? Much is still left unanswered by the Court when it comes to ATS litigation.

So, let's start with what is clear. A foreign plaintiff suing a foreign defendant for acts or omissions occurring wholly *outside* of the United States that allegedly violate the law of nations (a so-called "F-cubed case" as presented in *Kiobel*) cannot bring suit under the ATS, even when there is personal jurisdiction in the United States. Conversely, a foreign plaintiff suing a defendant (foreign or domestic) for acts or omissions occurring wholly *inside* of the United States that allegedly violate the law of nations can bring suit under the ATS. Although, we know nothing from the Court's opinion about how the ATS should be applied in such a case, except that lower courts should remain acutely sensitive to foreign policy implications. As noted by Justice Kennedy in his concurring opinion, "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." Let's take a look at some of those questions and where their answers might lead us.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *wholly outside* of the United State that allegedly violate the law of nations?

According to the opinion by Chief Justice Roberts, which was joined by Justices Scalia, Kennedy, Thomas, and Alito, the answer is "no." Even though the United States would have prescriptive jurisdiction under international law, as the case involves a U.S. defendant domiciliary, this too would be an extraterritorial application of the ATS. Note that this would be a case that Justices Ginsburg, Breyer, Kagan, and Sotomayor would allow to go forward under the ATS. This could also be an example of a case where, as noted by Chief Justice Roberts, "the claims touch and concern the territory of the United States" and "do so with sufficient force to displace the presumption against extraterritoriality." But, I doubt it, because "the claims" themselves have nothing to do with "the territory of the United States," and "mere [] presence" is not enough. So, it appears that escaping the presumption against extraterritoriality in the ATS context is not about "who" the defendant is but about "where" the tortious conduct took place.

Can a foreign plaintiff sue a foreign defendant for acts or omissions occurring *in part in* the United States that lead to an injury in a foreign country that allegedly violates the law of nations? For instance, what if the plaintiff alleges that an officer of a foreign corporation gives directions from an office in New York that directly lead to a foreign tort that allegedly violates the law of nations?

This is a closer question, but I think the answer is "no." I also think that reasonable judges interpreting the Court's *Kiobel* opinion might disagree on this. To get to "no," one has to look closely at Justice Alito's concurrence, joined by Justice Thomas, which has the potential to serve as a model for lower court judges writing future opinions in the area, even if it could not command a majority at the Court. According to Justice Alito, the answer to this question requires one to look at the "focus" of the ATS. In light of the Court's opinion in *Sosa*, not just any domestic conduct will be enough to escape the presumption. In Justice Alito's view, "unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations," the ATS claim will fail.

Here is the multi-million dollar question: What would such a case look like where the injury occurs abroad but some of the tortious conduct occurs in the United States and that U.S. conduct itself violates the law of nations? Does Justice Alito mean to say that individuals or corporations in the United States aiding and abetting or conspiring to commit a tort in violation of the law of nations in a foreign country might still be sued under the ATS? If so, the ATS might not be dead yet. Such cases would be rare.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *in part in* the United States that lead to injury in a foreign country? For instance, what if the plaintiff alleges that a U.S. corporate official directed corporate agents in a foreign country to take action that allegedly violates the law of nations? I think the answer here would also be "no" for the reasons given in the prior paragraphs, unless, assuming lower courts follow Justice Alito, that conduct itself violates an international law norm. These cases would also be rare.

At bottom, foreign plaintiffs will only be able to proceed under the ATS when they are injured in the United States or when substantial activities occur in the United States that violates the law of nations, even though the injury is ultimately felt abroad. As such, the Court has substantially limited the ability of plaintiffs to file

ATS cases in federal court.

*Second*, assuming these answers are correct, what will happen next? We should expect many ATS cases to be refiled in federal court to conform to the Court's new rule. As discussed above, we should expect some cases to be filed alleging that the tortious activity was planned or directed from the United States. However, in light of the fact that nearly all post-*Morrison* cases that tried to escape the presumption by pleading some U.S. conduct have failed, one might similarly expect significant obstacles to federal ATS cases, especially if courts follow Justice Alito's reasoning and in light of plausibility pleading requirements.

In light of this and as I have argued in the *Georgetown Law Journal*, the next round of international human rights cases will be filed under state law in federal court and, in some cases, under state law in state courts. There is also every reason to believe that foreign law and foreign courts may become another battleground for such cases. Courts and commentators must now focus on the appropriate role of transnational human rights litigation in U.S. courts generally. In what circumstances should state law reach transnational human rights claims? Should preemption, due process, and related doctrines constrain the ability of plaintiffs to raise such claims under state law? Should forum non conveniens be robustly applied when cases are filed under foreign law in the United States? Should courts be concerned that forcing such cases to be filed abroad may bring these cases back to the United States in later enforcement of judgment proceedings where the U.S. court has only limited review? Should Congress step in and resolve these issues?

*Finally*, the *Kiobel* decision raises a significantly broader institutional and normative question: What happens when U.S. federal courts close their doors to transnational cases? As I explain in a new draft piece that will be looking for a law review home shortly, recent Supreme Court decisions regarding the Alien Tort Statute, extraterritorial application of U.S. federal law, plausibility pleading, personal jurisdiction, class action certification, and forum non conveniens pose substantial obstacles for transnational cases to be adjudicated by U.S. federal courts. As noted, the result of this is that plaintiffs are now seeking other law – U.S. state and foreign law – and other fora – including U.S. state and foreign courts – to plead transnational claims. When U.S. federal courthouse doors close, other doors open for the litigation of transnational cases.

In my view, we are at the beginning of a brave new world of transnational litigation where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases and regulate transnational activities. Maybe it is time for increased regulatory cooperation between the federal government and the states as well as between the United States and other countries to resolve these transnational legal issues.