# Knop, Michaels and Riles on Feminism, Culture and the Conflict of Laws

Karen Knop (University of Toronto), Ralf Michaels (Duke) and Annelise Riles (Cornell) have posted From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style on SSRN. The abstract reads:

> *The German chancellor, the French president and the British prime minister have each grabbed world headlines with pronouncements that their state's policy of multiculturalism has failed. As so often, domestic debates about multiculturalism, as well as foreign policy debates about human rights in non-Western countries, revolve around the treatment of women. Yet there is also a widely noted brain drain from feminism. Feminists are no longer even certain how to frame, let alone resolve, the issues raised by veiling, polygamy and other cultural practices oppressive to women by Western standards. Feminism has become perplexed by the very concept of "culture." This impasse is detrimental both to women's equality and to concerns for cultural autonomy.*
>
> *We propose shifting gears. Our approach draws on what, at first glance, would seem to be an unpromising legal paradigm for feminism – the highly technical field of conflict of laws. Using the non-intuitive hypothetical of a dispute in California between a Japanese father and daughter over a transfer of shares, we demonstrate the contribution that conflicts can make. Whereas Western feminists are often criticized for dwelling on "exotic" cultural practices to the neglect of other important issues affecting the lives of women in those communities or states, our choice of hypothetical not only joins the correctives, but also shows how economic issues, in fact, take us back to the same impasse. Even mundane issues of corporate law prove to be dazzlingly indeterminate and complex in their feminist and cultural dimensions.*
>
> *What makes conflict of laws a better way to recognize and do justice to the different dimensions of our hypothetical, surprisingly, is viewing conflicts as technique. More generally, conflicts can offer a new approach to the feminism/culture debate – if we treat its technicalities not as mere means to an*

*end but as an intellectual style. Trading the big picture typical of public law for the specificity and constraints of technical form provides a promising style of capturing, revealing and ultimately taking a stand on the complexities confronting feminists as multiculturalism is challenged here and abroad.*

The paper is forthcoming is the *Stanford Law Review*.

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# Long Life ATS

American ATS is far from being dead: that's true both from the standpoint of academics and practitioners. Only two days ago, on Tuesday, Gilles announced a new article on the Statute.  Less than a month after a paper of my own called "Responsabilidad civil y derechos humanos en EEUU: el fin del ATS?" was published, I learned about a new title from O. Murray, D. Kinley and C. Pitts: "Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of Kiobel" (Melbourne Journal of International Law, vol. 52). The summary reads as follows:

*Over the past 15 years or so, we have become accustomed to assuming that corporations are proper subjects of litigation for alleged infringements of the 'law of nations' under the Alien Tort Statute ('ATS'). But, in a dramatic reversal of this line of reasoning, the United States Court of Appeals for the Second Circuit in Kiobel v Royal Dutch Petroleum ('Kiobel'),2 has dismissed this assumption and concluded that corporations cannot be sued under the ATS. This article explores the Court's reasoning and the ramifications of the decision, highlighting the ways in which the Kiobel judgment departs from both Supreme Court and Second Circuit precedent. The authors take to task the critical failure of the majority in Kiobel to distinguish between the requirements of legal responsibility at international law and that which is necessary to invoke ATS jurisdiction in the US District Courts. In the context of the maturing debates over the human rights responsibilities of corporations, the authors point to the political as well as legal policy implications of Kiobel and underscore the reasons why the case has already attracted such intense*

> *interest and will continue to excite attention as a US Supreme Court challenge looms.*

And these are the main issues addressed:

.- the source of law for causes of action under the ATS (does the ATS create a statutory cause of action, does it grant jurisdiction to federal courts to recognise federal common law causes of action, or does the ATS only permit the recognition of causes of action that exist in international law?); and
.- the debate regarding secondary liability: critics to the adoption by the Second Circuit of international law as the source of law for determining the rules on secondary liability under the ATS, and the conclusion of the majority in Kiobel (there is no norm of corporate liability in customary international law, and therefore there can be no liability of corporations under the ATS).

*Kiobel* has also been delt with in Spain by professor Zamora Cabot (University of Castellón), an ATS expert: see here his last paper, which will soon be published in English.

As for the judiciary: a petition for writ of certiorari was filed on June, 2011, to review the Kiobel judgment of the United States Court of Appeals for the Second Circuit, entered on September 17, 2010.

I would conclude that the ATS has a "mala salud de hierro" (prognosis: ill, but still a long way to go).

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# Issue 2011.1 Nederlands Internationaal Privaatrecht

The first issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, which was published in April of this year

(apologies for the late posting), was a special issue on Human Rights and Private International Law.

It includes the following interesting contributions:

Laurens Kiestra, Article 1 ECHR and private international law, p. 3-7. The conclusion reads:

*In this paper, the role of Article 1 ECHR, which defines the scope of the instrument, with regard to private international law has been discussed. When a court of one of the Contracting Parties either applies a foreign law or recognizes a foreign judgment originating from a third State, there is no reason not to apply the ECHR to such cases. Even though such a third State has never signed the ECHR, it would ultimately be the court of one of the Contracting Parties whose application of a foreign law or recognition of a foreign judgment violating one of the rights guaranteed in the ECHR that would breach the ECHR. This follows from the Court's case law concerning the extraterritorial effects of the ECHR which has been confirmed by the little case law that specifically deals with private international law. Even in circumstances in which there is only a negligible connection with the Contracting Party, the situation does not change appreciably. Such situations still come within the jurisdiction of the Contracting Party and the ECHR is thus applicable to such cases. This does not mean that there cannot be any consideration of specific private international law issues, but only that such concerns should be dealt with within the system of the ECHR. Therefore, one could question whether the public policy exception resulting in the non-application of the ECHR, because of the relative character of the exception, is permissible in light of Article 1 ECHR.*

Michael Stürner, Extraterritorial application of the ECHR via private international law? A comment from a German perspective, p. 8-12. The conclusion reads:

*In Article 1 the ECHR binds Contracting States to the observance of its provisions. Authorities of each such State must duly respect and foster Convention rights, implying that the entire legal order of that State must comply with Convention standards. Consequently, the ECHR influences private international law along with other branches of such legal systems. Its rules and provisions must equally avoid contradicting Convention rights. Within such legal*

*orders, the ECHR applies to national and transnational cases alike. As soon as there is jurisdictional competence in the Contracting State's courts, a judge acts as part of the State organs bound by the Convention. The operation of choice-of-law rules as applied by national courts and the ensuing results must be in accordance with Convention standards, just as much as the operation of any other national law of such State. If the consequence of the application of foreign law is a violation of the Convention, the forum judge has to see to it that this violation is avoided or corrected. This can be achieved via the public policy exception which is, in its turn, heavily influenced, inter alia, by ECHR standards. However, such an alteration of the resulting application of foreign law referred to through the rules of private international law does not in itself entail an extraterritorial application of the ECHR. There is, as concluded above, no obligation upon a State under public international law to install or apply choice-of-law rules at all; thus there can be no violation of generally accepted principles of international law through a State's application of a public policy exception emerging from its own legal system, including (in the case of the ECHR) its own obligations assumed under public international law.*

Ioanna Thoma, The ECHR and the *ordre public* exception in private international law, p. 13-18. Here is an abstract from the introduction:

*The purpose of this paper is to crystallize whether the ECHR claims an autonomous and direct application superseding the theoretical premises and technical construction of the conflicts rule itself or whether there is an intertwining interplay between the Convention's ordre public européen and the ordre public exception clause as understood in private international law. First, some examples from domestic case law will demonstrate the methodological approach taken vis-à-vis the interaction between the ECHR and the exception clause of ordre public). Second, further examples from the case law of the ECHR will highlight the position taken by the ECtHR on this question. On the basis of this bottom up and top-down approach our observations and conclusions will be presented.*

Patrick Kinsch, Choice-of-law rules and the prohibition of discrimination under the ECHR, p. 19-24. The abstract included on SSRN reads:

*This article deals with the relevance, or irrelevance, of the principle of non-*

*discrimination to that part of private international law that deals with choice of law. Non-discrimination potentially goes to the very core of conflict of laws rules as they are traditionally conceived – that, at least, is the idea at the basis of several academic schools of thought. The empirical reality of case law (of the European Court of Human Rights, or the equally authoritative pronouncements of national courts on similar provisions in national constitutions) is to a large extent different. And it is possible to adopt a compromise solution: the general principle of equality before the law may be tolerant towards multilateral conflict rules, but the position will be different where specific rules of non-discrimination are at stake, or where the rules of private international law concerned have a substantive content.*

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# Antisuit Injunctions and International Law

Those interested in antisuit injunctions and/or corporations accountability for human rights violations should not miss Roger Alford's post on a Second Circuit *amicus brief* addressing the propriety of antisuit injunctions under international law. The *amicus brief* addresses an appeal of Judge Kaplan of the Southern District of New York's preliminary injunction enjoining Ecuadorians and their lawyers from enforcing the $18 billion Ecuadorian judgment (the so called "Lago Agrio" judgment), concluding that their was a substantial likelihood that Chevron would prevail in its argument that the judgment was procured by fraud.

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# Italian Society of International

# Law's XVI Annual Meeting (Catania, 23-24 June 2011)

The **Italian Society of International Law** (Società Italiana di Diritto Internazionale – SIDI) will open today its **XVI Annual Meeting at the University of Catania** (23-24 June 2011). The conference is devoted to **"Protection of Human Rights and International Law"** ("La tutela dei diritti umani e il diritto internazionale").

In the morning of Friday, 24 June, the meeting will be structured in three parallel sessions, respectively dealing with the topic in a public international law, private international law and international economic law perspective (see the complete programme here). Here's the programme of the PIL session:

**Morning session (Friday 24 June 2011, 9:30) – Private International Law and Human Rights**

Chair and introductory remarks: *Angelo Davì* (Univ. of Rome "Sapienza")

- *Patrick Kinsch* (Univ. du Luxembourg – Secrétaire du GEDIP): Droits de l'homme et reconnaissance internationale des situations juridiques personnelles et familiales;
- *Cristina Campiglio* (Univ. of Pavia): Identità culturale, diritti umani e diritto internazionale privato;
- *Francesco Salerno* (Univ. of Ferrara): Competenza giurisdizionale, riconoscimento delle decisioni e diritto all'equo processo;
- *Nadina Foggetti* (Univ. of Bari): Riconoscibilità del matrimonio islamico temporaneo (Mut'a) e tutela dei diritti umani;
- *Fabrizio Marongiu Buonaiuti* (Univ. of Rome "Sapienza"), La tutela del diritto di accesso alla giustizia e della parità delle armi tra i litiganti nella proposta di revisione del regolamento n. 44/2001.

The **concluding session** of the meeting, in the afternoon of Friday, 24 June (16:00), will host a **round table on "International Courts and International Protection of Human Rights"**, chaired by *Luigi Condorelli* (Univ. of Florence), with *Flavia Lattanzi* (ICTY), *Paolo Mengozzi* (ECJ), *Tullio Treves* (ITLOS) and *Abdulqawi Yusuf* (ICJ).

# New Alien Tort Statute Case At The United States Supreme Court: Kiobel, et al., v Royal Dutch Petroleum Petition Filed

In *Kiobel, et al., v Royal Dutch Petroleum, et al.*, lawyers for 12 individuals seeking to hold major oil companies legally responsible for human rights abuses in Nigeria in the 1990s have asked the Supreme Court to overturn a federal appeals court's ruling that corporations are immune to such claims in U.S. courts. The law at issue is the Alien Tort Statute, a law that dates from the first Congress in 1789 but has grown in importance after a wave of lawsuits over the past three decades — lawsuits that were originally aimed at individuals, and then began targeting corporations in 1997. Prior coverage of the ATS has appeared on this site here and here, and discussions of this very case have appeared here, here, here, here and here. As Lyle Denniston at the SCOTUSBlog puts it, "[t]he new petition raises what may be the hottest international law issue now affecting business firms," and is "[i]n essence, the . . . ultimate test of what Congress meant when . . . it gave U.S. courts the authority to hear claims by foreign nationals that they were harmed by violations of international law."

Last September, the Second Circuit Court became the first federal court to rule that ATS does not apply at all to corporations, but only to individuals. The panel split 2-1, and the en banc Court divided 5-5 in refusing to reconsider the panel result. The Petitioners at the Supreme Court now seek to challenge that result and argue that "[c]orporate tort liability was part of the common law landscape in 1789 and is firmly entrenched in all legal systems today. The notion that corporations might be excluded from liability for their complicity in egregious human rights violations is an extraordinary and radical concept."

The *Kiobel* petition puts two questions before the Justices. The first issue is jurisdictional, and questions whether the Circuit Court should have reached the

issue of corporate immunity at all. Indeed, neither side had raised the issue of whether ATS applied to corporations in the district court; that question was accordingly not decided by the district judge, and was not an issue sent up to the Circuit Court. The Circuit Court panel majority, without deciding any of the issues actually sent up on appeal, acted *sua sponte* to conclude that it had no jurisdiction to decide the case because the ATS did not apply to corporations. The petition suggests that the Justices should summarily overturn the Circuit Court on this basic procedural point and remand the case for further proceedings.

The second question is the merits question: whether corporations are immune from tort liability for war crimes, crimes against humanity, and other human rights abuses perhaps even amounting to genocide, or whether they are liable as any private individual would be under ATS. On that point, there is a direct conflict between rulings of the Second Circuit and the Eleventh Circuit, and the issue is currently under review in the D.C., Seventh and Ninth Circuits as well. "Today," the petition says, "corporations may be sued under the ATS for their complicity in egregious international human rights violations in Miami or Atlanta, but not in New York or Hartford. This is contrary to the congressional intent that the ATS ensure uniform interpretation of international law in federal courts in cases involving violations of the law of nations."

The corporate defendants will have a chance to oppose the petition before the Justices act on it, and it is also possible that the Justices may seek the views of the federal government. No action on the petition will come until the Court's next Term, starting in October.

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# New French E-Journal

The Law Faculty of Metz has launched a new e-journal *Scientia Juris*. The new Journal is not specialised, but the editors anounce that it will have a clear comparative focus. The articles, which are freely available online, will not only be offered in French, but also in other European languages.

Indeed, the first issue includes articles written in English, German, Spanish and

French.

One of them is authored by Marta Requejo and explores a conflict issue: *La responsabilidad de las empresas por violacion de derechos humanos – deficiencias del marco legal*. The English abstract reads:

> *In a globalized world the activities of multinational and transnational corporations have a profound impact on the human rights of individuals and communities, especially in developing countries. The human rights violations committed by these agents have to be dealt with. Today is commonly accepted that the optimal approach from a legal point of view should be one of international law; but so far international law has not provided satisfactory answers. Therefore, the accountability of multinational and transnational corporations requires the intervention of domestic systems, where various regulatory options seem possible: one is the use of private civil claims. Civil litigation for human rights often involves private international law problems. Traditional PIL solutions for civil liability do not suit the factual context of violations of human rights. That is why changes on issues such as the criteria of international jurisdiction are needed. In the EU the task could be addressed at this very moment, in the context of the process of review of Regulation Brussels I.*

It can be downloaded here.

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# Surrogacy Agreements Violate French Public Policy

The French Supreme Court for private and criminal matters (*Cour de cassation*) has delivered yesterday three judgments which ruled that foreign surrogacy agreements violate French public policy.

In each of the three cases, the child or children were born in a state of the United

States where the practice was lawful (MN twice, CA once). In a common press release, the *Cour de cassation* explained that it was faced with two issues: 1) did the American judgments violate public policy, and 2) if so, should they be nevertheless recognised as a consequence of rights of the French couple and of the children afforded by international conventions. All three judgments gave the same reasons:

1. The foreign (ie American) birth certificate could not be mentioned in the French civil status registry.
2. The reason why was that the foundation of the birth certificate was a foreign judgment which violated French public policy.
3. Under present French law ("*en l'état du droit positif*"), surrogacy agreements violate a fundamental principle of French law.
4. The fundamental principle of French law is the principle that civil status is inalienable. Pursuant to this principle, one may not derogate to the law of parenthood by contract (see Art. 16-7 and 16-9 of the Civil Code).
5. This outcome does not violate Article 8 of the European Convention of Human Rights, as the children have a father in any case (ie the biological father), a mother under the law of the relevant US state, and may live together with the French couple in France.
6. This outcome does not violate either Article 3-1 of the New York Convention on the Rights of the Child and the best interest of the child rule (no reason given for this statement)

We had already reported on one of the three cases, where the California judgment had first been recognised by the Paris Court of appeal. The *Cour de cassation* had then allowed an appeal against this decision on a procedural point. A second Court of appeal judgment followed, which held that the American judgment violated French public policy. This new judgment of the *Cour de cassation* dismisses an appeal against this second jugdment of another division of the Paris Court of appeal.

Needless to say, the couple (picture) is not happy about this decision. They claim that the judgment ignores the best interest of the child. They challenge the fact

that the children may live in France, as, it is argued, they would not be granted French citizenship in the absence of mention in the French civil status registry. The couple has already announced that they intend to initiate proceedings before the European Court of Human Rights.

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# Krombach v. Bamberski: Update (updated)

The second criminal trial of Dr. Dieter Krombach began on March 29th in Paris.

Readers will recall that the first trial took place in the absence of Dr. Krombach, and then led to the famous *Krombach* decision of the European Court of Human Rights. Readers will also recall that this second trial will take place because the father of the alleged victim of Dr. Krombach, Mr. Bamberski, had Krombach kidnapped in Germany and delivered to French authorities.

Counsel for Krombach argued that the kidnapping made the procedure illegal. They also requested that the matter be referred (again) to the European Court of Justice.

These arguments were rejected by the Paris court on March 30th. The trial will go on.

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# Gambazzi Looses in Milan

On 24 November 2010, the Milan Court of appeal found that the English judgments delivered in 1998 and 1999 in the *Gambazzi* case were not contrary to Italian public policy and could thus be declared enforceable in Italy.

We had reported earlier on this judicial saga which has occupied the dockets of a number of higher courts of the western world in the last decade.

Most readers will remember that the Milan court had first referred the case to Luxembourg. The European Court of Justice had asked the national court to verify the following:

> *42 With regard, first, to the disclosure order, it is for the national court to examine whether, and if so to what extent, Mr Gambazzi had the opportunity to be heard as to its subject-matter and scope, before it was made. It is also for it to examine what legal remedies were available to Mr. Gambazzi, after the disclosure order was made, in order to request its amendment or revocation. In that regard, it must be established whether he had the opportunity to raise all the factual and legal issues which, in his view, could support his application and whether those issues were examined as to the merits, in full accordance with the adversarial principle, or whether on the contrary, he was able to ask only limited questions.*
>
> *43 With regard to Mr Gambazzi's failure to comply with the disclosure order, it is for the national court to ascertain whether the reasons advanced by Mr Gambazzi, in particular the fact that disclosure of the information requested would have led him to infringe the principle of protection of legal confidentiality by which he is bound as a lawyer and therefore to commit a criminal offence, could have been raised in adversarial court proceedings.*
>
> *44 Concerning, second, the making of the unless order, the national court must examine whether Mr Gambazzi could avail himself of procedural guarantees which gave him a genuine possibility of challenging the adopted measure.*
>
> *45 Finally, with regard to the High Court judgments in which the High Court ruled on the applicants' claims as if the defendant was in default, it is for the national court to investigate the question whether the well-foundedness of those claims was examined, at that stage or at an earlier stage, and whether Mr Gambazzi had, at that stage or at an earlier stage, the possibility of expressing his opinion on that subject and a right of appeal.*

In a ten page long judgment, the Milan Court of appeal explained why the English proceedings were not manifestly unfair to Gambazzi. The essentials of the

decision are the following.

**Betting on Winning on Jurisdiction**

Gambazzi was able to convince Swiss courts to deny recognition to the English judgments because the documents he needed to defend himself had been retained by an English firm with which he had an argument over the fees which had been charged (Pounds 1 million).

The Milan court found that Gambazzi had admitted that he had hoped to win on jurisdiction and had therefore dedicated all its resources to the jurisdictional challenge, that he eventually lost before the House of Lords. As a consequence, he had consciously decided not to invest anymore on defending on the merits, if only because by doing so, he was taking the risk of being told that he had submitted to English jurisdiction (and so he would indeed be told by the New York Court of Appeals later at the enforcement stage). The Milan court was not ready to rule that his rights to defend himself on the merits had been violated, since this was the result, the Milan Court ruled, of  an informed decision to focus on jurisdiction.

**Proportionality of the Sanction**

The heart of the decision of the Italian court is that the sanction suffered by Gambazzi was proportionate. The judgement repeated several time that the lesson from the ECJ judgment was that Contempt of Court was not a violation of the right to a fair trial per se, but only if disproportionate with the goals pursued by the institution, namely proper adminsitration of justice.

The conclusion of the Milan court was that, although debarment from defending was clearly severe, and unknown from Italian civil procedure, human rights are not absolute, proper administration of justice being a value which should also be considered. The issue was then whether such sanction was proportionate. The Court held that it was, for the following reasons: 1) Gambazzi had been repeatedly in default (the Court had also acknowledged, however, that Gambazzi had participated actively during the first stages of the English proceedings), 2) Gambazzi had no proper reason not to comply such as violating professional secrecy or foreign (i.e. Swiss) criminal law, and 3) Gambazzi knew about the sanction.

*Many thanks to Remo Caponi for the tip-off*