Issue 2010/3 Nederlands Internationaal Privaatrecht

The third issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* is dedicated to the proposal for a new Dutch Act on Private International Law that will be incorporated in Book 10 of the Dutch Civil Code. It includes a critical general review, and contributions on private international law rules on marriages and the consequences for public policy and human rights; the regulation of overriding mandatory rules; the regulation of *fait accompli*; methods of interpretation in the light of Europeanization and internationalization; and party autonomy and the law of names.

- A.P.M.J. Vonken, Boek 10 BW: meer – incomplete – consolidatie dan codificatie van het Nederlandse internationaal privaatrecht. Een bekommernisvolle bespiegeling over een legislatieve IPR-surplace, p. 399-409. The English abstract reads:

In recent decades European private international law (PIL) has undoubtedly made progress. This is largely due to the fact that a number of legislators have either codified part or all of their national PIL rules or adopted treaties and regulations drawn up by, e.g., the Hague Conference on Private International Law and the European Union. Recently, the Dutch legislator has also introduced a codification or, more precisely, a 'consolidation' covering an incomplete set of topics on the field of choice of law. I will argue that this Dutch project should be amended and supplemented to include the areas of international civil procedure (e.g., jurisdiction and the recognition and enforcement of foreign judgments) and to cover a more complete ruling of all kinds of choice of law issues for the sake of legal practice. Finally, I will propose some amendments and refinements to specific rules contained in this consolidation project.

- Susan Rutten, Aanpassing van het huwelijksrecht; gevolgen voor de openbare orde en mensenrechten in het IPR, p. 410-420. The English abstract reads:

The Dutch government is considering to take on problems of integration caused

by the immigration of spouses through amending the rules governing marriage. The objective is to prevent immigrants living in the Netherlands from marrying abroad merely for the purpose of enabling their new spouse to acquire legal residence in the Netherlands. With this in mind, the government intends to raise the minimum age for marrying; to prohibit the conclusion of marriages between cousins; and to tighten the rules governing the recognition of foreign polygamous marriages. The plans will also affect rules of private international marital law, as well as the use of the public policy exception. In this article, the author examines whether the government's tentative proposals respect human rights, in particular the right to marry. Furthermore, she questions whether the public-policy exception is a suitable technique for warding off undesirable foreign marriages. The introduction and codification in the Dutch Civil Code of a new book on private international law provide an opportunity for the legislator to legally define the concept of public policy. An express reference could be made to the effect that human rights are part of our public policy, since human rights, because of their nature, are in any case seen as fundamental principles. The above proposals by the government also prompt us to be aware of the risk of public policy being used or abused for interests other than those for which the exception was intended, where it is invoked to safeguard rules of which it is less evident that they may be seen as fundamental.

- Cathalijne van der Plas, Het leerstuk van de voorrangsregels gecodificeerd in boek 10: werking(ssfeer), p. 421-429. The English abstract reads:

Draft book 10 of the Dutch Civil Code contains a general conflict of laws provision in Article 10:7 on super mandatory rules (lois de police). Many international instruments, in particular several Hague Conventions and the Rome I and II Regulations, provide for the application of such special rules of a mandatory nature in addition to, or in derogation from, applicable private law. It nevertheless makes sense for the Dutch legislature also to provide for a domestic conflict of laws rule on the application of super mandatory rules, because not all areas of private law have been covered (as yet) by international instruments: notably parts of family law and the law of succession, the law of property, and of corporations. Some aspects of the application of super mandatory rules which remain uncertain in connection with the Rome I and II Regulations have been made explicit by the legislature, in particular the principle that the application of

a law pursuant to rules of PIL includes super mandatory rules of that lex causae. Article 10:7 also allows for the application of super mandatory rules of third countries, which goes beyond the room for the application of such rules under Article 9 of the Rome I Regulation. It is submitted that the test which a court must apply when deciding whether the application of foreign public or administrative rules of law is justified and bears a resemblance to the tests under EU case law for determining whether some national rule infringes the free circulation of assets, capital and persons. EU case law provides examples of compelling public interests which could justify the application of a super mandatory rule in a specific situation. However, the Dutch courts will have the freedom to decide on the tests to be applied, and it remains to be seen how the new Article 10:7 will work out in specific cases.

- M.H. ten Wolde, De mysteries van het *fait accompli* en Boek 10 BW, p. 430-436. The English abstract reads:

Article 9 of draft Book 10 of the Civil Code introduces a new fait accompli (an accomplished fact) exception to be used in every area of conflict of laws: 'In the Netherlands, the same legal consequences may be attached to a fact to which legal consequences are attributed under the law which is applicable under the private international law of a foreign state, also when this contravenes the law which is applicable according to Dutch private international law, in as far as not attaching those consequences would constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty.' This provision aims to adjust the result of applying a Dutch conflict of law rule in the event that such a result is unacceptable since the parties involved assumed that a foreign conflict rule that referred the case to a different law was in fact applicable. The question arises whether the consequences attributed to a fact or act according to a foreign conflict of law rule may be accepted, even if those consequences do not arise under the law which is applicable according to Dutch conflict of law rules. In such a case Dutch conflict rules should yield in favour of the foreign conflict rule, but subject to the condition that the parties rightfully believed that their legal position was determined by the closely connected foreign conflict rules in question. Moreover, not granting such effects has to constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty It is remarkable that the fait accompli exception is codified as an universal exception

to all conflict rules since it has never been regarded as such in the case law or literature. Among scholars it is mainly seen as a concept that helps to discover the applicable law. The legislator bases the exception of Article 9 on the principle of legitimate expectations as expressed in the Sabah case decided by the Supreme Court and on legal certainty. However, in the Sabah case the court dealt with a completely different problem, namely that of Dutch conflict rules succeeding each other in time. The author argues that the mentioned principle cannot, without any good reason, be extended to the question of the conflict between Dutch conflict rules and foreign conflict rules. Besides this, there is no valid reason to protect parties who deliberately cross the border to a foreign country against their unfamiliarity with the law (including confict of law) of that country. The reality of international legal practice is that a legal position as a consequence of differing conflict rules may have a different content in one country than in another. Parties should be aware of this fact. International legal practice does not need a fait accompli exception. It is advisable to delete Article 9 from Book 10 Civil Code.

- A.E. Oderkerk, Een lappendeken van interpretatiemethoden in de context van het Ontwerp Boek 10 BW – De invloed van Europeanisering en internationalisering van het IPR, p. 437-446. The English abstract reads:

In the Dutch Proposal on Private International Law (Book 10 of the Dutch Civil Code), a 'General Part' containing provisions on topics like public policy, internationally mandatory provisions, party autonomy, capacity et cetera has been included. However, unlike in some foreign private international law Acts, general provisions on interpretation and/or characterisation have been deliberately omitted. In this article it is argued that it would have been useful and possible to introduce such provisions. Useful because different methods (of a general, European or international background) of interpretation and characterisation have to be applied to different (groups of) provisions of this Book and it will not be obvious to practitioners which method will have to be applied when and how. Possible since – as will be shown – guidelines on which methods of interpretation and characterisation are to be applied and in which context can be laid down.

- Emilie C. Maclaine Pont, Partijautonomie in het 'nieuwe' internationale namenrecht, p. 447-455. The English abstract reads:

Recently, a bill has been prepared by the Dutch legislature in order to consolidate the rules of Dutch private international law. This 'Book 10 of the Dutch Civil Code' includes personal status issues. More specifically, this article focuses on surnames. In two judgments – Garcia Avello *and* Grunkin-Paul – *the Court of Justice of the EU provided incentives for the Member States to reconsider their rules regarding surnames concerning conflict of law rules and the recognition of surnames. The question is whether the Dutch regulations as laid down in the new 'Book 10 of the Dutch Civil Code' are in conformity with these decisions. This article reaches the conclusion that this question must be answered in the negative and recommends some adjustments to the current bill with the introduction of a choice of law clause.*

Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr

As we pointed out in a previous post, a very rich collection of essays **in honor of Prof. Kurt Siehr** on his 75th birthday has been recently published by Eleven International Publishing and Schulthess, under the editorship of *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger* and *Symeon Symeonides*: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**. A previous *Festschrift* was dedicated to Prof. Siehr in 2000: "Private Law in the International Arena – From National Conflict Rules Towards Harmonization and Unification: Liber amicorum Kurt Siehr" (see Google Books).

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Title: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**, edited by *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger*, *Symeon Symeonides*; Eleven International Publishing – Schulthess, The Hague – Zürich, 2010, 918 pages.

ISBN : 978-90-77596-93-7 (Eleven); 978-3-7255-6165-0 (Schulthess).

Katharina Boele-Woelki Talia Einhorn Daniel Girsberger Symeon Symeonides

Dutch Conference on the Impact of the ECHR on Private International Law

On 12 November 2010 the Netherlands Organisation for Scientific Research (NWO), the Amsterdam Center for International Law (ACIL) and the Centre for the Study of European Contract Law (CSECL) will organize a symposium about 'The Impact of the European Convention on Human Rights on Private International Law'.

The conference will take place in Amsterdam in the Doelenzaal of the university library (UB).

Preliminary Program

9h00–9h30: Arrival and Registration

9h30–9h45: *Welcome and Introduction*: Erika de Wet (Amsterdam/ Pretoria)

9h:45–11h.15: *The ECHR and the Public Policy Exception in Private International Law*
Chair: Jannet Pontier (Amsterdam)
Speaker: Ioanna Thoma (Athens) (25min)
Discussants: James Fawcett (Nottingham); Aukje van Hoek (Amsterdam) (20min each)

11h:45-13h15: *Art. 1 ECHR and Private International Law*
Chair: André Nollkaemper (Amsterdam)
Speaker: Louwrens Kiestra (Amsterdam) (25min)
Discussants: Jaco Bomhoff (Leiden, tbc); Michael Stürner (Frankfurt/Oder) (20min each)

13h15-14h15: Lunch

14h15-15h45: *The Prohibition of Discrimination under the ECHR and Private International Law*
Chair: Ted de Boer (Amsterdam)
Speaker: Patrick Kinsch (Luxemburg) (25min)
Discussants: Andrea Büchler (Zurich); Mathias Reimann (Ann Arbor) (20min each)

16h15-17h15: *General Discussion* – Chair: A.E. Oderkerk (Amsterdam)

17h15-17h30: *Closing Comments by the Organizers*

More information can be found here.

Rueda and Cuniberti on Abolition of Exequatur

Isabelle Rueda and I (University of Luxembourg) have posted Abolition of Exequatur – Addressing the Commission's Concerns on SSRN. The abstract reads:

> *After the European Council called for the reduction of intermediate measures necessary for the enforcement of judgments, the European Commission has initiated a process of gradual abolition of exequatur in the European Union. The exequatur procedure, however, serves the important purpose of preventing the enforcement of foreign judgments made in violation of human rights. Along with many other critiques of the project, this Article argues that existing mechanisms sanctioning human rights violations do not serve the same purpose, and that the new remedies forged by the Commission do not afford the same level of protection. However, unlike many other critiques, the Article argues that the concerns articulated by the European lawmaker with respect to the traditional exequatur procedure should not be ignored and could be addressed by reforming exequatur in a less radical way.*

The paper can be freely downloaded here. All comments welcome!

Conference Announcement: Extraterritoriality in US Law

Beyond Borders: Extraterritoriality in American Law

Southwestern Law School, Nov. 12, 2010

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

This one-day symposium will bring together leading legal figures from throughout the country to analyze critical issues related to transnational litigation and extraterritorial regulation. Do U.S. law stop at the border? If not, when do they – or when should they – govern the conduct of people abroad? From the controversial extraterritorial application of U.S. domestic law, to the contentious uses of universal jurisdiction in the human rights context, to debates over the extent to which the U.S. Constitution applies outside U.S. territory, a flurry of recent scholarship has involved disputes over the geographic reach of domestic law.

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

- Jeffery Atik, Professor of Law, Loyola Law School, Los Angeles
- Hannah Buxbaum, Professor of Law, Indiana Univ. Maurer School of Law
- Lea Brilmayer, Professor of Law, Yale Law School
- William Dodge, Professor of Law, University of California, Hastings College of the Law
- Stephen Gardbaum, Professor of Law, UCLA School of Law
- Andrew Guzman, Professor of Law, University of California, Berkeley School of Law

- Max Huffman, Associate Professor of Law, Indiana Univ. School of Law
- Chimene Keitner, Associate Professor of Law, University of California, Hastings College of the Law
- John Knox, Professor of Law, Wake Forest Univ. School of Law
- Caleb Mason, Professor of Law, Southwestern Law School
- Daniel Margolies, Professor of History, Virginia Wesleyan College
- Jeff Meyer, Professor of Law, Quinnipiac Univ. School of Law
- Trevor Morrison, Professor of Law, Columbia Law School
- Austen Parrish, Professor of Law, Southwestern Law School
- Tonya Putnam, Assistant Professor of Political Science, Columbia University
- Kal Raustiala, Professor of Law, UCLA School of Law
- Bartholomew Sparrow, Professor of Government, University of Texas at Austin
- Peter Spiro, Professor of Law, Temple Univ. Beasley School of Law
- Christopher Whytock, Acting Professor of Law, University of California, Irvine School of Law

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Keitner on Kiobel and the future of the Alien Tort Statute

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

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

The Second Circuit's recent panel opinion in *Kiobel v. Royal Dutch Petroleum* has justifiably spurred much talk in the blogosphere, including posts by Trey

Childress https://conflictoflaws.de/2010/is-it-the-end-of-the-alien-tort-statute/, Ken Anderson http://opiniojuris.org/2010/09/17/extra-thoughts-on-todays-2nd-circuit-ats-decision/, Julian Ku http://opiniojuris.org/2010/09/17/goodbye-to-ats-litigation-second-circuit-rejects-corporate-liability-for-violations-of-customary-international-law/, and Kevin Jon Heller http://opiniojuris.org/2010/09/18/a-tentative-thought-on-kiobel/. Here are my preliminary thoughts.

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

Second, whether or not the ATS is good policy, the jurisdictional grant it embodies must be interpreted within the context of U.S. law. This does not mean that U.S. law governs all aspects of ATS litigation—in my 2008 article on *Conceptualizing Complicity in Alien Tort Cases* http://uchastings.edu/hlj/archive/vol60/Keitner_60-HLJ-61.pdf, I argued that international law provides the "conduct-regulating" rules applied under the ATS, whereas U.S. law governs other aspects of ATS litigation. Although I focused on the standard for aiding and abetting, I also suggested that "the most coherent approach would look to U.S. law on the question of personal jurisdiction, including the type of entity against which a claim can be asserted, [while] international law would supply the substantive, conduct-regulating rules that apply to private actors" (p. 72).

Kiobel misconstrues language in *Sosa* about whether private actors can violate international law to conclude that corporations cannot be held liable for certain conduct in U.S. courts. In terms of my proposed framework, *Kiobel* miscategorizes the question of whether corporations can be named as defendants as a conduct-regulating rule akin to aiding and abetting. This is wrong because aiding and abetting liability, unlike corporate liability, does not involve the

attribution of the principal's conduct to the accomplice by virtue of a preexisting legal relationship. Rather, it prohibits the *accomplice's conduct* in providing substantial assistance to the principal. Consequently, under the ATS, the accomplice's (and the principal's) conduct is governed by international law. By contrast, whether or not the accomplice's (or the principal's) conduct can be attributed to a corporate entity is governed by U.S. law. Corporate liability is thus possible under the ATS whether or not corporate entities have themselves been subject to the jurisdiction of international tribunals or found liable for international law violations by such tribunals.

Kiobel indicates that "[t]he singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law—*i.e.*, those with international rights, duties, and liabilities—now include not merely *states*, but also *individuals*" (p. 7). In fact, this is not such a novel development: the paradigm violations of piracy, violations of safe conducts, and offenses against ambassadors identified in *Sosa* also would typically have been committed by private actors, rather than by states (see Conceptualizing Complicity http://uchastings.edu/hlj/archive/vol60/Keitner_60-HLJ-61.pdf, p. 70). The ATS's jurisdictional grant should be understood in this context. In an *amicus* brief filed on behalf of professors of federal jurisdiction and legal history in Balintulo v. Daimler AG (2d Cir., No. 09-2778-cv), my colleague William Dodge documents that "[l]egal actions for violations of the law of nations were not limited to natural persons in the late-eighteenth and early-nineteenth centuries" (p. 15), and that "no distinction would have been drawn between individual and corporate defendants" (p. 14) in these early cases. Any serious consideration of jurisdiction under the ATS needs to grapple with these historical foundations, and with the relationship between the law of nations and U.S. law, not simply "international law" in the abstract.

Looking at the big picture, there certainly need to be—and are—robust mechanisms to contain cases that are non-meritorious or vexatious, that impinge excessively on the Executive's conduct of foreign relations, or that should be heard in a non-U.S. forum that is willing and able to provide redress. At the front end, I would hazard that, although the increasing involvement of plaintiffs' law firms (as opposed to human rights lawyers associated with non-profits, or attorneys working strictly *pro bono*) in bringing ATS cases may have some

benefits in terms of reaching a greater swath of deleterious conduct, it may foster less coherence and restraint in case selection. At the back end, certain judges may be tempted to overcompensate by creating doctrinal barriers to entire categories of cases. This impulse might be understandable, but it does not justify judicial rewriting of the ATS.

Kenneth Anderson on Kiovel v. Royal Dutch Petroleum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the ICC negotiations.”

Vacancy at The Hague Conference

Vacancy at the Permanent Bureau of the Hague Conference

By reason of a vacancy as a result of the expected retirement of one of the staff members as of 30 June 2011, a post as a staff member at the diplomatic level will be open at the Permanent Bureau of the Hague Conference on Private International Law , beginning between 15 May and 1 July 2011 for a lawyer with good knowledge of private international law.

The number of Secretaries to the Permanent Bureau has been raised to five since 2008.

The Netherlands Standing Government Committee, instituted by Royal Decree of 20 February 1897, with a view to promoting the codification of private international law, has begun the procedure for recruitment of a highly qualified new official and for this purpose has drawn up a profile for the candidacy, which can be found below for information.

Written applications with an extensive curriculum vitae including publications, should be addressed to the Secretary General of the Hague Conference on Private International Law, before 1 October 2010, at the address indicated below.

The candidates whose applications are retained will be invited to an interview with the members of a special committee named by the President of the Netherlands Standing Government Committee.

Permanent Bureau | Bureau Permanent
6, Scheveningseweg 2517 KT The Hague | La Haye The Netherlands | Pays-Bas
telephone | téléphone +31 (70) 363 3303 fax | télécopieur +31 (70) 360 4867
e-mail | courriel secretariat@hcch.net website | site internet http://www.hcch.net

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Vacancy at the Permanent Bureau of the Hague Conference
(beginning between 15 May and 1 July 2011)

Lawyer of high level, with good knowledge of private international law

– Law school education in private law, including conflicts of laws, preferably in the common law tradition, familiarity with comparative law (substantive and procedural law). Knowledge of public international law including the law of treaties and human rights law desirable.

– Excellent drafting capabilities are important (e.g. dissertation, law review or other publication experience will be taken into account).

– At least 10 to 15 years experience or experience in practice of law desirable. Experience of international negotiations an advantage.

– Excellent command, preferably as native language and both spoken and written, of at least one of the working languages of the Hague Conference (French and English), with good command of the other; knowledge of other languages desirable.

– Personal qualities to contribute to: a good, co-operative working atmosphere both within the Permanent Bureau and in relation with representatives of Members; the administration of the Permanent Bureau; representation of the Hague Conference with other international organisations.

– The job requires more or less frequent travel to both neighbouring and distant countries.

– Medical clearance required.

– The position contemplated for the staff member corresponding to the profile would be in one of the steps of A3/4 of the international co-ordinated organisations.

The person appointed will be expected to take a leadership role in respect of particular areas of work within the Permanent Bureau. Applications will be particularly welcome from persons with experience in the field of international

family law and international child protection.

Knowles on the Alien Tort Statute

Robert Knowles, who is a Visiting Assistant Professor at Chicago-Kent College of Law, has posted A Realist Defense of the Alien Tort Statute on SSRN. Here is the abstract:

This Article offers a new justification for modern litigation under the Alien Tort Statute ("ATS"), a provision from the 1789 Judiciary Act that permits victims of human rights violations anywhere in the world to sue tortfeasors in U.S. courts. The ATS, moribund for nearly 200 years, has recently emerged as an important but controversial tool for the enforcement of human rights norms. "Realist" critics contend that ATS litigation exasperates U.S. allies and rivals, weakens efforts to combat terrorism, and threatens U.S. sovereignty by importing into our jurisprudence undemocratic international law norms. Defenders of the statute, largely because they do not share the critics' realist assumptions about international relations, have so far declined to engage with the cost-benefit critique of ATS litigation and instead justify the ATS as a key component in a global human rights regime.

This Article addresses the realists' critique on its own terms, offering the first defense of ATS litigation that is itself rooted in realism – the view that nations are unitary, rational actors pursuing their security in an anarchic world and obeying international law only when it suits their interests. In particular, this Article identifies three flaws in the current realist ATS critique: First, critics rely on speculation about catastrophic future costs without giving sufficient weight to the actual history of ATS litigation and to the prudential and substantive limits courts have already imposed on it.

Second, critics' fears about the sovereignty costs that will arise when federal courts incorporate international-law norms into domes-tic law are overblown because U.S. law already reflects the limited set of universal norms, such as torture and genocide, that are actionable under the ATS. Finally, this realist

critique fails to overcome the incoherence created by contending that the exercise of jurisdiction by the courts may harm U.S. interests while also assuming that nations are unitary, rational actors.

Moving beyond the critique, this Article offers a new, positive realist argument for ATS litigation. This Article suggests that, in practice, the U.S. government as a whole pursues its security and economic interests in ATS litigation by signaling cooperativeness through respect for human rights while also ensuring that the law is developed on U.S. terms. This realist understanding, offered here for the first time, both explains the persistence of ATS litigation and bridges the gap that has frustrated efforts to weigh the ATS's true costs and benefits.

The article is forthcoming in the *Washington University Law Review*, Vol. 88, 2011.

Yearbook of Private International Law, vol. XI (2009)

The **XI volume (2009) of the Yearbook of Private International Law** (YPIL), published by Sellier – European Law Publishers in association with the Swiss Institute of Comparative Law (ISDC), is out. The Yearbook, edited by *Andrea Bonomi* and *Paul Volken*, contains a huge number of articles, national reports, commentaries on court decisions and other materials, up to nearly 650 pages.

Here's the full list of contributions (available as .pdf on the publisher's website, where the volume can be purchased, also in electronic format):

Doctrine

- *Erik Jayme*, Party Autonomy in International Family and Succession Law: New Tendencies;

- *Ralf Michaels*, After the Revolution – Decline and Return of U.S. Conflict of Laws;
- *Diego P. Fernández Arroyo*, Private International Law and Comparative Law: A Relationship Challenged by International and Supranational Law;
- *Koji Takahashi*, Damages for Breach of a Choice-of-Court Agreement: Remaining Issues;
- *Eva Lein*, A Further Step Towards a European Code of Private International Law: The Commission Proposal for a Regulation on Succession;
- *Giulia Rossolillo*, Personal Identity at a Crossroads between Private International Law, International Protection of Human Rights and EU Law;
- *Urs Peter Gruber / Ivo Bach*, The Application of Foreign Law: A Progress Report on a New European Project;
- *Juan José Alvarez Rubio*, Contracts for the International Carriage of Goods: Jurisdiction and Arbitration under the New UNCITRAL Convention 2008.

Private International Law in China – Selected Topics

- *Yongping Xiao / Weidi Long*, Contractual Party Autonomy in Chinese Private International Law;
- *Qisheng He*, Recent Developments with Regards to Choice of Law in Tort in China;
- *Renshan Liu*, Recent Judicial Cooperation in Civil and Commercial Matters between Mainland China and Taiwan, the Hong Kong S.A.R. and the Macao S.A.R.;
- *Weidong Zhu*, Law Applicable to Arbitration Agreements in China;
- *Yongping Xiao*, Foreign Precedents in Chinese Courts;
- *Guoqiang Luo (Steel Rometius)*, Crime of Law-Bending Arbitration in Chinese Criminal Law and Its Effects on International Commercial Arbitration;
- *Fang Xiao*, Law Applicable to Arbitration Clauses in China: Comments on the Chinese People's Supreme Court's Decision in the *Hengji Company* Case.

National Reports

- *Didier Opertti Badán / Cecilia Fresnedo de Aguirre*, The Latest Trends in

Latin American Private International Law: the Uruguayan 2009 General Law on Private International Law;
- *Jeffrey Talpis / Gerald Goldstein*, The Influence of Swiss Law on Quebec's 1994 Codification of Private International Law;
- *Yasuhiro Okuda*, Initial Ownership of Copyright in a Cinematographic Work under Japanese Private International Law;
- *Elisabeth Meurling*, Less Surprises for Spouses Moving Within the Nordic Countries? Amendments to the 1931 Nordic Convention on Marriage;
- *Andreas Fötschl*, The Common Optional Matrimonial Property Regime of Germany and France – Epoch-Making in the Unification of Law.

News from UNCITRAL

- *Jenny Clift*, International Insolvency Law: the UNCITRAL Experience with Harmonisation and Modernisation Techniques.

Court Decisions

- *Zeno Crespi Reghizzi*, 'Mutual Trust' and 'Arbitration Exception' in the European Judicial Area: The *West Tankers* Judgment of the ECJ;
- *Mary-Rose McGuire*, Jurisdiction in Cases Related to a Licence Contract Under Art. 5(1) Brussels Regulation: Case-Note on Judgment ECJ Case C-533/07 – *Falco Privatstiftung and Thomas Rabitsch* v. *Gisela Weller-Lindhorst*;
- *Antonio Leandro*, *Effet Utile* of the Regulation No. 1346 and *Vis Attractiva Concursus*. Some Remarks on the *Deko Marty Judgment*;
- *Ben Steinbrück*, Jurisdiction to Set Aside Foreign Arbitral Awards in India: Some Remarks on an Erroneous Rule of Law;
- *Gilberto Boutin*, *Forum non conveniens* and *Lis alibi pendens* in International Litigation in Panama.

Forum

- *Fabrizio Marongiu Buonaiuti*, *Lis Alibi Pendens* and Related Actions in Civil and Commercial Matters Within the European Judicial Area;
- *Caroline Kleiner*, Money in Private International Law: What Are the Problems? What Are the Solutions?;
- *Benedetta Ubertazzi*, Intellectual Property and State Immunity from Jurisdiction in the New York Convention of 2004.

See also our previous posts on the 2006, 2007 and 2008 volumes of the YPIL.

(*Many thanks to Gian Paolo Romano, Production Editor of the YPIL)*