# 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.

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# 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."

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# 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
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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.

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

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# Yves Fortier Chair at McGill

Applications are currently invited for the L. Yves Fortier Chair in International Arbitration and International Commercial Law tenable in the Faculty of Law, McGill University

The L. Yves Fortier Chair in International Arbitration and International Commercial Law, endowed in 2009, has been created through the generous support of Rio Tinto Alcan Inc., in order to bring a leading scholar and teacher in the field of international arbitration and commercial law to the Faculty of Law at McGill University. The Chair is named in honour of L. Yves Fortier, BCL'58,

formerly Canada's Ambassador, Permanent Representative, Chief Delegate to the General Assembly of the United Nations and former Chairman of the Board of Alcan Inc.

**The Faculty seeks applications from scholars of international reputation in the field of international commercial law and arbitration.** The purpose of the Chair is to reinforce a Canadian locus for the study and research in these fields. Through his or her engagement in teaching and research, the chair holder will advance the understanding of theoretical and practical dimensions of international commercial law including trade and investment, formal and informal regulatory models, corporate governance and responsibility as well as dispute resolution. The chair holder will teach and supervise undergraduate students and graduate students at the master and doctoral levels in the Faculty of Law. The chair holder will endeavour to establish, where appropriate, relationships with other scholars, civil servants, international organizations and experts in non-governmental organizations.

Given the bilingual environment of McGill's Faculty of Law, the chair holder will be expected to evaluate written and oral work presented by students in both English and French.

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and Enterprise; Public Policy and Private Resources; and Human Rights and Legal Pluralism.

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**How to apply**

Applications and nominations, accompanied by a complete curriculum vitae, are now invited and will be considered as of October 15, 2010. Applications should be addressed to Professor Geneviève Saumier, Chair, Staff Appointments Committee, Faculty of Law, McGill University. Applications should be sent by electronic mail to Linda.coughlin@mcgill.ca

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# Perreau-Saussine on Rome II and Defamation

*Louis Perreau-Saussine is professor of law at the University of Nancy, France. His scholarship includes an article published at the Recueil Dalloz in May 2009 on* Les mal aimés du règlement Rome 2: Les délits commis par voie de media.

1. The "Rome II" Regulation deals with harmonized conflict-of-law rules relating to non contractual obligations. Unfortunately, it was left incomplete as, *inter alia*, no consensus was reached on the suitable applicable law to non-contractual obligations arising out of violations of privacy and personality rights. However, the Commission made it clear that the debate should be re-open (cf. article 30 of the Regulation), and this is precisely the object of Mrs Wallis's *Working Document on the Amendement of Regulation EC N°864/2007 on the law applicable to non-contractual obligations*, which offers an insightful overview on the matter

2. As the *Working Document* points out that "the unification of Member State laws on non-contractual obligations arising out of violations of privacy and personality rights is not a feasible option at the present stage of European legal integration" (p.7), this paper will focus on the harmonization of conflict-of-laws rules in this area of law, and, more precisely, on what could be the conflict of law rule suitably include in the "Rome II" EC Regulation. In line with the general principles of the "Rome II" Regulation, the *Working Document* recalls that the conflict-of-law rule must be "neutral", *i.e*. independent from all the parties involved's interests – which is said to be "very difficult" (p. 9) – and insure legal security and predictability. Moreover, the non-contractual obligations arising out of violations of privacy must put up with two specific problems, namely the "distance publication problem" – the place of the event giving rise to the damage and the place where the damage materialises are not the same – and the "multiple publications problem" – the damage materialises in several places.

In the *Working paper*, several connecting factors are discussed:

– the "place in which the tort took place" (1);

– the "place in which the damage materialises" (2);

– the "place of the publisher's establishment" (3);

– a flexible rule based on choice of the applicable law either by the parties or the judge (4).

Scrutinizing both the *Working Document* and the *Mainstrat study*, it is clear that none of those four conflict-of-laws rule satisfies *per se* both the media organisation and the plaintiff's interests. The media organisations tend to reject conflict-law rules n°1-2-4, blaming their lack of predictability for the defendant, and advocate the use of connecting factor n°3. If this option satisfies the need for predictability and insures that both the "distance publication problem" and the "multiple publications problem" can be sorted out, such a rule is obviously ill-balanced in favour of the defendant, and cannot be chosen for that very reason.

3. When analysing the process which led to the exclusion of the scope of the "Rome II" EC Regulation of non-contractual obligations arising out of violations of privacy and rights relating to the personality, one of the most striking feature is how soon a *special* conflict law rule has been discussed, without having really

challenged the suitability of the *general* rule of article 4 (connecting factor n° 2). On the contrary, considering, first, the general structure of the "Rome II" Regulation and, next, the general trend of the *Working Document,* and specially the list of the "things which need to be determined" (displayed in page 8 ), it is clear that:

– the general rule of article 4 cannot be set aside unless it has been proven that is not suitable for a category of torts: there should be good reasons to deviate from that rule.

– as the preliminary provisions of the Regulation put it (point 16), the general rule fulfils the legitimate expectations of both the publisher and the person harmed. Moreover, article 4.3 matches the need for flexibility mentioned in the *Working Document* (p. 10).

– most media organisations find it impossible to apply the general rule without adapting it.

4. That said, one of the main question is: what are the changes that ought to be brought to the general rule of article 4 to make it acceptable and applicable to non-contractual obligations arising out of violations of privacy and rights relating to the personality?

- **Article 4.1**:

Following the Commission and the European Parliament proposals, an exception to article 4.1 should be made for the right of reply, which should remain governed by the law of habitual residence of the defendant.

The *first objection* to the application of that rule to non-contractual obligations arising out of violations of privacy and rights relating to the personality is the "multiple publications problem": it can probably be solved by using the exception clause of article 4.3 which would allow the judge, in certain cases, to apply a single law to the whole case. The media's *second objection* to the general rule of article 4, concerns "the possibility of a journalist losing a case under a foreign law when the material published conforms with the law of their place of establishment". The *Working Document* wonders whether an "exception to the effect that a publisher should not be liable under a law that is contrary to the fundamental rights principles of its place of establishment" (p. 8) could be

included. It is quite clear, however, that the drawbacks of such a rule would outweigh its advantages, for several reasons:

– first, some guidelines would have to be given as to what is a "fundamental rights principles", and, obviously, this expression must receive a narrow interpretation;

– secondly, it will need to decide which mechanism is at stake: does it mean that the forum will have to apply a foreign public policy rule (and in that case, it is not sure whether it will it be eager to enforce the public policy of a foreign state), or are those rules part of the "lois de police", in which case, the rule will be contrary to article 16 of the "Rome II" Regulation, which does not allow a judge to apply foreign mandatory rules…

– finally, can all the "laws of the place of establishment" be treated on the same level? One can understand that a mandatory rule of a Member state where the publisher is established, which shares some common principles with the forum (specially considering the principles settled by the European Convention of Human rights), could be applied by the forum, but what if the law of the place of establishment is very different from the law of the forum? What, specially, if the fundamental rights principles of that foreign country is contrary to the public policy of the forum? What if it appears to be contrary to a principle of EC law?

- **Article 4.2:**

The situation would be a journalist working in France sued for a publication in, say, England, concerning the privacy of a French-based 'celebrity'. No doubt that article 4.2 would satisfy the interest of both parties and should be applied in this field of law. Moreover, it would allow a French forum to take over the case and apply its own law, on the basis of both articles 2 and 5-3 of the "Brussels I" Regulation (even though the English tribunals would also have jurisdiction on the basis of article 5-3).

- **Article 4.3:**

The possibility of applying article 4 to non-contractual obligations arising out of violations of privacy and rights relating to the personality depends greatly on how the exception clause based on the "closest ties" is drafted and used. The uncertainty involved in a bare *closest ties* exception rule must be limited by giving clear guidelines to the judge as to how to use this exception clause in this field of

law. As the *Working Document* puts it, the main drawbacks of the exception clause "could be overcome by including criteria upon which the test is to be based" (p. 8). The judge liberty could also be limited by the inclusion of a "forseeability clause", whereby a law of a country would be applied if the damage occurred in this country was foreseeable for the defendant.

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# Boskovic on Rome II and Defamation

*Olivera Boskovic is a professor of law at the University of Orléans, France*.

Many recent studies on defamation and violations of rights relating to personality assert that both jurisdiction and choice of law rules in this area are problematic. The following observations will mainly focus on choice of law.

However, it is worth saying that jurisdiction rules, laid down by the Brussels regulation (articles 2 and 5-3) seem globally satisfactory, even though one has to recognise that they need to be adapted to torts committed via the internet. The mere possibility to access a website from the forum State should not be considered sufficient to found jurisdiction under article 5-3. Closer connection with the forum (through the idea of targeting) should definitely be required. This adaptation does not require legislative intervention, the ECJ can do it. However one problem remains. Under article 5-3 ( as interpreted in *Shevill*) when jurisdiction is based on the place of damage, the remedy must be limited to damages arising in the forum State. The problem is that for some remedies, it is impossible or at least difficult to limit the remedy so that it does not have an impact in other countries (it is possible for damages, less so for injunctions). However the French *Yahoo* case (TGI Paris 20 nov. 2000, JCP 2000, Act, p. 2214) shows that it can be done.

Concerning choice of law, the situation is different. The working document of the European Parliament questions the necessity of legislative intervention and envisages the option of maintaining the status quo. It is submitted that this would

be an unsatisfactory solution from the point of view of legal certainty. Whatever one thinks of the Rome II regulation and the rules it lays down, it can not be denied that its main objective, that is improving legal certainty, has been attained. The same reasons justify legislative intervention in the area of defamation, area in which conflict of law rules in the member States vary considerably.

Having said that, the main question is obviously what is the appropriate choice of law rule?

Several options had been envisaged during the elaboration of the Rome II regulation. Basically these were the law of the habitual residence of the victim, the law of the place of damage subject to certain exceptions and the law of the country to which the publication is principally directed. The first two were perceived as being more claimant-friendly and the last one as being more favourable to the media.

Actually the country to which the publication is principally directed is not as such, necessarily, more favourable to the media. What explained that perception was that the European Parliament proposed to apply the law of the country in which editorial control is exercised whenever it was not apparent to which country the publication was principally directed. This is definitely favourable to the media and in contradiction with the general orientation of the regulation which chose to give relevance to the law of the place of damage as opposed to the law of the place of acting. The law of the country to which the publication is principally directed is a variant of the law of the place of damage and shall be discussed as such.

As for the law of the habitual residence of the harmed person, apart from the general criticism of being too favourable to the claimant three other criticisms were to be found. The first was uncertainty, based on the fact that celebrities' habitual residence is difficult to determine. This is very unconvincing. The second and third are linked. The idea is that this connecting factor makes it possible for a media to be held liable for behaviour perfectly legal in the place of acting and hence constitutes a danger for freedom of speech. The first part of the argument is correct, but this is true of any connecting factor other than place of acting, which precisely was rejected by EU authorities. Does the fact that the harmful act involves exercise of a fundamental right change something? Proponents of this argument think so. They take the example of foreign dictators who would become

impossible to criticise under the law of their residence, which probably considers any criticism ipso facto defamatory. This would endanger freedom of speech. The argument seems slightly excessive. Surely, in such cases the public policy exception (ordre public) could apply and constitute a sufficient barrier against such laws.

However, there is one argument against the law of the habitual residence of the victim that seems valid. Defamation and violations of rights relating to the personality involve two fundamental rights: freedom of speech and the right to privacy. The way nations all over the world strike a balance between these rights is very different. Hence, it appears that each State should remain in charge of striking that balance for its own territory. This consideration points to the law of the place of distribution, that is the law of the place of damage. Of course this connecting factor needs adaptation in the context of the internet (distribution, as a positive action has no sense in this context). Mere accessibility of a website should not be considered as distribution. Some targeting should definitely be required (this problem would be avoided with the law of the habitual residence of the victim, rejected for aforementioned reasons).

So it appears that the general rule (article 4-1) could perfectly apply to defamation. This is not necessarily true for article 4§2. Initially, one could think that there is no reason to treat defamation and violation of rights relating to personality differently than other non contractual obligations. This would mean that article 4§2 should apply. On second thought, several reasons come to mind. First of all, applying article 4§2 would hinder the possibility of each State striking the aforementioned balance as it thinks fit. Secondly, the general justification of the exception in favour of the parties' common habitual residence is that this law has closer ties with the case than the law of the place of the damage which is often fortuitous. But precisely, the place of damage in cases we are concerned with is not fortuitous (the media know where the defamatory article, for example, will be distributed), provided that place of damage in the context of internet be defined in a more demanding way.

However, this does not mean that common habitual residence would have no relevance whatsoever. It could certainly be taken into account by the court within the general "closest ties" exception. This exception provides for flexibility and allows for the application of several laws (of places of distribution) or one unique law (possibly of the parties' common residence) according to the circumstances.

This possible application of multiple laws is often seen as a serious disadvantage of the law of the place of damage rule. However, one may wonder why this is considered to be such a problem in this area, while it is accepted in others, such as unfair competition. In any case the existence of the general closest ties exception would allow to limit the negative effects of the place of the damage rules in extreme cases.

So at the end of the day, the only real problem with the place of damage rule is the internet and defining the place of damage in its context. It appears that it is probably preferable to leave this question to the courts and not lay down a final rule at this stage (although one can say that some targeting must be required).

In any case the public policy exception (ordre public) should apply and should be a sufficient barrier against laws which do not respect the requirement of the European Convention on human rights. No specific exception is needed.

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# Von Hein on Rome II and Defamation

*Jan von Hein is professor of civil law, private international law and comparative law at the University of Trier, Germany.*

Diana Wallis deserves praise for her lucid and insightful working document on a possible amendment of the Rome II Regulation with regard to violations of rights relating to the personality. In devising a conflicts rule for this special type of tort, one has to take into account that, although the Rome II Regulation is at present not applicable to this group of cases, the European legislators are no longer operating on a clean slate, because any new conflicts rule will have to fit into the basic doctrinal structure of the Regulation. Moreover, Recital No. 7, which mandates a consistent interpretation of Rome II and Brussels I is of particular importance here because of the ECJ's *Shevill* judgment (C-68/93), which established the so-called mosaic principle.

There are mainly two possible approaches: The first one would be to provide that the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality shall be the law of the country where the victim is habitually resident at the time of tort. This solution is popular in academia (for those who read German, I recommend the excellent contribution by my good friend Michael von Hinden to the *Festschrift* for Jan Kropholler [2008], p. 575), and a corresponding amendment of the Rome II Regulation has been recommended on February 19, 2010 by the German Council for Private International Law, a group of German P.I.L. professors advising the Federal Ministry of Justice (full disclosure: I am a member of this group, but did not participate in the vote on this issue). This proposal certainly has the virtues of simplicity and guaranteeing a protection of the victim in accordance with the social standards that he or she is accustomed to. With due respect, it has some drawbacks as well. From a political point of view, one must not forget that this approach has been on the table before, in the Commission's preliminary proposal for a Rome II Regulation of May 2002. It failed then, after protests from the media lobby, and I really doubt whether it would survive this time. From a doctrinal point of view, its main disadvantage is that V.I.P's – who are the main targets of the "yellow press" – frequently reside in tax havens. It would be a dubious irony of European conflicts legislation if the laws of third states such as Switzerland or tiny Monaco were to govern the freedom of the E.U. press more often than the laws of the Member States. Such an approach would be insensitive to the legitimate interests of E.U. newspaper readers, TV viewers and other media consumers in accessing legal content. Finally, the habitual residence of the victim is out of tune with the jurisdictional principles of the ECJ's *Shevill* judgment.

A different solution would result from closely tracing the existing framework of Rome II. First of all, in line with Article 4(1), the place of injury (i.e. here: the distribution of the media content) should be paramount, unless there are good reasons to deviate from this rule. Following the example set by Article 5(1) on product liability, however, one should restrain this connection by way of a foreseeability defense, in order to take the legitimate interests of publishers into account. Moreover, party autonomy (Article 14), the common residence rule (Article 4(2)) and the closest connection exception (Article 4(3)) should be respected. A good reason to deviate from the place of injury exists with regard to the right of reply, because such relief should be granted swiftly and is interim in nature. This was already recognized both by the Commission and the Parliament

in their earlier proposals of 2003 and 2005. A specific clause on public policy appears unnecessary, because Article 26 is fully sufficient to deal with any problems in this regard. A special clause safeguarding only the freedom of the press would be hard to legitimize in light of the fact that a lack of protection against violations of privacy may contravene human rights of the victim as well. It should be remembered that in the famous case of *Princess Caroline of Hanover v. Germany*, the Federal Republic was condemned by the European Court of Human Rights (judgment of June 24, 2004, application no. 59320/00) not because the Federal Constitutional Court had not respected the freedom of the press, but, on the contrary, because it had failed to protect the princess against intolerable intrusions of *paparazzi* into her private life. Apart from that, there should be a sufficiently flexible, general rule on violations of personality rights and no special rule concerning cyberspace torts. Frequently, potentially defamatory statements are often circulated via multiple channels (print and internet), so that differing outcomes are hard to justify. Any new rule should rather be slim and adaptable to technological developments rather than fraught with ponderous casuistics As far as the E-Commerce Directive is concerned, the precise demarcation between the Directive and Rome II should be left to Article 27 and the ECJ, where a pertinent case is currently pending (case C-509/09).

Specific problems arise in cases involving multi-state violations. Here, both the *Shevill* judgment and the model developed for multi-state restrictions of competition (Article 6(3)(b)) argue for a modified codification of the so-called mosaic principle. By adopting this approach, jurisdiction and the applicable law will regularly coincide, which saves time and costs for all the parties involved. For persons enjoying world-wide fame, it creates a welcome incentive to concentrate litigation in the defendant's forum. For rather unknown persons, it does not introduce any additional burden, because their reputation will usually only be affected in their home country anyway.

Taking the above considerations into account, I would like to propose the following rule, which builds upon earlier proposals and the existing regulation. Details concerning the interpretation of notions such as "reasonably foreseeable" or "direct and substantial" could be fleshed out in the recitals, where further guidance on public policy may be given, too.

***Article 5a Rome II – Privacy and rights relating to personality***

*(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country where the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee substantial consequences of his or her act occurring in the country designated by the first sentence.*

*(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and this person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.*

*(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*

*(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.*

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# Belgian Judgment on Surrogate Motherhood

A lower court sitting in Belgium has recently been faced with a case of international surrogate motherhood. Two men married in Belgium had contracted with a woman living in California, who gave birth to twins in December 2008. One of the men was the biological father of the twins. In accordance with the laws of California, the birth certificate of the twins had been established mentioning the names of the two spouses as fathers. When the parents came back with their twin daughters in Belgium, the local authorities refused to give any effect to the birth certificate, in effect denying the existence of

any parent-children relationship. The parents challenged this refusal before the Court of First Instance sitting in Huy.

In an opinion issued on the 22nd of March and yet unpublished, the court denied the request. Noting that what was at stake was not so much the recognition in Belgium of the decision by which the Superior Court in California had authorized, prior to the birth of the children, that the birth certificates mention the names of the two fathers, but rather the recognition of the birth certificates proper, the court applied the test laid down in Article 27 of the Code of Private International law, under which foreign acts relating to the personal status may only be recognized in Belgium provided they comply with the requirements of the national law which would be applicable to the relationship under Belgian rules. The court focused its ruling on one specific requirement of Article 27, i.e. public policy, mentioning the issue of *fraus legis* only briefly.

The parents had argued that since Belgian law allows the adoption of a child by two persons of the same sex, recognition of the birth certificates could not be held to be contrary to fundamental principles of the Belgian legal order. The court did not follow the parents. It first held that it should consider not only the birth certificates, but also the whole history of the dealings between the parents and the surrogate mother. The court thus examined the contract which had been concluded between the parties and noted that while such contract was invalid as a matter of Belgian law, it was uncertain whether public policy could defeat such a contract validly concluded under foreign law. Turning to two important international conventions in force in Belgium, the court found that the practice of surrogate motherhood raised questions both under the Convention of the Rights of Children and under the European Convention on Human Rights. As to the first Convention, the court relied specifically on Article 7, which grants each child the right to know and be cared for by his or her parents. Turning to Article 3 of the European Convention, the court found that the fact that a surrogate mother is paid for her services is difficult to reconcile with human dignity. The Court also noted that countries which tolerate surrogacy arrangements insist on the absence of commercial motives for such arrangements. The court concluded on this basis that giving effect to the Californian birth certificates would violate fundamental principles and hence be contrary to public policy.

It is not yet known whether this ruling will be appealed. In any case, the parents

will have to find an alternative solution to be recognized as such. They could turn to adoption, although this could prove difficult given that they have already had extensive contacts with the children. This is much probably not the last time a court is faced with this issue in Belgium.

*Editors' note: Patrick Wautelet is a professor of law at Liege University.*