The Kiobel Judgment of the US Supreme Court and the Future of Human Rights Litigation – Seminar at the MPI Luxembourg

On July 4th, 2013, the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law invited experts from the USA and Europe to a colloquium to discuss the consequences of the US Supreme Court's decision in the proceedings *Kiobel v. Royal Dutch Shell Petroleum Co.* The seminar aimed at a broad perspective: Subject of the discussion were the consequences of the judgment with regard to public international law, procedural law and private international law – from the viewpoint of Europe and the United States respectively.

Dr. *Clemens Feinäugle* (MPI Luxembourg) started by presenting how the reasoning of the judgment relates to the general principles of jurisdiction in public international law. He emphasized that *Kiobel* can hardly be qualified as a suitable leading case as far as the limits of exercising state jurisdiction in the international context are concerned. In this regard, the judgment (or at least the reasoning of the majority) follows too strictly the decision in *Morrison v. National Australia Bank, Ltd.* on presumption against territoriality which, on its part, is strongly oriented at the prerequisites of US constitutional law. In terms of legal policy, the US Supreme Court passed the buck to the Congress: If US courts were to adjudicate substantially human rights claims against civil actors, this should be authorized by the Congress – just as it had done it in 1997 in the *Torture Victims Protection Act* (in a rather questionable manner). The fact that *Kiobel* is to be read primarily from the viewpoint of the domestic discussion within the US on the role of International Law as "federal common law" was made clear by Prof. *David Steward* (Georgetown University Law Center). He presented the *Alien Tort Claims Act* (ATCA) in the context of the longstanding discussion on the legal role of international treaties, particularly the question of whether the constitutional separation of powers limits the authority of the federal state with regard to foreign affairs. A further perspective was taken by the following presentations:

Prof. *Horatia Muir Watt* brought up the question of the regulatory approach of the US Supreme Court and criticized the unclear notion of "extraterritoriality" in the *Kiobel* judgment. Prof. *Patrick Kinsch* (Luxembourg), on the other hand, noted from an international private and procedural law perspective that the ATCA can hardly be qualified as a suitable and effective instrument for the domestic implementation of international human rights protection: The Act regulates only the subject matter jurisdiction of US federal courts as opposed to state courts rather than the international jurisdiction (personal jurisdiction). From this observation Prof. *Kinsch* derived the forecast that future human rights claims in the USA would be brought increasingly before state courts.

In the second part of the seminar, a round table chaired by Professor B. Hess raised the issue of the practical consequences of the *Kiobel* judgment. Prof. *Jägers* (Tilburg) started with presenting the Dutch parallel judgment to *Kiobel*. On January 30th, 2013, The Hague District Court rejected a damage claim brought by Nigerian victims against Shell as a parent company but upheld the action against the subsidiary. The Dutch court based its judgment on Nigerian tort law – the claim against the parent company was dismissed for lack of evidence. Nevertheless, *Jäger* pointed out the general readiness of Dutch courts to deal with such disputes. Prof. *Catherine Kessedjian* (Paris) referred to the Sofia Declaration of ILA on International Civil Litigation and the Public Interest. It also stipulates the jurisdiction of the courts at the seat of the defendant company – particularly when no effective judicial protection can be obtained at the place of the human rights violations. Dr. *Anke Sessler*, Siemens AG, München, described from the perspective of an internationally operating company that a lawsuit in the USA is connected with substantial workload, time consumption and costs and at the same time is characterized by structural advantages for the plaintiff. Prof. *Trey Childress* (Pepperdine University) reported on the practical consequences of the *Kiobel* judgment: Overall, the last decade was marked by the increasingly restrictive attitude of US courts towards F-cubed litigation. US federal courts have strengthened the requirements with regard to pleading, general jurisdiction, class certification – also discovery has its limits. *Kiobel*, in particular, has already had a sustainable impact on the 25 currently pending ATCA lawsuits in the USA. Six of them have already been rejected, only one is still admissible: it concerns the bomb attack at the US embassy in Nairobi. In this case, the Federal Court affirmed the prevailing interest of the USA in continuing the proceedings. All things considered, *Childress* could hardly see increasing chances for ATCA claims

in the US. This, however, does not mark the end of human rights litigation – the plaintiffs are rather expected to resort to alternative grounds in order to support their claim (such as federal common law or the respective conflict of law rules of the states). This would naturally lead to different defense strategies on the part of the respondent, e.g. removal from state to federal courts and invoking the *forum non conveniens* objection which some federal courts have granted even before examining the personal jurisdiction.

Two rounds of discussions elaborated on and expanded the arguments of the speakers. It became clear that human rights litigation remains a controversial subject. Some discussants assessed *Kiobel* – in line with the judgment of the ICJ in *Germany v. Italy, Greece Intervening* from February 3rd, 2012 – as a "missed opportunity", whereas others welcomed the decision as a politically balanced reflection of the stand of current legal developments. The lively discussion showed that the research profile of the MPI Luxembourg, combining public international law, international litigation and questions of transnational regulation, can give a strong impetus towards understanding important issues of legal policy.

The Kiobel Judgment of the U.S. Supreme Court and the Future of Human Rights

In the aftermath of the *Kiobel* judgement of the U.S. Supreme Court a number of questions related to the access to justice in defence of human rights remain unanswered. The Max Planck Institute Luxembourg has decided to address the topic in a one-day seminar gathering academic, experts and professionals from Europe (Professors B. Hess, H. Muir Watt, C. Kessedjian, N. Jägers, P. Kinsch, Dr. C. Feinaeugle and A. Sessler) as well as from the U.S. (Professors D. Stewart and D.T. Childress III). We also expect the attendance of representatives of other stakeholders, such as NGOs.

The event will take place in Luxembourg on July, 4th; click here to see the program.

Venue: Max Planck Institute (4 Alphonse Weicker, L 2721). Language: English.

To register just send an email to registration@mpi.lu

Keitner on Human Rights Enforcement through Transnational Litigation

Chimene Keitner (UC Hastings College of Law) has posted Transnational Litigation: Jurisdiction and Immunities on SSRN.

> *Through transnational litigation, national courts enforce human rights norms "horizontally." Jurisdictional doctrines and immunity principles both shape the permissible contours of horizontal enforcement. Conflicts may arise between the principles of state sovereignty and non-interference, on the one hand, and the goals of promoting accountability and providing remedies for victims, on the other. This chapter in the forthcoming Oxford Handbook of Human Rights explores the bases for asserting jurisdiction in human rights cases and focuses on the development, and limits, of foreign official immunity and foreign state immunity. It also discusses claims against non-state actors including private corporations for committing or assisting human rights violations. While the horizontal enforcement of human rights norms by national courts carries the potential for both salutary and disruptive effects, national courts remain important developers and enforcers of international human rights law.*
>
> *The pre-publication text of this chapter will be available on SSRN while the Oxford Handbook of Human Rights is still in production.*

Borchers on Conflict of Laws in Human Rights Actions

Patrick J. Borchers, who is the Dean of Creighton University School of Law, has posted Conflict-of-Laws Considerations in State Court Human Rights Actions on SSRN.

> *As U.S. Supreme Court decisions have curtailed the availability of civil redress for human rights violations under the Alien Tort Statute, victims of human rights abuses are beginning to consider U.S. state courts as a possible forum. In some cases, state courts may prove to be a superior forum, however in many cases they will offer little — if any — hope of meaningful redress. In the paradigmatic case of a civil plaintiff seeking redress for torture, forced labor or other atrocities — usually as the result of an alleged conspiracy between foreign governments and private corporations or individual operating abroad — state choice-of-law doctrines will often require the application of the tort law of the foreign country, as well as the law relative to damages available. In many cases, the law choice will prove to have a crippling effect on the viability of U.S. litigation. Moreover, recent U.S. Supreme Court decisions limiting the personal jurisdictional reach of state courts over foreign corporations may make state courts unavailable for jurisdictional reasons. Finally, the common law doctrine of forum non conveniens may make state courts unavailable to victims of human rights abuses even if the state court has jurisdiction. In some cases, state courts will prove to be a preferable forum to federal court. However, prospective litigants and their counsel will need to carefully consider the potential pitfalls of filing in state court.*

The article was recently published in the *U.C. Irvine Law Review* as part of a symposium on Human Rights Litigation in State Courts and Under State Law.

Aligning Human Rights and Investment Protection

Transnational Dispute Management has a new issue forthcoming, on *Aligning Human Rights and Investment Protection*. This issue is edited by Professor Dr. Ursula Kriebaum (University of Vienna) and analyses how national courts and international tribunals may operate in the fields of human rights law, and take into account the developments occurring in the other realm. With private international lawyers and international litigators eagerly awaiting the United State's Supreme Court's decision in *Kiobel*–which is just the latest example of a national court applying international norms–this issue is a welcome addition to discipline.

PIL and Human Rights in Europe

Professor Veerle Van Den Eeckhout, who teaches private international law at the Universities of Antwerp and of Leiden, has just published "Private International Law and Fundamental Rights: Private International Law as an Instrument for the Promotion of Respect for Fundamental Rights?" on SSRN. The paper analyses – in an exploratory way – the impact of Fundamental Rights on Private International Law, comprising both Human Rights and European Fundamental Freedoms.

The article is written in Dutch in the context of a research project, and will also be published in a collective book; it can be downloaded here.

PIL and Human Rights In Europe

Professor Zamora Cabot (University of Castellón) has just published "Derecho Internacional Privado y Derechos Humanos en el Ámbito Europeo" in Papeles el tiempo de los derechos, 2012 (number 4).

This paper is a previous version of a broader article that will appear under the same title in a *Liber Amicorum* for Professor Alegria Borras. With this publication the author continues an already fruitful research on the relationship between private international law and human rights.

The article is introduced by a reflection on the need for a rapprochement between private international law and international law, with the aim of mutually reinforcing their potential against global governance- the *Kiobel* case being a good opportunity for experimenting in the field.

Section II is devoted to multiculturalism, which according to the author provides an appropriate "testing ground" to try out the interrelation between private international law and human rights through principles such as legal pluralism and tolerance.

In Section III Prof. Zamora focuses on the question of multinational corporations accountability – again another opportunity for private international law to show its potential, this time via the improvement of the legal remedies available to victims of human rights violations perpetrated by transnational and multinational corporations. In this regard the author draws attention to the different trends currently in place in Europe and the US, the protection of the victims being progressively enhanced here through case law and gradual legislative changes at the State level, as well as through the expression of a strong interest in the reform and improvement of the *acquis communnautaire* which deals with these questions.

Prof. Zamora concludes the article expressing his firm belief in private international law as a tool in the fight against racism and xenophobia -two phenomena which are unfortunately quite visible in nowadays Europe-, and against the frequent lack of respect towards human rights displayed by European transnational corporations present in third, underdeveloped countries.

On Business and Human Rights (Article)

Prof. Zamora Cabot's course on Human Rights (Donostia-San Sebastian, May 2011), entitled **"La responsabilidad de las empresas multinacionales por violaciones de los derechos humanos: práctica reciente"** has just been published in *Papeles "El tiempo de los derechos"* (ISSN: 1989-8797), and can be downloaded here. In due course it will also appear in the standard form in which these courses are usually published.

The author addresses the most relevant and contemporary items on the topic of human rights, multinational corporations and responsibility: the Protect Respect and Remedy framework of the UN, the Dahl Model Law, the Kiobel case under revision by the USSC… He also analyses five cases concerning the mineral extraction sector and Canadian companies, and another five of other business areas, among which the case of illness inoculations in Guatemala, involving the U.S. Government.

Worth remarking are the very extensive documentation that supports the study and the selection of cases, from which a panorama of the most interesting data about the current situation of litigation against multinational corporations for human rights violations may be inferred. As means of conclusion, the author speaks in favor of private litigation as necessary in order to compensate -even if only in part -the victims of the atrocities, and also as and effective tool for deterrence.

With this publication Professor Zamora Cabot goes one step further in his already rich literary production (so far probably the richest in Spanish) centered on disputes under the ATS in the business-human rights realm.

Van Den Eeckhout on Corporate Human Rights Violations

Veerle Van Den Eeckhout (Leiden and Antwerp) has posted Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor? on SSRN. Here is the abstract:

In this article the author explores the role private international law ('PIL') could play in addressing human rights violations committed by a multinational company operating outside Europe ? possibly in a conflict zone ? in a civil action in Europe. The article examines the feasibility of civil recourse in a European country seen from the perspective of PIL. Is PIL functioning as a neutral hinge – identifying the competent court(s) and the applicable law in a neutral way ? or does PIL lend itself rather to function as a tool, either serving the economic concerns of multinational companies, or the aims of plaintiffs who wish to hold companies accountable? To answer this question, the author analyzes PIL rules and PIL techniques in a technical-legal way and evaluates them with a critical eye. In the analysis, the concept of 'access to justice' is used as a central key concept; access to justice is linked both with PIL rules on jurisdiction and PIL rules on applicable law: rules of jurisdiction are decisive in 'opening' the door to proceedings in a European country, in which subsequently – to the extent that the rules of applicable law allow this – human rights may be invoked and the interests of third-country victims as 'weaker parties' may be protected.

The area of PIL rules to be studied is ? mainly – the area of torts, with special attention for issues of negligence, omission, duty of care and complicity. As the PIL rules of European Member States are increasingly being 'communitarized', the main PIL rules to be studied and analyzed in this article are sources of European PIL. Thus, the focus will be on the Brussels I Regulation (including aspects of the ongoing revision process of this Regulation, particularly proposals which could either broaden or limit the possibility of starting proceedings in a European country) and the Rome II Regulation as unified European PIL sources, albeit with attention for potential national differences

with respect to the application of the Rome II Regulation: evaluating the plausibility of various results is important, because it is conceivable that plaintiffs may choose between several European courts, taking into account in their choice the advantages or disadvantages of the specific way in which national courts will apply the Rome II Regulation ('shopping' possibilities for plaintiffs) and because it is conceivable that companies will take into account these differences in their decision where to 'establish' their headquarters and where to 'take decisions' etc. And indeed, the system of the Rome II Regulation makes it conceivable that different results are obtained depending on the European court that hears the case.

But what is more: the current literature is for the most part rather sceptical about the possibilities the Rome II Regulation offers to third-country victims of violations of human rights committed by companies outside Europe. Accordingly, although the author argues that some of the avenues for plaintiffs allowed by the system of the Rome II Regulation appear to be underestimated in the literature – and although the author also argues that even the current version of the Rome II Regulation has the potential to enhance human rights – it will be recognized that there are hurdles to be taken. This raises the question whether the system of the Rome II Regulation needs to be amended or needs to be 'fleshed out' by a set of specific rules. This could comprise actions such as broadening the scope of Article 7 of the Rome II Regulation; unification of mandatory rules – e.g. similar to the way in which the European legislator intervened in international labour law by unifying mandatory rules in the Posting Directive ? see the opening offered by the 'overriding mandatory rules' of Article 16 of the Rome II Regulation; promulgation – on a European level? – of statutory duties for companies with regard to extraterritorial compliance with human rights standards and creating more possibilities to take into account national or European rules on extraterritorial corporate criminal responsibility for human rights violations ? see the opening offered by the 'rules of safety and conduct' of Article 17 of the Rome II Regulation; unification of 'surrogate law' for cases where the plea of public order of Article 26 of the Rome II Regulation is successfully invoked.

ECJ Rules on Human Rights and Abolition of Exequatur

On December 22nd, the European Court of Justice delivered its judgment in *Joseba Andoni Aguirre Zarraga v. Simone Pelz*. For the timebeing, it is only available in Spanish, German and French.

The case was concerned with a Spanish judgment which had ruled on the divorce of a German-Spanish couple, and had ordered the return of a child to Spain. According to Article 42 of the Brussels IIa Regulation, this part of the judgment was immediately enforceable in Germany, as exequatur has been abolished for such judgments. Yet, the German party tried to resist enforcement in Germany on the ground that the Spanish judgment had been rendered in violation of human rights, as it appeared that the child had not been heard in the Spanish proceedings, and this was arguably contrary to Article 24 of the European Charter on Human Rights.

The Court of appeal of Celle, Germany, thus referred the matter to the ECJ, and asked whether, despite the abolition of exequatur, enforcing courts still had the power to review judgments rendered by courts from other member states on the ground that they would have been made in gross violation of the European Charter on Human Rights.

The ECJ answered that there was no such power. It put forward two reasons in support of its decision. First, in matters regarding child custody, time is of the essence and judgments should be immediately enforced. Second, the principle of mutual trust demands that foreign judgements be not reviewable on other grounds than those kept by the Regulation.

The German party should thus have challenged the Spanish judgment in Spain, and not in Germany.

The holding of the decision reads:

Unter Umständen wie denen des Ausgangsverfahrens kann sich das zuständige Gericht des Vollstreckungsmitgliedstaats der Vollstreckung einer mit einer Bescheinigung versehenen Entscheidung, mit der die Rückgabe eines widerrechtlich zurückgehaltenen Kindes angeordnet wird, nicht mit der Begründung entgegenstellen, dass das Gericht des Ursprungsmitgliedstaats, das diese Entscheidung erlassen hat, gegen Art. 42 der Verordnung (EG) Nr. 2201/2003 des Rates vom 27. November 2003 über die Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Ehesachen und in Verfahren betreffend die elterliche Verantwortung und zur Aufhebung der Verordnung (EG) Nr. 1347/2000 nach dessen mit Art. 24 der Charta der Grundrechte der Europäischen Union konformer Auslegung verstoßen habe, da für die Beurteilung der Frage, ob ein solcher Verstoß vorliegt, ausschließlich die Gerichte des Ursprungsmitgliedstaats zuständig sind.

En circunstancias como las del asunto principal, el órgano jurisdiccional competente del Estado miembro de ejecución no puede oponerse a la ejecución de una resolución certificada que ordena la restitución de un menor ilícitamente retenido por considerar que el órgano jurisdiccional del Estado miembro de origen del que emana esta resolución ha vulnerado el artículo 42 del Reglamento (CE) nº 2201/2003 del Consejo, de 27 de noviembre de 2003, relativo a la competencia, el reconocimiento y la ejecución de resoluciones judiciales en materia matrimonial y de responsabilidad parental, por el que se deroga el Reglamento (CE) nº 1347/2000, interpretado conforme al artículo 24 de la Carta de los Derechos Fundamentales de la Unión Europea, por cuanto la apreciación de la existencia de tal vulneración compete exclusivamente a los órganos jurisdiccionales del Estado miembro de origen.

Dans des circonstances telles que celles de l'affaire au principal, la juridiction compétente de l'État membre d'exécution ne peut pas s'opposer à l'exécution d'une décision certifiée ordonnant le retour d'un enfant illicitement retenu au motif que la juridiction de l'État membre d'origine qui a rendu cette décision aurait violé l'article 42 du règlement (CE) n° 2201/2003 du Conseil, du 27 novembre 2003, relatif à la compétence, la reconnaissance et l'exécution des décisions en

matière matrimoniale et en matière de responsabilité parentale abrogeant le règlement (CE) n° 1347/2000, interprété conformément à l'article 24 de la charte des droits fondamentaux de l'Union européenne, l'appréciation de l'existence d'une telle violation relevant exclusivement de la compétence des juridictions de l'État membre d'origine.

Many thanks to Patrick Kinsch for the tip-off.