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
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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
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* [link](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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**Is it the End of the Alien Tort Statute?**

Today, the United States Court of Appeals for the Second Circuit entered an important decision in *Kiobel v. Royal Dutch Petroleum* regarding whether corporations may be sued under the Alien Tort Statute. The upshot of the opinion is that corporations cannot be sued under the Alien Tort Statute for violations of customary international law because “the concept of corporate liability . . . has not achieved universal recognition or acceptance of a norm in the relations of States with each other.” Slip op. at 49.
The impact this decision will have cannot be understated. First, the decision comes out of the Second Circuit—the same circuit that started the modern era of ATS litigation in 1980 in the Filartiga case. Second, the opinion provides the most clearly articulated view, backed up with international legal analysis, concluding that corporations cannot be sued as a matter of international law. This analysis will likely be incredibly influential throughout the federal courts. Third, corporations now have the support of caselaw to dismiss ATS cases filed against them.

Given the fact that the majority of ATS litigation in recent years has been directed at corporations, this case may prove to be the end of the expansive use of the ATS. Rest assured, plaintiffs will likely seek en banc and Supreme Court review, and thus we will have to wait and see whether the Second Circuit has fired a warning shot or sounded the death knell for modern ATS litigation.

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 domestic 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.

Choice-of-Law Codification for Torts

Professor Symeon Symeonides, principal draftsman of Oregon’s new choice-of-law codification for torts and other non-contractual claims, which went into effect on January 1, 2010, published an article on these rules. This is the first codification of this interesting but difficult subject in a common-law state of the United States, and the second one after the 1991 codification of the civil-law state of Louisiana. The article is entitled Choice-of-Law. Codification for Torts Conflicts: An Exegesis (Oregon Law Review 2010) and can be downloaded on SSRN.

The New Chinese Tort Law: Conflict Rules on Tort Untouched

I am grateful to Fang Xiao, a postdoctoral fellow and lecturer at the Renmin University School of Law in Beijing, for contributing this report.

The Tort Law of the People’s Republic of China was adopted at the 12th session of the Standing Committee of the Eleventh National People’s Congress on December 26, 2009 and promulgated on the same day according to President Decree No. 21. It shall come into force on July 1, 2010.

The Tort Law consists of 12 chapters and 92 articles, divided into General Provisions, Constituting Liability and Methods of Assuming Liability, Circumstances to Waive Liability and Mitigate Liability, Special Provisions on Tortfeasors, Product Liability, Liability for Motor Vehicle Traffic Accident, Liability for Medical Malpractice, Liability for Environmental Pollution, Liability for Ultrahazardous Activity, Liability for Harm Caused by Domestic Animal, Liability for Harm Caused by Object and Supplementary Provision.

Different from the Contract Law of the P.R.C. (1999), which stipulates in Article
a conflict rule on the law applicable to contract, this new legislation does not include clause on the law applicable to tort. The present system of law application on tort will not be changed in waiting for the new Chinese legislation of the conflict rules on foreign related commercial and civil relations.

The present rules on choice of law in tort matters were established by Article 146 of the General Principles of the Civil Law of the P.R.C. (1986) and Article 187 of the “Interpretations” of the Supreme People’s Court on its implementation (1988). According to these rules, an act committed outside the P.R.C. shall not be treated as an infringing act if under Chinese law it is not considered an infringing act (the rule of double actionability); the tort will be governed by the law of the place of the tort, which includes the place where an infringing act was committed and the place where the damage occurred, if the two places are different, the judge can make a choice between them; if both parties are citizens of or have established domicile in the same country, their common lex personalis may also be applied.

In practice, these rules vest a large discretion in courts which may use several connecting factors: place where the infringing act was committed, place where the damage occurred, common nationality and common domicile of the parties. The generally accepted suggestion on the amendment of the present rules is, in addition to the above connecting factors, that the law with the most significant relationship with the tort should be applied in priority.

Act of state doctrine, the Moçambique rule and the Australian Constitution in the context of alleged torture in
Pakistan, Egypt and Guantanamo Bay

In *Habib v The Commonwealth* [2010] FCAFC 12, a Full Court of the Federal Court of Australia considered whether the applicant’s claim against the Commonwealth for complicity in alleged acts of torture committed on him by officials of the governments of Pakistan, Egypt and the United States was precluded by the act of state doctrine. The Court allowed the claim to proceed. In doing so, the Court has, it seems, concluded that the act of state doctrine cannot, consistently with the *Australian Constitution*, preclude an action against the Commonwealth based upon an allegation that the Commonwealth has exceeded its executive or legislative power.

The applicant was allegedly arrested in Pakistan a few days before the US commenced military operations in Afghanistan in October 2001. He alleged that while there, and afterwards in Egypt, he was tortured by Pakistani and then Egyptian officials, with the knowledge and assistance of US officials. He alleged that he was then transferred to Afghanistan and later Guantanamo Bay, where he was tortured by US officials. He alleged that Australian officials participated in his mistreatment. The applicant claimed damages from the Commonwealth based on the acts of the Australian officials. His claim was that the acts of the foreign officials were criminal offences under Australian legislation (which expressly had extraterritorial effect), that the Australian officials aided and abetted those offences, that this made them guilty of those offences under the Australian legislation, that committing those offences was outside the Australian officials’ authority and that the Australian officials therefore committed the tort of misfeasance in public office or intentional infliction of indirect harm.

The Commonwealth contended that the Court could not determine the applicant’s claim, because it would require the Court to sit in judgment on the acts of governments of foreign states committed on their own territories. This was said to infringe the act of state doctrine, as explained in decisions such as that of the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897) and the House of Lords in *Buttes Gas and Oil Co v Hammer* [1982] AC 888. The doctrine has been approved by the High Court of Australia: *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; [1906] HCA 88; *Attorney-General (United
The Full Court rejected the Commonwealth’s contention. Jagot J (with whom Black CJ agreed) reviewed the US and UK cases and concluded that they recognised circumstances where the act of state doctrine would not apply. In particular, she said that the UK cases supported the existence of a public policy exception where there was alleged a breach of a clearly established principle of international law, which included the prohibition against torture. She considered that the Australian authorities were not inconsistent with this approach and that it applied in this case. She also considered that the same result would be reached by considering the factors said to be relevant by the US Supreme Court in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

More fundamentally, as noted above, Jagot J (again with Black CJ’s agreement) concluded that for the act of state doctrine to prevent the Federal Court from considering a claim for damages against Australian officials based upon a breach of Australian law would be contrary to the *Australian Constitution*. This was because the *Constitution* conferred jurisdiction upon the High Court ‘[i]n all matters … in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’. The Federal Court has been invested with the same jurisdiction by legislation.

Indeed, the other member of the Court, Perram J, based his decision entirely on this constitutional ground. In doing so, Perram J made the *obiter* comment that it would be similarly inconsistent with the *Constitution* to invoke the *Moçambique* rule in response to a claim which asserted that the Commonwealth had exceeded its legislative or executive power. He considered that a previous decision of the Full Court, *Petrotimor Companhia de Petroleos SARL v The Commonwealth* [2003] FCAFC 3; (2003) 126 FCR 354, which treated the act of state doctrine as going to whether there was a ‘matter’ within the meaning of the *Constitution*, was plainly wrong. Having reached this conclusion, it was unnecessary for Perram J to consider whether there was a human rights exception to the act of state doctrine. However, without reaching a definite conclusion, he considered the point in some detail, in particular the contrasting views of whether the act of state doctrine is a ‘super choice of law rule’ requiring the court to treat the foreign state acts as valid or a doctrine of abstention requiring the court to abstain from considering those acts.
This case represents a significant development in Australian law on the act of state doctrine and, so far as Perram J’s comments are concerned, the *Moçambique* rule. The position adopted by the Full Court is, at the least, contestable. If it is accepted that the *Moçambique* rule and the act of state doctrine are legitimate restraints on State Supreme Courts, which have plenary jurisdiction, why should they not also restrain the federal courts, which have limited jurisdiction? Not every restriction on the exercise of federal jurisdiction is unconstitutional: limitation periods, procedural rules, the requirement to plead a cause of action and the rules of evidence all do so. The *Moçambique* rule and the act of state doctrine were well understood principles at the time of federation. It seems surprising to suggest that the Constitution operates to oust those principles without any express words, simply because it sets out limits on federal power and contains a general conferral of jurisdiction on the High Court. Indeed, in the case of the Federal Court, the Court’s jurisdiction is provided not by the Constitution but by legislation, albeit picking up the words of the Constitution. The question is one of the construction of that legislation, not the Constitution, and whether it purported to oust those principles. In any event, both in the Constitution and the relevant legislation, reading the word ‘matter’ — which it is accepted contains limits on the Courts’ jurisdiction (eg precluding advisory opinions) — as informed by, not ousting, the *Moçambique* rule and the act of state doctrine is at least arguably more consistent with the historical position.

It remains to be seen whether the Commonwealth seeks special leave to appeal to the High Court.

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**Are We Witnessing the Demise of Alien Tort Statute Litigation?**

Over the past few months, various US federal courts have handed down opinions that may presage a more limited role for the Alien Tort Statute in US litigation. The Alien Tort Statute provides US district courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of
nations or a treaty of the United States.” 28 U.S.C. § 1350. In a series of cases starting with *Filartiga v. Pena-Irala*, US courts had been willing to give a robust reading to the statute, thus allowing recovery in cases that pushed the envelope for violations of customary international law. When the Supreme Court issued its most recent opinion on the statute in *Sosa v. Alvarez-Machain*, hope existed in some quarters that the statute would be more narrowly construed by US lower courts. Decisions following that case, however, continued to follow caselaw allowing for robust recovery.

We may be witnessing a subtle sea change in ATS litigation, which is surprisingly being accomplished not by the US Supreme Court but by US lower courts. In the past six months, five decisions in particular have changed the litigating landscape substantially and will make it harder for plaintiffs to plead and prove ATS cases. These decisions span various subject areas, but each contributes to reining in ATS cases. A short summary of these cases follows.

In *Sarei v. Rio Tinto*, the Ninth Circuit has been willing to consider applying exhaustion of remedies requirements in ATS cases, thus allowing district court judges to dismiss ATS cases unless a plaintiff can show that all local legal remedies have been exhausted or that such remedies are unavailable, ineffective, or futile. In *Turedi v. Coca-Cola* and *Aldana v. Del Monte Fresh Produce*, the Second and Eleventh Circuits have been willing to affirm ATS dismissals on grounds on *forum non conveniens*. In *Sinaltrainal v. Coca-Cola*, the Eleventh Circuit relied on heightened pleading standards enunciated in the Supreme Court’s *Iqbal* and *Twombly* decisions, discussed here, to impose a higher standard of pleading on ATS claimants. Finally, and perhaps most importantly, the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, ruled that in order to find aiding and abetting liability under the ATS, a plaintiff must show “that a defendant purposefully aided and abetted a violation of international law.” In changing the standard from mere knowledge to purpose, the Second Circuit has placed a heavier burden on plaintiffs bringing ATS claims.

The upshot of these decisions is that from pleading to proof to discretionary doctrines like *forum non conveniens* US federal courts are perhaps closing the door on many ATS cases. While this movement will be favorable to defendants, at the level of process it is a surprising outcome for several reasons. Congress has known since *Filartiga* that there was potential for ATS abuse and has done nothing about it. In the wake of congressional silence, US courts had been
hesitant for 28 years to restrict the statute’s use, and rather looked to the US Supreme Court to provide guidance. The Supreme Court’s guidance in *Sosa* was opaque at best. Faced with such minimal direction, US lower courts have been forced to make a choice regarding the ATS. Momentum appears to be gathering in favor of choosing to limit ATS litigation. As such, US lower courts have been forced to use discretionary judicial doctrines to cabin the reach of a congressional statute.

While it may be too soon to say that the death knell has sounded for ATS litigation, these developments show that we may be witnessing the demise of ATS litigation.

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**Conference on Human Rights and Tort Law**

The Institute for European Tort Law (Vienna) organises a Conference on Human Rights and Tort Law which will take place on **1 December 2009** in Vienna.

The conference programme and detailed information on booking etc. as well as a registration form can be found [here](#).

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**Pleading Alien Tort Statute Cases in the US: Heightened Pleading in**
International Cases

As recently discussed on this blog, the US Supreme Court case of Ashcroft v. Iqbal will have important ramifications for private international law cases filed in US federal courts. That case requires that a complaint state a “plausible” claim for relief to survive a motion to dismiss. While it is too soon to have a full sense of Iqbal’s impact across the entire private international law field and civil litigation generally in the US, a recent Alien Tort Statute case decided by the US Court of Appeals for the Eleventh Circuit perhaps offers an important clue about where we are heading in pleading international cases in US federal courts.

In Sinaltrainal v. Coca-Cola Company, a group of consolidated plaintiffs, who were trade union leaders in Colombia, brought suit under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA) alleging that their employers–two bottling companies in Colombia–collaborated with Colombian paramilitary forces (and, in one case, conspired with local police officials) to murder and torture plaintiffs. Coca-Cola was allegedly connected to the bottlers through a series of alter ego and agency relationships, but was not alleged to be directly liable for the murder and torture; rather, the conduct was allegedly committed by paramilitary and local officials acting in concert with the local management of the bottling facilities. The district court dismissed the case for lack of subject matter jurisdiction against the Coca-Cola defendants in Sinaltrainal I because Coca-Cola did not have the requisite control to be liable for the bottlers’ alleged actions, and in Sinaltrainal II the district court similarly dismissed the complaints against the bottlers for insufficiently pleading a conspiracy. This appeal followed to the Eleventh Circuit.

In a nutshell, the complaint alleged that defendants conspired with paramilitary forces and/or the local police to rid their bottling facilities of unions. As to the complaints alleging violation of the ATS, the appellate court held that the plaintiffs mere recital that paramilitary forces were in a relationship with and assisted by the Colombian government did not state a plausible allegation of state action. Slip op. at 23. This was so because the complaints needed to sufficiently (read plausibly) plead that “(1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law (or that the war crimes exception to the state action requirement applies) and (2) the defendants, or their agents, conspired with the state actors,
or those acting under color of law, in carrying out the tortious acts.” *Id.* Finding the war crimes exception inapplicable, this meant that plaintiffs needed to plead “factual allegations” to support their conclusion of a relationship between the paramilitary and the Colombian government, which they did not do. *Id.* (noting that the complaint alleged merely that the paramilitary were “permitted to exist” and “assisted” by the Colombian government). As to the complaint alleging conspiracy, the court held that the mere recital of an alleged conspiracy without alleging “when” the conspiracy occurred and “with whom” the conspiracy was entered into likewise fails to state a claim under the ATS. *Id.* at 30. As described by the Eleventh Circuit, “[t]he scope of the conspiracy and its participants are undefined.” *Id.* Similar rationales were applied to the TVPA claims. *Id.* at 32-33. At bottom, the Eleventh Circuit has required clear statements of government action and clear identification of the scope and participants in an alleged conspiracy to survive a motion to dismiss in ATS and TVPA cases.

In the pre-*Iqbal* era, it is likely that the complaint would have survived a motion to dismiss in that there were some factual allegations that could have given rise to a cause of action. The allegation of government action and conspiracy based on information and belief would have entitled the plaintiffs to at least some discovery in the pre-*Iqbal* era to prove their case. In that *Iqbal* now requires heightened pleading, the Eleventh Circuit has been clear that a plaintiff must plead facts that make the allegation of unlawful conduct plausible on the face of the complaint. In other words, plaintiffs will not have the guarantee of discovery to help make out their case.

There are important outcomes to this decision. To begin with, it shows that the next wave of ATS litigation will be fought at the motion to dismiss phase for failure to plead plausible claims. Rather than focusing on legal theories—for instance, whether a certain type of liability is contemplated under the ATS—courts will now be asked to focus on whether the facts alleged in plausible detail unlawful activity. Such an approach to pleading will be tough for plaintiffs in ATS cases because plaintiffs may not have access to the facts necessary to prove such claims as conspiracy, especially given the necessity of discovery from foreign governments and officials. This places plaintiffs lawyers in a tough position. Even in cases where they believe under Rule 11 of the Federal Rules of Civil Procedure that the “factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity
for further investigation or discovery," they may in fact not be entitled to any discovery. As such, plaintiffs lawyers may need to think twice about filing these cases.

Second, courts are now be empowered to create heightened pleading standards in ATS cases. This means that the tide of ATS litigation may be stemmed through motions practice on factual as opposed to legal issues.

Third, it is likely that we will see Iqbal play itself out in myriad ways in international law cases generally. The most important way is that it is now much harder to allege private international law violations in US courts because such violations frequently require court-ordered discovery to enable plaintiffs and their lawyers to investigate activities occurring abroad.

It is now clear that the new pleading regime established by the US Supreme Court is having important ramifications in international civil litigation cases in the United States. The question, of course, is whether the new pleading standards announced by the Court are the appropriate standards for private international law cases. Will such cases needlessly be hampered by heightened pleading standards that may well be impossible to meet in cases involving foreign governments, foreign governmental entities, and foreign facts?

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### On the Desirability of the Alien Tort Statute

*Judicially made corporate human rights litigation is a luxury we can no longer afford.*

This is the conclusion of an op-ed ([Rights Case Gone Wrong](#)) published yesterday in the *Washington Post* by two leading American international law professors, Curtis Bradley (Duke) and Jack Goldsmith (Harvard).

An interesting debate is now following at [opiniojuris](#) between the supporters and
the critics of the Alien Tort Statute: see the comments of, inter alia, Kevin Jon Heller, Julian Ku, Kenneth Anderson and Eric Posner.