

What Will Happen to the Alien Tort Statute?

As many of our readers know, we are anxiously awaiting the United States Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*. Although the Supreme Court initially granted certiorari in *Kiobel* to decide the issue of corporate civil tort liability under the ATS, it subsequently orderd reargument on the broader question of “[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” Comments by the justices in the *Kiobel* oral arguments raise the possibility that the Court may require exhaustion of local remedies in ATS litigation. Some believe it is likely that the Court will limit ATS litigation—perhaps substantially. All of this raises an important question: What will human rights litigation look like after *Kiobel*? The *Kiobel* decision is unlikely to end ATS litigation in the federal courts, but it is likely that many post- *Kiobel* human rights claimants will consider alternative strategies.

A year ago, right after the first oral argument and before the reargument was ordered, Chris Whytock, Mike Ramsey, and I convened a group of private international law and public international law scholars and practitioners to examine the question of what might happen after *Kiobel*. In particular, we were curious to see whether pleading ATS-like claims in state courts under state law was viable. See here for one view. The UC Irvine Law Review is about to go to press with the papers from that conference. For those interested, here is a link to the issue's introduction where we provide an overview of the papers.

Here is the abstract:

Litigation in domestic courts is only one of many ways to promote and protect international human rights, but it has received much attention from lawyers and scholars. Attention has focused above all on litigation in the U.S. federal courts under the Alien Tort Statute (the “ATS”). However, plaintiffs are facing growing barriers to ATS human rights litigation in the U.S. federal courts, and it is likely that the Supreme Court's upcoming decision in *Kiobel v. Royal Dutch Petroleum Co.* will further restrict this type of litigation — perhaps substantially.

This Essay provides an overview of the legal issues surrounding one possible alternative human rights litigation strategy: human rights litigation in U.S. state courts or under U.S. state law. It highlights both the attractions and the limits of this strategy, and it identifies the challenging legal issues that this strategy will raise for judges, lawyers and scholars, ranging from choice of law and extraterritoriality, to jurisdiction and federal preemption. This Essay also serves as the foreword to a symposium issue of the UC Irvine Law Review that contains articles by leading practitioners and scholars of human rights, international law, and conflict of laws providing in-depth analysis of these and other aspects of human rights litigation in state courts and under state law.