Human rights issues reach Supreme Court during this term

By Barry Sullivan
October 1, 2012

Barry Sullivan is Loyola University Chicago School of Law's Cooney & Conway Chair in Advocacy. He was the Fulbright Canada visiting research chair at the University of Alberta in fall 2011 and will be the inaugural Arthur Cox visiting research fellow at Trinity College in Dublin in spring 2013.

The Supreme Court's 2012 term began as usual this morning, on the first Monday of October, with the marshal of the court lowering her gavel and delivering the traditional cry — "Oyez! Oyez! Oyez! All persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the court is now sitting. God save the United States and this honorable court."

As the first case of the new term was called for argument, the courtroom audience had even more reason than usual for reflecting on both the sense of history surrounding the court and the global importance of its contemporary role. The leadoff case, Kiobel v. Royal Dutch Petroleum, involves the Alien Tort Statute of 1789 (ATS), one of the oldest laws on the American statute books, and presents a cutting-edge issue of great importance to all who care about human rights and about America's role in protecting those rights: Whether and to what extent federal courts can hear lawsuits claiming violations of international law committed outside the United States by, or with the assistance of, persons who otherwise avail themselves of the protection of our laws.

Kiobel is a human rights case of extraordinary importance, perhaps one of the most important in a generation. The case arises from local opposition to operations that Royal Dutch Petroleum, better known as Shell Oil, conducted in Nigeria. After local villagers protested Shell's operations, they were allegedly tortured or killed by the Nigerian military. The villagers filed suit under ATS in federal district court in New York, claiming that Shell had aided and abetted the Nigerian government and was complicit in violations of international law. Shell asked the district court to dismiss the case, but the court found that, at least in part, the villagers had potentially legitimate claims of serious human rights violations, including torture.

But the federal appellate court in New York overturned the plaintiffs' victory. The 2nd U.S. Circuit Court of Appeals, in contrast to appellate court rulings elsewhere, held that international law (or the "law of nations" under ATS) does not permit corporations to be held liable for the kinds of harm that the villagers had claimed. Interestingly, the issue of corporate liability had not been briefed or argued.

To resolve the conflict among the appellate court decisions, the Supreme Court granted review and heard arguments on the corporate liability question in the October 2011 term. Shortly after hearing oral arguments, however, the court announced it was interested in exploring a different question. The court called for supplemental briefs and scheduled the case for reargument on the
question that was argued this morning: Whether ATS applies to conduct occurring outside the United States.

A decision in favor of the plaintiffs on this issue would greatly advance the protection of human rights; a decision in favor of the defendants would do the opposite. The reason is not difficult to grasp: If the court finds that those who perpetrate human rights violations abroad cannot be sued in the United States, even when they are physically present on our shores, the United States could become a safe haven for those who have committed gross human rights violations elsewhere. In addition, in many instances, victims of human rights abuses may not be able to sue anywhere else; the United States courts may provide the only available venue.

Although ATS was largely forgotten for two centuries, in the last 30 years it has become an indispensable vehicle for redressing violations of international human rights law, including claims based on conduct occurring, in whole or in part, overseas. It has given victims of human rights violations access to justice that is often unavailable in their own lands, making it an important part of U.S. efforts to uphold the law of nations. Providing a venue for redressing human rights violations — and an effective remedy for such violations — also helps to discourage those who would commit them in the first place.

That said, jurisdiction in ATS cases has been — and should be — exercised with care. In some cases, other venues may be more appropriate and it is important that relief be sought in those venues. The United States cannot be the policeman of the world, but that has not proved to be a problem. The lower federal courts have long recognized the need for restraint in this area and they have developed appropriate legal rules to ensure that the federal courts hear the cases that they should hear, without fear of being overrun with such lawsuits.

On the other hand, closing American courts altogether to these suits would abandon victims who cannot secure justice elsewhere. That would diminish, if not betray, this nation's historic commitments to promoting and protecting human rights at home and abroad and promoting accountability and effective remedies for human rights violations. In this regard, the work of the federal courts has been critical.

As a general matter, the rigorous protection afforded to human rights by our courts has inspired courts throughout the world. More specifically, legal precedents established in ATS cases have powerfully influenced the development of, and adherence to, human rights law.

The United States cannot turn a blind eye to human rights abuses abroad by giving what may amount to immunity to those who participated in the abuses and benefited from them. There must be justice for victims and sometimes only our courts can provide it. When that is the case, our courts must remain "open for business."