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## Appellate Lawyer of the Week: Michael Bazylar

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Chapman University School of Law's Michael Bazylar

Michael Bazylar is a self-described passionate proponent of the importance of the Nuremberg Trials to the development of international law. He has channeled that passion into a key amicus brief urging the Supreme Court to find corporate liability for human rights violations under the Alien Tort Statute.

"Here we are more than 60 years after the Nuremberg trials where the U.S. Supreme Court will be deciding what is the binding precedent of the Nuremberg trials on international law and, as a consequence, on U.S. law because the Alien Tort Statute says you use international law as basis for jurisdiction," said Bazylar. "To me it is amazing we are doing this right now. It's exciting. I wish amicus

counsel were allowed to come in and argue even for just two minutes."

Eighteen Nuremberg scholars joined in an amicus brief filed in *Kiobel v. Royal Dutch Petroleum*, which will be argued on Feb. 28 in tandem with *Mohamad v. Palestinian Authority*. Bazylar of Chapman University School of Law is co-counsel on the brief with Jennifer Green, director of the Human Rights Litigation and International Law Advocacy Clinic at the University of Minnesota School of Law.

The *Kiobel* case stems from a lawsuit filed by 12 Nigerian nationals against Dutch and British oil companies for allegedly aiding and abetting, through a Nigeria subsidiary, the Nigerian dictatorship's violent suppression of protests against oil exploration and its environmental harms in the Ogoni region of the Niger Delta.

The Supreme Court case raises two questions for the justices, but the business and human rights communities have enormous interest in one: whether corporations can be held liable in actions brought under the Alien Tort Statute (ATS). The statute is part of the 1789 Judiciary Act and provides 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."

Bazylar is the son of Holocaust survivors. He grew up in post-war Poland in the city of Lodz, near the Lodz ghetto where a quarter of million Jews were interned during the war and then deported to death camps in Chelmo and Auschwitz. His parents survived by fleeing to the

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Soviet Union. All of his father's family were killed by Nazis. Bazyler and his parents emigrated to the United States in 1964.

As a young law professor, he recalled, he focused his writing and litigation on human rights abuses, only much later getting involved in Holocaust restitution litigation.

"My involvement as a litigator in the human rights area began with *Siderman v. Republic of Argentina*," he said. "I started the case myself but I didn't have the financial resources. Paul Hoffman, who was legal counsel of the ACLU of Southern California at the time, joined as co-counsel and we were able basically to take on Argentina. It was the very first case where a foreign state was held responsible for human rights abuses committed in its own country. We settled it. Argentina paid damages for the torture that took place during the 'dirty war' years and for expropriation of property. Our clients were targeted because they were Jews."

Hoffman, now with Schonbrun DeSimone Seplow Harris Hoffman & Harrison in Venice, Calif., is counsel to the Nigerian nationals in *Kiobel*. He also argued *Sosa v. Alvarez-Machain*, the first time the Supreme Court addressed the scope of the ATS.

"Paul has done more of these ATS cases than anyone else," said Bazyler. "I usually become involved informally either reading briefs or filing amicus briefs. I'm part of this group of lawyers that gets involved in these cases."

In *Kiobel*, the context and legacy of the Nuremberg trials emerged as part of the analysis by the lower appellate court of corporate liability for international law violations. The U.S. Court of Appeals for the 2nd Circuit held that corporations could not be liable for those violations. In reaching its decision, the panel examined the decisions of international criminal tribunals, the Nuremberg trials, treaties, and academic commentaries. "Although customary international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has never extended the scope of liability to a corporation," a majority concluded.

Concurring in the judgment, Judge Pierre Leval challenged the majority's analysis, emphasizing that Nuremberg jurisprudence, especially the I.G. Farben case, recognized that corporations had duties under international law and were capable of committing international law violations.

The Nuremberg scholars' brief traces in depth the trials and actions by the Allied Control Council to show that the majority's analysis is incorrect.

"[The 2nd Circuit majority] end up using Nuremberg as one of their sources and they say the trials punished industrialists but there were no prosecutions against corporations," said Bazyler. "And that stands as precedent for no liability for corporations. Those of us who teach this, say, 'No, this is wrong.' Other circuits said the 2nd Circuit was wrong. Judge [Richard] Posner in the 7th Circuit agreed with us. And I was glad to see the U.S. government also agree with this position."

The scholar's brief explains that while only German industrialists were criminally prosecuted, the Allied Control Council used a range of remedial measures to hold juristic persons, including corporations, accountable for international law violations. Those measures included the dissolution of corporations and seizure of their assets.

"I don't see this as a disputed issue," said Bazyler. "The justices and their clerks are very smart. With all due respect, they are not experts on international law; they're not historians. They haven't done the scholarship on the legal order established in occupied Germany after World War II. If you look at what was done and the scholarship on that, I think it's pretty clear."

Human rights litigation is very hard and the cases take a long time, said Bazyler, adding, "It's a very worthy thing to do and it's something I try to instill in the students I teach. These are the students who will become lawyers and they can make a better world."

German corporations were not made to pay until 2000 for the slaves that they used during the

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war, he noted. A \$5 billion- settlement resulted from lawsuits against those corporations.

"We don't want this history to happen again, for victims of modern day abuses to also wait 50 some years," said Bazylar. "This is also where the majesty of the American legal system becomes important. It is only in the United States where these lawsuits are being heard. As result of these lawsuits, there is greater awareness on the part of multi-national corporations of their corporate social responsibility. There are certain things they cannot do or get in bed with certain governments when they know the governments are engaged in these massive abuses."

Bazylar can choose which cases in which to get involved and he tries to involve his students as well. Besides his teaching position, he is a research fellow at the Holocaust Education Trust in London and the author of numerous articles and books on international human rights law, international trade law and comparative law. But he is already thinking about the role of the generation after the students whom he now teaches..

"At age 53, the most incredible event happened in my life," he said. "I became a dad — the father of triplets. My daughters were born on December 10 — International Human Rights Day. A few months after they were born, I spoke at an Amnesty International conference. My daughters now are card-carrying members of Amnesty International. They're the next generation that will be taking this on."

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