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Volume 50 | Issue 1

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2018

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## Recommended Citation

Michael P. Scharf and Brooke Tyus, *Foreword: Corporations on Trial for Human Rights Violations*, 50 Case W. Res. J. Int'l L. 1 (2018)  
Available at: <https://scholarlycommons.law.case.edu/jil/vol50/iss1/3>

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# FOREWORD: CORPORATIONS ON TRIAL FOR HUMAN RIGHTS VIOLATIONS

*Michael P. Scharf*  
*Brooke Tyus*<sup>2</sup>

## I.

With the publication of this double issue, we are proud to celebrate the 50<sup>th</sup> anniversary of our *Journal of International Law*. The *Journal* was founded half a century ago by a group of students led by Austin T. Fragomen, Jr., who went on to establish the world's largest immigration law firm, with over 1,200 lawyers in New York and 50 other offices around the globe. Like Fragomen, the hundreds of student editors that have served on the *Journal* throughout the years have gone on to impactful careers in private practice, government, international organizations, and human rights organizations. In another milestone, its current Editor in Chief, Brooke Tyus, is the first African American student to have served as head of the *Journal*.

Over its fifty years, the *Journal* has become one of the most-cited and well-respected scholarly publications devoted to international law in the world. It has published cutting-edge articles by some of the most prominent figures in the field including:

-- two judges of the International Court of Justice: Christopher Greenwood and Thomas Buergenthal;

-- three judges of international criminal tribunals: Philippe Kirsh of the International Criminal Court, Christine van den Wyngaert of the International Criminal Court, and Geoffrey Robertson of the Special Court for Sierra Leone;

-- six Chief Prosecutors of international criminal tribunals: Luis Moreno-Ocampo of the International Criminal Court, Fatou Bensouda of the International Criminal Court, Richard Goldstone of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, David Crane of the Special Court for Sierra Leone, Brenda Hollis of the Special Court for Sierra Leone, and Robert Petit of the Khmer Rouge Tribunal;

-- two UN High Commissioners for Human Rights: Navenethem Pillay and Prince Zeid Ra'ad Al Hussein;

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1. Dean of the Law School since 2013 and Joseph C. Hostetler – BakerHostetler Professor of Law, Case Western Reserve University School of Law.
  2. Editor in Chief, *Case Western Journal of International Law*, JD 2018.

-- several top U.S. diplomats: Harold Koh, The State Department Legal Adviser in the Obama Administration; John Bellinger, The State Department Legal Adviser in the Bush Administration; Samantha Power, The U.S. Ambassador to the United Nations; Stephen Rapp, U.S. Ambassador at Large for War Crimes Issues in the Obama Administration; Pierre Prosper, U.S. Ambassador at Large for War Crimes Issues in the Bush Administration; and David Scheffer, U.S. Ambassador at Large for War Crimes Issues in the Clinton Administration;

-- Assistant Attorney General and head of the Department of Justice's Office of Legal Counsel, Harvard Law Professor Jack Goldsmith;

--and many of the world's leading human rights figures such as Albert L. Sachs, anti-apartheid activist and Judge of the Constitutional Court of South Africa; Aryeh Neier, President of the Open Society Institute; Kenneth Roth, Executive Director of Human Rights Watch; Michael Reisman, President of the Inter-American Commission for Human Rights; Philippe Sands, best-selling author and human rights advocate; Mark Ellis, Executive Director of the International Bar Association; David Talbert, Executive Director of the International Center for Transitional Justice; and Elizabeth Anderson, Executive Director of the American Bar Association's Rule of Law Initiative.

We believe this 50<sup>th</sup> anniversary issue is one of the *Journal's* most noteworthy contributions, exploring the important and timely issue of corporate liability for human rights violations.

## II.

Edward Thurlow, who served as Lord Chancellor of Great Britain under four Prime Ministers, famously said, “[c]orporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like.”<sup>3</sup> While there have been recent strides to infuse corporations with the same rights as natural persons,<sup>4</sup> much less has been done to impose upon them similar obligations and liabilities. Consequently, although multinational corporations have been complicit in human rights violations over many years, few have been successfully sued or prosecuted. After hundreds of years of virtually unregulated corporate human rights abuses, that situation may be starting to change. Consider the following recent legal developments:

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3. Edward, Lord Thurlow, 1731–1806, OXFORD DICTIONARY OF QUOTATIONS 810 (Elizabeth Knowles ed., 7th ed. 2009).
  4. See Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 955 (2008).

In September 2016, Fatou Bensouda, the Prosecutor of the International Criminal Court, promulgated a seminal policy document announcing her interest in pursuing cases against corporations for crimes against humanity relating to the environment.<sup>5</sup> The new document suggests that corporations that engage in widespread and systematic exploitation, contamination, or destruction of the environment could find their officers brought to justice in The Hague. In the future, we could see businessmen joining the political leaders and warlords in the dock.

In November 2017, the British Columbia Court of Appeal decided the case of *Araya v. Nevsun Resources Ltd.*, involving allegations that a Canadian corporation was complicit with the Eritrean military's use of forced labor, slavery, and torture at a mine in Eritrea.<sup>6</sup> The court rejected the defendant's argument that a corporation could not be liable for violations of customary international law, as well as its arguments that the case should be dismissed on grounds of the act of state doctrine and *forum non conveniens*.

The same question of whether a corporation can be held liable for violations of customary international law was the subject of a case that was argued before the U.S. Supreme Court in October 2017. In *Jesner v. Arab Bank*, victims of terror attacks in Israel alleged that Arab Bank knowingly funneled millions of dollars through its New York branch to finance the attacks and reward the families of suicide bombers. The district court dismissed, and the Second Circuit affirmed the dismissal, on the sole ground that suits under the Alien Tort Statute (ATS), which grants jurisdiction for torts in violation of the law of nations, cannot be brought against corporations. The Supreme Court's decision, holding that foreign corporations could not be sued under the Statute, was issued on April 24, 2018, just before this volume went to press, and several of the articles herein are the first published pieces to analyze and critique the Court's decision. Notably, there were several concurrences and dissents, and Justices Kennedy, Roberts, and Thomas were the only justices to opine broadly that international law does not extend civil or criminal liability to all corporations.<sup>7</sup>

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5. Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, 15 September 2016, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=policy-paper-on-case-selection-and-prioritisation>.

6. *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401 (CanLII), November 21, 2017, available at: <https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca401/2017bcca401.html?resultIndex=1>

7. *Jesner v. Arab Bank*, 584 U.S. \_\_\_\_ (2018), available at: <https://supreme.justia.com/cases/federal/us/584/16-499/>

Meanwhile, in February 2018, in a judgment that Oxford University Press named as one of their “top ten developments in international law in 2017,”<sup>8</sup> a United Kingdom Court of Appeals permitted 1,826 Zambian villagers to bring a claim in the English courts against a UK parent company for the human rights violations of its Zambian subsidiary involving environmental destruction.

Taken together, these cases could have high-stakes consequences, potentially opening the door to an increasing number of lawsuits filed against companies for alleged failure to comply with human rights standards at all levels of the corporate structure.

With these then pending cases as a backdrop, on September 15, 2017, Case Western Reserve University School of Law’s Frederick K. Cox International Law Center, convened a day-long conference with leading scholars and practitioners from around the world to explore a variety of topics related to corporate criminal and civil liability for human rights violations. The symposium was organized by a program committee chaired by Professor Avidan Cover. The archived webcast of the symposium is available for viewing anytime at: <https://law.case.edu/Lectures-Events/EventId/305/e/corporations-on-trial-international-criminal-and-civil-liability-for-corporations-for-human-rights-violations-15-sep-2017>

This symposium issue of the *Case Western Reserve Journal of International Law* contains 9 articles and 2 transcripts generated from the “Corporations on Trial” conference. The volume also reproduces the 2018 Klatsky Endowed Lecture in Human Rights, featuring Sean Murphy, the President of the American Society of International Law and a member of the U.N. International Law Commission. In addition, the volume includes a transcript of the “Talking Foreign Policy” radio broadcast devoted to the theme of the conference. Finally, the volume contains four Notes by student editors of the *Journal* on current issues in international law.

### III.

This volume’s “Corporations on Trial” symposium content includes five, starting with the keynote speech from Judge Thomas Buergenthal, Lobingier Professor Emeritus of Comparative Law and Jurisprudence at George Washington University and former Judge of the International Court of Justice. Judge Beurgenthal’s speech expressed the need for additional international human rights

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8. Merel Alstein, Top Ten Development in International Law in 2017, OUPblog Oxford University Press (Jan. 2018), available at: <https://blog.oup.com/2018/01/top-ten-international-law-2017/>

institutions in order to obtain greater compliance by states with respect to their human rights obligations.

The second section contains articles from the symposium's first panel entitled "Developments in International Criminal Law in Addressing Corporate Human Rights Violations." This discussion was led by James Johnson, Adjunct Professor of Law and Director of the War Crimes Research Office at Case Western Reserve University. Joining Professor Johnson were Sara Sun Beale, Charles L.B. Lowndes Professor at Duke Law School; Michael Kelly, Interim Dean, Senator Allen A. Sekt Endowed Chair and Professor of Law at Creighton University School of Law and President of the U.S. National Section of L'Association Internationale de Droit Pénal (AIDP); Carsten Stahn, Professor of International Criminal Law and Global Justice at Leiden University; and Milena Sterio, Professor of Law and Associate Dean for Academic Enrichment at Cleveland-Marshall College of Law. In her article, Professor Beale explores how—for a narrow and important class of human rights violations—the Trafficking Victim Protection Act offers an effective alternative to the ATS as a vehicle for litigating human rights abuses in both civil and criminal prosecutions in U.S. federal courts. Professor Kelly provides a historical analysis of how profit motives of corporations and those who run them contribute to human rights violations. Citing examples of the British colonial expansion to the German military, he illustrates the need to hold corporations liable for human rights violations. Professor Stahn examines the strengths and weaknesses of individualized and collective approaches towards corporate wrongdoing, explaining that the establishment of a workable corporate criminal liability regime requires a balanced interplay between traditional theories of both individual and collective responsibility. Professor Sterio discusses *Jesner*—prior to its 2018 Supreme Court ruling—and the failure of *Kiobel* to specify which law, international or domestic, applies to the issue of corporate liability under the Alien Tort Claims Act, while also proposing other potential remedies to address corporate misbehavior and complicity in the violation of human rights, including criminal liability and lawsuits against corporate officers.

Our third section of articles includes content from a panel unpacking the "Ethical Principles and Corporate Social Responsibility as Limits on Corporate Human Rights Violations." This panel was moderated by Cassandra Burke Robertson, the John Deaver Drinko-BakerHostetler Professor of Law and Director of the Center for Professional Ethics at Case Western Reserve University. Joining Professor Robertson were Kish Parella, Associate Professor at Washington and Lee University School of Law; Dr. Caroline Kaeb, Senior Fellow at the Zicklin Center for Business Ethics Research of The Wharton School; and David Nersessian, Associate Professor of Accounting and Law Division at Babson College. In her article,

Professor Parella describes the function of transnational corporations in many global supply chains as information intermediaries, which carries with it responsibilities and opportunities for incentivization. Dr. Kaeb explains that a normative framework for corporate engagement with public policy is required as part of the evolving corporate responsibility paradigm. Along the ethics continuum, Professor Nersessian discusses the interplay between attorney-client obligations and human rights law, while also highlighting how it raises serious and unique ethical concerns.

The lunch address was delivered by David Scheffer, Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University Pritzker School of Law; former U.S. Ambassador at Large for War Crimes Issues. In his contribution, Ambassador Scheffer explained how corporate impunity should not be read into the Alien Tort Statute based upon a misinterpretation of the Rome Treaty or an unfamiliarity with the global evolution of both domestic and international law. He largely aligns himself with Justice Sotomayor's dissent in the recent Supreme Court decision, *Jesner v. Arab Bank*.

Our final section of articles stems from the symposium's panel on "Corporate Perspectives on Using Civil Litigation to Address Corporate Human Rights Violations" led by Timothy Webster, Associate Professor of Law, Director of Asian Legal Studies, and U.S. Director, Joint Program in International Commercial Law and Dispute Resolution at Case Western Reserve University. Professor Webster was joined by Ursula Doyle, Associate Professor of Law at Salmon P. Chase College of Law, Northern Kentucky University and Dr. Jonas Grimheden, Senior Policy Manager with the European Union Agency for Fundamental Rights (FRA) in Vienna, Austria and Associate Professor of Law (*Docent*) at the Faculty of Law, Lund University. In his article, Professor Doyle considers the apparent disjunction between the Court's effective limitation of liability for the U.S. corporation and expansive liability for the natural person for similar crimes, pursuant to current precedent. Dr. Grimheden assesses the barriers that victims of human rights abuse involving companies face in accessing effective judicial remedies in the European Union.

In addition to the symposium content, this volume of the *Journal of International Law* reproduces the 2018 Klatsky Endowed Lecture in Human Rights delivered at Case Western Reserve University Law School by Sean Murphy, Manatt/Ahn Professor of International Law at George Washington University; Member of the U.N. International Law Commission; and President of the American Society of International Law. Murphy describes his efforts at the International Law Commission to bring about an international Convention on Crimes Against Humanity, as well as the challenges facing the initiative and its prospects for success. Also at this lecture, Professor Murphy received the Cox International Law Center's Humanitarian

Award for Advancing Global Justice. The volume also features an edited transcript of a production of “Talking Foreign Policy,” a current-affairs radio program produced by Cleveland’s NPR affiliate, WCPN 90.3 FM ideastream. The September 2017 program installment featured host Michael Scharf and guests Judge Thomas Buergenthal, Carsten Stahn, Milena Sterio, Avidan Cover, and Timothy Webster discussing corporate liability for human rights abuses. The archived broadcast is available at: <http://law.case.edu/TalkingForeignPolicy>.

Lastly, this volume includes four notes written by graduating staff members of the *Journal of International Law*. The first, written by Senior Editor Michael Anderson, contends that private military contractors (“PMCs”) more resemble soldiers than civilians and should thus fall under the military’s jurisdiction, and that the 2007 Amendment to the Uniform Code of Military Justice should therefore be upheld if applied to a PMC. The second, written by Managing Editor Mackenzie Glaze, explores three historical forces that appear to have the most effect on how three particular countries—all following and interpreting Sharia Law—protect women’s rights. The third, written by Senior Notes Editor Kate Masetta-Alvarez, recommends that in order to accommodate international needs and remain in line with the United States’ recent acceptance of domestic violence asylum claims, the United States should apply asylum law flexibly to grant humanitarian relief to Central American victims of gang violence. Mrs. Masetta-Alvarez’s note received the *Journal of International Law* Distinguished Note Award. The fourth, written by Production Editor Shelby Wade, critiques the “living together” concept, used by the European Court of Human Rights to justify burqa and niqab bans, arguing that it is a vague and controversial test that has several potentially negative impacts on personal freedoms.

#### IV.

A few weeks after our September 2017 “Corporations on Trial” conference, we lost a good friend to the Law School and one of the leading lights in international criminal law when DePaul University Law Professor M. Cherif Bassiouni passed away at age 79. He had been a frequent participant in Cox Center events, received an Honorary Degree from our University in 2010, and his donated collection of maps and photographs from the UN Commission of Experts to Investigate Violations of Humanitarian Law in the former Yugoslavia that he chaired adorn the walls of the office of our *Journal of International Law*.

An immigrant from Egypt, Cherif Bassiouni was a prolific writer who also held important positions in international organizations throughout the years, where he played a key role in the drafting of the Torture Convention, the Rome Statute for the International Criminal Court, and the ILC Convention on Crimes Against

Humanity. He investigated war crimes in Bosnia, worked behind the scenes for Middle East peace, monitored human rights in Afghanistan and helped craft Iraq's new constitution after setting up the tribunal that tried the country's former dictator, Saddam Hussein. Bassiouni also stood up against discrimination against minorities in his adopted country, the United States.

We dedicate this issue of the *Journal* to the memory of this inspiring academic and diplomat, who is widely known as the "father of international criminal law."

## V.

Many students, scholars, practitioners, supporters, and advisors made Volume 50 of the *Journal of International Law* possible. We would like to thank all participants and organizers of the Corporations on Trial conference on September 15, 2017, for helping to make the day a success. We also thank the Law School's Frederick K. Cox International Law, the Law School's Center for Professional Ethics, the Inamori International Center for Ethics and Excellence, the American Society of International Law, the Cleveland Council on World Affairs, and the Cleveland International Lawyer's Group for co-sponsoring the conference. Last but certainly not least, we thank the student editors of the *Journal of International Law*, who worked tirelessly to make this publication possible.

Volume 51 of the *Journal* will be dedicated to the fall 2018 Symposium, "International Law and Policy in the Age of Donald Trump."