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IS THE PRESUMPTION OF CORPORATE IMPUNITY DEAD?

*Keynote Address by
Ambassador David Scheffer*
at Corporations on Trial: International Criminal and Civil
Liability for Corporations for Human Rights Violations
The Frederick K. Cox International Law Center Conference
Case Western Reserve University School of Law
September 15, 2017*

*Subsequent to the delivery of this address of September 15, 2017, the Supreme Court delivered its judgment in *Jesner v. Arab Bank* on April 24, 2018.¹ In a 5 to 4 vote, Justice Kennedy, writing for the majority of Justices Roberts, Alito, Thomas, Gorsuch, and himself, held that corporations are not subject to the jurisdiction of the Alien Tort Statute (“ATS”).² Justice Sotomayer, writing for the minority of Justices Ginsburg, Breyer, Kagan, and herself, argued that corporations can be held liable under the ATS.³ The author aligns himself with the views expressed by Justice Sotomayer in the dissenting opinion.*

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- *. David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University Pritzker School of Law. He was the first U.S. Ambassador at Large for War Crimes Issues (1997-2001). Portions of this keynote address were incorporated in a *Just Security* blog by Ambassador Scheffer entitled, “The Rome Treaty Has Nothing to Do with *Jesner v. Arab Bank*” (October 10, 2017), <https://www.justsecurity.org/45791/rome-treaty-jesner-v-arab-bank/>.
1. *Jesner v. Arab Bank, PLC*, 2018 WL 1914663 (Apr. 24, 2018).
2. *Id.*
3. *Id.* at 1 (Sotomayer, S., dissenting) (“The Court today holds that the Alien Tort Statute (ATS), 28 U. S. C. §1350, categorically forecloses foreign corporate liability. In so doing, it absolves corporations from responsibility under the ATS for conscience-shocking behavior. I disagree both with the Court’s conclusion and its analytic approach. The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged. I respectfully dissent”).

The dialogue at this conference focuses on three broad areas relating to corporate liability for human rights violations: accountability, transparency, and morality. I will bore into accountability, while recognizing up front that impunity for corporate behavior in the realm of human rights is being challenged with legislative and stakeholder initiatives in reporting transparency and development of guidelines, and by expressions of morality at the CEO level. I point to just one example of guidelines, namely “The Corporate Crimes Principles,” issued in October 2016 by the International Corporate Accountability Roundtable in Washington and by Amnesty International.⁴ It is an extremely useful set of ten principles to guide those who aim to hold corporations accountable. My colleagues in the profession, James G. Stewart and Alex Whiting, served as experts in the preparation of the principles.

But the force of morality can be stronger than anything we legislate, anything we uphold in the courts of law globally, and anything we mandate for reports and other instruments of transparency, including an aggressive mainstream media and Fifth Estate. None of us are naïve enough to think that corporate impunity is somehow gasping its last breath, far from it. But the tide is turning. The pathway to corporate responsibility, which is being built in bold defiance of impunity, is not a straight line and it does not and should not traverse only courtrooms. The issue of overcoming corporate impunity for human rights violations and how we frame our analysis of it is, and must be, multidimensional. Professor Caroline Kaeb, who joins us at this conference, is pioneering innovative ways to achieve corporate responsibility with non-litigious methodologies.⁵ But I speak here today of two developments in the field of accountability.

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4. *The Corporate Crimes Principles*, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, Oct. 6, 2016 [<https://perma.cc/4BET-YVU2>].
 5. *See generally* Caroline Kaeb, *A New Penalty Structure for Corporate Involvement in Atrocity Crimes*, 57 HARV. INT. L. J. (Online Symposium) (2016) also available at <http://www.harvardilj.org/2016/07/a-new-penalty-structure-for-corporate-involvement-in-atrocity-crimes-about-prosecutors-and-monitors/> (noting the use of corporate monitors to ensure corporate compliance); *and* Caroline Kaeb, *Law, Morality, and Rational Choice, in Corporate Social Responsibility?: Human Rights in the New Global Economy* 193-206, (Charlotte Walker-Said & John Kelly, eds.) (University of Chicago Press, 2015) (applying behavior economics to compliance); *and* Harlan Loeb, *Principles-Based Regulation and Compliance: A Framework for Sustainable Integrity*, Huffington Post: The Blog (May 5, 2015 5:24 PM), https://www.huffingtonpost.com/harlan-loeb/principlesbased-regulaton_b_7204110.html [<https://perma.cc/M4W9-9MCQ>] (working with Caroline Kaeb to advocate for a principle-based culture in corporations).

I begin with the notable case of *Jesner v. Arab Bank*, which will be argued before the Supreme Court on October 11, 2017.⁶ Full disclosure: I filed an *amicus* brief on behalf of the petitioners in the case.⁷ While the case concerns civil rather than criminal liability, the fate of corporate liability under the Alien Tort Statute,⁸ and how such liability is framed by egregious human rights violations, hangs in the balance, unless the Supreme Court simply invokes the presumption against extraterritorial application of U.S. law in favor of Arab Bank. I doubt that particular outcome because the Supreme Court presumably granted certiorari only for the purpose of addressing the issue of corporate liability; repeating the *Kiobel IP* exercise of raising the issue of corporate liability only to bury it under the presumption against extraterritorial application of U.S. law would be an odd undertaking and outcome for the Supreme Court. There is a clear circuit split on the issue of corporate liability, reaffirmed by the 2nd Circuit in *Jesner*, so the battle lines are drawn and the time has arrived. The Alien Tort Statute either covers, as violators of the law of nations or U.S. treaties, corporations as well as natural persons or it only covers natural persons. The relatively recent split in the circuits must be repaired.

In my *amicus* brief I examine two issues that the Supreme Court justices should take note of during their deliberations. First, the Second Circuit and the respondent continue to rely on the Rome Statute of the International Criminal Court (hereafter the “Rome Treaty”)¹⁰ and the negotiations leading to its conclusion to deny liability for corporations. Take it from someone who was there throughout the U.N. talks: There is simply no basis in the history of the negotiations leading to the Rome Treaty that prohibits civil liability of corporations for commission of or complicity in the commission of genocide, crimes against humanity, or war crimes, the most egregious types of human rights violations. Our relatively brief discussions about the status of criminal liability of corporations for commission of or complicity in atrocity crimes led to a dead end, but

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6. See generally *Jesner v. Arab Bank, PLC*, THE SUPREME COURT, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-499.html> [<https://perma.cc/AD83-EA4X>] (noting the disposition of the case thus as of Nov. 1, 2017).
 7. Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae in Support of the Petitioners, *Jesner v. Arab Bank, PLC*, No. 16-499.
 8. 28 U.S.C. § 1350 (1948).
 9. *Kiobel v. Royal Dutch Petroleum, Co.*, 569 U.S. 108 (2013).
 10. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, U.N. Doc. A/CONF.183/9 (entered into force July 1, 2002).

that only speaks to the issue of criminal liability. We were not discussing civil liability, which is the only form of liability under the Alien Tort Statute, but has no application whatsoever, even for natural persons, under the Rome Treaty.

Let me bore into this a bit because this issue remains central at least to the issue of civil liability for corporations under the Alien Tort Statute, and if that is eviscerated by the Supreme Court, thus immunizing corporations, then I suggest that criminal liability will be much harder to establish in the years ahead. We may need to strengthen the foundation for civil liability first before building new frameworks for criminal liability.

The Second Circuit and the respondent assume—incorrectly—that the Rome Treaty, which exclusively and deliberately focused on the establishment of a criminal court, purposely reflected a widely accepted international consensus against all criminal and civil liability of corporations for crimes against the law of nations, as if corporations essentially are immunized from any legal liability in their operations. That incorrect assumption is flatly refuted by the history of the Rome negotiations and the structure of the Rome Treaty itself, both of which expressly and solely address criminal liability. The Second Circuit also wrongly assumes that this purported international consensus continues to be accepted widely in customary international law. Even disregarding the fundamental error of its predicate assumption, the notion that there is a continuing consensus against civil liability is contradicted by the broad acceptance among legal systems that public law can provide remedies for corporate misconduct. Indeed, in addition to the widespread acceptance of civil liability, there is an increasing acceptance of criminal liability in the almost two decades since the Rome Treaty was completed.

The Second Circuit and respondent hold a position that, in its final analysis, would entitle corporations to commit or be accomplices in atrocity crimes wherever they operate in the world unless there is a national law on the territory where they operate that outlaws specific crimes by juridical persons. Luckily, provided the Supreme Court so rules, in the United States there is the Alien Tort Statute that at least imposes civil liability on such corporate conduct against aliens, including when it occurs on foreign territory and, under the *Kiobel II* test, touches and concerns the United States.

So, it is true, but irrelevant to the issue before the Supreme Court, that there was divergence among States and legal systems at the time of the Rome Treaty's negotiation regarding the applicability of criminal statutes to juridical persons that cannot be subjected to the traditional criminal penalty of deprivation of liberty. Exclusion of corporations from International Criminal Court prosecution was inevitable, not because States agreed that corporations are above the law as a matter of right or of principle, but because a fundamental underpinning of the Rome Treaty is the preference for and deference

to domestic prosecution (the principle of complementarity) and the obligation of State Parties to undertake the capacity to prosecute. If a legal system did not hold juridical persons liable under criminal law, then under the Rome Treaty that national system would likely fail the test of complementarity.

By the way, the U.S. delegation at Rome, which I headed, was fully aware of the fact that corporations are subject to criminal sanctions in the United States. Including juridical persons in the Rome Statute would have been an easy “give” for the United States if we only had our own jurisdiction to consider. But, given the diversity of treatment of corporate criminal liability globally, it was not possible to negotiate a new standard of corporate criminal liability with universal application in the time frame permitted for concluding the Rome Treaty. Equally, it was not plausible to foresee implementation of the complementarity principle of the Rome Treaty in light of such differences in criminal liability for juridical persons among so many national jurisdictions. Nor was it possible, in so few days at Rome, to consider the complex revisions to the long-evolving text of the treaty that would be required to extend the personal jurisdiction to corporations.

The omission in the Rome Treaty of provisions for civil proceedings against juridical persons is utterly insignificant. To the contrary, the negotiations in Rome leading to the creation of the International Criminal Court understandably steered clear of civil liability for tort actions—by multinational corporations as well as by natural persons—because civil liability fell outside of the self-described criminal tribunal. No conclusion can be drawn, either from the negotiations leading to the Rome Treaty or from the absence of corporate criminal or civil liability in the Rome Treaty, that undermines a general principle of law regarding corporate civil liability or that prevents national courts from holding corporations liable in civil damages for torts committed on national or foreign territory.

Nor have legal systems frozen in time. Article 10 of the Rome Treaty expressly accepts that international law may evolve for purposes other than the treaty.¹¹ Since 1998, corporate criminal liability has been growing rapidly across the globe.¹² A significant number of nations that have ratified the Rome Treaty, indeed 29 countries that I list in my *amicus* brief, also enacted national implementing legislation that establishes corporate criminal liability for atrocity crimes falling within the jurisdiction of the Rome Treaty,

11. *Id.* at Art. 10 (“Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”).

12. Scheffer, *supra* note 7, at 6.

or have adopted comparable laws for the same or other serious crimes. These States certainly did not act as if the Rome Treaty precluded expanding corporate liability into the realm of atrocity crimes. Indeed, one might speculate that the Rome Treaty, by focusing ratifying States' attention on atrocity crimes, provided an impetus to accord greater accountability within their domestic legal systems.

These developments point to the evolving codification of corporate criminal liability at the national level that aligns with the long-standing general principle of law of corporate civil liability for torts that is found in almost all jurisdictions, including the United States and, with respect to *Jesner v. Arab Bank*, the Alien Tort Statute. At the international level, the Special Tribunal for Lebanon, an international criminal tribunal, found in 2014 in a contempt case that corporate criminal liability has become a general principle of law.¹³ The respondent scoffs at this ruling, as if the deliberations of a far-off tribunal are somehow meaningless. I think we know better.

The United Nations International Law Commission is crafting a Convention on Crimes Against Humanity¹⁴ that includes corporate criminal liability. The commentary on the inclusion of corporate liability in the draft convention states that the ILC “decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.”¹⁵ The commentary also provides a rich source of authorities demonstrating the presence of corporate criminal liability in multilateral treaties.¹⁶ Thus while the Rome Treaty has been a major impetus in the trend towards corporate criminal liability in national legal systems, so too have the many

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13. See Press Release, Special Tribunal for Lebanon, Appeals Panel Decides on Jurisdiction in Case STL-14-05 (Oct. 2, 2014), <https://www.stl-tsl.org/en/media/press-releases/3514-judicial-panel-decides-on-jurisdiction-in-case-stl-14-05> [<https://perma.cc/T5W9-5P6H>] (stating that legal persons, which includes legal entities, can be criminally liable under Lebanese law).
 14. See *Summaries of the Work of the International Law Commission: Crimes Against Humanity*, INTERNATIONAL LAW COMMISSION (Aug. 9, 2017), http://legal.un.org/ilc/summaries/7_7.shtml [<https://perma.cc/VK3B-VJ7G>] (showing the Commission's progress of work concerning crimes against humanity).
 15. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 264 (2016).
 16. See *id.* at 263-64 (providing treaties that address corporate criminal liability).

recent multilateral treaties confirming corporate criminal liability for terrorism, bribery of foreign public officials in international business transactions, protection of the environment, transnational organized crime, corruption, the unauthorized trans-boundary movement of hazardous wastes, and, perhaps, someday crimes against humanity.

But let us return to the fundamental premise of the Alien Tort Statute: it is a law that concerns civil liability. While grave criminal conduct can certainly constitute violations of the law of nations, that fact does not translate into having to establish that corporations are subject to criminal liability as a matter of international law in order to be held responsible for criminal acts, falling within the extreme degree of torts no doubt, under a national statute of civil liability; it simply means that the criminality of certain actions, such as atrocity crimes, in which corporations engage, either directly or as accomplices, can certainly be subject to civil liability under a national statute, such as the Alien Tort Statute. Imposing additional criminal liability on corporations, which has been standard fare in the United States for certain corporate conduct for more than a century, can be pursued under other laws and with further legislation. To suggest, however, that the Alien Tort Statute can only hold corporations civilly liable if they are subject to criminal liability as a principle of international law is, frankly, nonsense. The general principle of law, as a major source of international law—that corporations are subject to civil liability for torts—remains as strong today as it has in the past.

The bottom line is this: Corporate impunity for violations of the law of nations or U.S. treaties 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.

The second issue I want to address is corporate liability under the Rome Treaty. As it now stands, only corporate officers or employees responsible for their company's criminal conduct that falls within the International Criminal Court's subject matter, territorial, and temporal jurisdictions are subject to investigation. I include "employees" because one must bear in mind that under the Prosecutor's Policy Paper on Case Selection and Prioritisation (15 September 2016), the Prosecutor leaves open the option of bringing charges not only "against those persons who appear to be the most responsible for the identified crimes."¹⁷ She will "first focus on the crime base in order to identify the organisations (including their structures) and individuals allegedly responsible for the commission of

17. Office of the Prosecutor [OTP], *Policy Paper on Case Selection and Prioritisation*, at 14 (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [<https://perma.cc/N66G-SLDS>].

the crimes.”¹⁸ The reference to “organisations” can include a corporate entity; nothing prohibits the Prosecutor from looking at the corporation and how it has engaged in atrocity crimes before focusing on natural persons within the corporation. Do not be surprised to see corporate officials called as witnesses, avoiding culpability but shedding light on how the corporation committed atrocity crimes or was complicit in their commission and thus how the charged individual fits within the corporate juggernaut and steered it towards criminal conduct. The prosecution of a corporate President, CEO, CFO, or Chairman of the Board of Directors will be a *de facto* prosecution of the corporation. At least that is a very real possibility before the International Criminal Court.

I should note that there has been one corporate executive, Joshua Arap Sang, the former head of operations and well-known radio personality of Kass FM in Nairobi, Kenya, who faced prosecution at the International Criminal Court as an indirect co-perpetrator of three counts of crimes against humanity. He was charged with using coded messages in his radio broadcasts to commit murder, forcible transfer, and persecution. This all related to the post-election violence of 2007-2008. But the Trial Chamber vacated the charges against him on April 5, 2016.¹⁹ The shadow power of witness interference and political meddling likely intimidated critical witnesses. The charges against Joshua Arap Sang broke the mold at the International Criminal Court and essentially put Kass FM—through the person of one of its corporate executives—on the road to a criminal trial.

The Prosecutor, in her policy paper, goes on to state that her investigation and prosecution of those most responsible “may entail the need to consider the investigation and prosecution of a limited number of mid- and high-level perpetrators in order to ultimately build the evidentiary foundations for case(s) against those most responsible.”²⁰ These types of individuals abound in the corporate world; just ask the investigators immersed in the investigation of VW²¹ and other diesel-engine automobiles today. Is it a crime against humanity by corporate officials to knowingly, willingly, fraudulently, and illegally cause the emission into the atmosphere of toxic chemicals that attack civilian populations *en masse*?

18. *Id.*

19. Prosecutor v. Ruto, ICC-01/09-01/11, Majority Opinion of Judge Eboe-Osuji, ¶ 464 (Apr. 5, 2016).

20. Office of the Prosecutor, *supra* note 17, at 14.

21. See Jack Ewing, *Former VW Engine Chief Arrested, Signaling Widening Emissions Case*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/business/volkswagen-diesel-cheating.html?_r=0 [<https://perma.cc/9SW9-VVGH>] (reporting the arrest of a high-ranking executive of Volkswagen).

Finally, the Prosecutor “may also decide to prosecute lower level-perpetrators where their conduct has been particularly grave or notorious.”²² This could include employees at low levels who are perpetrators of atrocity crimes at such a high level of gravity or notoriety that they cannot, indeed must not, escape justice. In corporate operations, such individuals are well positioned to implement higher-level instructions or policies.

It is generally corporations, either privately owned or state-owned, that accomplish the types of actions that the Prosecutor identified in the policy paper as fair game for her Office’s investigation: “Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”²³ So corporations that are targeted for investigation, and the framing of charges, will still focus on corporate officers or employees and not the juridical person that employs them.

But consider how powerful this tool can become in the future. Allow me a moment of bluntness. On territorial jurisdiction alone, multinational corporations are cooked. They operate in and across many jurisdictions, and one or more of those jurisdictions is likely to be a State Party to the Rome Statute, or a jurisdiction mandated by the U.N. Security Council to be investigated by the International Criminal Court, and where criminal conduct has occurred. On nationality jurisdiction, multinational corporations are cooked. They employ nationals of many countries and it is entirely possible that one of those nationals will be in a position of authority and action within the corporation in connection with the company’s engagement in atrocity crimes, even if the crimes are committed on the territory of a non-party State.

On temporal jurisdiction, multinational corporations are cooked. There has been enough destruction of the environment, illegal exploitation of natural resources, and illegal dispossession of land since July 1, 2002, and even since any State Party joined the International Criminal Court with respect to its own territory, to fully occupy investigative inquiries, whether by referral or by initiation of the Prosecutor.

Finally, on subject matter jurisdiction, multinational corporations are cooked. The Prosecutor’s list of environmental, natural resources, and land grab crimes by no means excludes her investigation of corporate complicity in more direct forms of ethnic cleansing and other crimes against humanity as well as war crimes. One might hope that the Holocaust was the last time we witnessed corporate complicity in genocide, but I fear otherwise. Dean Michael Kelly

22. Office of the Prosecutor, *supra* note 17, at 14.

23. *Id.*

addresses that issue masterfully in his recent book.²⁴ For example, corporations have engaged extensively. Military contractors in particular, including the manufacturers of weapons, need to be particularly sensitive to this emerging field of liability.

Of course, there remains the theoretical possibility of amending the Rome Treaty to explicitly extend its personal jurisdiction to juridical persons. State Parties could amend Articles 1 and 25(1) to include juridical persons.

Covering the consequential meaning of including juridical persons would require extensive amendments to the Rome Statute. Careful consideration would have to be made to distinguish, if necessary, between natural and juridical persons for purposes of production of evidence, the exercise of due process rights, proper physical presence of the defendant (who would appear for the corporation) in relevant proceedings, state cooperation requirements unique to corporations, and discerning which penalties are available and enforceable against corporations in the event of a guilty judgment.²⁵

Then there would be the staffing, at considerable cost, of a whole new division of the Office of the Prosecutor with lawyers and individuals of business and financial expertise who know how to investigate corporate conduct. Of course, such talent already is required as the Prosecutor turns her attention to corporate conduct leading to atrocity crimes. The election of at least some judges would need to turn in part on their expertise in criminal law as it pertains to corporate conduct. Any group of amendments covering juridical persons in the Rome Treaty would require approval by two-thirds of the State Parties pursuant to Article 121(3) and, if that hurdle is leaped, then such amendments would have to be ratified or accepted by seven-eighths of the State Parties in order to come into force pursuant to Article 121(4) of the Rome Treaty.

There might be a different path, namely negotiation of a protocol to the Rome Statute that would permit State Parties that join it to “opt in” to coverage of juridical persons. However, such a protocol may be very difficult to negotiate as it would still have to transform the Rome Treaty radically to cover juridical persons only for those State Parties ratifying or accepting the protocol. The protocol would have to largely mirror the complex amendments required for a comprehensive overhaul of the Rome Treaty with straight

24. *See generally* MICHAEL J. KELLY, PROSECUTING CORPORATIONS FOR GENOCIDE (2016)(debating a historical and legal liability for corporations who participate in human rights violations).

25. *See* David Scheffer, *Corporate Liability Under Rome Statute*, HARV. INT’L L. J. (Jul. 7 2017), <http://www.harvardilj.org/2016/07/corporate-liability-under-the-rome-statute/> [<https://perma.cc/PE9L-QG79>].

amendments, and may still need to be initially adopted by two-thirds of the State Parties pursuant to Article 121(3).²⁶

Any empirical study of corporate conduct internationally would not conclude that the presumption of corporate impunity is dead, as any reading of the news alone informs us that far too much corporate misconduct continues unchallenged. Surely, however, the tide is turning towards challenging the presumption and the reality of corporate impunity, if not as a matter of criminal law, than as a matter of reporting requirements mandated by law or by international organizations or civil society or as a matter of moral decision-making at the highest levels of corporate management.

Professor Kaeb and I co-chair the Working Group on Business and Human Rights of the U.N. Global Compact's PRME initiative,²⁷ where we seek to broaden the curriculum of business schools in particular to ensure that students understand the importance of compliance with human rights standards as they enter the corporate management ranks. We struggle against the view that this is a subject falling outside business and management instruction, and yet in recent years there has been a healthy increase in curriculum offerings and activities that focus on the human rights agenda. That gives me cause for hope, as would the Supreme Court's affirmation of corporate civil liability under the Alien Tort Statute and the International Criminal Court's tactful and challenging journey into corporate criminal liability through the decisions and actions of corporate officials.

Thank you.

26. *Id.*

27. *PRME Working Group on Business and Human Rights*, PRME (2016), <http://www.unprme.org/workine-groups/display-working-group.php?wgid=3306> [<https://perma.cc/N83S-LPU8>].