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In Defense of the Special Tribunal for Lebanon and theCase for International Corporate Accountability

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Abstract

In 2014, the Special Tribunal for Lebanon ("STL") examined evolving international standards of corporate accountability and held that legal entities can be found liable for criminal conduct as a general principle of international law. Prior to this decision, and in stark contrast to trends in domestic legal regimes, no legal entity had ever been prosecuted, convicted, or sentenced in an international court. Although this marked a watershed moment in global corporate accountability mechanisms, it has had little precedential effect; scholars have argued it is because the decision lacked a valid legal basis and is limited in scope. This Comment addresses these criticisms by examining the legal and historical record informing the decision and corporate accountability in general. Furthermore, it confirms the holding that corporate accountability is a general principle of international law and explores the use of this judgment as the basis for international corporate accountability.

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I. INTRODUCTION

> It is not a single individual who sells poison gas to a dictator to be used in war crimes, but it is a firm, organized as a legal person that is the provider of the gas. It is not a single individual who buys and re-sells stolen diamonds and thus lends critical financial support to a dictatorial regime, but an enterprise specialized in such lucrative deals.[1]

At the dawn of the modern international order, the Nuremberg Court famously held that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[2] Since then, legal entities[3] have gone unpunished for their criminal conduct under international law, until the Special Tribunal for Lebanon ("STL")—a court originally established to prosecute those responsible for the assassination of the former Lebanese prime minister Rafik Hariri[4]—became the first international tribunal to convict and sentence a legal entity.[5]

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1 Thomas Weigend, *Societas Delinquere Non Potest?: A German Perspective*, 6 J. INT'L CRIM. L. 927, 927–28 (2009).

2 United States v. Goring, Trial of The Major War Criminals Before the International Military Tribunal, Judgment, 223 (Int'l Military Trib. For Nuremberg, Germany, Oct. 1, 1946).

3 For the purposes of this Comment, "legal entity," "corporation," and "legal person" are all used interchangeably to refer to an

> entity created by or under the authority of the laws of a state or nation . . . consisting of an association of numerous individuals, who subsist as a body politic under a special denomination, which is regarded [i]n law as having a personality and existence distinct from that of its several members . . . and of acting as a unit or single individual in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law.

THE LAW DICTIONARY (2d. ed.), http://perma.cc/3422-X7C9.

4 *See* The Cases: *Ayyash et al.* (STL-11-01), THE SPECIAL TRIBUNAL FOR LEBANON, https://perma.cc/3TED-FSBK [hereinafter STL Primary Case].

5 Armina Tanja Savanovic, *Corporate Criminal Liability in International Criminal Law*, 57 (Spring, 2017) (unpublished Master Thesis, Lund University), http://perma.cc/PL3D-MJKJ ("*Al Akhbar* is the first case in which corporate criminal liability has been imputed on a corporation which resulted in sentencing."); Yvonne McDermott Rees, *Corporate Criminal Responsibility at the Special Tribunal for Lebanon*, Posting to *PhD studies in human rights*, HUMAN RIGHTS DOCTORATE BLOGSPOT (May 17, 2014), http://perma.cc/7ZEZ-6BSF ("[T]his is the first time that an international criminal tribunal has found itself to have jurisdiction over corporations."); Nadia Bernaz, *The New TV S.A.L. Case at the Special Tribunal for Lebanon – Corporate Criminal Liability under International Law*, RIGHTS AS USUAL (Oct. 31, 2014), http://perma.cc/U6D4-4C5T ("It is the first time an international tribunal recognises that corporations may be criminally liable under international law. . . . While limited in scope, the Appeals Panel's decision is the first of its kind and, as noted by other commentators, was 'completely unexpected.' It will hopefully bring an end to statements such as the U.S. Court of Appeals for the Second Circuit's when it asserted in *Kiobel v. Royal Dutch Petroleum* that 'although international law has sometimes extended the scope of liability for a violation of a given norm to

Central to this decision, the STL held that "corporate criminal liability has become a general principle of law."[6] General principles are a legitimate source of international law,[7] providing the STL with the legal basis to convict a media company.[8] While the STL acknowledged the novelty of its ruling, the court based its decision on evolving international standards, as well as trends in national jurisdictions. This marked a significant development in the trend toward international corporate accountability, and human rights activists cheered the decision as a breakthrough in the fight against corporate human rights abuses.[9]

However, in the four years since the STL declared that corporate liability has become a general principle of law, later tribunals have failed to uphold or rely on this precedent. This reluctance stems in part from a belief that the STL's decision is either limited to contempt crimes or the illegitimate result of judicial activism. If the STL misapplied the law, then its decision will not be adopted by the international community.[10] And if the judgment is limited to contempt cases, then it is of little help to prosecutors who seek to punish corporations for committing serious human rights abuses and war crimes.

Responding to these concerns, this Comment defends the proposition that corporate liability is now a general principle of law. In doing so, this Comment distinguishes between two of the STL's holdings: 1) the decision to expand their jurisdiction over contempt crimes beyond the scope of their core jurisdiction, and 2) the STL's substantive analysis of corporate accountability under international law. This Comment also examines the process by which rules are formed under international law to determine why, prior to the STL, there was no binding legal judgment against a corporate entity enforced by either treaties, courts, or customary law. This comprehensive review suggests that international law does

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individuals, it has *never* extended the scope of liability to a corporation."'); Dov Jacobs, *The Dream Factor Strikes Again: the Special Tribunal for Lebanon recognizes International Criminal Corporate Liability*, Posting to *Spreading the Jam*, DOV JACOBS (Apr. 28, 2014), http://perma.cc/45L9-RRQG ("[W]hat really deserves attention is this new revolution proposed by the STL: the recognition that legal persons can be the target of contempt proceedings. In other words, the STL has now recognized corporate liability in international criminal law.").

6 Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law, as Amicus Curiae Supporting Petitioners, at 6, *Jesner v. Arab Bank*, 138 S.Ct. 1386 (2018) (No. 16-499) [hereinafter Scheffer Brief].

7 Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945) [hereinafter ICJ Statute].

8 *See* Contempt Cases: *Akhbar Beirut S.A.L. & Mr Al Amin* (STL-14-06), THE SPECIAL TRIBUNAL FOR LEBANON, https://perma.cc/4NHY-SV73 [hereinafter STL Contempt Cases].

9 *See, for example,* Savanovic, *supra* note 5, at 58; Bernaz, *supra* note 5.

10 *See* Lukas Marecek, *Criminal Responsibility of Legal Persons Introduced by the Special Tribunal for Lebanon*, 2017 PECS J. INT'L & EUR. L. 62, 69 (2017).

not preclude corporate liability,[11] and until now the only obstacle has been a matter of political will.

Section II explores the history of corporate liability to explain why international corporate accountability did not previously develop under a positivist source of law. Section III describes the facts that led to the creation of the STL, the specific rules of the court, and the legal arguments employed by the various justices. Following the STL's monumental decision, critics began delegitimizing its holding and limiting its scope.[12] Section IV responds to these criticisms, and defends the STL's holding that corporate accountability is now a general principle of law applicable in the international context. The Conclusion argues for the use of this judgment as the basis for the future of international corporate accountability.

II. CORPORATE ACCOUNTABILITY PRIOR TO THE STL

Assuming the STL's decision to prosecute a legal entity was rooted in a valid analysis of evolving legal trends, the question still stands: why did it take so long for an international court to prosecute a legal entity? Perhaps the STL's decision was truly an aberration; after all, "international criminal law has traditionally been strongly centered on individual agency."[13] Since as far back as the "the Romanist civilist law systems, *les personalites juridiques* (legal entities) could not be held criminally responsible; only individuals could."[14] Lord Thurlow represented this ethos in his famous statement that corporations have neither "souls to damn [nor] bodies to kick,"[15] and they, therefore, do as they like.

Responding to this concern, this Section explores the history of corporate accountability under international law. This historical inquiry will support the STL's holding that corporate criminal liability has now become a general principle of law by demonstrating that the previous accountability gap resulted from a lack of political will, and not a legal bar. This analysis will cover all the official sources of international law, which are "not a static system of rules but rather a decision-making process."[16] The International Court of Justice ("ICJ")—the "principal

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11 *See* Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1029 (2009).

12 Marecek*, supra* note 10, at 69.

13 Carsten Stahn, *Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law*, 50 CASE W. RES. J. INT'L L. 91, 91 (2018).

14 M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 61 (2d rev. ed. 2013).

15 *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

16 Christoph Schreuer, *Sources of International Law: Scope and Application* 10–11, THE EMIRATES CENTER FOR STRATEGIC STUDIES AND RESEARCH, http://perma.cc/4UCZ-U693.

judicial organ" of the U.N.[17]—utilizes four primary sources of law: international conventions, judicial decisions, customary law, and general principles of law.[18] Even if "as a matter of 'judicial policy', the Court finds some advantage in giving priority to treaty rules over customary norms,"[19] there is no formal hierarchy or successive order of consideration.[20] As a result, these sources of law do not exist in isolation but rather interact closely and influence one another. The following Section first analyzes general principles, then treaties, followed by customary law, and lastly judicial decisions.

A. General Principles of Law

A general principle was the source of law invoked by the STL as the basis for their decision to prosecute a legal entity.[21] The International Court of Justice classifies "general principles of law" as one of four legitimate sources of international law.[22]

General principles are rooted in national systems, and they are those principles that are so fundamental to legal orders that they can be found in all or most legal systems. Therefore, they are used to fill gaps left by treaties and customary law[23] and to clarify discrepancies in existing bodies of law.[24] Even if differences exist in the way national legal systems address an issue, all that is necessary to establish a general principle is to show that most countries adopt the same notion.[25]

One example of a general principle is the "good faith" doctrine, which is the notion that parties must act honestly and fairly, observing reasonable commercial

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17 *History*, INTERNATIONAL COURT OF JUSTICE, http://perma.cc/XMK9-W2WS.

18 ICJ Statute, *supra* note 7, art. 38.

19 Alain Pellet, *Article 38, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 677, 774 ¶ 270 (Andreas Zimmermann et al eds., 2006).

20 *Id.* at 773 ¶ 265.

21 In re New TV S.A.L. & Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 67 (Oct. 2, 2014) [hereinafter Majority Decision] ("[C]orporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law."), https://perma.cc/J3NG-K2A7.

22 *See* ICJ Statute, *supra* note 7, art. 38.

23 Schreuer, *supra* note 16, at 7.

24 *Id.*; South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. Rep. 6, ¶ 88 (Jul. 18) (the court invoked "general principles of law" to determine whether a member of a community can take legal action in vindication of a public interest when the court's statute was not decisive on the matter).

25 *See* Giorgio Gaja, *General Principles of Law, in* OXFORD PUBLIC INTERNATIONAL LAW: MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 27–28 (2013), http://perma.cc/42AX-CUHB.

standards, and without intending to defraud or seek unconscionable advantage of the other party.[26] Because courts in the vast majority of countries take "good faith" into consideration in their domestic judicial systems, this indicates that "good faith" may be considered a general principle of international law.[27] It is not required that every state have the same standard for applying "good faith" tests; all that is necessary to create a general principle is that most states have a "good faith" test. Other examples of general principles are the presumption of innocence, the binding nature of contractual agreements, the prohibition of unjust enrichment, the principles of procedural fairness before a court of law, and the principle of legality.[28]

B. In Conventions and Treaties

Conventions and treaties are "rules expressly recognized by the contesting states,"[29] and thus the most convenient source of law on which judges can base their decisions.[30] Although there is no current international treaty or convention that enforces a binding mechanism of corporate accountability, there is also no treaty or convention that forbids it.[31]

The absence of any binding accountability measure is largely the result of non-legal political determinations; most states are unwilling or unable to prosecute legal entities across state borders. This inability stems from "dysfunctional legal systems, undercriminalization, and lack of material means, especially in conflict zones."[32] This dysfunction even preempts most attempts at local accountability

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26 *Good Faith*, BLACK'S LAW DICTIONARY, 701 (7th ed. 1999) (defining good faith as a "state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.").

27 Loan Agreement between Italy and Costa Rica, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, VOLUME XXV (Jun. 26, 1998) at ¶ 14 (referred to the fundamental character of the principle of good faith in international law and included it among the general principles of law recognized by civilized nations).

28 *See* Gaja, *supra* note 25.

29 ICJ Statute, *supra* note 7, art. 3.

30 Pellet, *supra* note 19, at 775 ¶ 271 ("There can however be no doubt that the application of a treaty rule is easier than the search for a customary rule, intuitive though this process might be, and that, in turn, it is more practicable for an international judge to investigate international practice in order to find a customary rule than to 'discover' a general principle of law from an inevitably sensitive incursion into municipal laws.") (citations omitted).

31 Fauchald & Stigen, *supra* note 11, at 1032 ("[W]hile the existence of an international enforcement mechanism implies the existence of a direct obligation, the opposite is not necessarily true.").

32 Alexandra Garcia, *Corporate Liability for International Crimes: A Matter of Legal Policy Since Nuremberg*, 24 TUL. J. INT'L & COMP. L. 97, 114 (2015).

measures,[33] let alone international ones, and should therefore not be the basis for denying international corporate accountability.

Unwillingness has more to do with countries choosing to protect the interests of foreign corporations over the human rights of their own citizens. Professor Carsten Stahn,[34] a Professor of International Criminal Law and Global Justice at Leiden University, argues that there is little incentive for states to voluntarily create binding enforcement mechanisms because prosecution of local corporations for anti-corruption practices in foreign states will lead to a decline in local competitive advantages.[35] This unwillingness is sometimes referred to as the "enforcement dilemma," whereby states are "reluctant to engage in investigations and prosecutions against foreign agents, due to fears of negative economic consequences or dependence on foreign investment, or difficulties to obtain evidence." [36]

This accountability gap, whether caused by unwillingness or inability, produces a diametrically opposed outcome: states are unhelpful in efforts to enforce international corporate liability through treaties and conventions, even as their domestic systems have evolved to include such provisions.[37]

C. In Customary Law

The third source of international law is "international custom, as evidence of a general practice accepted as law."[38] Customary law is often conflated with general principles, but there are key distinctions.[39] Customary international law requires the presence of two elements: 1) "State practice (*usus*)"[40] and 2) "a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*)."[41] Additionally, the "State practice has to be virtually uniform, extensive and representative."[42] What this

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33 Stahn, *supra* note 13, at 107.

34 Garcia, *supra* note 32, at 114.

35 Stahn, *supra* note 13, at 108.

36 *Id.* at 107.

37 Caroline Kaeb, *The Shifting Sands of Corporate Liability under International Criminal Law*, 49 GEO. WASH. INT'L L. REV. 351, 351–53 (2016).

38 ICJ Statute, *supra* note 7, art. 38.

39 *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L R. OF THE RED CROSS 175 (2005) (conducting a comprehensive review of customary international law).

40 *Id.*

41 *Id.*

42 *Id.* at 180.

means is that "[d]ifferent States must not have engaged in substantially different conduct."[43]

In 2005, the Red Cross produced a report that synthesized and listed what it deemed as generally accepted notions of customary international humanitarian law.[44] The Red Cross did not list corporate criminal liability as a practice of customary law. This omission is not surprising given that states differ in the legal standards and approaches by which they practice corporate liability, which precludes the establishment of a customary law.[45] For example, the U.S. has adopted the aggregation theory of corporate criminal liability. This theory provides that corporations can be held criminally liable based on the act of one employee if a group of employees cumulatively, but not individually, meets the actus reus and mens rea requirements.[46] The English and French models are more restrictive because they require that the individuals acting on behalf of the corporation hold a high position in the company.[47] In contrast, Germany has no criminal liability for corporations, and instead employs an administrative-penal system to regulate corporate wrongdoing.[48]

Until all or a majority of nations agree on the material elements of corporate liability, it will not develop into customary law. However, these uniformity requirements are not necessary to establish a general principle of law.

D. In Judicial Decisions

The final source of international law, as defined by the ICJ, derives from international courts.[49] Judicial decisions are "not intended to be sources of law in the strict sense,"[50] but they are instrumental in shedding light on existing laws and clarifying legal provisions. Enforcement mechanisms in the form of judicial opinions can sometimes lag behind the development of underlying laws, but this

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43 Henckaerts, *supra* note 39, at 180.

44 *Id.* at 178–84. While the report does not carry the weight of a judicial decision, it can be understood as the equivalent of the American Restatements of the law of torts or contracts.

45 *Id.*

46 *See, for example*, *U.S. v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (adopting this theory, known as the doctrine of collective knowledge).

47 *See, for example*, Tesco Supermarkets Ltd. v. Nattrass, [1972] AC 153 (HL) 170 (appeal taken from Eng.) ("[T]he person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.").

48 *See* Andres Lohner & Nicolai Behr, *Corporate Liability in Germany*, GLOBAL COMPLIANCE NEWS (2016), http://perma.cc/BC5J-BYVE.

49 ICJ Statute, *supra* note 7, at art. 38.

50 Schreuer, *supra* note 16, at 8.

does not nullify their existence. Laws can lay dormant for years before enough political capital is mustered to enforce them.

In this case, although no corporation was previously convicted in an international court,[51] legal entities were nonetheless subject to international law.[52] To support this claim, this Section will carefully examine the legislative history, decisions, and political contexts of three of the most influential international courts: The International Military Tribunal at Nuremberg, the International Criminal Court, and the International Court of Justice.

First and foremost is the International Military Tribunal at Nuremberg ("IMT"). Proponents of the view that corporations are immune from prosecution under international law often invoke the legal history of the IMT and its famous quote that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[53] This statement, coupled with the fact that no corporations were on the IMT's docket, is used as evidence that international criminal law "is not applicable to collective entities, such as corporations."[54]

This reductive view of the IMT misconstrues the court's intentions by stripping away the context in which this statement was made. Even if the IMT did not result in a conviction of a legal entity, for the first time in modern history, a "judicial body considered the cases of corporations and their agents committing war crimes and other violations of international law."[55]

This incremental expansion of judicial scope took place in a time in which international law was primarily concerned with state (mis)conduct. Consequently, the Nazi defendants standing trial before the IMT invoked the principle that "international law is concerned with the action of sovereign States, and provides no punishment for individuals."[56] The IMT "explicitly rejected [this] argument by affirming that 'international law imposes duties and liabilities on individuals as well as upon States.'"[57] Thus, historical evidence suggests that the statement, "crimes

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51 *See supra* note 5 and accompanying text.

52 Fauchald & Stigen, *supra* note 11, at 1032 ("Generally, international law is characterized by a lack of international enforcement mechanisms, and both indirect and direct international obligations may exist without the possibility of international enforcement. The existence of such mechanisms 'has never been the linchpin of the obligation itself.'") (citations omitted).

53 United States v. Goring, *supra* note 2, at 223.

54 Jonathan Kolieb, *Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law*, 32 AM. U. INT'L L. REV. 569, 586 (2017).

55 *Id.* at 583.

56 *Id.* at 590 (quoting United States v. Goring, *supra* note 2, at 222).

57 *Id.*

against international law are committed by men, not by abstract entities," was "intended as a rejection of this position of impunity put forward by the individual defendants. The Tribunal was seeking to extend accountability under international law, not restrict it."[58] This decision "marked the beginning of [an] increased focus on individual criminal responsibility, which was a departure from the view that only the state was responsible when gross human rights violations had been committed."[59]

Therefore, it is incorrect to conclude that the IMT's increased focus on individual criminal responsibility precluded corporate liability. In fact, the Nuremberg Charter explicitly "authorized the IMT to criminalize legal entities, such as the Gestapo";[60] the court, however, did not use this authority because the focus remained narrowly on punishing "war criminals."[61] This decision to prosecute individual Nazis in the IMT, and not the legal entities they were working for, was largely advanced on policy grounds and not because it was perceived as legally unsound to prosecute corporations under international law.[62] Because every corporation operating in Germany had done business with the Nazis, launching a campaign against these corporations would likely have crippled the country, preventing it from rebuilding and moving on from the war.[63] The IMT settled, instead, for prosecuting individual commanders and their soldiers.

Following the IMT, the Allied Powers held a series of subsequent hearings to prosecute "war criminals and similar offenders" in the German occupation zones.[64] During these trials, the link between corporate and regime crimes was further investigated, since these companies were not merely doing business with the Nazis but were actively facilitating and supporting the war effort. German industrial agents such as IG Farben, Krupp, and Flick "faced charges for

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58 Kolieb, *supra* note 54, at 591 (citations omitted).

59 Fauchald & Stigen, *supra* note 11, at 1035.

60 *Id.*

61 *See* Charter of the International Military Tribunal art. 1, 9 ("At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.").

62 *See* Martti Koskenniemi, *Between Show Trials and Impunity,* 6 MAX PLANCK Y.B. U.N.L. 1, 9 (2002) (explaining that there was little political appetite to try large swaths of the German citizenry and industrialists for war crimes in the aftermath of World War II and thickening Cold War atmosphere).

63 *See* Matthew Lippman, *War Crimes Trials of German Industrialists: The Other Schindlers*, 9 TEMP. INT'L & COMP. L.J. 173, 176 (1995) ("The National Socialist regime placed industry under the control of the Reich Chamber of Economics.").

64 Douglas O. Linder, *The Subsequent Nuremberg Trials: An Overview*, FAMOUS TRIALS, http://perma.cc/WHA7-7VY5.

complicity in war crimes, crimes against humanity, and aggression[.]"[65] The proceedings fittingly became known as the "Trials of the German Industrials."[66]

Through these trials, the Allied Powers acknowledged that large corporations, which actively supported the Nazi regime and played key roles in Nazi crimes, could be held liable as purely judicial matter. However, due to the same policy concerns expressed at the original IMT, the prosecutors ultimately limited their charges to individual corporate officials, directors, and managers, rather than pursuing the legal entities themselves. For example, prosecutors charged high level officers for the "knowing participation in corporate criminal activities,"[67] such as contributing to "plunder and slave labor," "appropriating factories in France and the Netherlands," and "using the labor of prisoners of war."[68]

This expansion of liability from states to individual persons, and the assertion that corporate entities had in fact violated certain laws of war,[69] provided a "crucial set of precedents for the development of the modern notion of international corporate liability."[70] At the very least, this context demonstrates that the famous trials of Nazi individuals were never meant to prevent international law from extending corporate liability to legal entities.

The second judicial instrument to consider is the Rome Statute, the founding document of the International Criminal Court ("ICC").[71] Now ratified by over 120 member states,[72] the Rome Statute acts as the guiding legal instrument for the ICC, giving it the right to investigate and prosecute individuals charged with "[g]rave breaches of the Geneva Convention."[73] The ICC is intended to "be complementary to national criminal jurisdictions,"[74] and it therefore can exercise its jurisdiction only when certain conditions are met, such as when national courts

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65 Stahn, *supra* note 13, at 99.

66 *See generally* Lippman, *supra* note 63.

67 Fauchald & Stigen, *supra* note 11, at 1036.

68 *Id.*

69 Garcia, *supra* note 32, at 128.

70 *Id.* at 116.

71 *See History*, INTERNATIONAL CRIMINAL COURT, http://perma.cc/K985-MHPK.

72 *Id.*

73 Rome Statute of the International Criminal Court, art. 8(2)(a), July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002) [hereinafter Rome Statute].

74 *Id.* at art. 1.

are unwilling or unable to prosecute criminals. This is referred to as the "principle of complementarity."[75]

In a notable omission, the Rome Statute does not give the ICC the jurisdiction to prosecute legal entities.[76] While this omission initially suggests that the drafters intended to preclude international corporate liability, this is rebutted by Article 10 of the Rome Statute, which expressly states that "[n]othing 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."[77]

Moreover, the reasons why the Rome Statute did not include corporate liability are no longer relevant today. David Scheffer, the first U.S. Ambassador-at-Large for War Crimes Issues and the chief U.S. negotiator for the Rome Statute, explicitly makes this argument.[78] He explains that the reasons for not including corporate liability in the Rome Statute were "not because States agreed that corporations are above the law as a matter of right or of principle."[79] Rather, it was issues of diplomatic expedience.[80] He explains that:

> no conclusion should be drawn regarding the exclusion of corporations from the jurisdiction of the Rome Statute other than that no political consensus could be reached to use the particular treaty-based court governed by the Rome Statute to prosecute corporations under international criminal law for atrocity crimes. The Rome Statute left other avenues for holding corporations accountable for criminal conduct wide open. Any interpretation of the Rome Statute, including that found in *Kiobel*, concluding that the treaty purposely meant to express a principle of law precluding national courts of law – either civil or criminal – from proceeding against corporations for the commission of atrocity crimes or, for that matter, other violations of international law, is in error and grossly distorts what transpired during the negotiations leading to the Rome Statute.[81]

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75 David Scheffer, *The Rome Treaty Has Nothing to Do with* Jesner v. Arab Bank, JUST SECURITY (Oct. 10, 2017), http://perma.cc/D8MZ-AWCU (noting that "a fundamental underpinning of the Rome Treaty is the preference for and deference to domestic prosecution").

76 Rome Statute, *supra* note 73, at art. 25.

77 *Id.* at art. 10.

78 *See* Scheffer Brief, *supra* note 6, at 5–6.

79 *Id.* at 5.

80 Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 156–58 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (detailing the historical debate surrounding the scope of the ICC's jurisdiction and withdrawal of expanded corporate liability due, in part, to coordination problems between parties).

81 David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statue and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 360 (2011).

Given the diversity of approaches to the material elements of corporate liability, Scheffer contends that "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."[82] These diverse approaches primarily disagreed on the means of applying corporate liability, not on the question of whether corporate liability exists. [83] Of utmost relevance to STL's decision, general principles of law only require a consensus over the existence, not the application, of corporate liability.[84]

Scheffer's assertion is consistent with the official records of the U.N. Diplomatic Conference. [85] At the conference, the chairman of the working group on the general principles of law "recognized the great merits of the relevant proposal"[86] to introduce corporate criminal liability during the Rome Statute debates, but feared that such an introduction would be premature at the time given the diversity of approaches to the material elements of corporate liability.[87] He admitted that "the inclusion [of legal persons] gradually became acceptable to a wider group of countries, probably a relatively broad majority," but "[t]ime was running out."[88]

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82 Scheffer Brief, *supra* note 6, at 5; *See also* Garcia, *supra* note 32, at 122 (citing Michael J. Kelly, *Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities,* 24 EMORY INT'L L. REV. 671, 683 (2010)) ("According to Michael J. Kelly, the fact that the proposed provision did not make it into the final statute had much more to do with time constraints affecting the conference rather than 'an overt hostility to the notion of holding companies accountable.'").

83 *Cf.* Stahn, *supra* note 13, at 96:

> The methods differ across criminal traditions. Some theories attribute the conduct of agents to the company as a legal person. Criminal responsibility is thus derived from the criminal acts of agents, i.e. corporate officers and senior managers (attribution model). It is necessary to inquire whether the agent committed the offence, and whether that conduct can be ascribed to the corporation based on a relationship to the agent. . . . Newer theories admit that the conduct of agents is determined by corporate cultures and collective decisionmaking processes, and take into account the aggregated knowledge of agents. Others hold the company itself accountable for its own wrongful conduct (organizational model). This approach takes into account that collective failures such as poor organization or communication may have caused the wrong. (citations omitted).

84 *See* Schreuer, *supra* note 16, at 7 (noting that only acceptance of general principle, like procedural due process, is necessary).

85 Kaeb, *supra* note 37, at 378.

86 *Id.* (quoting United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, 275 no. 10, U.N. Doc. A/CONF.183/13 (Vol. II) (2002)).

87 *Id.*

88 *Id.* (quoting Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Roy Lee ed., 1999)).

Another possible explanation for why corporate liability was not included in the ICC is put forward by Professor Caroline Kaeb, a senior lecturer at Loyola University School of Law. Kaeb argues that the primary reason corporate liability was excluded from the Rome Statute was the complementarity principle.[89] Because not all states provided for corporate liability in their national legal systems at the time, corporate liability would allow some states *carte blanche* access to the ICC.[90] The Paris negotiator feared this would "overburden the ICC and make criminal trials longer and more expensive."[91] Concerns involving the costs of investigations and discovery were paramount, as was the lack of consensus between states regarding the principle of corporate liability. But as evidenced by the STL, this issue "has increasingly lost its relevance"[92] because of the ubiquitous adoption of corporate liability in the majority of states.[93] Scheffer concurred that "there is an increasing acceptance of criminal liability in the almost two decades since the Rome Treaty was completed."[94] Kaeb goes on to argue that "the main reason for not including corporate liability under the Rome Statute in 1998 no longer stands today due to the changing legal realities in international criminal accountability of corporations."[95]

Lastly, there were also evidentiary concerns,[96] and the practical question of how investigations were expected to function across national boundaries. This remains a legitimate hurdle for all matters of international criminal law, not just corporate liability. But by considering the inclusion of legal persons within the jurisdiction of the ICC, international law is at least capable of creating directly enforceable duties for corporations,[97] despite these hurdles.

The final court to consider is the International Court of Justice. The ICJ was established by U.N. to solve disputes between members states, and therefore it does not have jurisdiction over natural or legal persons.[98] However, in *Belgium v.*

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89 Kaeb, *supra* note 37, at 353.

90 Fauchald & Stigen, *supra* note 11, at 1038–39.

91 Stahn, *supra* note 13, at 101.

92 Kaeb, *supra* note 37, at 353.

93 *Id.* ("Specifically, the growing trend in legal systems in Europe, Asia, and South America to incorporate extraterritorial corporate liability for international crimes will likely function as a catalyst for courts to construe international criminal law so as to apply to corporations as non-state actors.").

94 Scheffer Brief, *supra* note 6, at 4.

95 Kaeb, *supra* note 37, at 355.

96 *Id.* at 378 ("Furthermore, in its infancy, the ICC would have faced tremendous evidentiary problems with regard to the criminal liability of organizations in the absence of any recognized common standards.")

97 Kolieb, *supra* note 54, at 600 (citations omitted).

98 ICJ Statute, *supra* note 7, at art. 34.

Spain,[99] a lawsuit involving a dispute between the nations of Belgium and Spain regarding a Canadian corporation, the court held that states must properly protect and regulate the behavior of natural and legal persons when it admits them into its territory.[100] In making its decision, the court stated that:

> the need to bring international law into line with present-day requirements and conditions is real and urgent. . . . In considering the needs and the good of the international community in our changing world, one must realize that there are more important aspects than those concerned with economic interests and profit making; other legitimate interests of a political and moral nature are at stake and should be considered *in judging the behavior and operation of the complex international scope of modern commercial enterprises.*[101]

The court was suggesting that corporations can and must be held accountable to the norms and standards of international law, even if the ICJ—a court concerned with state conflicts—lacked the jurisdiction to do so. Moreover, according to a report on the use of domestic legal principles in the development of international law,[102] the court in *Belgium v. Spain* affirmed that the procedure of "lifting the corporate veil" was "a general principle of law originating from domestic legal systems."[103] As will be shown in the following Section, this line of reasoning directly mirrors Judge Baragwanath's legal arguments in *Ayyash et al.* ("*Ayyash*").

III. THE SPECIAL TRIBUNAL FOR LEBANON

A. From Murder to Contempt of Court

On February 14, 2005, the former Prime Minister of Lebanon, Rafik Hariri, was assassinated in a suicide truck bomb in Beirut.[104] Four members of Hezbollah were identified as suspects in the attack, and the Lebanese government requested

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99 Barcelona Traction, Light, and Power Company (Belg. v. Spain), Judgement, 1970 I.C.J. Rep. 3, (Feb. 5).

100 1970 I.C.J. Rep. at 254-55 (separate opinion by Nervo, J.).

101 *Id.* at 248 (separate opinion by Nervo, J.) (emphasis added).

102 M. H. Mendelson QC et al., Draft Report: The Use of Domestic Law Principles in the Development International Law (2016).

103 *Id.* at 6 ¶ 16:

> After referring to the 'wealth of practice accumulated on the subject in municipal law', it stated that 'in accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law, is equally admissible to play a similar role in international law.' As the relevant passage lacks a reference to Art. 38 (1) (c) ICJ Statute and does not employ its wording, the reference to the municipal origin of the principle is the only indicator, which justifies the assertion that the Court may have affirmed a general principle of law.

104 *See* STL Primary Case, *supra* note 4.

the establishment of a tribunal of an "international character" to prosecute the alleged assassins.[105] The United Nations Security Council complied by invoking Chapter VII,[106] the power to restore international peace and security, to create the STL.[107] The STL began operations in 2009. Two years later, the STL charged four Lebanese citizens connected to Hezbollah with "conspiracy aimed at committing a terrorist act," the act being Hariri's assassination.[108] This case, known as *Ayyash et al.*, was the STL's primary case.[109]

In August 2012, Al Jadeed TV ("Al Jadeed"), a privately owned Arab TV station, aired a series titled "The Witnesses of the International Tribunal."[110] The series publicized interviews of confidential witnesses in the *Ayyash* trial.[111] After the series was broadcasted on television, it was published on both Al Jadeed's website and its YouTube channel.[112] The trial judge presiding over the *Ayyash* case issued an "order directing Al Jadeed not to disseminate confidential information alleged to be related to purported witnesses, and to remove any such information from its website and other sources."[113]

Al Jadeed failed to comply with the order and its parent company, New TV S.A.L., was charged with two counts of contempt of court for: disseminating confidential information about court witnesses, and refusing to comply with a court order.[114] This posed two critical questions for the STL: 1) can a legal entity be found guilty of contempt of court under international law? And 2) does the STL itself have the jurisdiction to prosecute a legal entity? To answer these questions, the judges looked towards the STL's organic Statute and Rules of Procedure and Evidence.

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105 S.C. Res. 1757, Attachment, Statute for the Special Tribunal for Lebanon, art 2, art. 4. [hereinafter Statute].

106 Chapter VII of the United Nations Charter sets out the UN Security Council's powers to maintain peace. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take military and nonmilitary action to "restore international peace and security". U.N. Charter art. 39, 41-42.

107 Statute, *supra* note 105 at 2 ¶ 1.

108 Prosecutor v. Ayyash et al., Case No. STL-11-01, Indictment, ¶ 1 (June 10, 2011), http://perma.cc/HB53-G6GA.

109 *See* STL Primary Case, *supra* note 4.

110 STL Contempt Cases, *supra* note 8, Al Jadeed S.A.L. & Ms Khayat, STL-14-05.

111 *Id.*

112 *Id.*

113 *Id.*

114 In re New TV S.A.L. & Al Khayat, Case No. STL-14-05/I/C/J, Redacted Version of Decision in Proceedings For Contempt With Orders in Lieu of an Indictment (Jan. 31, 2014), http://perma.cc/SL8A-3ASW.

B. The Statute and Rules of Procedure and Evidence

The STL is often referred to as a court with a hybrid nature,[115] or an internationalized court.[116] This is distinct from the traditional label of an international court,[117] but it is consistent with the STL's founding documents that described it as "a tribunal of an international character."[118] More than just a semantic distinction, the STL's international characteristics included its mixture of Lebanese and international judiciaries, as well as its primacy over Lebanese national courts.[119] However, because of insufficient political support for the inclusion of crimes against humanity and war crimes in its mandate,[120] the STL was limited to domestic crimes under the Lebanese Penal Code.[121] This made the STL "unique from previous international courts and Tribunals because it would be the first international Tribunal to apply domestic [Lebanese] law exclusively,"[122] albeit with certain modifications.[123]

The prosecutors in *Ayyash* were mandated by the Statute of the STL ("Statute") to apply the Lebanese Criminal Code.[124] The Lebanese government insisted on charging the suspected criminals with the crime of terrorism, possibly for its symbolic value. Since international law lacked a cohesive definition of

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115 Francisca Ankrah & Marie Abou-Jaoude, *Victim Participation in The Special Tribunal for Lebanon Fuels Reflections on International Criminal Law and the Lebanese Justice System*, INTERNATIONAL JUSTICE MONITOR (Sep. 7, 2017), http://perma.cc/N7QW-UP5C.

116 William A. Scahbas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character Equivalent to an 'International Criminal Court'?"*, 21 LEIDEN J. INT'L L. 513, 523 (June 2008).

117 F. De Jonge, *International Corporate Criminal Liability at the Special Tribunal for Lebanon:* Prosecutor v. Karma Al Khayat and Al Jadeed, PEACE PALACE LIBRARY (May 8, 2015), http://perma.cc/AZ9Y-R566.

118 Statute, *supra* note 105, at 12.

119 *Id.*

120 Scahbas, *supra* note 116, at 519.

121 U.N. Secretary-General, *on the establishment of a special tribunal for Lebanon*, at 2 ¶ 7, U.N. Doc. S/2006/893 (Nov. 15, 2006) ("While in all of these respects the special tribunal has international characteristics, its subject matter jurisdiction or the applicable law remain national in character, however.").

122 Janice Yun, *A Tribunal of an International Character Devoid of International Law*, 7 SANTA CLARA J. INT'L L. 181, 181 (2010).

123 *See* Statute, *supra* note 105, art 28 (outlining that the Tribunal will follow Lebanese criminal procedure rules "as well as by other reference materials").

124 *Id.* art. 2.

terrorism,[125] Lebanese domestic law provided "the means to prosecute the perpetrator of the terrorist attacks,"[126] under its definition.

Procedurally, the STL was governed by the specific Rules of Procedure and Evidence ("RPE") it adopted in 2009.[127] According to the RPE, when the judges of the STL confronted an ambiguity, they had to try and resolve it in a manner consistent with the "spirit of the Statute."[128] Furthermore, they could rely on interpretative principles drawn from the Vienna Convention on the Law of Treaties, international standards on human rights, and the general principles of international criminal law and procedure.[129] For example, if the judges found an ambiguity regarding the STL's jurisdiction, they could reference principles of international law to resolve the ambiguity. And only if the ambiguity remained unresolved could they turn to the Lebanese Code of Criminal Procedure,[130] which explicitly allowed for the prosecution of legal entities.[131]

C. The Trial

After Al Jadeed refused to comply with the trial judge's order to take down the documentary footage, their parent company, New TV S.A.L., was charged with two counts of contempt of court. New TV S.A.L. moved to dismiss the case on the grounds that a legal entity cannot be found liable for violating international law.

According to rule 60 *bis*(A) of the RPE, the STL had jurisdiction to "hold in contempt those who knowingly and wilfully [sic] interfere with its administration of justice."[132] Unlike the jurisdiction described in Article 3 of the STL's Statute, the RPE did not explicitly limit contempt crimes to natural persons. The judges presiding over the STL disagreed on whether a distinction could be made between the jurisdiction provided in the Statute, which limited the court to prosecuting natural persons, and the jurisdiction provided in RPE, which had no such limit. The following Section briefly covers the main arguments.

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125 *See* Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 NEW CRIM. L. REV. 494 (2013).

126 Yun, *supra* note 122, at 187.

127 *See* Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.10, (Mar. 20, 2009) [hereinafter RPE].

128 *Id.* at 3.

129 *Id.*

130 *Id.*

131 LEBANESE PENAL CODE [hereinafter LPC] art. 210, ¶ 2 ("Legal persons shall be criminally responsible for the activities of their directors, management staff, representatives and employees when such activities are undertaken on behalf of or using the means of such legal persons.").

132 RPE, *supra* note 127, at Rule 60 *bis*(A).

The procedural history is as follows: First, the President of the STL assigned an acting judge to hear the arguments in the contempt hearing. The acting contempt judge ruled that there was ambiguity in the Statute and that international law allows for the prosecution of a corporate entity. Second, the presiding contempt judge reversed this decision on the grounds that there can be no distinction between the jurisdiction found in the Statute and the RPE. Third, an Appeals Panel affirmed the initial decision and held that corporate liability is a general principle of international law.

* * *

Judge David Baragwanath, in his capacity as an acting contempt judge, found that Rule 60 *bis* of the RPE extended to acts of contempt allegedly undertaken by legal persons.[133] His logic was simple: because criminal liability for legal persons had become a "familiar and increasingly pervasive legal construct in national systems,"[134] including the country in which the legal entity in question committed its crime,[135] the STL should not be bound by antiquated principles, and therefore had the jurisdiction to prosecute a media company. He held there was prima facie evidence that New TV S.A.L. violated Rule 60 *bis*(A) of the RPE[136] for "knowing and wilfull [sic]" interference in the administration of justice by publishing information on purportedly confidential witnesses, and failing to comply with a court order to remove the broadcast from its website and YouTube channel.[137]

In his decision, Judge Baragwanath drew a distinction between the STL's jurisdiction to hold persons in contempt, an authority necessary to ensure the "administration of justice," and its "primary purposes," to prosecute persons suspected of killing the former Prime Minister.[138] He claimed that in order to ensure the "administration of justice" in the court room, the obstruction of justice powers granted by Rule 60 *bis* must be read to cover acts of contempt allegedly undertaken by legal persons. Otherwise, corporate entities could freely interfere

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133 In the Case Against New TV S.A.L Karma Mohamed Thasin Al Khayat, STL-14-05/I/CJ, Decision in Proceedings for Contempt with Order in Lieu of an Indictment, ¶ 4 (Special Trib. for Leb. Jan. 31, 2014) [hereinafter Initial Decision].

134 *Id.* at ¶ 18.

135 *Id.* at ¶ 26.

136 *Id.* at ¶ 4(i).

137 *Id.*

138 *Id.* at ¶ 24 ("Whether a legal person can be accused under Articles 2 and 3 of the Statute is a very different question from whether a legal person can be held in contempt for knowingly and wilfully [sic] interfering with the administration of justice.").

with the judicial process.[139] In fact, he believed "[i]t would not only be naive but dangerous to accept that only natural persons can interfere with the administration of justice."[140]

Although Judge Baragwanath acknowledged that this would be the first time an international court prosecuted a legal entity,[141] he found sufficient evidence to conclude that corporate liability could be applied as a general principle of law. Specifically, he recognized that "the last couple of decades have witnessed major change[s]" culminating in a "general trend in most countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers."[142] Corporate liability, he argued, had become common practice among the nations of the world, and could thus be the basis for prosecuting a legal entity in an international court.

His final piece of evidence for expanding the definition of "persons" to include legal entities was that Lebanon, along with a growing number of civil law countries,

> deliberately rejected *societas delinquere non potest* [corporations cannot be criminal] in favour [sic] of an approach which holds legal persons accountable for criminal behaviour [sic] attributable to them. It would be bizarre for this Tribunal to deny protection of its due process against corporate interference because of an ancient maxim that the State it serves has rejected.[143]

Following this groundbreaking decision, Judge Baragwanath recused himself from the contempt hearings and designated Judge Nicola Lettieri to be the official contempt judge to review his prima facie decision.[144]

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After Judge Baragwanath issued his prima facie decision, the presiding contempt judge was charged with comprehensively reviewing the issue. Several months of deliberation later, the contempt judge, Nicola Lettieri, rejected the holding that Rule 60 *bis* applied to legal entities.[145] He reversed the decision on the

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139 *Id.* at ¶ 28.

140 *Id.*

141 *Id.* at ¶ 25 ("I reach this conclusion mindful of its novelty in the international criminal justice context. To date no contempt case has been brought against a legal person in an international criminal tribunal or court.").

142 *Id.* at ¶ 26 (citation omitted).

143 *Id.*

144 *See* In the Case Against New TV S.A.L Karma Mohamed Thasin Al Khayat, STL-14-05/PT/CJ, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, ¶ 3 (Special Trib. for Leb. July 24, 2014) [hereinafter Lettieri Decision].

145 *Id.* at ¶ 58.

narrow basis that the wording of the Statute does not apply to legal persons.[146] He held that "[h]owever preferable *de lege ferenda* ['with a view to the future law'] it might be to have corporations answer to charges of contempt, this preference does not suffice to solidly ground the Tribunal's jurisdiction *de lege lata* ['the law as it exists']."[147]

Judge Lettieri based his ruling on principles of statutory interpretation. While he conceded that, "international law does not prohibit the imposition of criminal liability for corporations,"[148] he argued that no general principle of law allowed the "ordinary meaning of 'person' . . . to include legal persons."[149] Furthermore, he believed that the lack of ambiguity with relation to the word "person" and the "lack of consensus in the international system and among domestic systems on corporate criminal liability, compel a finding that corporate liability under Lebanese law is inapplicable here."[150]

Judge Lettieri attempted to follow his mandate as narrowly as possible and not make a judgment on evolving standards of international corporate liability.[151] His decision overturned the original indictment against New TV S.A.L. placing the case into the hands of an Appeals Panel forced to address both the statutory interpretation issues and the broader question of whether corporate liability is applicable under international law.

* * *

Unlike Judge Lettieri, the Majority of the Appeals Panel ("the Majority") found that ambiguity existed with respect to the term "person" in Rule 60 *bis*.[152] Therefore, they turned to Rule 3, which called for a teleological reading of Rule 60 *bis* in line with the "spirit" rather than the mere "letter of the Statute."[153] According to Rule 3, this reading should be informed by the principles of interpretation laid down in "customary international law . . . international

146 *Id.*

147 *Id.* at ¶ 68.

148 *Id.* at ¶ 75.

149 *Id.*

150 *Id.* at ¶ 78.

151 *Id.* at ¶ 68 (Judge Lettieri wanted the decision to have at "*some* basis—at least implicit—in Rule 60 *bis*, which is the provision specifically addressing contempt and obstruction of justice.") (emphasis in original).

152 Majority Decision, *supra* note 21, at ¶ 60.

153 *Id.* at ¶ 38.

standards on human rights . . . general principles of international criminal law and procedure and . . . [as needed] the Lebanese Code of Criminal Procedure."[154]

The Majority explicitly criticized Judge Lettieri for "not giving sufficient weight to domestic practice under Rule 3 (A) in interpreting the trend criminalizing the acts of legal entities."[155] After conducting a thorough examination of evolving international standards,[156] as well as trends in national legal systems,[157] the Majority found there was "a concrete movement on an international level backed by the United Nations for . . . corporate accountability,"[158] and that "there is an emerging shared international understanding on the need to address corporate responsibility."[159] This emerging trend placed "positive obligations" on both natural persons and legal entities.[160] Therefore, the Majority held that the term "person" may "include legal entities for the purposes of Rule 60 *bis*."[161]

Because general principles of law only require a showing that most countries adopt the same notion,[162] once the Majority empirically found that "corporate liability for serious harms is a feature of most of the world's legal systems,"[163] they concluded that corporate liability "qualifies as a *general principle of law*."[164] Although corporate liability laws are not identical across jurisdictions, the Majority found they are "sufficiently similar"[165] to signify a major trend.[166] As a matter of principle,

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154 RPE, *supra* 127, at Rule 3.

155 Majority Decision, *supra* note 21, at ¶ 60.

156 *Id.* at ¶ 45–51.

157 *Id.* at ¶ 52–56.

158 *Id.* at ¶ 46.

159 *Id.*

160 *Id.*

161 *Id.* at ¶ 60 (emphasis in original).

162 Antonine Fabiani Case, X REP. OF INT'L ARBITRAL AWARDS 83, 117 (July 31, 1905) ("By reference to the general principles of the law of nations on the denial of justice, i.e., to the *rules common to most legislations*.") (emphasis in original).

163 Majority Decision, *supra* note 21, at ¶ 67.

164 *Id.* (emphasis added).

165 *Id.* at ¶ 51.

166 *Id.* at ¶ 58 ("[I]t is apparent that in a majority of the legal systems in the world, corporations are not immune from accountability merely because they are a legal—and not a natural—person."). Among the European states the court found to have corporate accountability include Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Hungary, Iceland, Lithuania, the Netherlands, Norway, Portugal, Romania, Spain, Switzerland, and the U.K. Germany and Italy were the two outliers. In addition to the European states, the court considered the following countries that also adopted a form of corporate liability: Australia, Bahrain, Bangladesh, Brazil, Canada, Chile, China, Egypt, Guatemala, India, Indonesia, Jamaica, Japan, Kenya, Lebanon, Malaysia, Morocco, New Zealand, Senegal, South Africa, Syria, U.A.E., and the U.S. *Id.* at ¶ 52, 55.

"judicial remedies are not barred against a legal person on account that some national laws limit the applicability of criminal law to legal persons."[167] Accordingly, the Majority ruled that the STL had personal jurisdiction over legal entities in contempt proceedings, and reinstated the indictment against Al Jadeed.[168]

Judge Walid Akoum dissented and objected to the Majority's interpretation of the term "person," but he did not discredit or disparage the Majority's analysis of evolving international legal principles.[169] Instead, he based his decision on what he called the "fundamental and holy principles of criminal law,"[170] namely, "*nullum crimen sine lege scripta* (crimes must be based on written provisions), *nullum crimen sine lege stricta* (strict construction of criminal provisions) and *in dubio pro reo* (when in doubt, side for the accused)."[171] Judge Akoum's dissent can be distilled into two points.

First, he took issue with the notion that "merely including the word 'person' in the relevant law and/or treaty is enough to extend its application to legal persons."[172] Judge Akoum could not find prior examples of liability extending to corporations "when only the word 'person' had been used."[173]

Second, Judge Akoum disagreed with the Majority's reasoning that the "inherent contempt power of the Tribunal can be broader than the jurisdiction *ratione personae* as contained in the Tribunal's Statute."[174] He pointed to what he thought was an illogical consequence of this ruling: that a legal entity could be criminally prosecuted for contempt in the STL but that it could not "be prosecuted for participation in the killing of former Prime Minister Hariri"—"the very reason why this Tribunal was created in the first place."[175] He described this as an "odd reality" and stated that "[i]f this strange result was indeed the intention of the drafters, then in my view this outcome should have been provided for explicitly, and not arrived at through (expansive) judicial interpretation."[176]

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167 *Id.* at ¶ 48.

168 *Id.* at ¶ 93.

169 *See* In the Case Against New TV S.A.L Karma Mohamed Thasin Al Khayat, STL-14-05/PT/AP/AR126.1, Dissenting Opinion of Judge Walid Akoum (Special Trib. for Leb. Oct. 2, 2014) [hereinafter Dissenting Opinion].

170 *Id.* at ¶ 2.

171 *Id.*

172 *Id.* at ¶ 17.

173 *Id.* at ¶ 21.

174 *Id.* at ¶ 4.

175 *Id.*

176 *Id.*

Most noteworthy in Judge Akoum's dissenting opinion is that he did not "offer [a] view on whether or not customary international law or general principles of law presently recognise [sic] corporate criminal liability. Should they not, [he] neither purport[ed] to impede nor prevent their future crystallisation [sic] and recognition through State action and/or subsequent judicial opinions."[177]

He went on to say that it "would be unwise to read my opinion as to stifle a clear trend towards the recognition of corporate criminal liability." [178] Just like Judge Lettieri before him, Judge Akoum believed the STL *could* have been given the authority to prosecute a legal entity; he simply felt that its jurisdiction to do so in this particular context was "generally limited by the terms contained in the Statute." [179]

Once the Majority decided that legal entities were within the STL's jurisdiction, the case was allowed to proceed against Al Jadeed and the contempt judge had to determine whether the corporate defendant was actually guilty of the alleged crime. In September 2015, the Judge Lettieri rendered his judgment against Al Jadeed, finding the media company not guilty of all counts.[180] The judgment was appealed and upheld in March 2016.[181] Therefore, although Al Jadeed was the first legal entity to be indicted in a court of international law, it was not the first legal entity to be convicted. However, it paved the way for a later conviction.

In a concurrent hearing that occurred in the same STL contempt court, the media company Akhbar Beirut S.A.L. was also charged and indicted for violating Rule 60 *bis* for publishing articles that contained information about confidential witnesses in the *Ayyash* case on their websites and newspapers.[182] The corporate defendant immediately appealed the indictment on the same grounds as *Al Jadeed* (that liability cannot extend to legal entities), and on January 23, 2015, the Appeals Panel affirmed their findings in the *Al Jadeed* case, holding that the STL had jurisdiction over legal entities.[183] Although the affirmation of the Akbar Beirut S.A.L. indictment did not add anything new to the discussion, it was important because it confirmed the findings of *Al Jadeed*, indicating it is "no longer an isolated decision."[184]

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177 *Id.* at ¶ 2.

178 *Id.*

179 *Id.* at ¶ 3.

180 Contempt Cases, *supra* note 8, Al Jadeed S.A.L. & Ms Khayat (STL-14-05).

181 *Id.*

182 Contempt Cases, *supra* note 8, Akhbar Beirut S.A.L. & Mr Al Amin (STL-14-06).

183 *Id.*

184 Nadia Bernaz, *Special Tribunal for Lebanon: Appeals Panel Confirms Jurisdiction over Corporations in Akhbar Beirut S.A.L. Contempt Case*, RIGHTS AS USUAL (Feb. 5, 2015), http://perma.cc/U6D4-4C5T.

However, this indictment resulted in a conviction. In 2015 Judge Lettieri found corporate defendant Akhbar guilty, marking the first time a legal entity was convicted and sentenced under international law.[185] Because the Appeals Panel provided no clear guidance on the material elements of convicting and sentencing a legal entity, Judge Lettieri had to identify the elements and parameters himself. Recognizing the lack of any relevant international convention, international custom, or general principle of law with respect to the elements of corporate liability, Judge Lettieri concluded that the fairest thing to do was to apply Lebanese law.[186] He reasoned that this would preempt claims that the corporate defendant was unfairly charged of a crime it could not have foreseen, because the corporation was domiciled in and substantially operated within Lebanon, a country that recognizes corporate accountability.[187]

IV. RESPONDING TO CRITICISM OF THE STL

The STL's holding that corporate liability is a general principle of law should have expanded corporate accountability in the international context. However, in the four years since this case was decided, no international court or prosecutor has cited the STL to expand jurisdiction over a corporate entity. This is likely the result of criticism that has sought to delegitimize or limit the holding in three distinct ways.

The first critique challenges the substantive holding, arguing that the STL prematurely held corporate liability to be a general principle of law. The second critique challenges the legal process, and the third applauds the normative ambition of the STL*,* but argues that the holding is limited in scope to contempt crimes.[188]

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185 Contempt Cases, *supra* note 8, Akhbar Beirut S.A.L. & Mr Al Amin (STL-14-06).

186 In the Case Against Akhbar Beirut S.A.L. Ibrahim Mohamed Ali Al Amin, STL-14-06/T/CJ, Public Redacted Version of the Judgement, ¶ 44 (Special Trib. for Leb., Jul. 15, 2016).

187 *Id.* at ¶ 45 ("Thus, under Lebanese law, in order for the corporate Accused to be held criminally responsible for the count charged, the prosecution must: (1) establish the criminal responsibility of a specific natural person; (2) demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative (someone authorized by the legal person to act in its name) or an employee/worker (who must have been provided by the legal body with explicit authorization to act in its name) of the corporate Accused; and (3) prove that the natural person's criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.").

188 Statute, *supra* note 105, art. 2.

A. In Defense of the Holding

The primary criticism of the STL's decision is that it is too soon to label corporate liability a general principle of law. This argument is bolstered by decades of impunity for corporate entities in international courts, and the historic principle *societas delinquere non potest* ("a legal entity cannot be blameworthy").[189] However, in light of recent developments in state practice and the international community, critics of the STL do not seriously advance this outdated argument.[190] Instead, they attempt to downplay the significance of the decision by calling it premature.[191]

For example, Professor Stahn recognized that there are at least "seventeen multilateral international instruments with provisions on corporate criminal liability,"[192] and he acknowledged that, "[t]he classical view that international criminal law is a system without a space for corporate criminal liability is under challenge."[193] Yet, because the international community had not decided what areas and in what forums corporate responsibility may best be pursued, he was

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189 *See* Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L. J. 126, 129 (2008).

190 *See* Gerhard O. W. Mueller, *Mens Rea and the Corporations: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 38–41 (1957) (discussing the contemporary rejection of the historical concept that legal persons are unable to form a mens rea or to be subject to criminal liability).

191 Perhaps they are concerned about cases such as *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), a U.S. court case in which the Second Circuit significantly narrowed the scope of corporate liability for violations of international law in the United States. *Id.* at 125. (The plaintiffs relied on the Alien Tort Statute ("ATS"). The ATS which confers on district courts "original jurisdiction of 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." 28 U.S.C. § 1350 (2012). In its decision, the court expanded on what was otherwise a domestic legal issue by providing a comprehensive review of corporate accountability under international law. Central to the court's decision was the question of "whether corporations can be subject to liability for violations of customary international law."). *Id.* However, this domestic decision was based on customary law, and not general principles of law. And the Second Circuit made this decision despite the fact that "Judge Leval and prominent international law scholars such as David Scheffer and Ralph Steinhardt (on behalf of fifteen other international law scholars as amici in support of petitioners in *Kiobel*), all conclude[d] that international law does not exempt corporations from its scope." *Kaeb*, *supra* note 37, at 363. Although the decision had no direct precedential power on international law, general principles are derived from domestic practice, and the court's declaration that corporations cannot be liable for international crimes under international law could possibly have a chilling effect on an otherwise strong trend towards corporate accountability. *See generally* DESISLAVA STOITCHKOVA, TOWARDS CORPORATE LIABILITY IN INTERNATIONAL CRIMINAL LAW (2010).

192 Stahn, *supra* note 13, at 95; *see* Bert Swart, *International Trends Towards Establishing Some Form of Punishment for Corporation*s, 6 J. INT'L CRIM. JUST. 947, 949 (2008) (noting in 2008 "a total of 17 multilateral international instruments containing one or more provisions on corporate criminal liability, while before 1997 none existed at all.").

193 Stahn, *supra* note 13, at 105.

unwilling to support the STL's decision and instead said "it is certainly too early to claim that corporate criminal responsibility is a general principle of law."[194]

Similarly, Professor Kaeb wrote that "[c]orporate criminal liability prescriptions for involvement in international crimes have become increasingly common in legal systems around the world."[195] She observed that "a growing number of legal systems around the world have included corporate liability for international crimes into their criminal codes."[196] In fact, she argued it is almost impossible to ignore the growing international trend.[197] And she believed, this growing trend would "likely function as a catalyst for courts to construe international criminal law so as to apply to corporations as non-state actors."[198] But, after examining the STL's holding, she argued that "further specification on the part of the courts and scholars will be required to determine whether corporate liability is primarily a matter of interpretation under the statute of the respective international tribunal, or whether it has developed into a general principle of international law."[199]

This hesitation to categorically embrace the STL's holding does not accurately reflect developments from the U.N., multi-lateral governmental organizations, and domestic legal regimes. In fact, the sources of international law all point to a common principle shared by national systems, supporting the STL's conclusion that corporate liability has become a general principle of law. Indeed, as Scheffer aptly notes, "[t]he trend lines globally point towards more, not less, accountability for both natural persons and corporations in the commission of atrocity crimes,"[200] and "[t]his trend complements the general principle of law of corporate civil liability that existed in 1998 [the creation of the Rome Statute] in practically all legal systems."[201] Alexandra Garcia, a Harvard Law School fellow, found that the "recognition of corporate criminal liability has cut across borders and legal systems,"[202] revealing "an emerging common pattern of generalized practice."[203] This corroborated another comparative study that uncovered "common lines of conceptualization, rather than stark differences, between

194 *Id.* at 124.

195 Kaeb, *supra* note 37, at 353.

196 *Id.* at 351–52.

197 *Id.* at 352.

198 *Id.* at 353.

199 *Id.* at 371.

200 Scheffer Brief, *supra* note 6, at 31.

201 *Id.* at 20.

202 Garcia, *supra* note 32, at 106.

203 *Id.* at 107.

common law and civil law systems in their acceptance of corporate criminal liability."[204]

As Kaeb predicted, this domestic trend is already beginning to act as a catalyst for international institutions, as seen by the U.N. Human Rights Council's[205] adoption of the United Nations' Guiding Principles on Business and Human Rights ("UNGP").[206] The UNGP is grounded on the principle that it is a state's duty to protect against human rights abuses in its territory "by third parties, including business enterprises."[207] This created the first global standard for preventing and protecting human rights abuses related to business activity. However, this is not a binding legal treaty, but a normative "social contract" that merely calls on each nation to comply with its respective domestic law in order to prevent or mitigate corporate abuse.

Nonetheless, the UNGP remains the strongest international agreement in favor of corporate accountability. Even though it alone cannot act as the basis for a prosecution of a legal entity, it supports the STL's argument that there is a general trend toward corporate accountability. By 2010, scholars were already arguing that conceptually, "transnational business corporations are bound by the prohibitions underlying the core crime of international law, despite the fact that currently no international criminal court or tribunal has jurisdiction to hold them accountable."[208]

Further evidence of this general principle lies in the Malabo Protocol, which extends the jurisdiction of the proposed African Court of Justice and Human and Peoples Rights to "legal persons, with the exception of States."[209] James G. Stewart, who served as an Appeals Counsel with the Prosecution of the U.N. International Criminal Tribunal for the former Yugoslavia and as a prosecutor in

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204 *Id.* at 106 (referencing Markus D. Dubber, *The Comparative History and Theory of Corporate Criminal Liability*, 16 NEW CRIM. L. REV. 203, 204 (2013)).

205 "The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe." UNITED NATIONS HUMAN RIGHTS COUNCIL, http://perma.cc/YCD4-9U4G.

206 UNHCR, Guiding Principles on Business and Human Rights, U.N. Doc. HR/PUB/11/04 (2011).

207 *Id.* at 3.

208 Volker Nerlich, *Core Crimes and Transnational Business Corporations*, 8 J. INT'L CRIM. JUST. 895, 908 (2010); *see also* G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 1 (July 18, 1976) (acknowledging the capacity of organizations and institutions to commit the crime of apartheid).

209 Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, A.U. Doc. No. STC/Legal/Min. 7(1) Rev. 1 (May 15, 2014), at 35, art. 46(C); *see also* Matiangai Sirleaf, *The African Justice Cascade and the Malabo Protocol*, 11 INT'L J. TRANSITIONAL JUST. 71, 76–77 (2017); List of Countries Which Have Signed, Ratified/Acceded to The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AFRICAN UNION (Mar. 20, 2019), http://perma.cc/X9F3-P6HE.

the International Criminal Tribunal for Rwanda,[210] recently described the recognition of corporate criminal liability for international crimes as "the next obvious 'discovery' in corporate responsibility."[211] And a growing body of scholarship and international legal instruments suggests that "alongside the rights and benefits that many transnational corporations ("TNCs") now enjoy under the international legal order are international legal duties to abide by core human rights and humanitarian law standards."[212]

B. In Defense of the Legal Process

The second group of critics can be further divided into two camps: the first rejects the "judicial activism" of the court, and the second argues that the distinction made between jurisdiction for contempt and core crimes invalidated the underlying holding.

Some critics believe the STL partook in "judicial activism,"[213] or the more pernicious activity of "judicial vigilantism."[214] This is often a criticism leveled against judges believed to have retroactively made legal arguments to justify preordained decisions.[215] For example, Karlijn van der Voort, a legal officer for the ICC's Office of Public Counsel, attacked the STL Majority's "idealistic approach" as unconvincing and lacking a "strong legal basis for the future development of corporate criminal liability."[216] Dov Jacobs, the former editor-in-chief of the European Journal of Legal Studies, called the majority's decision a "molotov cocktail on the principle of legality"[217] and claimed that "the arguments raised in the decision belong more to a policy paper than a judicial decision."[218] More specifically, Jacobs believed that the Appeals Panel "look[ed] for anything under international law that would not allow them to interpret

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210 *Biography*, JAMES G. STEWART, http://perma.cc/8UXK-JBCF.

211 James Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121, 121 (2014).

212 Kolieb, *supra* note 54, at 574 (2017).

213 Rees, *supra* note 5

214 Jacobs, *supra* note 5.

215 Judicial activism refers to "court rulings that are partially or fully based on the judge's political or personal considerations, rather than existing laws." *Judicial Activism*, ONLINE LEGAL DICTIONARY, http://perma.cc/37TL-LG4M.

216 Karlijn Van der Voort, *STL Appeals Chamber Decides It Can Prosecute Legal Persons for Contempt*, INTERNATIONAL JUSTICE MONITOR (Oct. 13, 2014), http://perma.cc/Y77J-H7J4.

217 Dov Jacobs, *A Molotov Cocktail on the Principle of Legality: STL confirms contempt proceedings against legal persons*, SPREADING THE JAM (Oct. 6, 2014), http://perma.cc/3LPR-KTTZ.

218 Jacobs, *supra* note 5.

person" in a way to "fight against impunity."[219] He argued that "[a]t this point, [it was] not even teleological interpretation anymore, it [was] backwards reasoning in its purest form!"[220]

Although this is not an unfair characterization of the process informing the Appeals Panel's decision, it is more aptly named "legal pragmatism," which is a forward-looking and policy-based adjudication method that "regard[s] adherence to past decisions as a (qualified) necessity rather than as an ethical duty."[221] When a legal pragmatist is confronted with a gap in the application of a law to a certain set of facts, they fill the gap with policy and social considerations. While this method of jurisprudence "was reasonably shocking seventy years ago," pragmatism in "the ensuing decades . . . has gradually been absorbed into American common sense."[222]

In this case, the STL was motivated by principles of fairness and justice; the President of the STL noted that "modern history is replete with examples where great harm has been caused by corporations with the advantages that result from the recognition of their status as legal persons."[223] This does not, in and of itself, discredit the legal analysis. Even if public policy concerns underlie the decision, a moral impetus is not sufficient to discredit the legal basis of the opinion itself.[224]

Beyond general criticisms of the judicial activism in *Ayyash,* some critics took specific aim at what they claim to be the false distinction the STL made between jurisdiction of core crimes and jurisdiction of contempt crimes. These critics claim that this "decision falls down . . . in the illogical consequences of its ultimate

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219 Jacobs, *supra* note 217.

220 *Id.*

221 RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 1, 60 (2003).

222 Richard Rorty, T*he Banality of Pragmatism and the Poetry of Justice*, *in* PRAGMATISM IN LAW AND SOCIETY 89, 89 (Michael Brint & William Weaver eds., 1991).

223 Yvonne McDermott Rees, *Criminal Liability for Legal Persons for Contempt Returns to the STL,* HUMAN RIGHTS DOCTORATE BLOGSPOT (Oct. 8, 2014), http://perma.cc/3QRE-Z7QB (citation omitted).

224 Consider the example of a judge, confronted with a man who killed another man out of a fear for his own life. Pretend the judge is newly appointed and knows nothing of criminal law, but her moral compass tells her that this man deserves a more lenient sentence than a man who kills for a selfish reason. And so, the judge might labor to look in the law to see if there was anything that would prevent the judge from giving the man a more merciful punishment. In doing so, the judge would likely find the doctrine of "self-defense," and it would be perfectly within the judge's right to apply this doctrine. This hypothetical, at its most basic level, could also be described as backwards reasoning. To discredit the judge's decision, however, one must still prove that the self-defense doctrine does not apply, not just that the judge wanted to grant leniency. Because, as long as the judge is operating within the legal framework given, her decision is valid. In the *Ayyash* case, these restraints took the form of an empirical inquiry into whether corporate liability had become a general principle of law. Simply calling the outcome of this decision the result of judicial activism is not enough to invalidate it.

conclusion - that corporate liability only attaches to contempt offences."[225] They believe "the arguments raised in favor of corporate responsibility for contempt apply equally to corporate responsibility for any criminal conduct."[226] Citing the STL's own language, Dov Jacobs asks, "[i]f a corporate entity were behind the Hariri assassination, would it not be 'bizarre' to deny victims justice against such [sic] entity that they would have gotten before a Lebanese court for the same acts?"[227]

As a threshold matter, even if there is merit to the argument that the STL incorrectly distinguished between jurisdiction for core and contempt crimes, this criticism is orthogonal to the claim that *Ayyash* was correct in its analysis of corporate liability under international law. Although the ultimate verdict was a charge of contempt, the STL did not analyze the principle of corporate liability exclusively within the context of contempt crimes, and the validity of their analysis does not hang on this procedural question of jurisdiction.

That being said, it is neither strange nor "bizarre" for a court to have expansive jurisdiction to ensure its administration of justice, even when this jurisdiction is not explicitly mentioned in the court's statute. In fact, a quick survey of the historical and modern applications of the crime of contempt supports the majority's distinction. The *locus classicus* in the law of contempt of court[228] is the seminal case of *Roach v. Garvan*,[229] in which the court "sent the printer of the *St. James's Evening Post* to prison for publishing an article about witnesses in a pending case."[230] Not only does this case remain the law in England today,[231] but the following statement by the court establishes the logic behind an expansive jurisdiction for contempt:

> Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the publick [sic] against persons concerned as parties in causes, before the cause is finally heard. [232]

And in the modern era, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court

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225 Rees, *supra* note 223.

226 Jacobs, *supra* note 5.

227 *Id.*

228 *See* Zelman Cowen, Professor of Public Law and Dean of the Faculty of Law at the University of Melbourne, lecture given at the Law Summer School held at the University of Western Australia, *Some Observations on the Law of Criminal Contempt* (1965) *in* 7(1) UWA L. REV. 1, 1.

229 *St. James Evening Post Case* (1742) 26 Eng. Rep. 683.

230 John W. Oliver, *Contempt by Publication and the First Amendment*, 27 MO. L. REV 171, 174 (1962).

231 *Id.* at 186.

232 2 Atk. at 469, 26 Eng. Rep. at 683.

for Sierra Leone were all called upon to consider cases of contempt of court.[233] Although none of their statutes explicitly empowered the judges to use their rules of procedure and evidence to create new charges or criminal offenses, the chambers of these tribunals consistently held that judges are allowed to adopt rules to preserve the exercise of their jurisdiction and safeguard their basic judicial functions.[234] Such conduct was deemed to be within "the *inherent jurisdiction* of Tribunals."[235] This is consistent with the STL's position that even if the STL's Statute does not "specifically provide for contempt . . . [t]he Tribunal's power to prosecute this crime derives from its inherent jurisdiction to protect the integrity of the judicial process and to ensure the proper administration of justice."[236]

Moreover, it is not entirely clear why the ordinary meaning of "person" in international law should not include corporate legal persons. None of the critics provide any affirmative evidence to support this position, and the readily available evidence points to the contrary. If the ordinary meaning of "person" did not encompass legal persons, why did the drafters of the statutes of the International Criminal Court,[237] the International Criminal Tribunal for Rwanda,[238] and the International Criminal Tribunal for the Former Yugoslavia[239] see the need to

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233 Silvia D'Ascoli, *Sentencing Contempt of Court in Criminal Justice*, 5 J. INT'L CRIM. JUST. 735, 735–736 n.1 (2007) ("In chronological order, as of 30 April 2007, the cases in which convictions were pronounced for contempt of the tribunal at the ICTY are the following: Finding of Contempt of the Tribunal, Aleksovski (IT-95-14/1-R77), Trial Chamber, 11December 1998; Judgment on Allegations of Contempt against Prior Counsel Milan Vujin, Tadić (IT-94-1-A-R77), Appeals Chamber, 31 January 2000; Decision on Contempt of the Tribunal, Milošević (Contempt Proceedings Against Kosta Bulatović) (IT-02-54-R77.4), Trial Chamber, 13 May 2005; Judgment on Contempt Allegations, Beqa Beqaj (IT-03-66-T-R77), Trial Chamber, 27 May 2005; Judgment, Marijacić and Rebić (IT-95-14-R77.2), Trial Chamber, 10 March 2006; Judgment, Jović (IT-95-14/2-R77), Trial Chamber, 30 August 2006; Judgment on Allegations of Contempt, Margetić (IT-95-14- R77.6), Trial Chamber, 7 February 2007.").

234 *Id.* at 737.

235 *Id.* (emphasis in original).

236 Initial Decision, *supra* note 133, at ¶ 10.

237 Rome Statute, *supra* note 73, at art. 25(1) ("The Court shall have jurisdiction over natural persons pursuant to this Statute.").

238 Statute of the International Tribunal for Rwanda, art. 5*, adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) ("The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.").

239 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 6, U.N. Doc. S/25704 at 38, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council on 25 May, 1993, U.N. Doc. S/RES/827 (1993) ("The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.").

specifically limit the jurisdiction of these courts to "natural persons,"[240] while there is no such limit in the STL's Rules of Procedure and Evidence?[241] The answer suggests that the drafters recognized that an ordinary interpretation of the word "person" does in fact include corporate legal persons.

C. The Scope of the Decision

The third group of critics welcomed the STL decision as the "foundation for further development of liability of corporate entities in international criminal law"[242] and "an important step to address a structural bias inside international criminal law against the responsibility of legal persons."[243] However, this group of international scholars argues that the true impact of the STL decision is limited in scope,[244] because the decision is "about an offence against the administration of justice, and not about a core crime over which the Tribunal has jurisdiction,"[245] and is "at least partially based on Lebanese law."[246] Unlike the first group of critics, these skeptics do not believe the distinction between contempt crimes and the core crimes under the jurisdiction of the STL invalidates the decision, but rather that it limits its application in future cases. They worry that the expansion of corporate liability will be limited to contempt crimes, as opposed to the core crimes international law traditionally governs. They expect this limitation because contempt powers are uniquely vital to the effective authority of courts and thus require a more expansive and flexible interpretation than core crimes.

The STL's underlying justification for expanding the definition of "person" to include legal entities placates this concern. If the STL's evidence was drawn from other contempt hearings, then the claim that this decision is limited to contempt crimes would have merit. But all of the arguments, justifications, and examples the STL cited were not limited to contempt cases. Rather, the STL surveyed cases in the Military Tribunals of Nuremberg, the statute of the ICC, U.N. resolutions, and domestic laws that deal with corporate liability more broadly. When the STL declared that corporate liability had become a general

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240 Russell Hopkins, *Comments on The STL's Approach to Corporate Criminal Liability*, CORPORATE WAR CRIMES (Apr. 13, 2015), http://perma.cc/78QE-3SPQ.

241 *Supra* Section III.

242 Karlijn Van der Voort, *Contempt Case against Lebanese Journalists at the STL*, SPECIAL TRIBUNAL FOR LEBANON BLOG (Apr. 30, 2014), http://perma.cc/R56S-HGHZ.

243 Stahn, *supra* note 13, at 120.

244 *Id.* at 122 (noting that the "STL decision does not go as far as some business and human rights advocates might have hoped.").

245 Bernaz, *supra* note 5.

246 Jonge, *supra* note 117.

principle of law, it did not limit this holding to contempt crimes. It issued a broad principle that could apply to any criminal violation.

Additionally, some skeptics are concerned about the hybrid nature of the court. Because the STL relied on Lebanese law, they argue this limits its precedential authority in an international context. More specifically, they claim that *Akhbar's* reliance on the Lebanese Criminal Code to model the elements of the crime diminishes the significance of the court's impact on corporate liability under international law.[247]

While it is true that Article 210(2) of the Lebanese Criminal Code provided the STL with the material elements required to prosecute corporate legal entities, this reliance on Lebanese law came after the STL established that corporate liability was a general principle of law. In other words, Lebanese law influenced *how* the court prosecuted a legal entity, but it was not dispositive in the decision *to* prosecute a legal entity. Therefore, it is incorrect to say that the STL's ruling on the international legal principle of corporate liability was limited to contempt crimes or in drawing from Lebanese law.

Since nearly all states have recognized corporate liability in the criminal context, and since no international court that adjudicates criminal law has prohibited corporate criminal liability as a matter of law, it follows that the STL's analysis regarding corporate criminal liability is correct and applies in a broad general context in international law.

V. CONCLUSION

The Special Tribunal for Lebanon held that corporate liability is now a general principle of law, noting that it "no longer seems to be a matter of whether corporations are liable under international law, but rather *how* such liability would be implemented."[248] This Comment has defended the STL's decision in *Ayyash*, both procedurally and substantively. In doing so, this Comment responded directly to criticism and sought to dispel the notion that corporate criminal liability is prohibited under international law or that it is too soon to declare corporate liability a general principle.

Inspired by the STL, international lawyers can and should challenge the accountability gaps that allow many corporations to escape liability under

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247 Hopkins, *supra* note 240 ("Although Judge Baragwanath and the majority of the Appeals Chamber in *Al Jadeed SAL* relied on Lebanese law to justify a finding that the STL's contempt jurisdiction includes legal persons, it is probably fair to say that the Appeals Chamber's most recent decision in *Akhbar Beirut SAL* represented a greater retreat to the STL's Lebanese character. Arguably this diminishes the significance of both cases for corporate criminal liability in international criminal law in general.").

248 Kaeb, *supra* note 37, at 402 (emphasis in original).

international law.[249] Corporations enjoy many benefits arising out of the globalized society in which we live: they lobby for international policies, they profit from multi-lateral trade agreements, and they even reserve the right to sue sovereign states and other legal entities.[250] Scholars have written extensively on how "[c]orporate actors have far too often engaged in the perpetration of mass atrocities and even more often proven to be de facto or de jure exempt from liability."[251] The STL provides the blueprint for countering this immunity and ushers in a new era of corporate accountability. As a practical matter, the STL may encourage legal practitioners seeking corporate accountability to take advantage of statutes that do not explicitly limit the term "person" to natural persons.[252] Whatever the strategy may be, anyone who seeks to resolve the issue of international corporate accountability must now reckon with the STL landmark decision, not as a judicial aberration, but as a well-reasoned precedent of international law.

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249 *See generally* Robert O. Keohane, Global Governance and Democratic Accountability (May 17, 2001) (unpublished manuscript).

250 Kolieb, *supra* note 54, at 574.

251 Garcia, *supra* note 32, at 127.

252 Ekaterina Kopylova, *Akhbar Beirut S.A.L. Guilty of Contempt, STL Found: One Small Verdict for a Tribunal, a Giant Leap for International Justice?*, OPINIO JURIS (Apr. 8, 2016), http://perma.cc/J7FD-RRFX.