THE SHIFTING SANDS OF CORPORATE LIABILITY UNDER INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

The sands of corporate criminal liability for atrocities are shifting. Demands for corporate accountability have risen significantly over the last decades and have manifested themselves in different ways, such as litigation under the U.S. Alien Tort Statute (ATS)[1] and the adoption of the U.N. Guiding Principles of Business and Human Rights,[2] as well as newly emerging regulatory mandates in the area of due diligence and reporting requirements on both sides of the Atlantic.[3] A growing number of legal systems around

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1. The Alien Tort Statute (ATS) 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). Corporate liability cases under the ATS show clear synergy with atrocity law as "violations of the law of nations" that are actionable under the statute, but then have to meet the standard of customary international law violations. Sosa v. Alvarez-Machain, 542 U.S. 692, 722, 725 (2004). In such cases, atrocity crimes generally include genocide, crimes against humanity, or serious war crimes. *See* DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 421–40 (2012).

2. John Ruggie (Special Representative of the Secretary-General), Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc A/HRC/17/31 (Mar. 21, 2011) [hereinafter Ruggie, Report on the Issue of Human Rights and Transnational Corporations].

3. *See* Council Directive 14/95 2014 O.J. (L 330) 1 (regarding disclosure of non-financial and diversity information by certain large undertakings and groups); *see also* Arnaud Poitevin, *Towards Mandatory Corporate Human Rights Due Diligence at the EU Level?*, INST. HUM. RTS. & BUS. (July 15, 2015), http://www.ihrb.org/commentary/towards-mandatory-corporate-human-rights-due-diligence.html [https://perma.cc/XNB5-RY4E]

the world have included corporate liability for international crimes into their criminal codes and are poised to adjudicate such liability before their domestic courts.[4] Moreover, international treaties have increasingly featured corporate criminal liability provisions.[5] Most recently, the issue of corporate accountability in a broader societal and political context has been the subject of adjudication by the Special Tribunal for Lebanon (STL).[6] It is hard to ignore the growing international trend where courts and regulators are trying to grapple with fundamental questions of corporate personality, corporate guilt, and corporate criminality. Because corporations have "neither bodies to be punished, nor souls to be

(discussing the possibility of the French Parliament codifying corporate due diligence as set forth by the U.N. Guiding Principles on Business and Human Rights).

4. *See* Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 Netherlands Int'l L. Rev. 333, 336–39 (2009) (finding that corporate criminal liability is well ingrained in the common law tradition); *id.* at 342 (finding also that there is a "general movement toward corporate criminal liability [in civil law jurisdictions around the world]"); *id.* at 334 ("By introducing offences similar to those contained within the [International Criminal Court (ICC)] Statute in order to implement the Treaty, many states have extended enforceable duties to comply with international criminal law to corporations . . . ."); *see also* Robert Thompson, Anita Ramasastry & Mark Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 Geo. Wash. Int'l L. Rev. 841, 844 (2009) (exploring whether countries hold corporations liable for international crimes committed abroad)

5. *See* Bert Swart, *International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J. Int'l Crim. Just. 947, 949 (2008) (citing seventeen international instruments which include provisions on corporate criminal liability that leave it to each state's discretion the kind of sanctions to impose on corporations at the domestic level, i.e., criminal or otherwise); *see also* Organization for Economic Co-operation and Development (OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 2, 3(2), 4, Dec. 17, 1997, S. Treaty Doc. No. 105–39; U.N. Convention Against Corruption, arts. 26, 42, Dec. 9, 2003, S. Treaty Doc. No. 109–06; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, arts. 2(14), 9, Mar. 22, 1989, 1673 U.N.T.S. 57; International Convention on Civil Liability for Oil Pollution Damage art. II, Nov. 29, 1969, 973 U.N.T.S. 3; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 58; U.N. Convention on the Law of the Sea, art. 137(1), Dec. 10, 1982, 1833 U.N.T.S. 397 (as further examples of corporate liability provisions). *See generally* Joanna Kyriakakis, *Prosecuting Corporations for International Crimes*, *in* International Criminal Law and Philosophy 108, 111–12 (Larry May & Zachary Hoskins eds., 2010) (examining examples of international agreements governing transnational crimes with regard to businesses).

6. *See* al Khayat Judgment, *infra* note 83; *see also About the Contempt Cases*, Special Trib. For Leb., http://www.stl-tsl.org/en/the-cases/about-the-contempt-cases#stl-14-05 [https://perma.cc/3BUB-RNSZ] (last visited Nov. 22, 2016) (full jurisprudence of *The Al-Jadeed Case* dealing with charges of contempt and interference of the administration of justice against a news company as a corporate defendant). For a further discussion of the case, *see infra* Section II.B. R

condemned[,]"[7] these questions create unique challenges, especially with regard to the criminal responsibility of legal persons.[8]

Given that the Rome Statute, completed in 1998, did not include corporations within the jurisdictional scope of the International Criminal Court (ICC), modes of international corporate criminal liability have not been the main focus of the political debate or scholarly attention.[9] But the situation is changing. A recent decision of the Appeals Panel of the STL evidences this shift.[10] Such a decision aligns with developments at the domestic level where corporate criminal liability prescriptions for involvement in international crimes have become increasingly common in legal systems around the world.[11]

Complementarity concerns were the main reasons why corporations were not included under the jurisdiction of the ICC during the treaty negotiations.[12] This reasoning, however, has increasingly lost its relevance. 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 , or even bring the issue of

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7. JOHN POYNDER, LITERARY EXTRACTS, VOL. 1, 268 (1844) (quoting Lord Chancellor of England & Lord Edward First Baron Thurlow).

8. A legal person, here, refers to an "[e]ntity, as a firm, that is not a single natural person, as a human being, authorized by law with duties and rights, recognized as a legal authority having a distinct identity, a legal personality." BLACK'S LAW DICTIONARY FREE ONLINE DICTIONARY (2d. ed.), http://thelawdictionary.org/juridical-person/ [https://perma.cc/J8W3-4U5P] (last visited Nov. 22, 2016).

9. *Contra* Andrew Clapham, *The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States*, *in* FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 233, 238 (Peter Malcontent & Ramesh Thakur eds., 2004); Kyriakakis, *supra* note 5, at 111; Nadia Bernaz, *Corporate Criminal Liability under International Law: the New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon*, 13 J INT'L CRIM. JUST. 313, 313–30 (2015). R

10. In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 74 (Special Trib. for Leb. Oct. 2, 2014) [hereinafter al Khayat Interlocutory Appeal Concerning Personal Jurisdiction].

11. *See* Thompson et al., *supra* note 4, at 852–53, 871. R

12. *See* WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 212 (2007); *see also* Brief of Amici Curiae International Law Scholars in Support of Plaintiff-Appellees, Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2009) (No. 09-2778-CV), 2009 WL 7768619 at *9–*15 [hereinafter International Law Scholars Daimler AG Amici Brief] (arguing secondary liability for corporations can be pursued against corporations under the Alien Tort Statute).

corporate liability back to the agenda of the states parties to the ICC.[13]

Moreover, recent international tribunal jurisprudence, namely by the STL, has confirmed corporate liability before the tribunal and is emblematic of the broader trend toward holding corporations accountable for international crimes.[14] These recent judicial developments have important normative implications on domestic laws. For instance, U.S. courts have drawn heavily on the jurisprudence of the international criminal tribunals for guidance in ATS cases against corporate defendants for "violations of the law of nations."[15]

This Article argues that corporate management is ill-advised to merely account for liability risks at the domestic level in countries where they invest, either in the form of incorporation or business operations. It is still conventional wisdom that companies need to comply first and foremost with local law in their respective countries of operation.[16] Yet, there is a whole body of law that has traditionally not been within the scope of a corporation's legal and compliance departments, namely the area of international criminal law.[17] With businesses operating more globally than ever, frequently in countries with repressive governments, companies have become prominent actors in the international arena impacting the

13. *See* Thompson et al., *supra* note 4, at 852–53, 856, 871–72. R

14. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, Case No. STL-14-05/PT/AP/ARI26.1, ¶ 74 (Spec. Trib. for Leb., Oct. 2, 2014); In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, Case No. STL-14-05/PT/AP, Public Redaction Version of Judgment on Appeal (vacated on other grounds), ¶191 (Special Trib. for Leb., Mar. 8, 2016) [hereinafter al Khayat Public Redacted Version of Judgment on Appeal] (reaffirming the October 2, 2014 holding on corporate liability under international law but confirming the Contempt Judge's finding that the evidence did not substantiate such liability in this case).

15. *See* David Scheffer, *The Impact of War Crimes Tribunals on Corporate Liability for Atrocity Crimes under US Law*, *in* Corporate Social Responsibility? Human Rights in the New Global Economy 152, 163–64 (Walker-Said & Kelly eds., 2015).

16. *See* OECD, *Guidelines for Multinational Enterprises*, I.2 (2011) [hereinafter OECD *Guidelines for Multinational Enterprises*], http://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/PU7M-Q63Z]; *see also* Sandra Sucher & Daniel Baer, *Yahoo! In China (A)*, Harv. Bus. Sch. 8 (2009) (rev. Apr. 2011).

17. *See State of Compliance Survey 2015, Moving Beyond the Baseline: Leveraging the Compliance Function to Gain a Competitive Advantage*, PricewaterhouseCoopers 8 (2015), http://www.pwc.com/us/en/risk-management/state-of-compliance-survey/assets/pwc-2015-state-of-compliance-survey-final.pdf [https://perma.cc/29U3-D25C] (illustrating the scope of the compliance function within firms).

fate of local communities, societies, and the international community.[18]

This Article develops as follows: Part I sets the scene of key trends in holding corporations accountable by discussing the implications of the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*[19] for the corporate accountability movement. Part II examines recent developments regarding corporate liability before two international criminal tribunals, the Special Tribunal for Lebanon and the International Criminal Tribunal for the former Yugoslavia. Part III then draws the contours of corporate liability before the ICC. Following an analysis of the existing structures for corporate liability under the Rome Statute, Part IV revisits the question of corporate liability before the ICC in light of the Rome Statute's negotiating history and shows 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. Finally, Part V addresses some of the challenges in the Rome Statute for corporate liability and presents three potential types of criminal punishments for corporations. The Article concludes by examining the legal challenges and normative implications when imposing international criminal liability on corporations as legal persons. The fictional character of the corporation has sensitive consequences for the material elements of corporate criminal liability, which are further amplified in cases involving atrocity crimes.[20] The changing landscape of corporate liability for international crimes can have important impact on ATS litigation before U.S. courts, international tribunal jurisprudence, and possibly also for the ICC. The legal debate needs to move beyond the mere question of whether corporate liability exists under international law to the more granular question of what standards should be established for such liability and how to implement them effectively. This paper aims to contribute to this overall conversation

18. *See* Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 141, 143–48 (Philip Alston ed., 2005).

19. Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659 (2013).

20. The term "atrocity crimes" has been coined by David Scheffer to provide a unifying terminology that describes collectively the heinous crimes prosecuted by international tribunals. This common collective term avoids legalistic semantics that can prove counterproductive in situations that need swift action, such as in the war crimes prosecutions related to Bosnia and Herzegovina and Rwanda in the 1990s, and again in Darfur. DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 428–29 (2012).

and offer some fresh perspective on the regulatory design of criminal penalties. Insights from behavioral psychology can be helpful in designing corporate penalties not merely to achieve deterrence and retribution, but also to ensure organizational change at the firm level.

I. Corporate Accountability Trends and the Legacy of *Kiobel*

The U.N. Guiding Principles on Business and Human Rights—developed by John Ruggie under his mandate as the U.N. Secretary General's Special Representative on Business and Human Rights and adopted by the U.N. Human Rights Council in 2011[21]—shaped the last decade of holding corporations accountable for their overseas conduct. The United Nations' approach under Ruggie's mandate followed a framework approach rather than a mandatory regulatory approach to the issues of business and human rights.[22] This Part will discuss the continued changing perceptions regarding corporate liability for atrocity crimes in the United States through ATS litigation, and two international tribunals: the Special Tribunal for Lebanon (STL) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

In addition to Ruggie's framework approach to business and human rights, tort litigation under the ATS has been an important part of the corporate accountability movement as a vehicle to hold corporations accountable for their overseas involvement in violations of international law.[23] While reporting and due diligence requirements in the United States and Europe have increased in

21. *See* Ruggie, Report on the Issue of Human Rights and Transnational Corporations, *supra* note 2. R

22. John Ruggie, *Business and Human Rights: Treaty Road not Travelled*, Ethical Corporation (2008), https://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf [https://perma.cc/8WUE-NEQC] (describing his business and human rights framework submitted to—and approved by—the U.N. Human Rights Council as a "strategic policy framework for better managing business and human rights challenges"); *see also* Scott Jerbi, *Business and Human Rights at the UN: What Might Happen Next?*, 31 Hum. Rts. Q., 299, 310 (2009) (discussing the role of Ruggie in creating a normative framework at the global level that clarified the responsibilities of private sector actors).

23. *See* Beth Stephens, *Enforcing Human Rights Through Domestic Law*, 24 Hastings Int'l & Comp. L. Rev. 401, 409 (2001) (finding that "[n]o other country has a statute that creates a specific statutory claim for human rights violations"); *see also* Beth Stephens, *Judicial Deference and the Unreasonable View of the Bush Administration*, 33 Brook. J. Int'l L. 773, 773–74, 776–80, 813–18 (2008) (providing an overview of corporate defendant human rights cases).

recent years,[24] the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum* limited federal court litigation opportunities to establish corporate accountability for extraterritorial operations.[25]

The Court's decision in *Kiobel* significantly narrowed the scope of corporate liability for international law violations under the ATS, a federal law enacted in 1789 that provides a tort remedy for aliens in a narrow set of "violations of the law of nations."[26] The international community had long awaited this high-profile case, which is representative of a long line of cases in federal courts holding multinational corporations (MNCs) tortiously liable for overseas violations of international law.[27] The Court held that a presumption against extraterritoriality applies to cases under the ATS, thus limiting the set of eligible lawsuits that human rights victims can bring against perpetrators, including corporations.[28] Commentators generally agree that not all cases have been foreclosed by the Court's recent judgment, but it is fair to say that at least cases seeking to enforce universal norms of international law against *foreign* (i.e., non-U.S.-based) corporations have been largely removed

24. *See, e.g.*, California Transparency in Supply Chains Act of 2010 (Sen. Bill 657), Cal. Civ. Code § 1714.43 (2010); Proposition de Loi 2578 du 11 février 2015 de Relative Au Devoir De Vigilance Des Sociétés Mères Et Des Entreprises Donneuses D'Ordre [Proposed Law 2578 of Feb. 11, 2016 on the Duty of Care of Parent Companies and Subcontracting Companies] (On November 29, 2016, the bill on duty of vigilance for parent and subcontracting companies was adopted in a third reading.); *Corporate Duty of Vigilance: Another Step Forward Towards the French Law's Adoption,* European Coalition for Corporate Justice (Nov. 30, 2016), http://corporatejustice.org/news/353-corporate-duty-of-vigilance-another-step-forward-towards-the-french-law-s-adoption [https://perma.cc/BWF3-UGFS]. For the complete legislative history, see http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp [https://perma.cc/3N8D-8W4E].

25. *See* Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659, 1669 (2013). In *Kiobel*, a group of Nigerian nationals brought suit in U.S. federal court against (then) two holding companies, the Netherlands-based Royal Dutch Petroleum Company and the England-based Shell Transport and Trading Company, for complicity in violations of international law (including crimes against humanity, extrajudicial killings, torture, and arbitrary arrest) that were committed at the hands of the Nigerian government to suppress local protests against oil exploitation by corporate defendants. *Id.* at 1662–63.

26. The ATS, passed by the Congress in 1789, 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).

27. Cases before U.S. federal courts included charges of corporate complicity in violations of human rights, including: Romero and Krauss, *Ecuador Judge Orders Chevron To Pay $9 Billion*, N.Y. Times, Feb. 14, 2011 (concerning Chevron in Nigeria); Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (concerning Unocal in Myanmar); The Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (concerning Talisman in Sudan; in the case of Talisman, the charges even included corporate complicity to genocide).

28. *See Kiobel*, 133 S.Ct. at 1669.

from the jurisdiction of federal courts.[29] In the two decades prior, the ATS had become an important tool to enforce human rights responsibilities against corporations.[30] International legal scholars, civil society organizations, and human rights litigators now mourn the Court's decision in *Kiobel* as the loss of a crucial vehicle to hold corporations accountable as global citizens of a world economy and members of the international legal order.[31] Taking a different perspective on this recent development, the Court's judgment can be understood, first and foremost, as a decision against the overreach of U.S. law, and thus shifts the matter of holding corporations accountable for violations of universal international norms out of the domestic and into the international sphere.[32]

Civil society and governments have called upon MNCs to take responsibility for the societies in which they operate as the main beneficiaries of an interconnected economic world.[33] Cases like *Kiobel* bring up two dichotomies dominating much of the debate and transatlantic regulatory landscape: first, whether corporate

29. The Supreme Court significantly limited the exterritorial reach of the ATS in so-called "foreign cubed" cases, where there is no link to the United States as a forum jurisdiction either in terms of the conduct alleged or the nationality of the corporation. However, Justice Breyer's concurring opinion clearly signals that the door remains open for cases that involve a U.S. corporation or "adversely affects an important American national interest." *Id.* at 1671. Chief Justice Roberts' majority opinion can be read to support the first point. *Id.* at 1669 (holding that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application").

30. *See* Beth Stephens, *Human Rights Litigation in U.S. Courts Against Individuals and Corporations*, *in* Corporate Responsibility for Human Rights Impacts 179, 199 (Lara Blecher & Nancy Kaymar Stafford eds., 2014); Peter Henner, Human Rights and the Alien Tort Statute 2 (2009); Sandra Coliver et al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 Emory Intl'l L. Rev. 169, 169 (2005).

31. *See* Roger Alford, *The Future of Human Rights Litigation After Kiobel*, 89 Notre Dame L. Rev. 1749, 1754 (2014); *see also* Christopher Whytock, Donald Childress III & Michael Ramsey, *Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 UC Irvine L. Rev. 1, 4–5 (2013).

32. The expectations were high that the Supreme Court would take the opportunity to delineate the contours of corporate liability under the ATS. Despite the fact that the Supreme Court was, first and foremost, briefed on the corporate liability question, the Court's decision on April 17, 2013 did not directly address the issue of corporate liability for overseas violations of international law. Rather, the Supreme Court held that "[t]he presumption against extraterritoriality applies to claims under the ATS," thus deciding on the extraterritoriality question, but leaving open the question of corporate liability under the ATS. *Kiobel*, 133 S.Ct. at 1669.

33. *See* OECD *Guidelines for Multinational Enterprises*, *supra* note 16 (as an example of the heightened expectations by civil society and governments regarding responsible business conduct); *see also The Ten Principles of the U.N. Global Compact*, U.N. Global Compact (Oct. 17, 2016), https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/4UZP-N98L] (for similar support). R

accountability is best achieved at the domestic level through statutory law and regulation, or at the international level through a coordinated effort;[34] and second, whether civil or criminal liability is the appropriate avenue for such cases.[35] For a long time, many, especially civil law jurisdictions, have firmly held to the principle of *societas delinquere non potest* ("a legal entity cannot be blameworthy"). However, this has changed as an increasing number of jurisdictions in Europe have incorporated into their domestic criminal codes prescriptions for criminal liability for legal persons.[36] At the same time, there have also been recent developments towards corporate criminality at the international level both in tribunal jurisprudence and treaties.[37]

Moreover, it would be consistent with Supreme Court thinking to address issues of international corporate accountability through treaty law. Recognizing "the danger of unwarranted judicial interference in the conduct of foreign policy,"[38] the Supreme Court cut back on the domestic adjudication of such claims.[39] One could draw from the decision by the Court in *Kiobel*[40] the need for an international mandate to hold corporations accountable for their complicity in gross violations of human rights, sometimes leading to atrocity crimes under the Rome Statute of the ICC.

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34. *See* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 901 (2003) (discussing the Draft U.N. Norms on business and human rights issues as the first non-voluntary international initiative on business and human rights issues). The Draft U.N. Norms were considered by the U.N. Commission on Human Rights in April 2004, but were not adopted. *U.N. Sub-Commission Norms on Business & Human Rights: Explanatory Materials*, BUS. & HUM. RTS. RESOURCE CTR. (Oct. 16, 2016), http://business-humanrights.org/en/united-nations-sub-commission-norms-on-business-human-rights-explanatory-materials [https://perma.cc/E7U5-CM7Y]; *see also* JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 55–65 (2014) (identifying the challenges of taking "the [international] treaty route" with regard to business and human rights issues); Ruggie, *supra* note 22. R

35. *See* Beth Stephens, *Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime*, 60 ALB. L. REV. 579, 581–87 (1997); *see also* Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*, 107 AM. J. INT'L L. 852, 854–55 (2013).

36. *See* Kaeb & Scheffer, *supra* note 35, at 856–57; *see also* Thompson, Ramasastry & Taylor, *supra* note 4, at 841, 893. R R

37. *See* discussion *infra* Sections II.B–C.

38. Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659, 1661 (2013).

39. *Id.* at 1669.

40. *Id.*

II. Corporate Accountability Before International Tribunals

Scholars and courts at the domestic and, more recently, international level have passionately debated whether corporate liability exists under international law.[41] The following Part lays out the landscape of international tribunal jurisprudence dealing with the issue of corporate liability. Section A examines the normative guidance that U.S. courts have drawn from relevant international tribunal jurisprudence for corporate cases under the ATS. Sections B and C discuss recent developments in international tribunal jurisprudence on the subject of international corporate criminal liability, respectively before the International Tribunal for Lebanon and the ICTY.

A. *International Tribunal Jurisprudence in Corporate ATS Litigation*

As mentioned above, U.S. courts have recently grappled with the issue of corporate liability in *Kiobel*, which concerned Royal Dutch Petroleum's alleged complicity in human rights violations in their extractive operations in Nigeria.[42] Such corporate litigation under the ATS drew heavily on the jurisprudence of international tribunals to determine the contours of corporate liability under international law.[43]

The corporate-friendly decision by the Second Circuit Court of Appeals in *Kiobel* came as a surprise to many, because it deviated from more than a decade of jurisprudence (including the Second

41. *See, e.g.*, 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, 139 (Menno Kamminga & Saman Zia-Zarifi eds., 2000); Kyriakakis, *Prosecuting Corporations for International Crimes*, *supra* note 5, at 110–11; Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1020–22 (9th Cir. 2014), *cert. denied*, 136 S.Ct. 798 (2016); Balintulo v. Ford Motor Co., 796 F.3d 160, 166 n. 28 (2d Cir. 2015); Prosecutor v. TotalFinaElf et al. [Cass.][Court of Cassation], Mar. 28, 2007, AR P.07.0031.F, http://www.cass.be/ [https://perma.cc/G9CF-F82M] (Belg.). R

42. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010); *Kiobel*, 133 S.Ct. at 1662–63; s*ee also* Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 Nw. U. J. Int'l Hum. Rts. 327, 330–31 (2008) (analyzing human rights violations in the extractive sector, including the activities of and the charges against Royal Dutch/Shell).

43. *See* Scheffer, *supra* note 15, at 152, 160; *see also* Amicus Curiae Brief of Former U.S. Ambassador-At-Large for War Crimes Issues David J. Scheffer in Support of Appellants and Reversal at 10–16, Doe et al. v. Cisco Systems, Inc. et al, No. 5:11-cv-02449-EJD (N.D. Cal. Sept. 5, 2014), ECF No. 14-1 (discussing the standard for aiding and abetting under the Rome Statute and acknowledging that U.S. federal courts "rely heavily" on it for guidance on interpretation). R

Circuit's own precedent) that operated on the premise that corporations may be held liable under the ATS.[44] At the heart of this litigation lies the question whether there is corporate liability under international law.[45] The lengthy judgment includes an extensive and passionate concurring, though highly critical, opinion by Judge Leval.[46] In his concurrence, Judge Leval points out internal inconsistencies in the majority opinion on various counts and refers to the majority opinion's reasoning as "illogical" on nine different occasions.[47] The U.S. Supreme Court granted certiorari for *Kiobel* to resolve "whether corporations are immune from tort liability for violations of the law of nations . . . [or] may instead be sued in the same manner as any other private party defendant under the ATS,"[48] but ultimately decided the case on jurisdictional grounds and left the corporate liability question unresolved.[49]

44. Since the Second Circuit first upheld a claim under the ATS in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), the Court has issued various rulings in corporate cases under the ATS assuming (without addressing) corporate liability under the ATS. *Presbyterian Church of Sudan*, 582 F.3d at 261 n.12; *see also* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 193 (2d Cir. 2009); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 326 (2d Cir. 2007); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

45. *Kiobel*, 621 F.3d at 120.

46. *Id.* at 149–96.

47. *See id.* at 151, 152, 153, 159, 166, 166 n.18, 170, 174, 185–87 (Leval, J., concurring).

48. Cheryl Blake & Jennifer Uren, *Kiobel v. Royal Dutch Petroleum*, Legal Info. Inst., Cornell U. L. Sch., http://www.law.cornell.edu/supct/cert/10-1491_feb2012 [https://perma.cc/9T7S-PW7Q] (last visited Nov. 1, 2016).

49. There remains a U.S. circuit court split on the specifications of liability under the ATS, including the circumstances under which the presumption against extraterritoriality can be overcome, the applicable mens rea standard for aiding and abetting, as well as whether there is corporate liability under international law. Currently, the Seventh Circuit, through Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011), the Eleventh Circuit, through Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009), the D.C. Circuit, through Doe VIII v. Exxon Mobile Corp., 654 F.3d 11 (D.C. Cir. 2011), and the Ninth Circuit, through Doe I v. Nestle USA, 766 F.3d 1013 (9th Cir. 2014), all endorse corporate liability under the ATS. The Second Circuit has followed its earlier ruling in *Kiobel v. Royal Dutch Petroleum Co.* against corporate liability, arguing that "the Supreme Court in *Kiobel II* [has not] overturned [the Second Circuit's] holding in *Kiobel I* because the Supreme Court failed to address the specific question of whether corporations are liable for violations of international laws under the ATS." *Balintulo*, 796 F.3d at 166 n.28 (reasoning that "[t]here is no authority for the proposition that when the Supreme Court affirms a judgment on a different ground than an appellate court it thereby overturns the holding that the Supreme Court has chosen not to address[; to] hold otherwise would undermine basic principles of *stare decisis* and institutional regularity").

On the personal jurisdiction requirements under the new "touch and concern" test as articulated by the U.S. Supreme Court in *Kiobel*, and specifically the question of when "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application [of federal law]." Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1669 (2013); *see also Balintulo*, 796 F.3d at 166–67; *Nestle USA*, 766 F.3d at 1034–35 (9th Cir. 2014)); Cardona, et al v. Chiquita Brands Int'l,

Therefore, the Second Circuit's *Kiobel* decision provides some of the most comprehensive discussion about this international law issue in U.S. courts.

In its reasoning, the Second Circuit rejected corporate liability under the ATS on the ground that "customary international law has steadfastly rejected the notion of corporate liability for international *crimes*, and no international [criminal] tribunal has ever held a corporation liable for a violation of the law of nations."[50] While this statement held true in 2010,[51] it has been challenged by an Appeals Panel decision of the STL where a corporation, rather than merely a corporate executive, was found subject to the criminal jurisdiction of the STL.[52] Prior to this, no international or hybrid criminal tribunal had ever confronted a legal person directly with criminal charges.[53]

Notably, Judge Leval, in his concurring opinion in *Kiobel*, makes a civil-criminal distinction with regard to remedies for corporate misconduct under international law, whereas the majority opinion considered this distinction as neither appropriate nor decisive for the case.[54] In his concurrence, Judge Leval states:

> The reasons why the jurisdiction of international criminal tribunals has been limited to the prosecution of natural persons, as opposed to juridical entities, relate to the nature and purposes of criminal punishment, and have no application to the very different nature and purposes of civil compensatory liability.[55]

In this regard, the ATS provides the opportunity to hold corporations liable with *civil* remedies for egregious violations of international law, the definition and scope of which have been significantly informed during the last two decades by the enforcement of atrocity crimes by international criminal tribunals, which nonetheless impose strictly criminal penalties.[56] This variance has

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Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (regarding the presumption against extraterritoriality, the court states, "In *Kiobel*, the Supreme Court reviewed the history of the ATS, and we see no reason to rehash it here. We can dispose of the claims that are before us simply by applying the conclusion of the *Kiobel* Court.").

50. *Kiobel*, 621 F.3d at 120 (emphasis added).

51. *Id.*

52. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 74; *see also* al Khayat Public Redacted Version of Judgment on Appeal, *supra* note 14, ¶¶ 191, 196. R

53. *See* al Khayat Judgment, *infra* note 83, ¶ 1. R

54. *Kiobel*, 621 F.3d at 146, 151.

55. *Id.* at 166 (Leval, J., concurring).

56. Judge Leval in his concurring opinion in *Kiobel* in 2010 draws upon this distinction between the civil and criminal elements underlying corporate ATS cases. He points out that "[w]hat international law does is it prescribes norms of conduct; [it] identifies acts

created discussion among scholars and courts alike about the merits of either civil liability or criminal prosecution.[57] An understanding of the civil-criminal dimension of corporate accountability can be helpful in further substantiating the details of corporate liability under international criminal law, including in particular the question of suitable monetary and non-monetary corporate penalties.[58]

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 that international law does not exempt corporations from its scope.[59] Steinhardt emphasizes this point by highlighting the commonality in substance, rather than the differences in implementation, with regard to corporate liability for international crimes, namely that "no domestic jurisdiction exempts legal persons from *all* liability,"[60] irrespective of the civil or criminal nature of the remedy. This is in line with legal scholar Beth Stephens' work where she describes the variance in domestic procedures as merely a different means to implement the common concept, namely corporate accountability for human rights abuses,

(genocide, slavery, war crimes, piracy, etc.) that it prohibits." *Id.* at 175 (Leval, J., concurring). After the Supreme Court's ruling in *Sosa*, the ATS is narrowly confined to crimes of universal character, which include atrocity crimes, as listed by Judge Leval. *See* David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 344 (2011); *see also* Scheffer, *supra* note 15, at 154 ("The federal courts have clarified that the reference to 'torts' in the Alien Tort Statute includes commission of atrocity crimes, namely, genocide, crimes against humanity, and serious war crimes."). The substantive norms of law ought to be distinguished from the remedies prescribed for violations of such norms. *See Kiobel*, 621 F.3d at 176 (Leval, J., concurring). R

57. U.S. courts across different circuits have consistently pointed out the hybrid civil/criminal nature of liability questions under the ATS. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 949 (9th Cir. 2002); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 270, 310 n.5 (2d Cir. 2007) (Katzman, J., concurring). Judge Scheindlin illustrates this inherent tension when she notes in *In re South African Apartheid Litigation* that "the [ATS] provides an alternative civil remedy for violations of customary international law that are traditionally addressed as crimes." 617 F.2d 228, 257 n.144 (S.D.N.Y. 2009). A group of prominent international law scholars have discussed the normative implications of this blended criminal approach in the context of a (civil) tort statute in their Amicus Brief in *Balintulo v. Daimler AG*. International Law Scholars Daimler AG Amici Brief, *supra* note 12, at 9–10. R

58. *See* discussion *infra* Section IV.D.

59. *See Kiobel*, 621 F.3d at 166 (Leval, J., concurring); Brief of David J. Scheffer as Amicus Curiae in Support of the Petitioners at 4, *Kiobel*, 621 F.3d 111 (No. 10-1491) [hereinafter David Scheffer Royal Dutch Amicus Brief]; *see also* International Law Scholars Daimler AG Amici Brief, *supra* note 12, at 25. R

60. *See* International Law Scholars Daimler AG Amici Brief, *supra* note 12, at 25. R

into the laws of different domestic legal systems.[61] Outside of the domestic realm, a number of international tribunals have recently made important holdings relevant to the issue of corporate accountability.

B. *Corporate Liability Before the Special Tribunal for Lebanon*

As mentioned above, the STL has considered the question of whether liability for violations of international law can be attributed to corporations as legal persons in a significant contempt case known as *The Al-Jadeed Case*.[62] In this contempt case, Al-Jadeed TV, a Lebanese broadcasting company, and its Deputy Head of News and Political Programs, were charged with knowingly and willfully interfering with the administration of justice on two counts: (1) by publishing information on confidential witnesses in another case before STL and (2) failing to remove this information from its website and other third-party web platforms where it uploaded the information, thus violating a pre-trial order of the STL.[63]

In Contempt Judge Nicola Lettieri's words, *The Al-Jadeed Case* constitutes an "unconventional" contempt case as it is "the first in the history of international criminal justice in which a legal person is accused of a crime."[64] In its October 2014 decision, the STL Appeals Panel ruled that Judge Lettieri had erred in holding that the STL has no personal jurisdiction over legal persons for contempt proceedings under Rule 60 *bis*[65] and remanded the case to the STL Contempt Judge for retrial on corporate liability grounds.[66]

The STL dealt with two legal issues pertaining to the corporate liability question in *The Al-Jadeed Case*.[67] The first issue centered on

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61. *See* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1, 4 (2002).

62. *See* al Khayat Judgment, *infra* note 83, at ¶ 1. R

63. Prosecutor v. Ayyash et al., STL-11-01, Public Redacted Version of Judgment on Appeal, ¶ 2 (Special Trib. for Leb. Mar. 8, 2016). Contempt charges are based on Rule 60 *bis*. *See* SPECIAL TRIBUNAL FOR LEBANON, *Rules of Procedure and Evidence*, STL-BD-2009-01-Rev.6-Corr.1 (Apr. 3, 2014), https://www.stl-tsl.org/images/RPE/20140403_STL-BD-2009-01-Rev-6-Corr-1_EN.pdf [https://perma.cc/JW3C-CKTQ].

64. *See* al Khayat Judgment, *infra* note 83, at ¶ 1 (This case is also significant in another respect, namely that it is the first case before an international court that "implicates media expression and supposed limits to that expression under the law[.]"). R

65. *See* SPECIAL TRIBUNAL FOR LEBANON, *Rules of Procedure and Evidence*, *supra* note 63. R

66. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 74. R

67. For the list of the procedural history of the case, see *Contempt Cases: Al Jadeed S.A.L. & Ms Khayat (STL-14-05)*, SPECIAL TRIBUNAL FOR LEBANON, http://www.stl-tsl.org/

whether the STL has jurisdiction over legal persons for contempt, for which the Appeals Panel found it does have such jurisdiction and therefore remanded to the Contempt Judge for reconsideration.[68] The second issue dealt with the material elements of corporate liability (before the STL and under international law in general) and the relevant sources of legal authority.[69]

Under the statutory framework of the STL, Rule 60 *bis* (A) codifies the STL's inherent contempt power to "hold in contempt [any *person*] who knowingly and willfully interfere[s] with its administration of justice."[70] The Appeals Panel found that "the term 'person' in a legal context can include a natural human being or a legal entity (such as a corporation),"[71] based on a teleological reading of Rule 60 *bis* in line with the "spirit" rather than the mere "letter of the Statute."[72] The STL Contempt Judge, on the contrary, applied a narrow interpretation to the premise that nowhere in the statute or the Rules of Procedure and Evidence of the STL (the Rules) is there express language that the word "person" encompasses legal persons and such an interpretation by analogy in criminal law would fly in the face of the rights of the accused under the principle of *nullum crimen sine lege*.[73]

In contrast, the STL Appeals Panel relied on the "principle of effectiveness" as developed in its previous jurisprudence according to which the statute and Rules of the STL ought to be interpreted

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en/the-cases/contempt-cases/stl-14-05 [https://perma.cc/7TR8-CSPM] (last accessed Nov. 23, 2016) [hereinafter *al Khayat Procedural History*].

68. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 2. R

69. *See* al Khayat Public Redacted Version of Judgment on Appeal, *supra* note 14, ¶¶ 175196 . R

70. *See* Special Tribunal for Lebanon, *Rules of Procedure and Evidence*, *supra* note 63, r. 60 *bis* (emphasis added). R

71. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 36 R

72. *See id.* ¶¶ 27–28 (emphasis omitted).

73. In the Case Against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/PT/CJ, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, ¶ 71 (Special Trib. for Lebanon July 24, 2014) [hereinafter New TV S.A.L. Decision on Motion Challenging Jurisdiction]; *see also* In the Case Against Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin, Case No. STL-14-06/PT/CJ, Decision on Motion Challenging Jurisdiction, ¶¶ 61–62 (Special Trib. for Lebanon Nov. 6, 2014) (holding that Rule 60 *bis* does not apply to legal persons, because neither Statute nor Rules contain reference to corporations as possible accused and this would violate principle of *nullum crimen sine lege*) [hereinafter Akhbar Beirut Decision on Motion Challenging Jurisdiction].

in a manner that "makes effective the authority of the Tribunal."[74] The Appeals Panel argued that holding only natural persons within a corporation accountable and shielding the corporate entity, as a legal person, from the contempt power of the tribunal would "potentially lead to unacceptable impunity for criminal actions" and "be contrary to the interests of justice."[75]

Because the express language of Rule 60 *bis*, codifying the STL's inherent contempt power, is ambiguous regarding the *ratio personae*, the Appeals Panel deferred to the step-by-step analysis in Rule 3(A) that offers interpretative guidance under the statute and the Rules.[76] According to Rule 3(A), ambiguities "shall be interpreted in a manner consonant with the spirit of the Statute and in order of precedence" with interpretative principles drawn from "customary international law . . . , international standards of human rights, . . . general principles of international criminal law and procedure, and, as appropriate, . . . the Lebanese Code of Criminal Procedure."[77]

The application of Rule 3(A) is exactly where the STL Contempt Judge and Appeals Panel diverge in their legal reasoning, with conflicting outcomes in their respective judgments.[78] The Appeals Panel found that there has been "a concrete movement on an international level backed by the United Nations for . . . corporate accountability" for human rights which manifests in state practice providing for corporate criminal liability.[79] Granted, national laws across different jurisdictions are not identical; yet, the Appeals Panel found that they are "sufficiently similar"[80] to signify a major trend, and "[i]ndeed, corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as [a] general principle of law."[81] The Amicus Curiae Prosecutor in

74. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶¶ 39, 81. R

75. *See id.* ¶¶ 83–84.

76. *See id.* ¶ 26 (holding "Rule 3 contains principles of interpretation which must be applied when considering the meaning of provisions of the Rules and when resolving any ambiguity or *lacuna* in the Rules").

77. *See* SPECIAL TRIBUNAL FOR LEBANON, *Rules of Procedure and Evidence*, *supra* note 63, r. 3(A). R

78. *Compare* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶¶ 26, 90 (position of the Appeals Panel to apply Rule 3(A)), *with* New TV S.A.L. Decision on Motion Challenging Jurisdiction, *supra* note 73, ¶ 76 (position of the Contempt Judge to apply Rule 3(B)). R R

79. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶¶ 46, 50, 52. R

80. *See id.* ¶ 51.

81. *See id.* ¶ 67.

the case endorsed the position by the Appeals Panel,[82] while the Contempt Judge disagreed with this assessment of contemporary international law and state practice and concluded that "there is indeed nothing approaching a universal model or a consensus across national systems" regarding corporate liability under international law.[83]

Unlike the Appeals Panel, Contempt Judge Lettieri examined Lebanese law for guidance on the corporate liability question[84] after finding that international sources provide no conclusive guidance on the "material elements for attributing liability to legal persons charged with contempt before this Tribunal."[85] Deferring to the judicial interpretation of the relevant provision on legal person liability in the Lebanese Criminal Code, the Contempt Judge applied a strict identification requirement that would mandate that the criminal responsibility of a specific person is established before responsibility can be attributed to the legal person, in this case the corporation.[86] This creates a significant hurdle to holding corporations criminally liable "due to the complexity of corporate structures, internal operating processes, and the aggregate effect of the actions of many individuals," as the Appeals Panel had cautioned.[87]

It is a reality that oftentimes elements of a crime are distributed between different functions and natural persons in a complex organization, such as a corporation.[88] The Amicus Curiae Prosecutor criticized the Contempt Judge for his "restrictive interpretation of Lebanese law rather than a broader, more international approach which addresses the contemporary realities of modern

82. In the Case Against Al-Jadeed S.A.L. & Al Khayat, STL-14-05/A/AP, Prosecution's Appeal Brief, ¶¶ 95–102 (Special Trib. for Lebanon Oct. 22, 2015) [hereinafter al Khayat Prosecution's Appeal Brief].

83. In the Case Against Al-Jadeed S.A.L. & Al Khayat (*The Al-Jadeed Case*), STL-14-05/T/CJ, Judgment, ¶ 61 (Special Trib. for Lebaonon Sept. 18, 2015) [hereinafter al Khayat Judgment].

84. *See id.* ¶ 67.

85. *See id.* ¶ 55.

86. *See id.* ¶ 71 (citing Lebanon's Court of Cassation, Criminal Chamber 6, Decision No. 60/2010 (Mar. 9, 2010) (published in Almarjaa-Cassandre) (STL unrevised English translation)).

87. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 83. R

88. *See* William Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 Am. Crim. L. Rev. 1285, 1288 n.25 (2000) (citing U.S. case law on the collective knowledge doctrine; "[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components"); *see also* United States v. Bank of New England, 821 F.2d 844, 856 (1987) ("The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this." (citation omitted)).

corporate structures."[89] The Amicus Curiae Prosecutor, in his brief, describes a general movement in state practice and at the international level to deviate from the strict identification requirement and move toward an aggregate model that would allow for elements of the crime to be "aggregated between separate natural persons in the corporation."[90]

Details of attribution of responsibility go to the heart of questions pertaining to corporate personality, and especially criminal culpability, considering that a legal person has no mind of its own and can only act through its human agents.[91] Methods of attribution therefore become the critical lynchpin to determine the liability of the corporate entity itself.[92] International tribunals and domestic courts have increasingly substantiated a comparative international trend among legal systems toward corporate liability under international law.[93] However, there remains a need for a more thorough examination of comparative trends with regard to the material elements of such corporate liability in terms of actus reus requirements and attribution standards for mens rea. While undertaking such analysis, it is crucial, however, as the Amicus Curiae Prosecutor pointed out, to "consider the context of this case before an international tribunal."[94] Following the prosecutor's reasoning, it would not be sufficient merely to consult one legal system—as the STL Contempt Judge did[95]—when determining the elements of corporate criminal lability for violations of international law.[96]

The Al-Jadeed Case illustrates how heavily debated is the issue of corporate liability before the international tribunals and under international law. The procedural history of the case seems to

89. *See* al Khayat Prosecution's Appeal Brief, *supra* note 82, ¶ 107. R

90. *See id.* ¶ 111.

91. *See* Eric Orts, Business Persons: A Legal Theory of the Firm 9, 54 (2013). (framing questions about the nature of the firm as an analysis about law and legal theory—such as agency law); *see also* Caroline Kaeb, *Putting the 'Corporate' Back into Corporate Personhood: A Comparative Legal Analysis*, 35 Nw. J. Int'l L. & Bus. 591, 595 (2015) (arguing that the—possibly conflicting—interests of a corporation's human constituents, i.e., its shareholders and its other stakeholders, should inform questions about the nature of the firm and the doctrine of corporate personhood).

92. *See* Celia Wells, Corporations and Criminal Responsibility 40–47, 110 (1993).

93. *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1018–21 (7th Cir. 2011); *see also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 131–44 (2d Cir. 2010) (Leval, J., concurring); al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶¶ 45–67; David Scheffer Royal Dutch Amicus Brief, *supra* note 59, at 13–26. R

94. *See* al Khayat Prosecution's Appeal Brief, *supra* note 82, ¶ 101. R

95. *See* al Khayat Judgment, *supra* note 83, ¶ 67. R

96. *See* al Khayat Prosecution's Appeal Brief, *supra* note 82, ¶¶ 95–102. R

unfold as a power play between the Contempt Judge and the Appeals Panel. In September 2015, the Contempt Judge acquitted the corporate defendants on the grounds that no guidelines or material elements exist under international law for corporate liability and those that do under Lebanese law were not satisfied.[97] Earlier, in another case, this Contempt Judge defied the Appeals Panel's finding of the STL's jurisdiction over corporate liability[98] by deciding that the Appeals Chamber had essentially misinterpreted the law and that its ruling had no precedential effect on his decision in the contempt case.[99] Contempt Judge Lettieri found comfort in Judge Walid Akoum's dissenting opinion in the Appeals Panel's decision on corporate liability, where Judge Akoum argued for a strict interpretation of criminal law and thus against extending the tribunal's jurisdiction for contempt to legal persons absent an express provision in that regard.[100]

Instead of following the STL Appeals Panel's decision, the Contempt Judge took the traditional view by finding the respective corporate manager criminally liable, but not the corporate entity itself.[101] There are several problems with the premise that the prosecution of responsible, natural persons within the corporation would be sufficient to render effective the contempt authority of the STL.[102] Specifically, the approach to impose criminal liability solely on the responsible individual within the corporation runs the risk of producing significant accountability gaps and would "potentially lead to unacceptable impunity," as the STL Appeals Panel concluded.[103]

On March 8, 2016, the Appeals Panel decision was handed down. While it reaffirmed the existence of corporate criminal liability under international law, the Appeals Judges agreed with the Contempt Judge's reliance on Lebanese law to determine whether Al-Jadeed was liable as a legal person.[104] Under that analysis, the

97. *See* al Khayat Judgment, *supra* note 83, ¶¶ 55–56, 67. R

98. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, at 67, 74. R

99. See Akhbar Beirut Decision on Motion Challenging Jurisdiction, *supra* note 73, ¶¶ 66, 73 (Lettieri, J., stating, "I cannot agree with the reasoning and the result of the Appeals Panel's decision in case STL-14-05."). R

100. *See id.* ¶¶ 2–4, 17 (Akoum, J., dissenting).

101. *See* al Khayat Judgment, *supra* note 83, ¶¶ 176, 190. R

102. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 81. R

103. *See id.* ¶ 83.

104. *See* al Khayat Public Redacted Version of Judgment on Appeal, *supra* note 14, ¶191–92, 196. R

Appeals Panel determined that Ms. Al Khayat, the media company's Deputy Head of News and Political Programs, could not be found guilty on the evidence in this case.[105] This rendered irrelevant the issue of attributing liability to the corporation, leading to an acquittal of Al-Jadeed, a legal person.[106] Interestingly, the Appeals Panel chided the Contempt Judge for failing to properly examine sources of international law that the Appeals Panel determined had merited closer scrutiny.[107] Despite the acquittal on evidentiary grounds in this case, legal persons fall under the jurisdiction of the STL, as held by the Appeals Panel.[108]

Much literature exists on corporate criminal liability and the behavioral psychology of corporate punishment, which should inform the debate and jurisprudence surrounding corporate accountability within the international justice system.[109] Questions of fair and effective punishments have received much attention in the criminal law and criminology literature on corporate criminality/liability.[110] The collective and individual dimensions of corporate criminal liability have sensitive normative implications, as the Amicus Curiae Prosecutor illustrated by cautioning that the Contempt Judge's restrictive approach to corporate liability for contempt before the tribunal could lead to a situation where "only . . . small, single person-owned businesses [would] be held accountable, whereas large complex enterprises involving many different actors would generally remain immune."[111] Furthermore, prosecuting only the responsible individuals in a corporation, rather than the entity as well, can have adverse behavioral implications, because such an approach "would fail to . . . punish corporate cul-

105. *See id.* ¶190, 214.

106. Press Release, Special Trib. for Lebanon, Summary of the Appeals Judgment in STL-14-05 (Mar. 8, 2016).

107. *See* al Khayat Public Redacted Version of Judgment on Appeal, *supra* note 14, ¶190. R

108. *See id.* ¶ 191, 214.

109. *See* discussion *infra* Section II.B *passim.*

110. *See, e.g.*, William Laufer, Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability (2006) (examining the effectiveness of of corporate criminal law in light of recent reforms and their effect on corporate behavior and punishment); Wells, *supra* note 92, at 122; Albert Altschuler, *Two Ways To Think About The Punishment of Corporations*, 46 Am. Crim. L. Rev. 1359, 1359 (2009) (arguing "corporate criminal punishment is a mistake" and examining it through two lenses of corporate liability defenses); Gilbert Geis & Joseph DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 Am. J. Crim. L. Rev. 342 (2002) (examining the evolution of and academic debate about corporate criminal liability); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 Harv. L. Rev. 1477 (1996) (exploring the rational behind corporate criminal liability). R

111. *See* al Khayat Prosecution's Appeal Brief, *supra* note 82, ¶ 107. R

tures that condone and in some cases encourage illegal behaviour."[112]

It remains to be seen what the significance of the STL jurisprudence in *The Al-Jadeed Case* will be for the bigger issues pertaining to corporate criminal liability in the context of international justice, namely whether corporate liability before the STL will be limited to contempt powers, as such powers are particularly vital to the effective authority of the STL and thus "require . . . more expansive and flexible interpretation."[113] Also, 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.

C. *Recent Developments on the Aiding and Abetting Standard Before ICTY*

U.S. federal courts have looked to the jurisprudence of the international criminal tribunals for guidance on the legal standard for aiding and abetting liability of corporations in a number of ATS cases.[114] This is so even though the tribunals only prosecute natural persons. In the view of the federal courts, the intent requirements for aiding and abetting are the same whether the actor is a natural person or a juridical person.[115] Thus, an international

112. *See id.* ¶ 109.

113. *See* al Khayat Prosecution's Appeal Brief, *supra* note 82, ¶ 101. R

114. *See, e.g.*, Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1026 (9th Cir. 2014) *cert. denied*, 136 S. Ct. 798 (2016) (drawing upon the jurisprudence of the international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia , the International Criminal Court, and the Special Court for Sierra Leone, for guidance on the elements of aiding and abetting liability under the ATS); Doe v. Exxon Mobil Corp., 654 F.3d 11, 33 (D.C. Cir. 2011) ("The court therefore looks to customary international law to determine the standard for assessing aiding and abetting liability, much as we did in addressing availability of aiding and abetting liability itself. Important sources are the international tribunals, mandated by their charter to apply only customary international law. Two such tribunals, the International Criminal Tribunals for the former Yugoslavia and Rwanda, are considered authoritative sources of customary international law." (citation omitted)); Scheffer, *supra* note 15, at 156 ("In fact, the federal courts are bursting at the seams with full-scale reliance upon the jurisprudence of the war crimes tribunals to determine the proper interpretation and enforcement of federal law."). For a list of relevant tribunal jurisprudence on the mens rea standard for aiding and abetting, see Brief of [Ambassador] David J. Scheffer as *Amicus Curiae* in Support of the Petitioners, at 5, Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015), *cert. denied*, Lungislie Ntsebeza v. Ford Motor Co., 136 S. Ct. 2485 (No. 15-1020). R

115. *Exxon Mobile Corp.*, 654 F.3d at 33. Regarding the mens rea standard for aiding and abetting liability under the ATS, both the D.C. and Eleventh Circuits have endorsed a

criminal tribunal's mandate of the controlling standard for aiding and abetting liability becomes extremely relevant for federal court litigation. For example, in the late 2015 ICTY judgment in the case of *Prosecutor v. Jovica Stanišiæ and Franko Simatoviæ* (*Simatoviæ*), the Appeals Chamber held that the Trial Chamber had erroneously applied a "specific direction" standard for aiding and abetting liability and remanded the case back to the Trial Chamber for retrial with explicit instructions to use the knowledge standard.[116] This blunt instruction came as no surprise, because the ICTY Appeals Chamber had reaffirmed the knowledge standard and explicitly rejected the specific intent standard in its early 2015 ruling in *Prosecutor v. Vujadin Popoviæ* (*Popoviæ*).[117]

If a court held corporations to a specific intent standard for aiding and abetting, as opposed to a knowledge standard, the bar for accountability for human rights violations in cases of corporate complicity would be raised significantly.[118] Rarely would a business have the specific intent to commit atrocity crimes or other serious human rights abuses, considering that the primary purpose of business activity is maintaining and increasing profits rather than committing human rights violations; yet, the pursuit of profits may lead to complicit behavior with, for example, a government that itself has the specific intent to perpetrate the criminal acts.[119] The utility of the tribunal jurisprudence is that it confirms a knowledge standard, which is a far more realistic mens rea standard for how corporations facilitate the commission of atrocity crimes and serious human rights abuses in the pursuit of their own profits.[120] The specific intent standard essentially would require the corporation to share the perpetrator's criminal intent to commit the underlying crime, an almost impossibly high standard to prove with respect to a legal person in any court of law. Fortunately, with the

knowledge standard. *See, e.g., id.* at 39; Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1249–50 (11th Cir. 2005). Yet, the Second Circuit, in *Kiobel*, 621 F.3d at 158, and *Presbyterian Church of Sudan*, 582 F.3d at 259, 261 n.12, along with the Fourth Circuit in Aziz v. Alcolac, Inc., 658 F.3d 388, 399–401 (4th Cir. 2011), have invoked a purpose standard that would require the aider and abettor to share the criminal intent of the principal perpetrator. The Ninth Circuit has not decided the issue yet but has neither rejected the knowledge standard nor the purpose standard. *See Nestle USA*, 766 F.3d at 1023–24.

116. Prosecutor v. Stanišiæ, Case No. IT-03-69-A, Judgment, ¶¶ 43–50 (Int'l Crim. Trib. for the former Yugoslavia Dec. 9, 2015).

117. Prosecutor v. Vujadin Popoviæ, Case No. IT-05-88-A, Judgment, ¶¶ 1732, 1758 (Int'l Crim. Trib. for the former Yugoslavia Jan. 30, 2015).

118. *See* Scheffer & Kaeb, *supra* note 56, at 346–47. R

119. *See id.*

120. *See id.*

ICTY Appeals Chamber's recent judgments in *Popoviæ* and *Simatoviæ*, "the tide finally appears to be turning back, with strength, to far more realistic assessments of how atrocity crimes are committed."[121]

D. *The Need for International Guidance*

Questions of corporate criminal liability in international justice continue to seize—and often divide—the courts domestically, as seen in U.S. ATS complicity cases against corporate defendants, as well as internationally in *The Al-Jadeed Case* before the STL. International guidance on these questions will be imperative to solve these gridlocks. What this guidance could look like in substance and form goes beyond the scope of this Article, but one can discern certain guideposts.

Even if one accepts liability of legal persons before international tribunals and under international law, there remain many details that require further judicial rulings in terms of determining actus reus and imputing mens rea to the legal person. Questions include, but are not limited to: what type of decision-making authority on the part of the individual person is required to attribute responsibility to the entity?; in other words, is corporate liability limited to the acts of "organs" or "representatives" of the corporation only, or does it extend also to acts of other agents?;[122] can knowledge be aggregated across the entire organization, or do all elements of the crime need to be present in one specific individual natural person in order to attribute responsibility to the entity?; what are the appropriate and effective penalties for legal persons as perpetrators of international crimes?

The penalty question is of vital significance when holding legal persons criminally liable, as legal persons constitute a fiction. Courts sometimes resort to monetary fines as a readily available penalty levied against companies because, as legal persons, they cannot be imprisoned or otherwise confined.[123] As will be elaborated below, monetary sanctions can prove inadequate in stirring corporate behavior. Given that cost-benefit analyses guide corporations as for-profit business organizations, monetary fines could

121. David Scheffer, *Reflections on Contemporary Responses to Atrocity Crimes*, *in* 10 Genocide Studies International 105, 110 n.23 (2016).

122. For a comparative overview on the issue of corporate liability attribution, see al Khayat Judgment, *supra* note 83, ¶¶ 64–67; al Khayat Prosecution's Appeal Brief, *supra* note 82, ¶ 114–20. R R

123. *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, 388–89 (1981).

commoditize moral values, which can have perverse consequences.[124] Some creative thinking in terms of sanctioning legal persons, and business organizations in particular, is necessary to ensure that the objectives of criminal law are achieved, especially in terms of retribution and deterrence. Also, it is questionable whether monetary fines are an appropriate means for punishing corporate involvement in human rights violations.[125]

III. Revisiting Corporate Liability Before the ICC

The availability of corporate liability before the ICC, as the permanent international criminal court, can be considered of significant political importance for the corporate accountability agenda at an international level and has been the subject of extensive scholarship over the last two decades.[126] Missing from the current debate, however, is a sophisticated contemporary account of changing state practice on corporate criminal liability for atrocity crimes. Also absent is an examination of the material elements of such corporate liability, particularly regarding questions of attribution of wrongdoing, culpability, and penalties. This Part discusses the existing corporate liability structures before the ICC in light of the legacy of the negotiating history of the Rome Statute for the establishment of the ICC. It concludes by illustrating how recent legal developments on the issue of international corporate criminal liability have mitigated some of the original concerns about complementarity.

A. *The Existing Corporate Liability Structure: Individual Officer and Entity Liability*

A number of issues need to be addressed when contemplating if and how corporate perpetrators can be prosecuted under the Rome Statute. While legal persons do not fall under the jurisdiction of the ICC under the Rome Statute's existing structure, it is important to note that corporate managers and executives can be prosecuted for complicit conduct in crimes against humanity, war crimes, and genocide.[127] Like any other perpetrator, they are "nat-

124. *See* Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. Legal Stud. 1, 10 (2000).

125. *See* Stephens, *supra* note 35, at 579. R

126. *See* Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. Int'l. Crim. Just. 899 (2008); Kyriakakis, *Prosecuting Corporations for International Crimes*, *supra* note 5, at 108–38. R

127. *See* David Scheffer, *Corporate Liability Under the Rome Statute*, 57 Harv. Int'l L.J. 35, 36 (2016). In this article, Scheffer notes the enormous political difficulties in achieving agreement from the states parties to the Rome Statute for the many amendments that

ural persons" that are subject to the ICC's jurisdiction under Article 25(1) of the Rome Statute.[128] In this context, the individual's corporate affiliation is irrelevant and does not bar the ICC's jurisdiction over such individuals.[129] The former Chief Prosecutor of the ICC, Luis Moreno-Ocampo, made the legal feasibility and his general willingness to investigate corporate officers and directors for their involvement in atrocity crimes abundantly clear.[130] Thus, in reference to the first situation investigated by the ICC in 2003—pertaining to the atrocities committed in the Democratic Republic of the Congo—Moreno-Ocampo stated: "[C]rimes . . . appear to be directly linked to the control of resource extraction sites. Those who direct mining operations, sell diamonds or gold extracted in the conditions . . . could also be authors of the crimes, even if they are based in other countries."[131]

The Office of the Prosecutor of the ICC brought charges against a corporate executive of a media company in Kenya (a situation before the ICC for the period between June 1, 2005 and November 26, 2009) for incitement to commit crimes against humanity.[132] There has also been precedent to this end before the International Criminal Tribunal for Rwanda (ICTR) in *The Media Case*, where the ICTR found executives of a media company guilty of public incite-

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would be required to fully consider, for legal persons, such issues as due process, production of evidence, and state cooperation, to name only a few. *Id.* at 39. In the alternative, Scheffer argues for greater focus on corporate executives as natural persons and on further development and enforcement of corporate liability under national law. *Id.*

128. *See id.* at 35; *see also* Prosecutor v. Ruto & Sang, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 349, 367 (Jan. 23, 2012) (corporate executive of a media company subject to the prosecution of the ICC on charges of incitement to commit crimes against humanity).

129. *See* Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 Brook. J. Int'l L. 955, 959–60 (2008).

130. *See* J. Malpas, *New ICC Chief Puts Business Lawyers on Spot*, Legal Week (Sept. 18, 2003), http://www.legalweek.com/sites/legalweek/2003/09/24/new-icc-chief-puts-business-lawyers-in-the-spotlight/?slreturn=20161001181104 [https://perma.cc/EM24-SEAX]; Luis Moreno-Ocampo (Prosecutor of the ICC), *Second Assembly of State Parties to the Rome Statute of the International Criminal Court, Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo*, at 2, 4 (Sept. 8, 2003) [hereinafter Luis Moreno-Ocampo, *Report of the Prosecutor of the ICC*] (pledges "to continue . . . to analyze information received, in order to verify . . . the links between the killings [in Ituri (DRC)] and the exploitation of resources").

131. *See* Luis Merono-Ocampo, *Report of the Prosecutor of the ICC*, *supra* note 130, at 4. R

132. *See* Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 22 (Jan. 23, 2012). On April 5, 2016, the Trial Chamber vacated the charges on evidentiary grounds. *See* Prosecutor v. Ruto, ICC-01/09-01/11-2027-Red-Corr, Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal, ¶ 127, 131 (Apr. 5, 2016).

ment to genocide.[133] The hate radio and hate-spewing magazine at issue in *The Media Case* helped incite the Rwandan genocide of 1994 and it is significant that the ICTR brought the executives of these two media outlets—but not the corporate entities themselves—to justice on grounds of superior responsibility.[134]

Long before the ICTR, the International Military Tribunal (IMT) in Nuremberg held accountable industrialists and directors of I.G. Farben and the Krupp for their affiliations with the corporation.[135] While the IMT only had jurisdiction over natural persons, the Allied Control Council (governing occupied Germany at that time)—even before the trials—imposed several sanctions against legal persons for violations of international law, according to Control Council Law No. 10, including their dissolution and seizure of their assets for reparations.[136] Academic scholars discussing the Nuremberg era have argued that it "is an historically inaccurate conclusion that international law that came out of the jurisprudence of Nuremberg does not provide for sanctions on corporations."[137] The jurisprudence of the IMT confirms this, as well as the notion that the corporation itself was considered the real perpetrator of war crimes.[138] Thus, as international law scholar Andrew Clapham pointed out, the IMT in the I.G. Farben Trial (*Farben*),[139] is to be understood to have "considered Farben, as a corporation, to have violated the laws and customs of war" even if the tribunal did not have jurisdiction over the corporation as a

133. *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 1051, 1096, 1113–14 (Nov. 28, 2007).

134. *See id.* ¶¶ 328–30, 943.

135. *See* Clapham, *supra* note 9, at 233, 238; *see also* Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 Berkeley J. Int'l L. 91, 108 (2002) (discussing the USMT's prosecution of industrialists from the Krupp firm). R

136. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity 306 (Dec. 20, 1945); *see also* Flomo v. Firestone Nat'l. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011).

137. *See, e.g.*, Brief of Amici Curiae Nuremberg Scholars Omer Bartov, Michael J. Bazyler, et al., in support of Plaintiffs-Appellants Seeking Reversal, at 3, *Flomo*, 643 F.3d 1013 (App. No. 10-3675); *see also* Jonathan Bush, *The Prehistory of Corporations and Conspiracy in Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009) (examining historical records and showing that "theories of [corporate] liability were not adopted, but not because of any legal determination that was impermissible under international law; [i]nstead, their rejection was the result of the wishes of the occupation governments for handling the corporations").

138. *See* Clapham, *supra* note 9, at 238–39; *see also* Elizabeth Borgwardt, *Bernath Lecture: Commerce and Complicity: Corporate Responsibility for Human Rights Abuses as a Legacy of Nuremberg*, 34 Dipl. Hist. 4, 627, 630–31 (2010). R

139. *See The I.G. Farben Trial, Trial of Carl Kruach and Twenty-two Others*, *in* 10 Law Reports of Trials of War Criminals 1 (1945) [hereinafter *I.G. Farben Trial*].

legal person.[140] The text of the judgment confirms that reading as follows:

> The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of the Hague Regulations. It was in violation of the rights of private property, protected by the Law and Customs of War.[141]

B. *The Legacy of Rome*

The discussion about corporate criminal liability under the Rome Statute is not new. Part of the negotiations in Rome in 1998 hinged upon the question of whether legal persons, particularly corporations, should be included under the jurisdictional ambit of the Rome Statute.[142] Despite efforts, particularly by the French delegation, to link corporate liability to "individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities," the concept of criminal liability of legal persons under the Rome Statute could not prevail in the end.[143] Since then, the reasons and consequences of not extending the jurisdictional reach of the ICC to corporations have been subject to much discussion and speculation.[144]

The exclusion of legal persons from the jurisdictional realm of the ICC often has been argued against the concept of any corporate (entity) liability for international crimes.[145] However, David

140. *See* Clapham, *supra* note 9, at 239. R

141. *See I.G. Farben Trial*, *supra* note 139, at 50. R

142. *See* Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 189, 199 (Roy Lee ed., 1999) (providing an account of "the legislative history of the [twelve] articles on general principles of criminal law contained in Part 3 of the Rome Statue . . . , which were negotiated mostly under [Per Saland's] chairmanship in [the relevant] working group").

143. *See* Kai Ambos, *Art. 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 475, 477–78 (Otto Triffterer ed., 1999).

144. *See, e.g.*, SCHABAS, *supra* note 12, at 224–25; Clapham, *supra* note 9, at 244–45; R
Ambos, *supra* note 143, at 475–78. R

145. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 168 (2d Cir. 2010); *see also Balintulo*, 796 F.3d at 166 n.28 (reaffirming its long-held position, sourced from its original analysis of the corporate liability issue in its *Kiobel* judgment, that there is no corporate liability under the ATS in significant part because of its exclusion from the Rome Statute). For a further discussion on the corporate liability issue under the Rome Statute, see David Scheffer Royal Dutch Amicus Brief, *supra* note 59. R

Scheffer, the first U.S. Ambassador-at-Large for War Crimes Issues and the chief U.S. negotiator for the Rome Statute, strongly rebuts this line of thinking by stating that the only conclusion that should be drawn from the Rome Statute's failure to include corporations under its jurisdiction is simply that "no political consensus could be reached to use the particular treaty-based court governed by the Rome Statute."[146] Scheffer's position is supported by Article 10 of the Rome Statute, which explicitly states that "[n]othing in [the Statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[147]

The Official Records of the United Nations Diplomatic Conference show that there was a division of perspective in "including criminal responsibility of legal persons in the Statute."[148] The chairman of the working group on the general principles of law "recognized the great merits of the relevant proposal" to introduce corporate criminal liability, but feared that such an introduction would be premature at the time.[149] He later emphasized again 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."[150] 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.[151] The structural differences among the different legal systems of the signatory states and the fact that some member jurisdictions lacked any legal codification for corporate criminal liability would have put at risk the functioning of the system of complementarity as provided under Articles 17, 18, and 19 of the Rome Statute.[152] Such discrepancies turned the tide against

146. Scheffer & Kaeb, *supra* note 56, at 360; *see also* David Scheffer Royal Dutch Amicus Brief, *supra* note 59, at 3–4. R R

147. Rome Statute of the International Criminal Court art. 10, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

148. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records Vol. 3, at 31 n.71, UN Doc. A/CONF.183/13 (June 15–July 17, 1998) [hereinafter U.N. Plenipotentiaries Conference].

149. *See id.* at 14 n.10.

150. Per Saland, *International Criminal Law Principles*, *in* The International Criminal Court: The Making of the Rome Statute 189, 199 (Roy Lee ed., 1999).

151. *See* Scheffer, *supra* note 127, at 36 (emphasizing the differences in evidentiary standards among members). R

152. *See* Ambos, *supra* note 143, at 477–78. The jurisdiction of the ICC is premised on the principle of complementarity according to which "the [ICC] shall be complementarity to national criminal jurisdictions." Rome Statute, *supra* note 147, art. 17. The ICC therefore serves as a court of last resort in cases when national justice systems are "unwilling or R R

including corporate liability in the Rome Statute as negotiations concluded during the summer of 1998.[153]

C. *Mitigating Complementarity Concerns: Changing Legal Reality*

The legal landscape has changed significantly since Rome and much has happened since the failed attempt to include a corporate liability provision in the Rome Statute.[154] Bert Swart, a former international criminal judge and distinguished scholar in the field, notes the "striking phenomenon" that a great number of international instruments featuring provisions recognizing corporate criminal liability have been adopted since 1997.[155]

Additionally, the jurisprudence of the ICC itself shows that the exclusion of corporate liability from its jurisdiction does not preclude corporations being subject to international law. Thus, in 2008, the Trial Chamber of the ICC, in its decision on victims' participation in *The Prosecutor v. Thomas Lubanga Dyilo*,[156] made reference to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles and Guidelines), a U.N. resolution which "identif[ies] mechanisms, modalities, procedures and methods" for victim reparations in implementation of existing international law and human rights obligations.[157] The Principles and

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unable genuinely" to investigate or prosecute. *See* WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 190–91 (Cambridge Univ. Press ed., 2011). To ensure the effectiveness of the system of complementarity, it is crucial that there is sufficient coherence across the national legal systems of signatory states with regard to the legal standards relevant for the prosecution of international crimes under the Rome Statute.

153. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 66 ("[N]o definitive legal conclusion can be drawn from the exclusion of legal persons from the jurisdiction *ratione personae* of the ICC. Instead, it is a reflection of the lack of a *political* (rather than legal) consensus to provide such jurisdiction in the Rome Statute."). R

154. *See supra* Sections II.B–C.

155. *See* Bert Swart, *Discussion: International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J. INT'L CRIM. JUST. 947, 948 (2008); *see also* OECD, *supra* note 5, arts. 2–3; Second Protocol to European Convention on the Protection of the European Communities' Financial Interests, arts. 3–4, 1997 O.J. (C 221); Convention against Transnational Organized Crime, art. 10(2), Nov. 15, 2000, 2225 U.N.T.S. 209; Council of Europe Convention on the Prevention of Terrorism, art. 10(2), May 16, 2005, C.E.T.S. No. 196 (2005). R

156. The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on Victim's Participation, ¶¶ 35, 92 (Jan. 18, 2008).

157. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006) [hereinafter U.N. Basic Guidelines for Gross Violations of International Humanitarian Law].

Guidelines provide for "equal and effective access to justice . . . *irrespective of who may ultimately be the bearer of responsibility* for the violation."[158] Even more explicitly, Principle 15 prescribes the liability of non-state actors by requiring states to provide for reparation "[i]n cases where a person, a legal person, or other entity is found liable."[159] Such wording reveals the changes regarding corporate liability in international and state practice since 1998, and thus reduces concerns about possible interference with the underlying system of complementarity.

The same is true with regard to domestic legal practice. In the past, civil and common law jurisdictions were divided on the issue of corporate criminal liability in terms of entity liability.[160] While in the United States, criminal liability of corporations has been a long-established concept confirmed by the U.S. Supreme Court as early as 1909, a tentative shift towards corporate criminal liability occurred in Europe only in 1988 when the Council of Europe urged member states to consider changing their criminal codes to include corporate criminal liability.[161] During the last decades, civil law nations have increasingly introduced corporate criminal liability schemes in their domestic criminal codes, including in Europe.[162] For example, Spain (June 2010)[163] and Luxembourg (March 2010)[164] joined their European neighbors and now recognize criminal liability for legal entities. According to a 2006 survey covering sixteen countries from different regions of the world, eleven of those countries apply criminal liability to legal persons.[165] The increasing number of domestic laws prescribing liability of corporations for international crimes can be attributed to the increase

158. *See id.* ¶ 3(c) (emphasis added).

159. *See id.* ¶ 15.

160. *See* Kyriakakis, *supra* note 4, at 336; *see also* Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L. J. 126, 129 (2008). R

161. *See* WELLS, *supra* note 92, at 122 (citing Council Recommendation (EC) No. R (88) 18 of Oct. 20, 1988). R

162. These civil law nations are: the Netherlands (1976), Indonesia (since the 1980s), Portugal (1983), Norway (1991), France (1992), Iceland (1993), Finland (1995), Denmark (1996), China (1997), Belgium (1999), South Africa , Switzerland (2003), Argentina, Austria (2006). *See* Kyriakakis, *supra* note 4, 340–42. R

163. Ley Organica 5/2010 art. VII (B.O.E. 2010, 152) (Spain).

164. *See* Nicole Atwill, *Luxembourg: New Law on Criminal Liability of Legal Entities*, GLOBAL LEGAL MONITOR (May 4, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401953_text [https://perma.cc/CGY4-A8XQ].

165. Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict, Legal Remedies for Private Sector Liability for Grave Breaches of International Law, A Survey of Sixteen Countries, Executive Summary*, FAFO 1, 13 (2006).

in international and regional agreements that mandate states to adjust their domestic legal systems accordingly and adopt provisions for corporate liability for certain crimes.[166]

As an outlier, Germany remains a "bastion" of the traditional principle *societas delinquere non potest*, with the result that under the German legal system a corporation as a legal person cannot be held criminally liable.[167] Instead, the prosecutor must identify the individuals responsible and only prosecute those particular individuals, a task that can prove significantly difficult when dealing with the complex corporate structures of modern-day MNCs.[168] The case of Germany also illustrates that resistance against providing for criminal liability of legal persons is not necessarily rooted in conceptual doubts, but rather in the practical difficulties pertaining to the sanctioning of corporations as legal persons.

On a global scale, however, there is an increasingly universal trend across domestic legal systems to incorporate provisions for corporate liability for legal entities.[169] Moreover, experts talk about an "expanding web of liability for business entities implicated in international crimes."[170] This is not to say that corporate criminal liability has developed into a norm of customary international law, but it means that the complementarity concern, as one of the major impediments to including corporate criminal liability into the Rome Statute in 1998, is increasingly disappearing. Yet, there are still major practical issues to address when holding corporations criminally liable.

IV. The Rome Statute and Corporate Liability: A Reality Check

An analysis of corporate liability under the Rome Statute of the ICC provides a useful test case to identify legal and practical challenges when holding corporations as legal persons accountable for atrocity crimes and complicity therein. There are key issues that courts would need to address before they could hold any legal person criminally liable before the ICC—or any criminal court, for that matter—including the question of appropriate penalties

166. *See* Kyriakakis, *supra* note 5, 112–13 (citing De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, Background Paper, 2–6 (Dec. 2006)); Bert Swart, *International Trends Towards Establishing Some Form of Punishment for Corporations*, 6 J. Int'l Crim. Just. 947, 949 (2008). R

167. *See* Diskant, *supra* note 160, at 142. R

168. *See id.*

169. *See* Kyriakakis, *supra* note 4, at 334. R

170. Thompson, Ramasastry & Taylor, *supra* note 4, at 856. R

against corporations when dealing with atrocity crimes, the most heinous offenses against humankind. The remainder of this Part focuses on the issues of attribution of responsibility and penalties in corporate criminal liability.

A. *Jurisdictional Prescriptions*

As a treaty-based statutory regime, Article 25(1) of the Rome Statute on "Individual Criminal Responsibility" would need to be amended to explicitly include jurisdiction over legal persons.[171] As mentioned above, under the current structure, the ICC would hold only individual corporate managers and executives criminally liable under the Rome Statute.[172] However, studies have shown that investigations and prosecutions against such individuals do not ensure optimal retribution and deterrence in the face of corporate criminality, and discussions among scholars and practitioners have increasingly focused on holding the corporate entity itself criminally liable.[173]

Furthermore, research has shown that criminal liability of the corporate entity itself aligns more with the purposes of criminal punishment in terms of retribution, as well as deterrence.[174] Thus, in cases where crimes have been committed through institutional action, individual prosecution likely will not go far enough.[175] Only penalties imposed on the entity will incentivize a change of corporate policies and structures.[176]

This is not to say that individual officer liability for complicity in atrocity crimes under the Rome Statute is not an important tool to achieve accountability in a corporate context.[177] Rather, the leading literature on criminology and organizational behavior suggests

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171. Under Article 25(1) of the Rome Statute, the ICC explicitly exercises jurisdiction only over "natural persons." Rome Statute, *supra* note 147, art. 25(1). The amendment procedure is laid out in Article 121(5) of the Rome Statute: R

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Id.

172. *See* Scheffer, *supra* note 127, at 38. R

173. *See* Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1481, 1484–85 (2009).

174. *See id.* 1485–86; *see also* Slye, *supra* note 129, at 960. R

175. *See* Slye, *supra* note 129, at 962. R

176. *See id.* at 963.

177. *See* Scheffer, *supra* note 127, at 36. R

that optimal deterrence is achievable by holding criminally accountable the individual wrongdoer *and* the corporation itself.[178] From a behavioral perspective, this provides a comprehensive approach to dealing with corporate criminality in its complex dimensions.[179]

However, individual corporate officers may not be effectively incentivized when punishment is directed *only* against the legal person.[180] The reason has proven to be that the individual manager may view the illegal conduct to be in his or her interest even if it is detrimental to the firm under a cost-benefit analysis.[181] Thus, a corporate executive may be inclined to take risks that are counterproductive to the interests of the collective firm as long as an associated increase in profits would serve his or her individual interest in achieving a promotion, preventing his or her dismissal, or receiving incentive compensation, for example.[182] It is therefore imperative to take a holistic approach to corporate criminal accountability by extending joint liability to both the corporate entity *and* the responsible individual officers within the firm.

B. *The Corporate Actus Reus*

Because a corporation is an association of individuals that act as agents of the fictional entity, it is necessary to specify when a legal person "commits" an international crime in terms of Article 25(2) of the Rome Statute. In a multi-country comparison, it is common in many domestic legal systems that only criminal acts of organs (as designated by law or the organizational documents) or representatives (that received delegation of power from an organ) can be imputed to the corporation.[183] Thus, courts would attribute criminal offenses by directors and high-level managers to the corporate

178. See Coffee, *supra* note 123, at 407–10. R

179. *See* WILLIAM LAUFER, *supra* note 110, at 44–96 (2006) (refer to Chapter 2 for challenges recognizing personhood, and Chapter 3 for challenges constructing corporate fault). R

180. *See* Coffee, *supra* note 123, at 407–11. R

181. *See id.* at 393.

182. *See id.* at 393–94.

183. *See* Anna Triponel, *Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad*, *in* PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST CONFERENCE ON LABOR 59, 78 (Andrew Morriss & Samuel Estreicher eds., 2010); *see also* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1346, 1374 (1999) (arguing that "[the] risk of liability . . . has been pushed down the corporate hierarchy from senior managers to subordinate 'wayward' employees" by delegating risk-sensitive responsibilities).

entity, while acts of low-level employees would generally not give rise to criminal liability of the corporate entity as a whole.[184]

The standard of *respondeat superior*, according to which corporations can be held liable for acts of *any* (even low-level) employee *as long as* the latter was acting within the scope of employment, is still applied in the context of corporate criminal liability in the United States,[185] but this approach is more the exception than the rule in an international context.[186] As the STL Trial Chamber held and the STL Appeals Panel confirmed, there is no international consensus yet on the *elements* of corporate liability under international law.[187] To identify common standards of attribution and determine whether they have emerged into international custom or general principles of law would require an in-depth empirical comparative analysis of a cross-section of legal systems around the world.

C. *The Corporate Mens Rea*

Because a corporation lacks a mind of its own, establishment of corporate guilt is a major challenge. There is much controversy about the legal standards for determining knowledge and intent with regard to criminal liability of a legal entity, such as a corporation.[188] Some countries, such as France, employ a vicarious liability model to establish criminal liability of the corporation; in such cases, "corporate blameworthiness" is irrelevant.[189] Rather, mens rea needs to be found in the individual. Then, the proof of causality in terms of "cause and effect" leads to the attribution of criminal

184. *See* Cristina de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 WASH. U. GLOBAL STUD. L. REV. 547, 553–54 (2005).

185. The jurisprudence of U.S. courts has confirmed this rule of attribution. Egan v. United States, 137 F.2d 369, 379 (8th Cir. 1943), *cert denied*, 320 U.S. 788 (1943); *see also* de Maglie, *supra* note 184, at 553–54 (noting that for U.S. states that have adopted the Model Penal Code, corporate criminal liability is only found "where a corporate director or a high managerial agent authorized, commanded, performed, solicited, or recklessly tolerated an offense by a corporate employee or agent") (citing MODEL PENAL CODE § 2.07(1) (AM. LAW INST. 1962)). R

186. Diskant, *supra* note 160, at 128–29. R

187. *See* al Khayat Interlocutory Appeal Concerning Personal Jurisdiction, *supra* note 10, ¶ 191. R

188. *See* de Maglie, *supra* note 184, at 555–60; *see also* WELLS, *supra* note 92, at 113–16 (noting the draft Criminal Code developed by the Law Commission for England and Wales identified corporate liability as 'controversial' back in 1989, and the legal concept of intent in the corporate liability context has progressed at different rates in Western legal systems). R

189. *See* de Maglie, *supra* note 184, at 555. R

liability to the corporation.[190] This approach reflects the notion in France that corporations lack minds and thus a corporation can only be found guilty through its individual employees.[191] The practical implication is that a court must find all elements of the offense in *one* individual, which imposes a stringent standard to establish criminal liability of the corporate entity.[192]

A major downside of this approach is that corporations could avoid liability by dividing up duties and compartmentalizing information within the corporate structure in bad faith.[193] For that reason, courts have often established corporate guilt on the basis of the "collective knowledge" doctrine that imputes to the corporation the totality of the knowledge of *all* employees, as acquired within the scope of their employment.[194] The United States follows this model, for example.[195] This approach recognizes corporations as aggregate bodies that have a personality of their own and thus establishes criminal culpability of the corporation as an independent entity.[196]

Especially when dealing with large-scale atrocity crimes, this collective approach seems to be a more accurate reflection of corporate wrongdoing, because involvement in such crimes is often a function of a systemic issue that proliferates throughout the corporate culture of the organization.

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190. *See id.* at 556 (quoting CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-2 (Fr.)).

191. *See* Triponel, *supra* note 183, at 80. R

192. *See id.*

193. *See* Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 237–38 (1997).

194. *See generally* WELLS, *supra* note 92, at 118 (providing a general analysis of the corporate aggregate knowledge doctrine); Hagemann & Grinstein, *supra* note 193, at 210–47 (1997) (analyzing effect of collective knowledge doctrine on corporate criminal law). U.S. courts have long applied a collective or aggregate knowledge standard. *Cf.* United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987); Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951). R R

195. *Bank of New England*, 821 F.2d at 856; *see also* WELLS, *supra* note 92, at 118 (stating that "corporations have been recognized as aggregate bodies such that it is not necessary to prove intent either which employee had the intent . . . ."). R

196. *See* George Skupski, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE W. RES. L. REV. 263, 264–65 (2011) ("That organizations demonstrate culpability independent of their individual agents has long been recognized both in other areas of the law and competing academic conceptualizations of organizational criminal liability."); *see also* Kaeb, *supra* note 91, at 614 (illustrating the negative normative implications "if the essence of corporate personhood, in other words, the nature of the firm and the diversity of interests of its constituents, including shareholder and other stakeholders, is ignored"). R

D. *Corporate Penalties*

The issue of remedies for corporate liability for complicity in international crimes is a crucial one and will require amendments under the Rome Statute.[197] This Section discusses the advantages and disadvantages of three different structures for corporate sanctions.

1. Hybrid Civil-Criminal Penalty Structures

Corporate criminality is of a hybrid civil-criminal nature such that the crimes are committed by a legal fiction under private law. Unlike individuals, typically corporations are mainly regulated, constrained, and incentivized in their behavior by private law and *civil remedies*.[198] This is one main reason why the ATS—which is unprecedented globally in that it provides civil damages in tort cases for violations of international law that are often criminal in nature—has long been considered uniquely suited to remedy the violations at hand.[199] Yet, it is exactly this compensatory civil liability for corporate involvement in international crimes that has often been subject to criticism.[200] For example, a leading comparative law scholar in this field concluded that much of the resistance in other legal systems outside of the United States to impose compensatory damages (rather than criminal penalties) on corporate wrongdoers relates to the notion that "tort remedies [do not] fit the crime."[201]

While monetary compensation alone is probably insufficient to right wrongs of the magnitude and scale of international crimes, many civil law systems have paired civil tort claims for monetary damages with criminal prosecution in those cases.[202] The so-called

197. *See* Scheffer, *supra* note 127, at 38–39. R

198. *See, e.g.*, Beale, *supra* note 173, at 1486. R

199. *See* Stephens, *supra* note 35, at 594. R

200. *See* Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 Hastings Int'l & Comp. L. Rev. 401, 412 (2001). With the exception of the United States, most legal systems regard civil litigation as a means to settle private disputes rather than to address public policy concerns. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976). Criminal prosecution, on the other hand, is in the public interest: "only criminal punishment involves expressing moral censure and moral condemnation." Laufer & Strudler, *supra* note 88, at 1293; *see also* Richard Cappalli & Claudio Consolo, *Class Actions for Europe? A Preliminary Inquiry*, 6 Temple Int'l & Comp. L. J. 217, 268–70 (1992) (finding that "[t]he criminal process effectuates the public interest by a public party who has exclusive standing to sue. . ., [which] deters future illegal conduct by means of public example."). R

201. *See* Stephens, *supra* note 35, at 602. R

202. *See* Thompson et al., *supra* note 4, at 885–86 (finding that "Argentina, Belgium, France, Japan, the Netherlands, and Spain have the mixed civil/criminal mechanism of R

"partie civile" procedure, also referred to as "action civile," provides a mechanism by which the victim of a crime can attach to the criminal case his or her civil claim for damages suffered and therefore become a (civil) party to the criminal proceedings.[203] This model provides one option for structuring corporate liability before the ICC. This would generate significant challenges, though, that would be difficult to overcome for the ICC in its current structure and design. Thus, the issue facing the ICC would be a determination on the merits of a civil action for damages that would be joined with the criminal proceedings, but that still would be regarded as an independent claim grounded in substantive tort law.[204] It seems to be an unrealistic expectation that states parties to the Rome Statute would expand the mandate of the ICC in such a way that would change the very nature of the ICC as a *criminal* court for atrocity crimes.

2. Criminal Penalties for Legal Persons

A different approach would be to stay within the scope of the ICC's purely criminal structure and amend the current penalty section in Part VII of the Rome Statute to include corporate actors.[205] Extending the ICC's jurisdiction to non-natural persons poses challenges with regard to the existing penalty structure under Article 77 of the Rome Statute, which provides imprisonment as the primary penalty available.[206] However, according to Article 77(2), the ICC can impose fines *in addition* to the primary penalty of imprisonment, but these fines do not constitute a legitimate stand-alone

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action civile . . . ."); *see also* Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. U. J. INT'L HUM. RTS. 263, 300 (2008) (finding that states that use the "partie civile" model allow private individuals to bring a complaint, forcing the investigating criminal magistrate to "take it up.").

203. *See* Eric Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP-DISKUSSIONSPAPIER 28 (2005) (finding that Belgium and French civil law recognize "action civile" for damages in criminal cases); *see also* Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems*, 34 WAYNE L. REV. 95, 115 (1987).

204. *See* Jean Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TULANE L. REV. 687, 688–89 (1965).

205. Part VI of the Rome Statute deals with "penalties." Rome Statute, *supra* note 147, arts. 77–85. R

206. According to Article 77(1) of the Rome Statute, "the Court may impose one of the following penalties[:] . . . (a) [an i]mprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) [a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." *See id.* art. 77(1) (alteration in original).

penalty in the face of the egregious crimes under the jurisdiction of the Rome Statute.[207]

Because corporations are fictional entities under the law, a court cannot sentence a corporate entity to imprisonment per se. Thus, the states parties of the ICC will have to expand the catalogue of available penalties under Article 77(1) of the Rome Statute to include other available penalties that are suitable to be imposed on convicted legal persons. Criminal fines would appear to be the most viable option to punish corporate crimes for the simple reason that corporations are profit-driven structures and thus would be expected to be responsive to monetary disincentives arising from fines. However, this Article does not suggest imposing criminal fines as the primary penalty pertaining to convicted legal persons if Article 77(1) of the Rome Statute were to be amended. Fines imposed as criminal penalties are not dissimilar from civil monetary damages, neither of which may be meaningful punishments for complicity in, or even direct perpetration of, atrocity crimes of great magnitude. This holds particularly true when considering that modern-day multinational corporations are of tremendous economic power, with annual revenues often exceeding the GDP of middle-sized economies.[208]

Judged against a behavioral psychology standard,[209] monetary fines risk putting a price tag on moral values, including the most egregious violations of human rights. The outcome can change the underlying social norms into a mere market exchange.[210] Already in 1948, a delegate to the negotiations on the Genocide Convention correctly noted that "if genocide were committed, no

207. According to Article 77(2) of the Rome Statute, "[i]n addition to imprisonment, the Court may order: (a) [a] fine under the criteria provided for in the Rules of Procedure and Evidence; (b) [a] forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties." *See id.* art. 77(2) (alteration in original).

208. According to a study, Wallmart's annual revenue exceeds the GDP of Norway in 2010. *See* Vincent Trivett, *25 US Mega Corporations: Where They Rank If They Were Countries*, Business Insider (June 27, 2011), http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6#walmart-is-bigger-than-norway-25 [https://perma.cc/E2B5-RW7S]. This trend has long been established. *See* Sarah Anderson & John Cavanagh, *The Rise of Global Corporate Power*, Institutez Pol'y Stud. (Dec. 4, 2000), http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf [https://perma.cc/8SYJ-JGDR].

209. *See supra* Section IV.A.

210. *See* Lynn Stout, Cultivating Conscience: How Good Laws Make Good People 11–12 (2010); *see also* Gneezy & Rustichini, *supra* note 124, at 13–14 (concluding from experiment, which showed increased frequency of wrongdoings after fines were imposed, that monetary fines may induce people's perception of wrongdoing as a commodity that may be purchased). R

restitution or compensation would redress the wrong. The Convention would be rendered valueless if it were couched in terms which might allow criminals who committed acts of genocide to escape punishment by paying compensation."[211]

Criminal fines can be used as an effective and appropriate penalty for international crimes under the following conditions: (1) if fines under Article 77(2) of the Rome Statute are very high (relative to the global annual revenue of the company concerned) so as to prevent a commoditizing of human rights, because the costs outweigh the benefits for the corporation under a classical cost-benefit analysis as the major premise of modern-day business decision making,[212] *and* (2) if criminal fines are joined with other non-monetary sanctions as primary penalties under Article 77(1) of the Rome Statute.[213] The latter requires some innovative thinking with regard to corporate perpetrators as, unlike human beings, they cannot be imprisoned per se.

Critical lessons for reform at the ICC can be drawn from precedents in French law governing criminal penalties for corporations as legal persons.[214] More than two decades ago France became one of the first civil law jurisdictions in Europe to adopt a comprehensive corporate criminal liability scheme, which led to a detailed catalogue of penalties aimed at legal persons as criminal perpetrators.[215] Under French law, there are nine deprivations of corpo-

211. *See* Michael Kelly, *Prosecuting Corporations for Genocide Under International Law,* 6 HARV. L. & POL'Y REV. 339, 341 (2012) (quoting HIRAD ABTAHI & PHILIPPA WEBB, 2 THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 1778 (2008).

212. *See* Iris Bohnet, Bruno Frey & Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 AM. POL. SCI. REV. 131, 133 (2001); *see also* Gneezy, Uri & Rustichini, *supra* note 124, at 15 (noting that "a 'large enough' fee would eventually reduce the behavior"). R

213. *See* Bruno Frey, *Motivation Crowding Theory—A New Approach to Behavior*, *in* BEHAVIOURAL ECONOMICS AND PUBLIC POLICY, ROUNDTABLE PROCEEDINGS 40, 45–46 (Australian Government Productivity Commission 2008).

214. *See* Leonard Orland & Charles Cachera, *Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) Under The New French Criminal Code (Nouveau Code Pénal)*, 11 CONN. J. INT'L L. 111, 114–16 (1995) (traditionally, French law was grounded in the concept of *societas delinquere non potest*, which has had "a profound impact on civil law systems." The adoption of the French new criminal code deviated from this legal tradition and marked "the establishment—for the first time in France and, indeed, for the first time in any civil law nation—of comprehensive principles of corporate criminal liability and the creation of a powerful array of corporate criminal sanctions."); *see also* Sara Sun Beale & Adam Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 106, 154–55 (2004) (France's new law on corporate criminal liability "is more comprehensive than other statutory schemes, particularly in its provision of extensive non-monetary sanctions[.]").

215. *See* Kyriakakis, *supra* note 4, at 340; *see also* Orland & Cachera, *supra* note 214, at 114. R

rate rights as enforceable penalties.[216] These penalties include dissolution of the corporation, judicial surveillance, public display and distribution of the sentence, confiscation of assets, permanent or temporary exclusion from invitations for tenders offered by public authorities, and permanent or temporary closure of the corporation's establishments engaged in the commission of the crimes.[217] In light of the gravity of international crimes under the Rome Statute, the closure of implicated corporate units, general confiscation of all of the company's assets (rather than only those assets associated with the criminal offense),[218] and even the extreme measure of dissolving the corporation—"the corporate death penalty"—may be suitable penalties in the context of the Rome Statute.

From a comparative legal perspective, it seems that countries providing for corporate criminal liability share a similar standard for when dissolution of the company is an eligible penalty for corporate criminal conduct. Thus, the French[219] and Belgian[220] legal systems permit the winding-up of the legal person provided the legal person was criminal in character, that is, was established to commit the crimes, or was intentionally misused for criminal purposes contrary to the original purpose of the corporation. In an effort to avoid complementarity problems, an in-depth multi-country analysis of the different standard requirements for corporate capital punishment is required to inform the way forward.

In addition to measures of closure of business premises, confiscation of assets, fines, or (in the most severe cases) dissolution of the company, judicial surveillance and transparency initiatives could further enforce effective retribution and future deterrence. On all these aspects, close cooperation with signatory states is necessary, because there would need to be a companion domestic law created to render enforceable any such penalty imposed by the ICC.[221] This is particularly true at the enforcement level when seizing a company's assets. There are many legal, political, and practical

216. *See* Andrew Kirsch, *Criminal Liability for Corporate Bodies in French Law*, 9 EUR. BUS. L. REV. 38, 41 (1998).

217. *See id.*

218. France, for example, prescribes general confiscation of assets for crimes against humanity that were committed by a legal person. *Id.*; *see* CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 213.3 (Fr.) [hereinafter FRENCH CODE PÉNAL].

219. See FRENCH CODE PÉNAL, *supra* note 218, arts. 131–39. R

220. CODE PÉNAL/STRAFWETBOEK [C.PÉN./SW.] art. 35 (Belg.).

221. See SCHABAS, *supra* note 152, at 190 (discussing the concept of complementarity in relation to enforceability of international law). R

issues that will have to be addressed at the enforcement level as modern-day MNCs consist of a complex structure of parent company, subsidiaries, branches, and joint ventures across multiple jurisdictions world-wide.

3. Innovative Penalty Structures: Corporate Monitors as Gatekeepers

One innovative tool that the U.S. Department of Justice (DOJ) has used to enforce the Foreign Corrupt Practices Act (FCPA) has been the non-monetary criminal penalty of assigning an independent compliance monitor to oversee the company.[222] Under the FCPA regime there has been an increasing number of prosecutions in recent years of individual corporate officers for violations of the FCPA.[223] While individual prosecutions remain important to deter future criminal conduct, it is also crucial to address systemic problems in the company that can lead to a culture of non-compliance.[224] Increasingly, federal prosecutors have insisted, as a key condition arising from their FCPA investigations, on the assignment of independent monitors to the indicted companies.[225] From 2004 to 2010, the DOJ imposed monitors on more than forty

222. The decision to impose a compliance monitor depends on the specific facts of the case. According to the *Resource Guide to the U.S. Foreign Corrupt Practices Act* (FCPA) by the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC), the following factors determine whether a monitor is appropriate, namely: "seriousness of the offense[;] duration of the misconduct[;] pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines[;] nature and size of the company[;] quality of the company's compliance program at the time of the misconduct[;] subsequent remediation efforts." DEP'T OF JUSTICE, CRIM. DIV., & SEC, ENF'T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, at 71 (2012) [hereinafter DOJ & SEC RESOURCE GUIDE], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/WYC2-PP78].

223. *See* Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, NYU J. L. & BUS. 845, 853–54 (2011). There is no specialized accounting provision for human rights, unlike for FCPA-related matters; however, there are discernable regional trends. Thus, human rights are subject to the reporting requirements under the E.U. directive on disclosure of non-financial information "to the extent [that this information is] necessary for an understanding of the undertaking's development, performance, position and impact of its activity." *See* Council Directive 2014/95/EU O.J. (L 330) 1 (regarding disclosure of non-financial and diversity information by certain large undertakings and groups).

224. *See* Joseph Warin, Michael Diamant & Veronica Root, *Somebody's Watching Me: FPCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 26 (2011); *see also* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 682 (2009) (noting that as of 2009, "[t]he DOJ has imposed at least [forty-four] monitorships as part of settlements agreements with corporations").

225. *See* David Krakoff et al., *FCPA: Handling Increased Global Anti-Corruption Enforcement*, MAYER BROWN 4 (2008), https://m.mayerbrown.com/Files/Publication/3cecc51c-17bd-

percent of all companies entering into a settlement or plea bargain on FCPA charges.[226]

In the context of FCPA enforcement, an independent monitor is usually a condition for a deferred prosecution agreement, settlement, or plea bargain for the company in question.[227] While the use of monitorship has been common practice within the FCPA regime as enforced by the DOJ, it could well be used beyond the realm of contractual agreements with the prosecution, such as being incorporated into the relevant sentencing guidelines for the ICC. That would make it another option for a non-monetary form of penalty which the court could impose.

That is not to say that there should be no individual liability imposed for corporate wrongdoing. Rather, it is important with regard to any kind of organizational criminality to make sure that penalties address the individual and institutional level.[228]

The appointment of monitors by the prosecution in FCPA enforcement proceedings has become an effective option to change the culture of non-compliance within the targeted company, a process that entails great attention to the shortcomings in compliance procedures and systems within the organization.[229] "Few penalties imposed on a corporate criminal offender cause as much consternation as do compliance monitors."[230] Companies that retained an independent monitor as a condition for settling

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402d-8f7c-519530e8a4de/Presentation/PublicationAttachment/63686ef2-e850-481a-8671-ce12a834e59b/Handling_Increased_Global.pdf [https://perma.cc/CA2P-BQ55].

226. *See* Warin et al., *supra* note 224, at 322. Since 2010, the imposition of external monitors has decreased; while in the past "monitors have been imposed in approximately one out of every three FCPA settlements with sanctions greater than [US]$3 million[;] in 2011, only one of twelve such FCPA settlements included a monitor." *Imposition of Compliance Monitors in FCPA Settlements Is Down, but Recent Court Ruling Increases the Risk of Public Access to Monitor Reports*, WILLKIE FARR & GALLAGHER, LLP 1 (Apr. 20, 2012), http://www.willkie.com/~/media/Files/Publications/2012/04/Imposition%20of%20Compliance%20Monitors%20In%20FCPA%20Settle__/Files/ImpositionofComplianceMonitorspdf/FileAttachment/Imposition_of_Compliance_Monitors.pdf [https://perma.cc/S4VL-YUDY]. This is not to say that monitorships are not part of enforcement agencies' settlement toolset anymore, but rather recent years have shown that monitorships have been used primarily in cases of severe misconduct. *See* Laura Fraedrich & Jamie Schafer, *What Is in It For Me: How Recent Developments in FCPA Enforcement Affect the Voluntary Disclosure Calculus*, GLOB. TRADE & CUSTOMS J. 257, 260 (2013). R

227. See Warin et al., *supra* note 224, at 328. R

228. *See* Coffee, *supra* note 123, at 387. R

229. *See* Vikramaditya Khanna & Timothy Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1720 (2007).

230. *See* Warin et al., *supra* note 224, at 321. R

FCPA charges include such major brands as Siemens,[231] Daimler,[232] and Eni,[233] to name just a few. The DOJ has also established the precedent of imposing monitorships for purposes other than FCPA enforcement.[234] One of the conditions imposed by the DOJ to settle the BP case related to the Deepwater Horizon oil spill was the appointment of two independent corporate monitors—a process safety monitor and an ethics monitor.[235]

Monitors typically perform an independent review of a firm's compliance policies and procedures.[236] There are different methodologies for selection of monitors: the prosecution can designate a specific monitor, or the selection of the monitor may be made in cooperation with the respective government, typically by granting relevant government agencies veto power over the selection.[237] The monitors' primary task is to construct a robust compliance system and to recommend measures that would strengthen future compliance.[238] However, it is important to bear in mind that no attorney-client privilege exists between the company and the monitor in these situations.[239] The monitor can perform many critical tasks, including the investigation of specific allegations on behalf

231. *See* Complaint, SEC v. Siemens Aktiengesellschaft, No. 1:08-cv-02167 (D.D.C. 2008).

232. *See* Deferred Prosecution Agreement, United States v. Daimler AG, No. 1:10-cr-00063-RJL (D.D.C. 2010).

233. *See* Richard Cassin, *Snamprogetti, ENI in $365 Million Settlement*, THE FCPA BLOG (July 27, 2010), http://www.fcpablog.com/blog/2010/7/7/snamprogetti-eni-in-365-million-settlement.html [https://perma.cc/CC8B-UD4T].

234. Khanna & Dickinson, *supra* note 229, at 1719–20 (finding that enforcement authorities have imposed monitors in a "wide range of cases, including securities fraud, tax fraud, and . . . cases involving charges under the Foreign Corrupt Practices Act"). R

235. *See BP Statement on Deepwater Horizon Settlement with U.S.*, WALL ST. J. (Nov. 15, 2012), http://blogs.wsj.com/law/2012/11/15/bp-statement-on-deepwater-horizon-settlement-with-u-s/ [https://perma.cc/AVF9-3J9S].

236. *See* DOJ AND SEC RESOURCE GUIDE, *supra* note 222, at 71. R

237. *Id.* at 71 n. 348–49. Internal guidance documents by the DOJ dictate the process to select monitors. Lanny A. Breuer, Assistant Attorney General, U.S. Dep't of Just., Memorandum to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters (June 24, 2009), http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp-appx-3.pdf [https://perma.cc/NLV5-BFZX]; Craig S. Morford, Acting Deputy Attorney General, U.S. Dep't of Just., Memorandum to the Heads of Department Components and United States Attorneys on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf [https://perma.cc/ECK4-8A88].

238. On the scope of duties of corporate monitors, see Craig S. Morford, *supra* note 237, § III. R

239. *See* Warin et al., *supra* note 224, at 353–54. R

of the agencies.[240] They also wield influence over the management of the company by virtue of their reports to the government.[241] The monitor typically delivers such a report annually during his or her appointed term, which often lasts three years for FCPA enforcement actions.[242]

The monitor sometimes exercises broad investigative powers and is not limited to the mandate sought by the prosecution.[243] For example, "the monitor might discover and reveal previously undisclosed [w]rongdoing" which "may or may not be FCPA related, but if found by a monitor, it can lead to further scrutiny by the government and additional penalties."[244] Such incidental discoveries illustrate the extensive reach and influence of the monitor over the company. The scope of monitorships can vary significantly depending on the terms of the agreement, and the role of the monitor can range from taking the function of an "Advisor, Auditor, Associate, and Autocrat."[245]

Due to the extensive nature of its scope, a monitorship can require significant resources and subject the company to high costs associated with staff who are allocated to the needs of the monitor and to implement compliance measures.[246] All this makes the appointment of an independent monitor highly punitive and thus likely to move corporate behavior towards compliance. Monitorship as a criminal penalty does not merely serve the purpose of deterrence, but can also be a driving factor for organizational and behavioral change. In this vein, the DOJ understands the government's role in corporate prosecution "to be a force for positive change of corporate culture [and] alert corporate behavior."[247]

240. *See* Rachel Louise Ensign, *How Daimler Got a Very Good Report Card*, WALL ST. J. (May 29, 2013), http://blogs.wsj.com/riskandcompliance/2013/05/29/how-daimler-got-a-very-good-report-card/ [https://perma.cc/Q752-7MX2].

241. *See* Khanna & Dickinson, *supra* note 229, at 1725. R

242. *See* Warin et al., *supra* note 224, at 347. R

243. *See* Khanna & Dickinson, *supra* note 229, at 1725 (explaining that monitors have broad powers because the underlying engagement letter usually features language that grants the monitor authority to investigate and review "as necessary to certify to the [SEC]"). R

244. *See* Warin et al., *supra* note 224, at 354. R

245. *See* Ford & Hess, *supra* note 224, at 707. R

246. *See* Warin et al., *supra* note 224, at 321. R

247. *See* Paul J. McNulty, Deputy Attorney General, U.S. Dep't. of Just., Memorandum to the Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations, 2 (Dec. 12, 2006), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf [https://perma.cc/9VNV-W583].

Monitorship can "serve [both] as a reform measure and as a deterrent."[248]

A corporate monitorship has the potential to facilitate such a mindset shift within an organization.[249] This would require a so-called "growth mindset."[250] Mindset theory in psychology literature can be helpful in understanding the change function of organizational mindsets and thus inform the design of effective penalties for corporate wrongdoers.[251] Research has shown that mindsets can either be "fixed" with regard to the belief that certain human attributes are stable and cannot be changed, or they can be premised on a growth mentality grounded in the belief that people can substantially change.[252] Cultivating and communicating a growth mindset (both internally and externally) has important implications, such that it increases trust as well as cultural sensitivity.[253] These are important elements of a culture of compliance and integrity. A growth mindset can therefore be considered imperative to render corporate monitorships effective in behavioral terms.

Ideally, monitorships serve two purposes: to create an effective compliance system and to promote a mindset of integrity.[254] Companies facing compliance challenges in the past have recognized the importance of promoting a culture of integrity as the indispensable glue between obedience to the law and compliance with internal rules.[255] While it is undisputed that a solid overarching rules structure is critical, neuroscience and behavioral science confirm that an integrity-based compliance system is apt to produce more intrinsic compliance results at lower monitoring costs, compared to large rules-based systems.[256] Integrity management has long been considered a central component of enlightened busi-

248. *See* Ford & Hess, *supra* note 224, at 703. R

249. *See* Warin et al., *supra* note 224, at 326–27. R

250. *See* Mary Murphy & Carol Dweck, *Mindsets Shape Consumer Behavior*, 26 J. CONSUMER PSYCHOL. 127, 127 (2016).

251. *See id.* at 131 (An organizational mindset is the shared belief in certain human attributes, values, and norms within a group.).

252. *See id.* at 127.

253. *See id.* at 131, 133–34.

254. *See* Warin et al., *supra* note 224, at 326–27. R

255. *See* Ensign, *supra* note 240 (citing Dr. Christine Hohmann-Denhardt, board member for legal affairs and integrity at Daimler AG 2011-2015); *see also Culture of Integrity*, DAIMLER, https://www.daimler.com/sustainability/integrity/culture.html [https://perma.cc/KT7R-7Z2M] (last accessed Nov. 23, 2016). R

256. *See* Caroline Kaeb & Harlan Loeb, *Principles-Based Regulation & Compliance: A Framework for Sustainable Integrity* 4–5 (working paper) (on file with author).

ness practice.[257] Recent business examples that have put this concept into practice include the auto manufacturers Daimler and Volkswagen, both of which have made integrity concerns a core part of their legal affairs and compliance programs and created a corresponding director position on their respective boards of management.[258] This direct line to the board on issues of compliance and integrity signals an important change in corporate structures that implements a mindset shift. The appointment of a monitor can facilitate systemic change at the organizational level and contribute to changing the corporate mindset and culture.

V. Corporate Liability in International Justice Today

Holding corporate officers individually liable offers a feasible and readily available option to establish corporate accountability. Individual criminal liability of corporate officers clearly falls within the jurisdiction of the ICC and the international tribunals over natural persons and would therefore not require any treaty amendments to the existing statutory structures. However, there are hurdles that impair the actual practicability of individual corporate officer liability as the main tool to hold corporations accountable. Most prominently, the discovery process and evidence production are significantly more cumbersome when holding individual corporate officers criminally liable. In that case, a court must find all elements of the offense (including fault) in one individual. In cases of institutional liability, on the other hand, it is not necessarily required to prove which or whether any employee indeed had knowledge or intent. Rather, courts can establish corporate liability on the basis of the "collective knowledge" doctrine,[259] which merely requires that the members of the company had knowledge in the aggregate. This mental fiction would lower the evidentiary bar for the prosecution significantly. As shown in Part IV above, the standards for attributing corporate liability vary across different jurisdictions. A comparative legal analysis can assist in rethinking the reform process for corporate liability under the Rome Statute to reflect prevailing state practice.[260]

257. *See* Lynn S. Paine, *Managing for Organizational Integrity*, Harv. Bus. Rev. 106–07 (Mar.–Apr. 1994).

258. *See* Doron Levin, *Daimler Lends VW a Hand to Manage Scandal Clean up*, Fortune (Oct. 20, 2015) http://fortune.com/2015/10/20/vw-daimler-board-scandal/ [https://perma.cc/U4NX-EYAF].

259. *See* Wells, *supra* note 92, at 118. R

260. *See supra* Part IV.

This notion of corporate blameworthiness, which is associated with corporate entity liability and requires establishing corporate guilt and intent, has its own conceptual problems because a corporation as a legal person has no conscience of its own.[261] Despite those inherent conceptual challenges that will need to be addressed, attaching liability to the corporate entity, rather than merely the individual managers or officers involved, can be considered a more accurate reflection of the nature of corporate malfeasance, particularly at the scale of atrocity crimes involvement. As criminal law scholar Sara Sun Beale has pointed out, "because of their size, complexity, and control of vast resources, corporations have the ability to engage in misconduct that dwarfs that which could be accomplished by individuals."[262] In that vein, mere individual officer liability seems vastly insufficient for an act that, while carried out by an individual, was amplified in its impact throughout the corporate context in which it was committed.

A. *Normative Implications of Developments in Corporate Accountability and the Mitigation of Complementarity Concerns*

The legal landscape has changed significantly since the negotiations for the Rome Statute forfeited inclusion of liability of legal persons under the jurisdiction of the ICC. International treaty-making and the jurisprudence of international tribunals has increasingly recognized corporate liability for international crimes.[263] These changes have important normative implications for the adjudication of these issues before U.S. courts, as well as significant practical and design implications with regard to penalty structures.

On a normative plane of analysis, the Second Circuit has regularly cited the failure to include legal persons under the scope of the Rome Statue as evidence against the existence of corporate liability under international law and, for that matter, under domestic law, namely the ATS.[264] The legislative history of the negotiations to the Rome Statute reveal that the decision against including legal persons under the jurisdiction of the ICC was primarily the result of practical considerations related to the realities and constraints of international treaty negotiations, rather than a function of a

261. *See* Coffee, *supra* note 123, at 386; *see also* LAUFER, *supra* note 110, at 70–72 (outlining the challenges to fairly attribute culpability to corporate organizations). R

262. *See* Beale, *supra* note 173, at 1484. R

263. *See supra* Sections II.B–C.

264. *See supra* Section II.B; *see also* cases cited *supra* note 145. R

normative choice. Moreover, an analysis of domestic criminal codes and the jurisprudence of international tribunals shows that the primary concerns raised at the time against providing for corporate international criminal lability before the ICC largely have been weakened by the increasing recognition of corporate international criminal liability in domestic criminal codes, international treaties, and international tribunal jurisprudence.[265]

Additionally, recent international tribunal jurisprudence is indicative of this trend towards holding corporations accountable for international crimes. The underlying general concept of corporate criminal accountability as a prong of international justice traces back to the international trials in Nuremberg in the aftermath of the Second World War. While the IMT only had jurisdiction over natural persons and thus could only prosecute individual industrialist and corporate officers, the tribunal did so based on their association and role with the corporation implicated in atrocity crimes. The International Criminal Tribunal for Rwanda has established similar precedent in *The Media Case* in 2007.[266] Most recently, the STL has ruled on the question of corporate liability, interpreting it more expansively under its statute of formation so that it includes legal persons, such as corporations, as eligible subjects of investigation and prosecution by the ICTR.[267]

These developments in international tribunal jurisprudence also impact norms at the domestic level. For instance, U.S. federal judges across different circuits have regularly consulted the jurisprudence of the international tribunals when applying the ATS as a private cause of action for violations of international law. According to the Supreme Court's ruling in *Sosa v. Alvarez Machain*, international law ought to be interpreted in a contemporary manner, such that present-day international norms are actionable under the Rome Statute as long as they constitute "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth]-century paradigms [the Supreme Court has] recognized."[268] This is a function of the fundamental principle that "[i]nternational law is part of our [U.S.] law" as held by the Supreme Court in *The Paquete Habana*.[269]

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265. *See supra* Sections II and III.C.

266. *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment (Nov. 28, 2007).

267. *See supra* Section II.B.

268. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

269. The Paquete Habana, 175 U.S. 677, 700 (1900).

Despite significant convergence in state practice on the concept of criminal liability of legal persons, there is still vast legal disagreement and uncertainty about the material elements of corporate liability under international law. The procedural history of *The Al-Jadeed Case* before the STL illustrates this as the controversy unfolds between the Contempt Judge and Appeals Panel of the same tribunal.[270] While reaffirming the existence of corporate liability before the tribunal, the Appeals Panel conceded to the Contempt Judge that "there is no relevant international convention with respect to the elements of corporate liability, nor international custom or general principles of law."[271]

B. *Behavioral Implications for Corporate Penalties Design*

The legal analysis under the Rome Statute shows that imposing criminal liability on corporations as legal persons also poses significant practical challenges, especially with regard to corporate mens rea and corporate punishment. While courts, especially in the United States, have intensively studied the mens rea standard for corporate aiding and abetting international law violations,[272] the question of penalties for corporate involvement in atrocity crimes has not received much attention. This is a significant gap in the literature, which needs to be addressed as the design of criminal penalties for legal persons is the underlying "hard question" that is the fulcrum for an effective criminal remedy structure.

The quest for an effective and appropriate criminal penalty structure for legal persons goes to the heart of the nature of corporations as organizational fictions under the law with no mind, soul, and body of their own. Behavioral law and economics studies provide important insights in this regard that should inform the related regulatory design questions. As suggested by the existing literature, joint liability of the implicated corporate officers, as well as the corporation itself, would be most effective in terms of deterrence and retribution. While individual officer liability is an important starting point towards corporate criminal accountability, it would not account for the organizational dimension of corporate

270. *See supra* Section II.B.

271. *See* al Khayat Public Redacted Version of Judgment on Appeal, *supra* note 14, ¶ 191 (emphasis added). R

272. *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009); Bowoto v. Chevron Corp., No. C99-02506 SI, 2006 WL 2455752, at *3–4 (N.D. Cal. 2006).

wrongdoing. Yet, the corporate context in which crimes are committed matters, as future abuses can only be prevented if penalties are imposed at the corporate level, not merely the individual level. This is particularly true when dealing with corporate involvement in large-scale atrocities, which would usually be endemic of a systemic organizational structure and corporate culture that lead to the violations in the first place. It is not, however, merely a matter of effectiveness of remedies, but also one of rendering justice. After all, the crimes committed are not merely a function of individual wrongdoing, but also of corporate wrongdoing at the organizational level of the company.

One key challenge when holding corporations criminally liable is that they are mere fictions under the law and cannot be imprisoned. Monetary fines offer an available alternative within the existing penalty structures for natural persons.[273] But here again, lessons from behavioral game theory offer valuable insights. Thus, monetary fines have been shown to run the risk of corrupting social norms by transforming the underlying relationship into a market exchange. This would remove uncertainty from the "game" on the part of the company and thus turn accountability into one item in the cost-benefit calculus of the company. In other words, it would put a price tag on human rights. This realization bears important regulatory design implications with regard to corporate penalties. Some innovative thinking is required to identify new penalty options that would stir corporate behavior effectively and in an incentive-compatible[274] manner so as to minimize similar violations.

Monitorship offers a possible penalty option that has previously been applied in another context of corporate accountability, namely anti-corruption enforcement.[275] While the nature of the infringements are substantially very different in cases involving corruption and those involving atrocity crimes, the appointment of an independent monitor can effectively change a corporate culture of non-compliance and help develop a robust compliance system

273. *See supra* Section IV.D.1.

274. *See* Leonid Hurwicz, *Optimality and Informational Efficiency in Resource Allocation Processes*, *in* MATHEMATICAL METHODS IN THE SOCIAL SCIENCES 27, 28–29 (Kenneth J. Arrow et al. eds., 1959); *see also* Harvey S. James, Jr., *Incentive Compatibility*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/topic/incentive-compatibility [https://perma.cc/5Z6V-TUVH] (last visited Nov. 23, 2016) (defining incentive compatibility as a state in economic game theory when the incentives that stir the behavior of individual participants are in line with the rules established by the group).

275. *See supra* Section IV.D.3.

within the company. Monitorships can function as a vehicle for organizational change from within the company to promote a culture of integrity. While the experiences with FCPA monitorships provide valuable lessons, some adjustments will be required when monitors are used in the context of violations of the Rome Statute. In these cases, monitorships likely would not be a matter of contract law (in the form of an agreement with the prosecution), as with FCPA cases. This methodology would not be appropriate for the heinous crimes in question, because human rights are not transactional. Rather, they involve moral and rights-centric norms[276] that often require discretionary judgment in terms of how to remedy the underlying misconduct. This discretion, however, can be well-informed by a regulatory approach that stipulates a uniform standard for the scope and administration of monitorships in individual cases.

Monitorships, as developed under FCPA procedures, offer an innovative option for non-monetary penalties in the broader context of corporate crime, including corporate involvement in atrocity crimes, that courts can combine with other forms of penalties as deemed fit.[277]

In U.S. law, there is no statutory definition of a compliance monitor,[278] but rather "[e]ach FCPA monitorship is strictly a creation of the settlement with the government, and the settlement agreement, in effect a written contract."[279] A different approach is necessary for compliance monitors under the Rome Statute, because these proceedings involve atrocity crimes, as opposed to traditional white collar crimes. The Rome Statue would have to be explicitly amended in order to envision using compliance monitors as enforcement measures. Before that would happen, negotiators doubtless would look to some standardization at the international level to understand the scope of how monitors can be defined and used to ensure "correction" of corporate behavior, particularly as it might pertain to commission of or complicity in atrocity crimes.

276. See Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 BUS. ETHICS Q. 739, 740 (2012).

277. *See supra* Section IV.D.3.

278. A proposed amendment that would have defined the term was rejected by the U.S. Sentencing Commission in 2010. The DOJ's Morford Memorandum of 2008 has provided some standardized guidance on FCPA monitorships. *See* Warin et al., *supra* note 224, at 345. R

279. *See id.* at 345–46.

Conclusion

This Article provides a contemporary examination of corporate liability under international criminal law. The recent developments toward corporate liability for atrocity crimes justify revisiting corporate liability under the Rome Statute of the ICC; whatever its plausibility, any such exercise clearly reveals the pressure points of the elements of such liability. Considering the pivotal importance of the ICC within the international justice system as the permanent international criminal court and the mitigated (if not moot) complementarity concerns, the ICC system provides a compelling test case. Assessing the criminal liability of legal persons against the backdrop of the Rome Statute vividly illustrates major challenges relating to mens rea standards, principles of attribution, and the design of effective penalties that deter and render justice for victims.

Whether an opportunity may arise in coming years to re-introduce the concept of corporate entity lability under the Rome Statute remains rather uncertain, especially considering the simple reality that the problems confronting the ICC today are of a different character and urgent.[280] Nonetheless, there may exist accelerating pressures within the international community to achieve under the Rome Statute what cannot be achieved in domestic courts, with *Kiobel* as the latest example. As those pressures possibly mount in the future, it will be useful for corporate counsel and others to consider the points raised in this Article as they develop strategies to address the issue of corporate accountability in the realm of international justice.

The winds are changing—internationally and domestically—to establish some level of liability for corporate complicity in the commission of atrocity crimes. In light of the recent developments in state practice and judicial development, no longer seems to be a matter of whether corporations are liable under international law, but rather *how* such liability would be implemented—in other words, what the material elements for liability are and what an effective penalty structure would look like. Just a few years after the Supreme Court asked for briefing on the question "whether corporations are immune from . . . liability for violations of the law of nations," the question seems increasingly dated.[281] We have left

280. For a current compilation of the many issues confronting the court, see ICC Forum, http://iccforum.com/home [https://perma.cc/HZL2-P323] (last accessed Nov. 23, 2016).

281. *See* Blake & Uren, *supra* note 48. R

the normative realm of "whether" and entered the practical phase of "how." This Article aims to contribute to this transition in legal analysis by raising key issues that will need to be addressed by the courts, as well as by offering some insights into the normative implications and behavioral dimensions that stir corporate behavior toward international accountability.