

The Prosecution of Corporations before a Hybrid International Criminal Tribunal

The *New TV* and *Akhbar Beirut* Contempt Jurisdiction Decisions of the Special Tribunal for Lebanon*

Manuel J. Ventura**

Abstract

*This case note considers two decisions from two separate Appeals Panels of the Special Tribunal for Lebanon (“STL”) which held that the STL possessed the inherent power, pursuant to its inherent jurisdiction in matters relating to contempt, to exert its *ratione personae* jurisdiction over legal persons – two Lebanese corporations – accused of contemptuous conduct. These decisions opened the door for the first trials of corporate defendants in the history of international criminal law. The analyses of the Appeals Panels are pertinent to unresolved debates before United States (“US”) courts on whether the US Alien Tort Statute recognizes corporate liability for violations of the law of nations; raise the issue of the proper place of the principle of legality when jurisdictional questions arise as well as the proper interpretation of the STL’s Rules of Procedure and Evidence; and also have implications for other international criminal tribunals with provisions regulating contempt of court that are similarly worded to those in place at the STL.*

Keywords: Special Tribunal for Lebanon, international criminal law, personal jurisdiction, corporate criminal liability, interpretation of Rules of Procedure and Evidence.

STL – Appeals Panel, In the Case Against *New TV* S.A.L. and Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014

STL – Appeals Panel, In the Case Against *Akhbar Beirut* S.A.L. and Al Amin, Case No. STL-14-06/PT/AP/AR126.1, F0004, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015

* The views expressed herein are those of the author and do not necessarily reflect the views of the Special Tribunal for Lebanon.

** LL.M. (Hons) (Geneva Academy of International Humanitarian Law and Human Rights). Associate Legal Officer, Chambers, Special Tribunal for Lebanon; Director, The Peace and Justice Initiative <www.peaceandjusticeinitiative.org>; Adjunct Fellow, School of Law, Western Sydney University. Email: manuel.j.ventura@gmail.com.

On 2 October 2014 and 23 January 2015, two different Appeals Panels of the Special Tribunal for Lebanon (STL) held that the STL possessed the inherent power, pursuant to Rule 60 *bis* of the STL Rules of Procedure and Evidence (Rules) (the STL provision that criminalizes contempt), to exert its jurisdiction over legal persons alleged to have engaged in contemptuous acts, specifically two Lebanese corporations: *New TV S.A.L. (Al Jadeed TV)* (a television station) and *Akhbar Beirut S.A.L.* (a newspaper).¹ These decisions paved the way for the prosecution of legal persons – corporations – before a tribunal of an international hybrid character; for the first time in the history of international criminal law, corporations were accused of and were called to answer for (alleged) crimes (albeit those of contempt).

Established pursuant to United Nations (UN) Security Council Resolution 1757 (2007), the STL's primary mandate is to investigate and prosecute those responsible for the assassination of former Lebanese Prime Minister Rafik Hariri, as well as the death and injury of others, on 14 February 2005.² The events that gave rise to the present decisions stemmed from allegations that *Akhbar Beirut S.A.L.* (in print) and *New TV S.A.L. (Al Jadeed TV)* (through television reports) had separately revealed purported confidential witnesses in the STL's prosecution of

- 1 STL, *In the Case Against New TV S.A.L. and Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014 (“*New TV (Al Jadeed TV) Jurisdiction Decision*”); STL, *In the Case Against Akhbar Beirut S.A.L. and Al Amin*, Case No. STL-14-06/PT/AP/AR126.1, F0004, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015 (“*Akhbar Beirut Jurisdiction Decision*”).
- 2 In addition, the STL has jurisdiction over other connected attacks of a similar nature and gravity committed in Lebanon between 1 October 2004 and 12 December 2005 (“connected attacks”) as well as other such attacks committed in Lebanon after those dates as decided by the UN and Lebanon with the consent of the UN Security Council (“related attacks”): Art. 1, STL Statute. At the time of writing, the Prosecution is actively investigating three connected attacks, with the Lebanese case files having been formally transferred to the Prosecution, on the order of the Pre-Trial Judge, in 2011: the assassination of Mr George Hawi on 21 June 2005 (*see* STL, Case No. STL-11-02/D/PTJ, F0005, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon, 19 August 2011), and the attempted assassinations of Mr Marwan Hamadeh and Mr Elias El-Murr on 1 October 2004 and 12 July 2005 respectively (*see* STL, Case No. STL-11-02/D/PTJ, F0004, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr Marwan Hamadeh on 1 October 2004 to Defer to the Special Tribunal for Lebanon, 19 August 2011; STL, Case No. STL-11-02/D/PTJ, F0006, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon, 19 August 2011). No attempts have been made to extend the STL's jurisdiction over other related attacks.

that crime – that is, in the *Ayyash et al.* case.³ *New TV S.A.L.* (*Al Jadeed TV*) was further accused of having failed to remove the offending reports from its YouTube and website pages in violation of a court order. These accusations were also imputed to natural persons, namely Mr Al Amin (*Akhbar Beirut S.A.L.*'s Editor in Chief and Chairman of the Board of Directors) and Ms Al Khayat (*New TV S.A.L.* (*Al Jadeed TV*)'s (then) Deputy News and Political Programmes Manager).⁴

After the contempt charges and the allegations became public (they were initially confidential), the STL's jurisdiction over legal persons was challenged by the defence in each of the two separate cases. The first decision on the matter was in the *New TV S.A.L.* (*Al Jadeed TV*) case, where the Contempt Judge (Judge Lettieri) held that Rule 60 *bis* applied only to natural persons and not to legal persons.⁵ This holding was subsequently overturned by a majority of the ad hoc Appeals Panel (Judges Hrdličková and Nosworthy; Judge Akoum dissenting) constituted to hear appeals in that case.

At its heart, the decision turned on the interpretation of Rule 60 *bis* (emphasis added):

- 3 Initially, the Prosecution charged four individuals – Messrs Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra – who were described as 'supporters of Hezbollah' for the attack of 14 February 2005: see STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/PTJ, F0007, Indictment, 10 January 2011, para. 59. Later, a fifth person – Mr Hassan Habib Merhi – was indicted and eventually joined to the main case: see STL, *Prosecutor v. Merhi*, Case No. STL-13-04/I/PTJ, F0012, Indictment, 5 June 2013; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, F1424, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014 (upheld on appeal: STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/AC/AR126.7, F0013, Decision on Appeal by Counsel for Mr Merhi Against Trial Chamber's "Decision on Trial Management and Reasons for Decision on Joinder", 21 May 2014). However, on 11 July 2016, the STL Appeals Chamber held that the Prosecution had presented enough evidence to convince it that Mr Badreddine had died on the balance of probabilities, and the case against him was accordingly discontinued (according to the Prosecution's evidence – consisting mainly of public statements and media releases by Hezbollah as well as condolence and funeral ceremonies – he was killed near Damascus in Syria): see STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, F2612, Reasons for Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings, 7 June 2016; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/AC/AR126.11, F0019, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016; STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, F2633, Order Terminating Proceedings Against Mustafa Amine Badreddine without Prejudice and Ordering the Filing of an Amended Consolidated Indictment, 11 July 2016. In this respect, the STL Trial Chamber noted that some of the evidence presented by the Prosecution "suggest[ed] that he [Mr Badreddine] was a senior Hezbollah military commander": STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, F2713, Decision Amending the Consolidated Indictment, 7 September 2016, para. 56.
- 4 See generally STL, *In the Case Against New TV S.A.L. and Al Khayat*, Case No. STL-14-05/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014; STL, *In the Case Against Akhbar Beirut S.A.L. and Al Amin*, Case No. STL-14-06/I/CJ, F0001, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, 31 January 2014.
- 5 See STL, *In the Case Against New TV S.A.L. and Al Khayat*, Case No. STL-14-05/PT/CJ, F0054, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, 24 July 2014.

The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice[] [...]. This includes, but is not limited to the power to hold in contempt *any person* who: [...]

The Appeals Panel held that, in determining the meaning of *person*, the Contempt Judge misapplied Rule 3 – the provision mandating how STL Rules are to be interpreted.⁶ According to the Appeals Panel, the Contempt Judge was obligated by that provision to interpret the rules in a manner consistent with the spirit of the Statute rather than the (black) letter of the law⁷ and noted that Rule 60 *bis* outlined but did not confine the Tribunal’s inherent jurisdiction over contempt.⁸ Each of the interpretative sources outlined in Rule 3(A)(i)-(iv)⁹ was then addressed in turn.

Concerning the Vienna Convention on the Law of Treaties (1969) (Rule 3(A)(i)), the Appeals Panel held that the plain meaning of *person* could refer to a natural or legal person – particularly in a legal context.¹⁰ Reliance by the Contempt Judge on the gendered language of the STL Statute was found to be in accordance with the letter but not the spirit of the Statute, since only its English version (not the French or Arabic versions) contained such language.¹¹ The fact that no international criminal tribunal had ever prosecuted a legal person for contempt was dismissed on the ground that the legal question had simply not been previously adjudicated, rather than as proof that they did not possess such jurisdiction.¹² In particular, the Appeals Panel found that charging legal persons did not *extend* the Tribunal’s jurisdiction over contempt, since when in the realm of its inherent jurisdiction, “the Tribunal’s jurisdiction remains undefined, only to be determined upon the crystallization of circumstances that call for a judicial pronouncement”.¹³

Next, the Appeals Panel turned to international standards on human rights (Rule 3(A)(ii)), holding that they included both the rights of the accused and also “trends that address corporate acts that violate human rights”.¹⁴ After noting

6 Rule 3 of the STL Rules provides that:

- a The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Arts. 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights, (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.
- b Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.

7 *New TV (Al Jadeed TV) Jurisdiction Decision*, para. 27.

8 *Id.*, para. 32.

9 *See supra* note 6.

10 *New TV (Al Jadeed TV) Jurisdiction Decision*, paras. 36-37.

11 *Id.*, paras. 38-39.

12 *Id.*, para. 41.

13 *Id.*, para. 42.

14 *Id.*, para. 45.

that human rights standards applied to legal entities and that corporations have been considered to be subjects of international law, the Appeals Panel held that criminal prosecution is to be regarded as an available remedy in light of a concrete movement at the domestic and international levels for corporate accountability as well as “an emerging international consensus regarding what is expected in business activity[] [...] in relation to the respect for human rights”.¹⁵ Various UN resolutions, reports, documents, as well as domestic laws and jurisprudence of over 44 countries concerning corporate accountability were considered. Although it was found that many nations recognized corporate criminal liability while some did not, it was apparent that “in a majority of the legal systems in the world, corporations are not immune from accountability merely because they are a legal – and not a natural – person”.¹⁶ Similarly, although it held that international law had not evolved to the point “where the subjection of a corporate person to criminal liability has become an imperative on States”, the Appeals Panel, in exercising its inherent power pursuant to Rule 60 *bis*, did not feel constrained by that fact but only by the principles of the fair administration of justice and full respect for human rights.¹⁷

Principles of international criminal law and procedure (Rule 3(A)(iii)) followed. Here, World War II-era material was scrutinized, in particular, cases and documents related to crimes involving Nazi-era German corporations. The Appeals Panel noted *obiter dictum* comments in cases of that time signifying that legal persons were bound by, and could even breach, international law; that the International Military Tribunal (IMT) at Nuremberg could (and did) declare groups or organizations as criminal; that the assets of Nazi-era German corporations were confiscated, dismantled and used for victims reparations after the end of the war;¹⁸ that (in)famous language in the IMT’s judgment that only natural persons could commit international crimes were *obiter dictum* and had been made so as to prevent the defendants from hiding behind Germany’s international legal personality;¹⁹ and that Control Council Law No. 10 had not included corporate criminal liability because of policy and logistical concerns rather than a legal conclusion that it was impermissible.²⁰ Numerous treaties recognizing corporate criminal liability were then cited, “suggest[ing] that they [do] not enjoy impunity for their actions”.²¹ As for the omission of corporate criminal liability in the Rome Statute of the International Criminal Court (1998), the Appeals Panel noted that the treaty did not purport to codify customary international law, that it did not apply beyond its own confines, and that it did not reflect a legal view that legal persons were beyond the reach of international criminal law.²² Although acknowledging that no post-World War II international criminal tribunal had ever found

15 *Id.*, para. 46.

16 *Id.*, para. 58.

17 *Id.*, para. 59.

18 *Id.*, para. 63.

19 *Id.*, para. 64.

20 *Id.*, para. 65.

21 *Id.*, para. 66.

22 *Id.*, para. 66.

Manuel J. Ventura

that they possessed the authority to try legal persons, that fact alone did not sway the Appeals Panel when operating within the Tribunal's inherent jurisdiction. It further held that corporate liability for serious harms qualified as a general principle of international law and that States only differed on whether such liability should be civil or criminal or both. As a result of all of these developments, in the Appeals Panel's view, corporate criminal liability was "on the verge of attaining, at the very least, the status of a general principle of law applicable under international law".²³

Finally, the Appeals Panel considered the Lebanese Code of Criminal Procedure (Rule 3(A)(iv)). However, since that document addresses only procedural and not substantive criminal matters, it was deemed that the Lebanese Criminal Code was of more relevance. Here, it was noted that Lebanon recognizes corporate criminal liability (as per Art. 210 of the Lebanese Criminal Code), making it foreseeable for a journalistic publication or television station to be criminally liable for substantive offences under Lebanese law.²⁴

The Appeals Panel concluded that these factors (Rule 3(A)(i)-(iv)), in light of the spirit of the Statute and in the exercise of its inherent jurisdiction over contempt,²⁵ led to the conclusion that the Tribunal possessed *ratione personae* jurisdiction over legal persons, in this case corporations. The Contempt Judge was found to have erred in relying on Rule 3(B) (which favours the accused when Rule 3(A) does not provide an answer) when Rule 3(A) was dispositive of the matter.²⁶ The Appeals Panel found that the Tribunal's authority was made most effective by the ability to hold legal persons responsible for contempt.²⁷ It was held to be contrary to the interests of justice "to shield legal persons when Rule 60 *bis* d[id] not restrict [the Tribunal's] inherent power to punish contemptuous acts".²⁸

In dissent, Judge Akoum made it clear that he did not wish to impede the development of the law in this area and stressed that his disagreement stemmed solely from his view that criminal law must be based on written provisions, be interpreted strictly and that, when in doubt, an interpretation in favour of the accused should be preferred.²⁹ He insisted that the *spirit* of the Statute was not a *carte blanche*, permitting anything and everything to be done merely because they supported the noble aims of the Tribunal. Instead, the highest standards of international criminal justice were paramount – first and foremost, the rights of the accused.³⁰ Judge Akoum considered it telling that in most of the examples cited by the Appeals Panel, corporate criminal liability was expressly stated within a clear, unambiguous and detailed provision, unlike Rule 60 *bis*.³¹ In his view, in light of the vagueness of Rule 60 *bis*, the highest standards of international crimi-

23 *Id.*, para. 67.

24 *Id.*, paras. 68-70.

25 *Id.*, paras. 78-80.

26 *Id.*, paras. 74, 92.

27 *Id.*, para. 81.

28 *Id.*, paras. 84, 91.

29 *New TV (Al Jadeed TV) Jurisdiction Decision – Judge Akoum Dissent*, para. 2.

30 *Id.*, para. 7.

31 *Id.*, paras. 17, 21-22.

nal justice demanded an interpretation favourable to the accused, that is, one that excluded corporate criminal liability.³²

In most circumstances before international criminal tribunals, an appellate decision of this kind would have spelt the end of a contested legal question. Not so in the present case. While the Appeals Panel deliberated on the appeal in the *New TV S.A.L. (Al Jadeed TV)* case, the same jurisdictional challenge was made by the defence in the separate *Akhbar Beirut S.A.L.* case, and it again fell upon Judge Lettieri to rule upon it – the same Contempt Judge who had dismissed the charges against the legal person in the *New TV S.A.L. (Al Jadeed TV)* case at first instance. However, his second decision on the same legal issue was issued *after* the Appeals Panel handed down its *New TV (Al Jadeed TV)* jurisdiction decision (overturning Judge Lettieri's first-instance decision in that case). In a quite remarkable and unprecedented opinion at the international criminal tribunals, the Contempt Judge *repudiated* the legal findings of the *New TV (Al Jadeed TV)* jurisdiction decision, noting, among other things, that the Appeals Panel had exclusive jurisdiction over that case alone and therefore its legal holdings did not extend to the separate *Akhbar Beirut S.A.L.* case. After picking apart the Appeals Panel's decision, and going so far as indirectly comparing the reasoning of the *New TV (Al Jadeed TV)* Jurisdiction Decision to the laws of judgments of totalitarian regimes such as Soviet Russia and Nazi Germany(!) through reliance on notions of *substantive justice*, he ultimately held, once again, that the Tribunal did not have jurisdiction over legal persons in contempt proceedings.³³

As a result, the matter went again to an(other) Appeals Panel, this time composed of Judges Hrdličková, Nosworthy and Chamseddine, whose jurisdiction was limited to appeals in the *Akhbar Beirut S.A.L.* case. Since Judges Hrdličková and Nosworthy had been the majority in the *New TV (Al Jadeed TV)* Jurisdiction Decision, the outcome remained the same in the *Akhbar Beirut* Jurisdiction Decision: the STL was held to possess jurisdiction over legal persons. However, this time the decision was unanimous, and the Appeals Panel proceeded to directly address many of the Contempt Judge's criticisms of the *New TV (Al Jadeed TV)* Jurisdiction Decision. In particular, it emphasized that the *nullum crimen sine lege* principle had not been violated since no new offence had been created nor had the *mens rea* or the *actus reus* of an offence been altered, but that the *New TV (Al Jadeed TV)* Jurisdiction Decision had simply dealt with a matter of jurisdiction alone.³⁴

32 *Id.*, paras. 23-25.

33 See STL, *In the Case Against Akhbar Beirut S.A.L. and Al Amin*, Case No. STL-14-06/PT/CJ, F0069, Decision on Motion Challenging Jurisdiction, 6 November 2014, paras. 33 (fn. 94), 51, 62, 74, 94 (noting that "totalitarian regimes have anchored their legal systems to the doctrine of substantive justice" (citing Soviet Russia's 1922 Criminal Code, Nazi Germany's 1935 Criminal Code and a 1938 decision of the German (Reich) Supreme Court as examples) and then finding that the *New TV (Al Jadeed TV)* Jurisdiction Decision "appears to apply notions of substantive justice" and that its conclusions "can be reached[] [...] only by adopting the principle of substantive justice").

34 *Akhbar Beirut* Jurisdiction Decision, paras. 54-55.

Manuel J. Ventura

The Appeals Panel also held that the criminal responsibility of a Lebanese company before the Tribunal was foreseeable, since Lebanese law recognized the concept and the Tribunal was primarily mandated to apply Lebanese law.³⁵ Likewise, the Appeals Panel rejected the charge that it had applied Rule 60 *bis* by analogy, noting that the Contempt Judge had confused analogy with interpretation and that a progressive approach to the latter was compatible with human rights standards and had long been practiced at the various international criminal tribunals.³⁶ Although the Contempt Judge had not erred in holding that he was not formally bound by the *New TV (Al Jadeed TV) Jurisdiction Decision*, the Appeals Panel found it preferable for the Contempt Judge to have followed it, since the legal issue was indistinguishable.³⁷

Judge Chamseddine penned a short separate concurring opinion, expressing the view that the Contempt Judge should have given further consideration to referring the case to Lebanese authorities.³⁸ Judge Nosworthy filed a separate and partially dissenting opinion, holding that the *New TV (Al Jadeed TV) Jurisdiction Decision* had binding and obligatory force upon the Contempt Judge.³⁹ In order to avoid different Appeals Panels handing down conflicting decisions, and after considering various policy reasons why making a determination on the issue was necessary, as well as Lebanese law on the subject,⁴⁰ she held that contempt judges should be bound by earlier pronouncements of any Appeals Panel and that subsequent Appeals Panels should be likewise bound unless cogent and compelling reasons could be identified.⁴¹

In 1946, the IMT at Nuremberg famously proclaimed that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.⁴² Since then, this has been cited to support the notion that legal persons cannot commit crimes in the eyes of international law.⁴³ Indeed, the International Law Commission itself retreated from, and ultimately removed, Article 19 from the 1976 ILC Draft Articles of State Responsibility, whereby States could, in particular circumstances, be *criminally* liable for wrongful acts.⁴⁴

35 *Id.*, para. 59.

36 *Id.*, paras. 60-64.

37 *Id.*, paras. 66-71.

38 *Akhbar Beirut Jurisdiction Decision – Separate Opinion of Judge Chamseddine*, paras. 1-7.

39 *Akhbar Beirut Jurisdiction Decision – Separate Opinion of Judge Nosworthy*, para. 2.

40 *Id.*, paras. 17-39.

41 *Id.*, paras. 40-41.

42 *United States of America et al. v. Göring et al.*, Judgment, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (Nuremberg, International Military Tribunal, 1947), p. 223.

43 See e.g. US Court of Appeals (Second Circuit), *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 17 September 2010, at 119.

44 See generally J.H. Weiler, A. Cassese and M. Spinedi (Eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Walter de Gruyter, Berlin/New York, 1989.

However, with the present decisions, that notion – at least as it relates to corporations – is no longer true. While these cases certainly do not involve core international crimes – crimes against humanity, war crimes, genocide or aggression – the perception that crime and legal persons do not mix at international law has now been forever broken. These decisions thus signify a landmark moment and, perhaps, a pivotal legal development that could have wide repercussions.

In particular, these cases may play a role in litigation in the United States (US) with respect to Alien Tort Statute (ATS) cases, where the Federal Circuits remain split on the issue of whether corporations can be held liable for violations of the law of nations under that US legislation,⁴⁵ a schism that perpetuates because of the US Supreme Court's recent denial of a petition for a writ of *certiorari* (i.e. leave to appeal) in *Nestlé U.S.A., Inc. v. Doe*, where this issue was squarely raised.⁴⁶ While, arguably, the present cases can be distinguished on the ground that they do not deal with international crimes per se,⁴⁷ the analysis of international criminal law contained in the *New TV (Al Jadeed TV) Jurisdiction Decision* – particularly World War II-era case law and the rejection of corporate criminal liability in the Rome Statute of the International Criminal Court (1998) – would be relevant in any future ATS cases. Indeed, such material has been routinely relied upon by US courts in this context. For now, however, it would appear that the STL's jurisprudence on these issues has yet to be brought to the attention of courts in the US.⁴⁸

Nevertheless, a prominent issue that did not garner detailed attention in the decisions of the two Appeals Panels, but probably should have, and which Judge Akoum emphasized in his dissent in the *New TV (Al Jadeed TV) Jurisdiction Decision*, is the proper place of the principle of legality when questions of jurisdiction arise. While *nullum crimen sine lege* concerns (foreseeability, specificity, *in dubio pro reo*, etc.) are most often associated with the consideration of the elements of substantive criminal offences (i.e. the *mens rea* and *actus reus* of crimes), the present cases raised this issue in the interpretation of the word *person* so as to determine the Tribunal's *ratione personae* jurisdiction in contempt proceedings. In other words, do foreseeability, specificity and *in dubio pro reo* have a role to play when interpreting jurisdictional provisions rather than substantive criminal offences?

45 See US Court of Appeals – 2nd Circuit, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 17 September 2010; US Court of Appeals – D.C. Circuit, *Doe VIII v. Exxon Mobil Corporation*, 654 F.3d 11, 8 July 2011; US Court of Appeals – 7th Circuit, *Flomo v. Firestone Natural Rubber Co., LLC.*, 643 F.3d 1013, 11 July 2011; US Court of Appeals – 9th Circuit, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 25 October 2011.

46 Docket No. 15-349, 11 January 2016.

47 See J.G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', *New York University Journal of International Law and Politics*, Vol. 47, No. 1, 2014-2015, p. 121, at 169, fn. 128 (opining that the *New TV (Al Jadeed TV) Jurisdiction Decision* has "little bearing" for Alien Tort Statute cases).

48 See US Court of Appeals – 2nd Circuit, *Jesner v. Arab Bank*, Docket No. 13-3605; 13-3620; 13-3635; 13-4650; 13-4652, 8 December 2015 (where the 2nd Circuit upheld its prior rejection of corporate liability under the ATS without having considered developments at the STL).

Surprisingly, given the rapid development of international criminal law and concurrent explosion of international criminal jurisprudence, this issue has received next to no direct attention by the various international criminal tribunals when considering their respective jurisdictional provisions. Academic discussion of the matter is also scarce.⁴⁹ However, Judge Akoum's dissent was clearly premised on the view that the principle of legality applies with equal force when questions of jurisdiction are at play – even if he did not explicitly say as much.⁵⁰ One may also see glimpses of the principle of legality in the *New TV (Al Jadeed TV) Jurisdiction Decision*, since the decision pointed to Lebanese law on corporate criminal liability to determine that *New TV S.A.L. (Al Jadeed TV)* could have foreseen their prosecution under Lebanese law.⁵¹

This might be contrasted with the approach taken by the Appeals Panel in the *Akhbar Beirut Jurisdiction Decision*, where the Contempt Judge's assertion that the Appeals Panel in the *New TV (Al Jadeed TV) Jurisdiction Decision* had violated the principle of legality was refuted on the basis that the decision did not create a new crime nor alter or affect the *mens rea* or *actus reus* of an existing crime.⁵² The implication of this holding is that *nullum crimen sine lege* applies in such circumstances, but not when matters of jurisdiction are at issue. Yet, the *Akhbar Beirut Jurisdiction Decision* also went into some detail concerning the foreseeability of the application of Rule 60 *bis* to legal persons and in the consideration of Lebanese law on corporate criminal liability (i.e. Art. 210 of the Lebanese Criminal Code).⁵³ This begs the question: if the principle of legality has supposedly no role to play when jurisdictional questions arise, then why is it relevant whether *New TV S.A.L. (Al Jadeed TV)* could foresee its prosecution before the STL?

Another consideration that clearly had an effect on the Appeals Panels' determinations was the directive in Rule 3 that the interpretation of the STL's rules be consistent with the *spirit* of the Statute. The issue here is that the inclusion of a broad, vague and amorphous concept like the *spirit* of a statutory document for the purposes of interpretation can mean anything to anyone; exactly what the *spirit* of the Statute means (and what it does not) is not clearly articulated in any of the decisions of the Appeals Panels. Indeed, defining the *spirit* of anything is not an easy task, particularly when it is supposed to inform and enlighten legal interpretation. Under these circumstances, one wonders whether the *spirit* of any document should be considered an appropriate factor when a court makes a determination on jurisdictional questions. One should also bear in mind that this precise issue proved critical in this case – the Contempt Judge was faulted, and

49 *But see* D. Jacobs, "International Criminal Law", in J. Kammerhofer and J. D'Aspremont (Eds.), *International Legal Positivism in a Post-Modern World*, Cambridge, Cambridge University Press, 2014, pp. 460-462 (discussing the principle of legality in the context of jurisdictional challenges at the ICTY); M. Vagias, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, pp. 67-72 (discussing the ICC's territorial jurisdiction in light of the principle of legality).

50 *See New TV (Al Jadeed TV) Jurisdiction Decision – Judge Akoum Dissent*, para. 2.

51 *See New TV (Al Jadeed TV) Jurisdiction Decision*, paras. 68-71.

52 *See Akhbar Beirut Jurisdiction Decision*, paras. 52-55.

53 *Id.*, paras. 56-59.

overturned, in the *New TV (Al Jadeed TV) Jurisdiction Decision* for, *inter alia*, having adopted an interpretative approach consistent with the wording but not the *spirit of the Statute*.⁵⁴

These cases also raise another particularly acute issue: if a tribunal of an international character like the STL can prosecute legal persons for contempt with a Rule 60 *bis* that is a near carbon copy (in the relevant part) of the contempt provision found at the International Criminal Tribunal for the former Yugoslavia (ICTY)⁵⁵ and the now closed International Criminal Tribunal for Rwanda (ICTR),⁵⁶ then perhaps those tribunals could have likewise done so all along. As a matter of fact, on 5 December 2014 – two months after the *New TV (Al Jadeed TV) Jurisdiction Decision* was handed down – the ICTY issued an amended (confidential) indictment in *Jojić et al.* against three individuals (Mr Petar Jojić, Mr Jovo Ostojić and Ms Vjerica Radeta) who were reported to be officials of the Serbian Radical Party for contempt of court. Among the allegations were that a witness “would telephone the Serbian Radical Party and a delivery of [500 Euros per month] would be made to him” and that another “received [redacted] payment from the Serbian Radical Party [redacted]”.⁵⁷ In issuing this amended indictment, the judges of the ICTY would have been cognizant of the *New TV (Al Jadeed TV) Jurisdiction Decision*. It is unclear, however, whether the fact that the Serbian Radical Party was not indicted as a legal person was due to the investigation not being carried out with that possibility in mind, there being insufficient evidence, or that a specific decision was made not to follow the *New TV (Al Jadeed TV) Jurisdiction Decision*.⁵⁸ In any event, it would appear that the initial order in lieu of an indictment – issued on 30 October 2012 – predated the present contempt jurisdiction decisions.⁵⁹ However, with the closing down of the ICTY now very much on the horizon and with the closure of the ICTR in December 2015, the time for further developments in this area on those two fronts has likely passed.

54 See *New TV (Al Jadeed TV) Jurisdiction Decision*, paras. 38, 92.

55 See ICTY Rule 77.

56 See ICTR Rule 77.

57 See ICTY, *In the Case Against Jojić et al.*, Case No. IT-03-67-R77.5, Order Lifting Confidentiality of Order in Lieu of Indictment and Arrest Warrants, 1 December 2015, Annex A – Public Redacted Revised Order in Lieu of Indictment, paras. 11, 17.

58 In relation to this case, Serbia has refused to arrest and extradite the accused to the ICTY on the basis that Serbia was only obliged to cooperate with respect to crimes that fall within the ICTY's primary jurisdiction – war crimes, crimes against humanity and genocide – and not for crimes that lie beyond it such as contempt, a position that had been previously espoused by France with respect to Ms Florence Hartmann, a French national, who had been convicted of contempt of court by the ICTY (see generally ICTY, *In the Case Against Hartmann*, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, 14 September 2009; ICTY, *In the Case Against Hartmann*, Case No. IT-02-54-R77.5-A, Judgment, 19 July 2011). However, this position has been recently rejected by the Trial Chamber: ICTY, *In the Case Against Jojić et al.*, Case No. IT-03-67-R77.5, Decision in Relation to the Cooperation of the Government of the Republic of Serbia with the Tribunal, 1 August 2016.

59 See ICTY, *In the Case Against Jojić et al.*, Case No. IT-03-67-R77.5, Addendum to Order Lifting Confidentiality of Orders in Lieu of Indictment and Arrest Warrants, 3 December 2015, para. 4, fn. 1.

Manuel J. Ventura

On the other hand, it is to be recalled that the Mechanism for International Criminal Tribunals (MICT), the UN Security Council-created institution that will eventually take over the essential functions of both the ICTY and the ICTR after their closures,⁶⁰ also has jurisdiction over contempt under the same language employed at the ICTY and ICTR.⁶¹ There is therefore dormant potential for the MICT to consider the culpability of legal persons for contempt. Of course, whether the MICT will take up the jurisprudence of the STL in its future contempt prosecutions remains to be seen. Regardless, there is tangible proof that the STL's decisions are already having an impact on international criminal law. One need only look at the proposed Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 – whose creation was ultimately vetoed by Russia at the UN Security Council on 29 July 2015 – which included a provision on contempt stating that “[t]he Tribunal shall have jurisdiction over offences against the administration of justice committed by natural persons and *legal persons*”.⁶² It is also interesting to note that at the UN Security Council, no country expressed concerns or objections that a tribunal of this kind would possess jurisdiction over legal persons, albeit for contempt.⁶³

With the Appeals Panels' rulings that the STL has jurisdiction over legal persons with respect to contempt (but not, it seems, with respect to crimes under its primary jurisdiction),⁶⁴ other pertinent questions relating to the criminal liability of legal persons subsequently arose. The most prominent of these was how to attribute the acts and conduct of natural persons to legal persons, given that Rule 60 *bis* was silent on this issue. On that matter, the Appeals Panels were also silent in their respective *ratione personae* jurisdiction decisions. Predictably, that issue was considered by the Contempt Judge in his trial judgment (which acquitted the legal person) and then reviewed by Appeals Panel in the *New TV S.A.L. (Al Jadeed TV)* case. In the end, it was held that Lebanese law on attribution would be used in light of, *inter alia*, the directive in Rule 3(A)(iv) to consider Lebanese law in interpreting the STL's rules; the corporation's domiciled status in Lebanon; the recognition of corporate criminal liability in Lebanon; and the principle of legal-

60 See generally UN Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010.

61 See MICT Rule 90 and Art. 1(4)(a), MICT Statute (where both provisions state that the MICT can prosecute “any person” in respect of contempt offences).

62 See UN Doc. S/2015/562, 29 July 2015, Annex – Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17, Art. 40(2).

63 See UN Security Council, 7498th Meeting, UN Doc. S/PV.7498, 29 July 2015.

64 See *New TV (Al Jadeed TV) Jurisdiction Decision* – Judge Akoum Dissent, para. 4.

ity.⁶⁵ Thus, the fact that the corporation was Lebanese assisted greatly, and was, it seems, dispositive. While it is beyond the scope of this case note to venture into an in-depth discussion on this, it is worth pondering what would have ensued if the legal person had been from a country (e.g. Germany or Italy) that did not recognize corporate criminal liability within their domestic legal system and, consequently, did not have any provision detailing how to attribute the conduct of natural persons to legal persons. For now, the answer to that interesting legal conundrum is unclear. What is clear, however, is that the STL, as result of the *New TV (Al Jadeed TV) Jurisdiction Decision* and the *Akhbar Beirut Jurisdiction Decision*, is squarely navigating in uncharted legal waters. Indeed, these decisions ensured, for the first time in legal history, that legal persons – corporations – stood trial for crimes before a tribunal of an international character. Time will tell whether other international tribunals will join this very exclusive one-member club.

65 STL, *In the Case Against Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) and Al Khayat*, STL-14-05/CJ, F0176, Public Redacted Version of Judgment, 18 September 2015, paras 67-72; STL, *In the Case Against Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) and Al Khayat*, STL-14-05/A/AP, F0028, Public Redacted Version of Judgment on Appeal, 8 March 2016, paras. 188-196. This issue did not arise before the Appeals Panel in the *Akhbar Beirut S.A.L.* case, despite the conviction of the corporation at trial (see STL, *In the Case Against Akhbar Beirut S.A.L. and Al Amin*, Case No. STL-14-06/PT/CJ, F0262, Public Redacted Version of the Judgment, 15 July 2016), because no appeal was filed either by the *Amicus Curiae* Prosecutor or the Defence (who had been appointed to represent the accused after he/they walked out in the middle of the initial appearance: see STL, *In the Case Against Akhbar Beirut S.A.L. and Al Amin*, Case No. STL-14-06/PT/CJ, F0018, Reasons for Decision on Assignment of Counsel, 5 June 2014).