



THE CONTEMPT JUDGE

Case No.: STL-11-01/PT/CJ/R60bis.1

Before: Judge David Baragwanath, Contempt Judge

Registrar: Mr Daryl Mundis, Acting Registrar

Date: 29 April 2013

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

Public Redacted version of DECISION ON ALLEGATIONS OF CONTEMPT

Office of the Prosecutor:

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Mr David Kinnecome
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Mr Mohammad F. Mattar

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INTRODUCTION

1. Following a series of assassinations in Beirut, specifically the 14 February 2005 attack that killed the former Prime Minister of Lebanon, Rafiq Hariri and others, the United Nations Security Council found there to be such a threat to international peace and security as to warrant establishing the Special Tribunal of Lebanon in exercise of its powers under Chapter VII of the United Nations Charter.¹ The Tribunal's task is to investigate, prosecute, defend and try suspects in the relevant attacks mentioned in Article 1 of the Tribunal's Statute.

2. The attack of 14 February 2005 in which 23 people were killed and 226 injured, is the subject of an indictment against four Accused, Messrs. Ayyash, Badreddine, Oneissi and Sabra. A trial *in absentia* has been ordered.²

3. With respect to these proceedings, the Pre-Trial Judge made two decisions in relation to the non-disclosure of confidential material to the public. In the first, dated 25 May 2012, he ordered *inter alia*:

all third parties to the proceedings not to disseminate material in the proceedings of which they may have knowledge or any information contained therein, which may be subject to a protective measure, unless that material or information becomes public during open session proceedings.³

In the second order, dated 14 June 2012, he further stated that "the measures set out in the Decision of 25 May 2012 apply to all material disclosed by the Parties and the Victims' Legal Representative."⁴ Other confidentiality orders and provisions of the Tribunal's Rules of Procedure and Evidence ("Rules") may also apply.

¹ See SC Res. 1757, UN Doc. S/RES/1757 (30 May 2007), including its annexed document and attachment thereof (Statute).

² STL, *Prosecutor v Ayyash et al*, STL-11-01/ITC, Decision to Hold Trial in Absentia, 1 February 2012.

³ STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/PTJ, Decision Relating to the Prosecution Request Seeking Measures for the Non-Dissemination of Material of 2 May 2012, 25 May 2012 ("Decision of 25 May 2012"), p. 23.

⁴ STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/PTJ, Decision Authorizing the Withdrawal of the Prosecution Application of 21 December 2011 and the Modification of the Application of 15 March 2012 Requesting protective Measures for Witnesses, ("Decision of 14 July 2012"), p. 4.



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4. [REDACTED]. I will refer to these publications as the first event.
5. [REDACTED]. I will refer to these publications as the second event.
6. [REDACTED]. I will refer to these publications as the third event.
7. On 12 April 2013, the Head of Defence Office informed the Pre-Trial Judge of the third event. The Pre-Trial Judge considered that the publication of the information was likely to constitute contempt of the Tribunal and referred the matter to the President for referral to a Contempt Judge.¹⁴ Rule 60 *bis* (C) of the Rules requires the President of the Tribunal to designate a Contempt Judge in accordance with the relevant Practice Direction to hear cases of contempt and obstruction of justice. On 11 March 2013, as President, I had issued a Practice Direction designating a Contempt Judge for each calendar month of the year and also Appeals Panels to hear appeals from the Contempt Judges.¹⁵ Given that I was rostered to be the Contempt Judge for the month of April, and acting in my capacity as President, on 15 April I designated myself as Contempt Judge in that case.¹⁶
8. In response to submissions by the Legal Representative of Victims and the Prosecutor,¹⁷ the Pre-Trial Judge then referred to me, in my capacity as President, for referral to a Contempt

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ/R60bis.1, Order Referring the Facts Brought to His Attention on 12 April 2013 by the Head of the Defence Office to the President of the Tribunal for Referral to a Contempt Judge, 12 April 2012, para. 4.

¹⁵ Practice Direction on Designation of Judges in Matters of Contempt, Obstruction of Justice and False Testimony, STL/PD/2013/06, 11 March 2013 ("Practice Direction").

¹⁶ STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PRES/R60bis.1, Order Designating Contempt Judge, Confidential, 15 April 2013, para. 3.

¹⁷ LRV Submission, para. 37, STL, *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, Request to Refer Matters to Contempt Judge pursuant to Rule 60bis(D), Confidential, 16 April 2013 ("Prosecution Submission of 16 April") (a public redacted version was filed on 17 April 2013)



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Judge the matter of the first and second events which he considered likely to constitute contempt.¹⁸ Again acting as President, I designated myself Contempt Judge in relation to all three events.¹⁹

9. As Contempt Judge, I ordered the Prosecutor, Defence counsel, the Head of Defence Office, the Registrar and the Legal Representative of Victims (“Participants”) to make submissions on *inter alia* whether there is reason to believe that any person has committed contempt of the Tribunal and on which course under Rule 60 bis (E) I should take if this were the case, and scheduled a hearing for 25 April 2013.²⁰ On 24 April, I further issued a public order directing that the hearing be held in public, reserving my decision on whether to move into closed session for portions of the discussion.²¹

10. At the opening of the hearing, in open court, I announced that since it was publicly known that applications were made before the Pre-Trial Judge to refer certain matters to the Contempt Judge, and given that normally all proceedings before the Tribunal should be held in public, having received relevant submissions from the Participants, I had decided that complete confidentiality was not warranted at this stage. In particular, there was no need to keep confidential (subject to the necessary redactions made with respect to the particulars of the allegations):

- (i) the fact that the applications were referred by the Pre-Trial Judge to the President and that, having previously rostered myself Contempt Judge for April 2013, I appointed myself to that office;
- (ii) the fact that as Contempt Judge I had asked for further submissions on the matter;

¹⁸ STL, *Prosecutor v Ayyash et al*, STL-11-01-PT/PRES/R60bis.2, Order Referring to the President of the Tribunal the Facts Brought to His Attention by the Legal Representative of Victims and the Prosecution for a Referral to a Contempt Judge, Confidential, 18 April 2013.

¹⁹ STL, *Prosecutor v Ayyash et al*, STL-11-01-PT/PRES/R60bis.1, Order Designating Contempt Judge, Confidential, 15 April 2013, STL, *Prosecutor v Ayyash et al*, STL-11-01-PT/PRES/R60bis.2, Order Designating Contempt Judge, Confidential, 18 April 2013.

²⁰ STL, *Prosecutor v Ayyash et al*, STL-11-01-PT/CJ/R60bis.1, Order on Submissions, Confidential, 15 April 2013, STL, *Prosecutor v Ayyash et al*, STL-11-01-PT/CJ/R60bis.1, Order on Additional Submissions and Scheduling, Confidential, 18 April 2013.

²¹ STL, *Prosecutor v Ayyash et al*, STL-11-01-PT/CJ/R60bis.1, Order on Confidentiality, 24 April 2013.



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(iii) the fact that I scheduled the oral hearing.

11. I will issue public redacted versions of my orders in this regard and will also direct the Participants to file redacted versions of their filings.

APPLICABLE LAW

12. Rule 60 *bis* allows the Tribunal to hold accountable those who knowingly and willingly interfere with its administration of justice. This includes those who disclose information relating to proceedings in knowing violation of a judicial order,²² those who threaten and intimidate witnesses,²³ and those who threaten, intimidate, or seek to coerce persons from complying with an obligation under a judicial order.²⁴ An individual who commits, attempts to commit, or incites others to commit these acts is guilty of contempt of this Tribunal or obstruction of justice.²⁵

13. When the Contempt Judge has reason to believe that a person may be in contempt of the Tribunal, he may: (i) invite or direct the Prosecutor to investigate the matter and prepare an indictment for Contempt; (ii) where the Prosecutor is unable to investigate the matter, he may direct the Registrar to appoint an *amicus curiae* to report on whether there are sufficient grounds for commencing contempt proceedings; (iii) or prosecute the matter himself.²⁶

14. According to Rule 60 *bis* (H), contempt proceedings follow the rules of procedure that apply in other criminal proceedings before this Tribunal. Rule 60 *bis* (I) accords to any person charged with contempt the rights envisaged in Rule 69. Rule 69 states “[a]n accused shall enjoy the rights enshrined in Article 16 of the Statute and under Rules 65 and 66.” These rights include: (i) the presumption of innocence; (ii) the standard of proof beyond reasonable doubt; and (iii) all other procedural rights normally afforded to an accused in a criminal trial.

²² Rule 60 *bis* (A)(iii).

²³ Rule 60 *bis* (A)(v).

²⁴ Rule 60 *bis* (A)(vi).

²⁵ Rule 60 *bis* (B).

²⁶ Rule 60 *bis* (E).



15. Individuals found guilty of contempt may be imprisoned for up to seven years or be sentenced to pay significant fines. Such persons have the right of appeal against the decision of the Contempt Judge to a bench of three judges also designated in the Practice Direction of 11 March 2013.²⁷

DISCUSSION

I. Confidentiality

16. The first issue for consideration is whether the proceedings should continue as confidential. Since that could not be argued in public with reference to matters claimed to be confidential, I ordered that the hearing go into closed session.

17. This Tribunal has clarified on numerous occasions that its proceedings must be held in public and that confidentiality is the exception.²⁸ As Lord Tolson and Mr. Phipps have stated:

The courts are generally reluctant to allow hearings to take place in private camera for reasons that were set out by the House of Lords in *Scott and Scott* [1913] AC 417.²⁹

Lord Shaw of Dunfermline cited among various passages from the works of Bentham:

Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against probity. It keeps the judge himself, while trying, on trial.³⁰

That principle is subject to one sole exception: when sitting in public, or allowing publication, would itself defeat justice. The same principle applies to contempt proceedings before the Tribunal.

18. In his written submissions and during the hearing, counsel for Mr Oneissi contended that the interest of publicity is of such an importance that no exception should be permitted.³¹ I do not

²⁷ Rule 60 bis (M).

²⁸ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/PRES, Public Redacted Version of Order on Request to Redact Transcript of Hearing, 12 April 2013, para. 6 (referring e.g. to STL, *In the matter of El Sayed*, CH/AC/2013/01, Public Redacted Version of Decision on Appeal by the Prosecutor Against Pre-Trial Judge's Decision of 11 January 2013, 28 March 2013, para. 9).

²⁹ Charles Phipps and Roger Grenfell Toulson, *Confidentiality*, 2nd ed. (Sweet and Maxwell 2006), pp 380-1

³⁰ John Hill Burton (ed.), *Benthamiana, or Select Extracts from the Works of Jeremy Bentham* (1844), p. 139.



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accept that contention. I have emphasized that all actual or potential suspects are entitled to the presumption of innocence until and unless the contrary is established by due process. I therefore speak hypothetically in saying there can be cases in which interference with witnesses constitutes interference with due process of such gravity as may warrant a maximum seven-year prison sentence with or without a maximum fine of 100,000 Euros, as provided by Rule 60 *bis* (J). Making no assumption whatever as to what the evidence in this case may or may not establish, it would be very odd if an investigation into an allegation of such conduct were to be undertaken with disclosure to the suspects of all that is going on; unsurprisingly, no authority was cited by counsel in support of the contention that total publicity applies at the investigation stage of proceedings, where suspects may not even be identified. As submitted by some of the Participants, full publicity at this stage might imperil the Tribunal's ability to effectively investigate and substantiate the allegations, and could even lead to the dissemination and re-publication of confidential information.³²

19. I have therefore decided that the proceedings at this stage are to be treated as confidential.

II. Whether there is reason to believe that contempt has been committed in relation to the events referred to the Contempt Judge

20. The Participants contend that the publication of names of certain individuals amounts to contempt.³³ Conceivably, publication of names of alleged witnesses could amount to contempt and obstruction of justice under Rule 60 *bis*. This is either because names of potential witnesses

³¹ STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/CJ/R60bis.1, Contempt Hearing, 25 April 2013 ("Contempt Hearing"), Closed Session, pp. 8-12; STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/CJ/R60bis.1, Oneissi Response to Order on Additional Submissions and Scheduling, 24 April 2013, Confidential ("Oneissi Response"), paras 11-14.

³² Registry Submission of 19 April 2013, para 33; Prosecution Submission of 19 April, para. 10; STL, *Prosecutor v Ayyash et al*, Prosecution Submissions on Whether Contempt Proceedings Should Remain Confidential, Confidential, 24 April 2013 ("Prosecution Submission of 24 April"), paras 5-9

³³ LRV Submission, paras 26-31; Registry Submission of 19 April 2013, paras 26-27; Prosecution Submission of 19 April, paras 7-8, 36-45; Prosecution Submission of 24 April, paras 5-9; STL, *Prosecutor v Ayyash et al*, STL-11-01/PT/CJ/R60bis.1, Further Submissions of the Legal Representative of Victims Pursuant to the 18 April 2013 Order of the Contempt Judge, 24 April 2013 ("LRV Further Submission"), paras 4-10.



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are disclosed in violation of an order issued by the Tribunal,³⁴ or because the mere statement that names of witnesses are disclosed—whether or not these are names of potential witnesses actually to be called by the parties—could be construed as attempted interference with actual witnesses. In the former case, contempt would stem from the disclosure of the names (that ought to remain confidential under an order by the Pre-Trial Judge) by somebody who possesses them and their wilful further dissemination. In the latter case, contempt might result from attempts to interfere with, or even threaten, potential witnesses by leading them to believe that protective measures taken by the Tribunal are insufficient and by giving rise to apprehension on their part.³⁵

21. It is not my function at this point to form any final opinion on the allegations made by the Participants. Suffice it to say that the standard of “reason to believe” is a low one, aimed at avoiding frivolous litigation. In the light of the submissions by the Participants, and the fact that names purporting to be those of potential witnesses before the Tribunal have been publicized with respect to all three events, I have reason to believe at the very least that (i) either confidential information about potential witnesses was disclosed in violation of a Tribunal’s order, (ii) and/or that false names of, and information related to, witnesses are being disseminated with a view to attempting interference with actual witnesses.

III. Who should carry out the investigation

22. Under the Rules, as mentioned above, once I have decided that there is a reason to believe that contempt has been committed, I have three options: (i) direct the Prosecutor to

³⁴ I note that the publication of such names postdates the Decision of 25 May 2012 and the Decision of 14 July 2012, through which the Pre-Trial Judge explicitly ordered confidentiality as to certain names. For similar cases before other international criminal jurisdictions, see for instance: ICTY, *Prosecutor v. Šešelj*, IT-03-67-R77.3, Judgment, 31 October 2011, para. 78 (discussing specifically the gravity of electronic publication and dissemination), ICTY, *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Judgment, 19 July 2011, para. 91; ICTY, *In the Case Against Vojislav Šešelj*, IT-03-67-R77.2-A, Judgment, 19 May 2010, para. 29; ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on the Prosecution’s Urgent Motion Alleging Contempt of the Tribunal, 15 December 2009 (directing Registrar to Appoint amicus to investigate allegations of disclosure of protected information).

³⁵ ICTR, *Prosecutor v. Ntirabatware*, ICTR-99-54-R77.1, Decision on Allegations of Contempt, 12 March 2010 (initiating contempt proceedings for both disclosure and witness intimidation). On the definition of threats and intimidation before other international criminal jurisdictions, see for instance: ICTY, *Prosecutor v. Haraqija & Morina*, IT-04-84-R.77-4, Judgment on Allegations of Contempt, 17 December 2008, para. 18 and ICTY, *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgment on Contempt Allegations, 27 May 2005, paras 16-17.



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investigate and prepare an indictment; (ii) direct an *amicus curiae* to investigate and report back to me; or (iii) initiate proceedings myself.

23. No Participant supported the third option. I prefer in the present circumstances to have the enquiry performed independently of my judicial responsibility.

24. The rule is so worded that to have jurisdiction to appoint a person other than the Prosecutor requires either that the Prosecutor have a preference to that effect, or that the Contempt Judge be of the opinion that the Prosecutor would be subject to a conflict of interest. In his written submissions, the Prosecutor has expressed a preference not to investigate the matter himself.³⁶ Prosecution counsel during the hearing also expressed a preference that the Registrar appoint *amicus curiae*. The Prosecutor did not accept or suggest actual conflict; appointment of *amicus* would be premised on the need for justice to be *seen* to be done, in a context where all organs of the Tribunal and other participants in its proceedings with access to any relevant documents are potentially under scrutiny. There is further the advantage of not requiring further to burden the Prosecutor with additional responsibilities.³⁷

25. For those reasons I exercise my discretion in favour of the submission that *amicus curiae* be appointed. In such circumstances, the Rule requires me to direct the Registrar to appoint a person as *amicus* to properly investigate the matter. As I stated at the hearing, the Legal Advisory Section of the Registry will consult with me on the suitability and availability of candidates in order to receive my approval before any such appointment is made.

IV. The scope of the investigation

A. The issues to be referred to amicus

26. Counsel debated two major options: whether *amicus curiae* should investigate only the publication of the material that came to be published, or also the source. The investigation could

³⁶ Prosecution Submission of 19 April, paras 46-47.

³⁷ Contempt Hearing, pp. 28-29. See also Onessi Response, paras 6-7; Registry Submission of 19 April, para. 32.



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conceivably extend to any who were privy to the conduct of the source and of the publisher. There was consensus that each avenue should be examined, but opinions differed as to their priority.³⁸ At this preliminary stage, which concerns only the question of what should be investigated by the *amicus curiae*, it would be impracticable to limit the scope of such investigation to either the sources or the publisher. In any event, once I receive the report of *amicus* under Rule 60 bis (E) (ii), I have to evaluate whether there are sufficient grounds to proceed against any individual identified by *amicus* as potentially having committed contempt. At that point, I will know more about the nature and difficulty of the respective inquiries. Accordingly, I order that the scope of *amicus*'s investigation extend both to those who made the publications which are the subject of the first, second and third events, and to their sources.

B. Should all three events be investigated together?

27. The Participants have argued that one investigation should encompass all three events referred to me as Contempt Judge.³⁹ I note that there is such overlap among aspects of the various events currently referred to me as Contempt Judge that some relationship among them is possible. Whether there is and how the inquiry should proceed in this regard is again a matter to be considered first by *amicus curiae*. He or she will advise me whether it is desirable to appoint one or more further *amici* in order to deal effectively and efficiently with each. Such *amici*, whether one or several, will undoubtedly require expert assistance as well as administrative support.

C. Publication

28. Having now heard the arguments and reviewed the transcript, I have decided to maintain the order issued at the hearing in relation to the closed session portions which followed, which included the discussion of the basis for supporting each of the complaints advanced. It would be contrary to principle to inform potential suspects of the nature of the investigation process,

³⁸ Contempt Hearing, pp. 16-26. See also LRV Further Submission, paras 11-15.

³⁹ Registry Submission of 19 April, paras 28-31; Prosecution Submission of 19 April, para. 45; STL, *Prosecutor v. Ayyash et al*, STL-11-01/PT/CJ/R60bis I, Observations additionnelles du Bureau de la défense suite à l'ordonnance du Juge compétent en matière d'outrage en date du 18 avril 2013, para. 4.



beyond the generalities expressed in a public redacted version of this decision, at such an early stage.

D. Appointment of amicus curiae

29. I therefore direct the Registrar to appoint *amicus curiae* selected with my approval, and that *amicus curiae* report to me under Rule 60 (E) (ii) within a timeframe to be set as soon as the appointment is finalized. The powers and scope of *amicus*'s authority will be set out in a separate order.



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DISPOSITION**FOR THESE REASONS;****PURSUANT** to Rule 60 *bis* (E) (ii);**I****ORDER** that

- (1) an investigation be initiated in the present matter;
- (2) the Registrar appoint *amicus curiae* selected with my approval;
- (3) the portions of the transcript of the Contempt Hearing there ordered to be confidential and the material there referred to remain confidential until further order;
- (4) the Participants tender in draft for my consideration redacted version of their filings which excludes identification of the first, second, and third events and the persons allegedly involved therein;

RESERVE any other decision in the present matter.

Done in Arabic, English and French, the English version being authoritative.

Dated 29 April 2013

Leidschendam, the Netherlands

Judge David Baragwanath

Contempt Judge

