



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.: STL-14-05/I/CJ/
Before: Judge David Baragwanath, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 31 January 2014
Original language: English
Classification: Confidential and *Ex Parte*

IN THE CASE AGAINST
***NEW TV* S.A.L.**
KARMA MOHAMED THASIN AL KHAYAT

**REDACTED VERSION OF
DECISION IN PROCEEDINGS FOR CONTEMPT WITH
ORDERS IN LIEU OF AN INDICTMENT**

Amicus Curiae Prosecutor



INTRODUCTION

1. The purpose of “contempt” proceedings of a court or tribunal is to protect the public from wrongful interference with the administration of justice.¹ So Rule 60 *bis* (A) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (“Rules” and “Tribunal”, respectively) states, in part:

The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice, upon assertion of the Tribunal’s jurisdiction according to the Statute.²

2. Between [REDACTED] there were published on several occasions names of individuals alleged to be witnesses before the Tribunal. As the Tribunal’s designated Contempt Judge with respect to these events,³ I am now seized of allegations by counsel appointed as *amicus curiae* under Rule 60 *bis* (C) that such conduct entailed knowing and wilful interference with the Tribunal’s administration of justice in breach of Rule 60 *bis*, so as to expose those responsible to criminal liability.

3. The events entailed publications:

(i) by *New TV* S.A.L., the company operating *Al Jadeed* TV, in programmes broadcast on *Al Jadeed* TV on 6, 7, 9 and 10 August 2012, on its website and on YouTube (which publication continues to this date);

¹ See Anthony Arlidge *et al.*, *Arlidge, Eady & Smith on Contempt*, 4th ed. (Sweet & Maxwell 2011), p. 72; see also, e.g., ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001 (“*Nobile* Contempt Judgment”), para. 36 (“Both the purpose and the scope of the law of contempt to be applied by this Tribunal [are] to punish conduct which tends to obstruct, prejudice or abuse its administration of justice in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded.”).

² The Rule continues: “This includes, but is not limited to, the power to hold in contempt any person who:

[...]

(iii) discloses information relating to the proceedings in knowing violation of an order of a Judge or Chamber;

[...]

(v) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Judge or Chamber, or a potential witness;

[...].

³ See Rule 60 *bis* (C) STL RPE; STL, Practice Direction on Designation of Judges in Matters of Contempt, Obstruction of Justice and False Testimony, STL/PD/2013/06, 11 March 2013; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES/R60*bis*.1, Order Designating Contempt Judge, Confidential, 15 April 2013, para. 3; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PRES/R60*bis*.2, Order Designating Contempt Judge, Confidential, 18 April 2013, para. 4.

(ii) by *Akhbar Beirut* S.A.L., the company operating the newspaper *Al Akhbar* in its newspaper and on its Arabic and English websites on 15 January 2013; in its newspaper and on its Arabic website on 19 January 2013 and on its English website on 20 January 2013 (which website publications continue to this date);

(iii) [REDACTED].

4. *Amicus curiae* was appointed to investigate these three events. A series of reports from him under Rule 60 *bis* (E) (ii) lead me to conclude that with respect to

(i) the publications by *New TV* S.A.L. referred to in paragraph 3 (i), and

(ii) the publications by *Akhbar Beirut* S.A.L. referred to in paragraph 3 (ii)

there are sufficient grounds to proceed against certain persons, natural and corporate, for the publication of names asserted to be those of alleged confidential witnesses in the Tribunal's proceedings. In particular, I have concluded:

(i) There is *prima facie* evidence that the publication of information relating to the identity of alleged confidential witnesses entailed knowing and wilful interference with the administration of justice in breach of Rule 60 *bis* (A);

(ii) There are sufficient grounds to proceed for contempt with respect to the first set of publications against *New TV* S.A.L. and its Deputy Head of News and Political Programmes Manager Ms Karma Khayat; and with respect to the second set against *Akhbar Beirut* S.A.L. and its Editor-in-Chief Mr Ibrahim Al-Amin;

(iii) I should and do hereby exercise the power under Rule 60 *bis* (F) (ii) to issue an order in lieu of an indictment against such persons and direct these matters be prosecuted by *amicus curiae*;

(iv) I should and do hereby disqualify myself from hearing and determining the prosecutions I have ordered in relation to the first and second events.

5. As regards [REDACTED] referred to in paragraph 3 (iii), [REDACTED] I await further reports from *amicus curiae* on this. I reserve to myself and retain jurisdiction with respect to this inquiry.

PROCEDURAL HISTORY

6. In my Decision on Allegations of Contempt I set out in detail the procedural background to the present proceedings.⁴ In short, after reviewing certain information provided by the Head of Defence Office, the Prosecutor and the Registrar, and after hearing the Defence in the *Ayyash et al.* case, I found there was reason to believe that contempt was committed with respect to the three events mentioned in paragraph 3 above, ordered that an investigation be initiated and requested the Registrar to appoint *amicus curiae* for that purpose.⁵

7. On 25 June 2013, after preliminary discussions on a working plan, the Acting Registrar appointed Mr Stéphane Bourgon *amicus curiae* (“*amicus*”) to (i) investigate the allegations of contempt and (ii) provide two interim reports and a final report to me whether there were sufficient grounds for instigating contempt proceedings.⁶ The next day I ordered that *amicus* conduct his investigation and present his final report on the investigation no later than 15 October 2013.⁷ That date was later extended by one week.

8. *Amicus* filed two interim reports on 15 August 2013 and 16 September 2013, respectively.⁸ In these, *amicus* updated me on the progress of the investigations and suggested possible courses of action. He filed his final report on 23 October 2013.⁹ I consulted with him pursuant to Rule 88 (D) and (E), which applies *mutatis mutandis* to the present proceedings.¹⁰

⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/CJ/R60bis.1, Decision on Allegations of Contempt, Confidential, 29 April 2013 (“Decision on Allegations of Contempt”), paras 1-11 (a public redacted version was issued the same day). All further references to filings and decisions in this Decision relate to this case number unless otherwise stated.

⁵ Decision on Allegations of Contempt, paras 20-27, 29, Disposition.

⁶ Registrar’s Decision Under Rule 60 *bis* (E) (ii) to Appoint *Amicus Curiae* to Investigate Contempt Allegations, Confidential and *Ex Parte*, 25 June 2013, p. 3; *see also* Registrar’s Decision Under Rule 60bis(E)(ii) to Appoint an *Amicus Curiae* on an Interim Basis to Investigate Contempt Allegations, Confidential and *Ex Parte*, 17 May 2013 (appointing Mr Bourgon as an interim *amicus curiae* to prepare a working plan); Registrar’s Decision Under Rule 60bis(E)(ii) to Appoint an *Amicus Curiae* on an Interim Basis to Investigate Contempt Allegations, Confidential and *Ex Parte*, 17 May 2013 (appointing Mr Hugo Keith as an interim *amicus curiae* to prepare a working plan).

⁷ Order on Investigation by *Amicus Curiae* and Cooperation, Confidential and *Ex Parte*, 26 June 2013.

⁸ First *Amicus Curiae* Report with Annex, Confidential and *Ex Parte*, 15 August 2013; Second *Amicus Curiae* Report with Annex, Confidential and *Ex Parte*, 16 September 2013.

⁹ Third and Final *Amicus Curiae* Report with Annexes, Confidential and *Ex Parte*, 23 October 2013 (“Final Report”).

¹⁰ Rule 60 *bis* (H) states, “The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.”

Amicus has since provided me with supporting material related to the recommended charges and draft counts with which to proceed, as well as additional information I requested.¹¹

DISCUSSION

I. The applicable law on contempt

A. Contempt under the Statute and Rules

9. Rule 60 *bis* expresses the Tribunal's authority to hold accountable those who knowingly and wilfully interfere with its administration of justice. They include those who disclose information relating to proceedings in knowing violation of a judicial order,¹² those who threaten and intimidate witnesses¹³ and those who threaten, intimidate, or seek to coerce persons to prevent them from complying with an obligation under a judicial order.¹⁴ A person who commits, attempts to commit, or incites others to commit these acts is guilty of contempt of this Tribunal or obstruction of justice.¹⁵

10. The Tribunal's Statute does not specifically provide for contempt. The Tribunal's power to prosecute this crime derives from its inherent jurisdiction to protect the integrity of the judicial process and to ensure the proper administration of justice.¹⁶ Article 28 of the Statute mandates the judges in plenary to adopt Rules of Procedure and Evidence for the conduct of the proceedings and other appropriate matters with a view to ensuring a fair and expeditious trial. The judges have decided to adopt Rule 60 *bis* which by punishing contempt seeks to safeguard

¹¹ Additional *Amicus Curiae* Report, Confidential and *Ex Parte*, 28 November 2013 ("Additional Report"); Further *Amicus Curiae* Report, Confidential and *Ex Parte*, 15 January 2014 ("Further Report"); Further Submissions on Essential Elements, Confidential and *Ex Parte*, 17 January 2014; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/CJ/R60bis.1, Addendum to Annex D and E to Additional *Amicus Curiae* Report ("Addendum"), Confidential and *Ex Parte*, 23 January 2014; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/CJ/R60bis.1, Supplementary *Amicus Curiae* Report, Confidential and *Ex Parte*, 24 January 2014; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/CJ/R60bis.1, Supplementary Addendum to Annex D and E to Additional *Amicus Curiae* Report, Confidential and *Ex Parte*, 31 January 2014 ("Supplementary Addendum"); see also Order on Further Report by *Amicus Curiae*, Confidential and *Ex Parte*, 29 November 2013; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/CJ/R60bis.1, Order on Further Report by *Amicus Curiae*, Confidential and *Ex Parte*, 16 January 2014.

¹² Rule 60 *bis* (A) (iii) STL RPE.

¹³ Rule 60 *bis* (A) (v) STL RPE.

¹⁴ Rule 60 *bis* (A) (vi) STL RPE.

¹⁵ Rule 60 *bis* (B) STL RPE.

¹⁶ See STL, *In the matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010, paras 44-49 (explaining the concept of inherent jurisdiction); see also ICTY, *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Contempt Judgment"), para. 13.

the proceedings before the Tribunal. Other international criminal courts and tribunals have adopted equivalent provisions.¹⁷

B. The definition of “contempt”

11. Rule 60 *bis* states in general terms that the Tribunal “may hold in contempt those who knowingly and wilfully interfere with its administration of justice”. The Rule goes on to identify specific examples of such conduct but makes plain that this list is not exhaustive. As to whether Rule 60 *bis* sufficiently states the definition of contempt, I concur with the relevant holding of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) with respect to the equivalent Rule 77 of the ICTY Rules of Procedure and Evidence:

a) The inherent power of the Tribunal as an international criminal court to deal with contempt is for present purposes adequately encompassed by the wording of the reservation inserted in Rule 77 in November 1997 – that the Tribunal has the power to “hold in contempt those who knowingly and wilfully interfere with its administration of justice” – as such conduct would necessarily fall within the general concept of contempt, being “conduct which tends to obstruct, prejudice or abuse the administration of justice”; and

b) each of the formulations in the current Rules 77(A) to (D), when interpreted in the light of that statement of the Tribunals’ inherent power, falls within – but does not limit – that inherent power, as each clearly amounts to knowingly and wilfully interfering with the Tribunal’s administration of justice.¹⁸

12. It has been argued that, while an international tribunal undoubtedly has inherent power to make rules governing the prosecution of contempt, prosecuting as contempt conduct not explicitly prohibited in the rules is inconsistent with the principle of legality.¹⁹ I agree, however, with the Appeals Chamber of the ICTY that holding in contempt any knowing and wilful interference with a tribunal’s administration of justice comports with the principle of legality.²⁰ In any event, international case-law provides adequate notice that deliberate interference with the

¹⁷ See Rule 77 ICTY RPE; Rule 77 ICTR RPE; Rule 77 SCSL RPE; Rule 35 ECCC IR. The International Criminal Court and the Mechanism for International Tribunals explicitly provide for contempt in their Statutes, see Art. 70 ICC St. (“Offences against the administration of justice”), Art. 1 (4) MICT St.

¹⁸ *Vujin* Contempt Judgment, para. 26.

¹⁹ See e.g. Gwendolyn Stamper, “Note: Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda”, 109 *Michigan Law Review* 1551 (2010-2011), 1565 (“While the Tribunals’ power to promulgate procedural rules governing the prosecution of contempt is grounded in the inherent powers of the courts, the principle of legality requires that the judges codify these rules so that potential contempt defendants have prospective notice of forbidden conduct. Punishment of conduct not explicitly classified as prohibited would violate fundamental human rights and the due process principle of legality [. . .].”).

²⁰ See *Nobilo* Contempt Judgment, paras 30, 38; *Vujin* Contempt Judgment, paras 24-28.

administration of justice, expressed in general terms, is an indictable offence.²¹ That determining the exact content of the tribunal's power requires "reference to the usual sources of international law"²² is perfectly compatible with due process.²³ As a matter of common sense, intentionally broadcasting or publishing information about purportedly confidential witnesses potentially constitutes such interference.

13. It follows that a person may be charged with contempt either under the general provision of Rule 60 *bis* (A) and/or under any one of the specific provisions listed in subparagraphs (i) to (vii) of the Rule.²⁴ What precisely will be charged depends of course on the circumstances of the case to which I will return.

C. Freedom of expression and the protection of the Tribunal's criminal proceedings

14. As the allegations of contempt in this case relate to publications by the press and other media, it is necessary to consider both the principles pertaining to freedom of expression, which include freedom of the press, and the proper administration of justice. Where there is a potential conflict, courts evaluating these principles must identify and state them with clarity and apply the law in a manner that respects the values underpinning each. To a certain degree this exercise is likely to be case-specific.

15. The criminal charge of contempt is not to be abused as a cudgel to silence an independent media acting within the law. On the contrary, the Fundamental Provisions of the Lebanese Constitution include "respect for public liberties, especially the freedom of opinion" and abiding by the Universal Declaration of Human Rights, of which the Lebanese statesman Charles Malik

²¹ See *Nobilo* Contempt Judgment, para. 30; *Vujin* Contempt Judgment, para. 26.

²² See *Nobilo* Contempt Judgment, para. 30; *Vujin* Contempt Judgment, para. 24.

²³ See *Nobilo* Contempt Judgment, para. 38; see also ECtHR, *Case of the Sunday Times v. The United Kingdom*, 6538/74, Judgment, 26 April 1979, paras 46-53; Canada, Supreme Court of Canada, *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 R.C.S. 901 (16 April 1992), pp. 929-931; Australia, High Court of Australia, *Monis v. The Queen*, [2013] HCA 4 (27 February 2013), para. 338.

²⁴ See for the equivalent provisions at other Tribunals: ICTY, *In the matter of Šešelj*, IT-03-67-R77.4, Public Redacted Version of Judgement issued on 28 June 2012, 28 June 2012 ("Šešelj Contempt Judgment"), para. 38 ("Rule 77(A) of the Rules identifies, in a non-exhaustive fashion, conduct falling under the Tribunal's inherent jurisdiction."); ICTR, *Prosecutor v. Nshogoza*, ICTR-07-91-T, Judgment, 7 July 2009, para. 156 ("The listed punishable acts are non-exhaustive, and do not limit the Tribunal's jurisdiction to punish contempt."); SCSL, *Independent Counsel Against Samura*, SCSL-2005-01, Judgment in Contempt Proceedings, 26 October 2005, para. 16 ("[...] Rule 77(A) identifies and describes certain conducts relating to the offence of contempt of court throughout a defined, non-exhaustive, list of acts.").

was an originator.²⁵ Undoubtedly the vigorous Lebanese media would echo emphatically, and rightly, Victor Hugo's cry, "[s]ans la presse, nuit profonde".²⁶ The importance of the press as the eyes, ears and voice of the community is at its highest when confronted with the power of public decision-makers, such as judges. That was expressed lucidly by Jeremy Bentham:

Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity is there no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against impropriety. It keeps the judge himself, while trying, under trial.²⁷

16. But like judges, and the rest of the community, the media must comply with the law. Indeed "[t]here are innumerable dicta which emphasise the importance in a democracy of a free press, but that it must operate within the rule of law".²⁸

Domestic judgments emphasize that freedom of expression is not absolute.²⁹ On the international level, Article 19 of the International Covenant on Civil and Political Rights,³⁰ to which Lebanon has acceded,³¹ while endorsing the right of freedom of expression, clarifies that the exercise of this right

*carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.*³²

The Human Rights Committee—set up under the International Covenant—has observed that the “requirement of necessity implies an element of proportionality, in the sense that the scope of the

²⁵ Preamble, *Constitution* (Lebanon).

²⁶ Victor Hugo, *Actes et paroles, Pendant l'exil* (1875), p. 14.

²⁷ Cited in Canada, Supreme Court of Canada, *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 R.C.S. 175 (26 January 1982), Dickson J (later CJ), p. 183.

²⁸ R.G. Toulson & C.M. Phipps., *Confidentiality*, 2nd ed. (Sweet & Maxwell 2006) p. 266.

²⁹ See, e.g. United Kingdom, Court of Appeal (Civil Division), *Douglas v. Hello! Ltd (No. 1)*, [2001] Q.B. 967 (21 December 2000), para. 137 (“If at trial [...] a minor but real risk to life, or a wholly unjustifiable invasion of privacy, is entitled to no less regard, by virtue of article 10(2), than is accorded to the right to publish by article 10(1), the consequent likelihood becomes material under section 12(3). Neither element is a trump card. They will be articulated by the principles of legality and proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights. It will be remembered that in the jurisprudence of the Convention proportionality is tested by, among other things, the standard of what is necessary in a democratic society.”); Australia, High Court of Australia, *Monis v. The Queen*, [2013] HCA 4 (27 February 2013), Crennan, Kiefel and Bell JJ (opinion), para. 326.

³⁰ International Covenant on Political and Civil Rights, Adopted 16 December 1966, 999 U.N.T.S. 171.

³¹ Lebanon acceded to the ICCPR on 3 November 1972.

³² Emphases added.

restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect".³³ There is also case-law in Lebanon to that effect.³⁴

Nothing is more fundamental to the rule of law than that there must be no deliberate interference with the administration of justice.

17. With respect to contempt of the Tribunal, this means that the freedom of the press must find its limits where it impinges upon the Tribunal's ability to function properly as a criminal court and to administer justice for the benefit of the people of Lebanon. In this regard, the Tribunal's contempt power expressed in Rule 60 *bis* is an acceptable limit on the freedom of the media to report on all matters concerning the Tribunal because it punishes only conduct that undermines the administration of justice. It leaves intact the ability of the press otherwise to comment on the Tribunal's work, including criticizing it. But it does not allow for interference with the Tribunal's mandate.

D. Corporate liability for contempt

18. Because the impugned publications at issue here involved the conduct of legal as well as natural persons, it is necessary to consider whether the Tribunal's inherent power to prosecute cases of contempt extends to legal persons. Criminal liability for legal persons, such as corporations, is a familiar and increasingly pervasive legal construct in national systems based on the premise that the criminal conduct of certain natural persons done in their official capacity should be attributed under criminal law to the legal entity on whose behalf they acted. But to date international law has applied an ancient principle—expressed in Latin as *societas delinquere non potest*—in essence, only natural persons can be charged with crimes. I must determine whether the principle of legality affords such defence to companies in the present context.

19. On its face, Rule 60 *bis* neither embraces nor rejects such liability in the contempt context. Rather, it simply affirms the Tribunal's inherent power to hold in contempt "*those* who

³³ UNHRC, *Marques v. Angola*, Communication No. 1128/2002, 29 March 2005, UN Doc. CCPR/C/83/D/1128/2002, para. 6.8.

³⁴ *Cf.* the following decisions related to the Law of Publications (Legislative Decree No. 104/77): Lebanon, Court of Criminal Cassation, 7th Chamber, Decision No. 18/2001 publications (23 October 2001) (referring to the fact that "it is prohibited to publish any of the investigations' facts before being read out in a public hearing. This prohibition includes the Prosecutor General's submissions on merits."); Lebanon, Court of Publications, Decision No. 81 (12 July 1999) (stressing the need to prohibit "the publication of the content of the ongoing official investigations [...] and the prohibition of publishing their records in order to protect the secrecy, safety and efficiency of the investigation").

knowingly and wilfully interfere with its administration of justice” and details what must be done when a Contempt Judge “has reason to believe that a *person* may be in contempt of the Tribunal”.³⁵ No other provision of Rule 60 *bis* in terms limits the Rule’s application to natural persons. Notably, Rule 60 *bis* (J), which sets forth the maximum permissible penalties for contempt, allows for the imposition of a monetary fine as a stand-alone penalty. The mere fact that the Rule contemplates imprisonment as one possible penalty, a penalty uniquely applicable to natural persons, does not therefore exclude punishment of legal persons by other means. Further, because Rule 60 *bis* (H) makes Parts Four to Eight of the Rules applicable to Rule 60 *bis* proceedings *mutatis mutandis*, an interpretation appropriate to the contempt context is required. On a literal interpretation any such Rules could be compatible with a proceeding implicating a legal person.

20. Whether the Tribunal’s contempt jurisdiction covers legal persons can thus only be determined through recourse to the Statute and relevant Rules and also operative principles of interpretation.³⁶ Of central importance here is Article 28 of the Statute, which requires that, in adopting the Rules, “the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial”. Further, Rule 3 commands that “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 law [. . .], (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”. In considering the Tribunal’s Statute and Rules, the Appeals Chamber has affirmed an important principle of interpretation, namely “the search for the purpose and the object of a rule with a view to bringing to fruition as much as possible the potential of the rule”.³⁷ The Appeals Chamber reasoned that such an approach requires “an interpretation that best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner”.³⁸

³⁵ Rule 60 *bis* (E) (emphasis added); *see also* Rule 60 *bis* (F) (“sufficient grounds to proceed against a *person* for contempt”).

³⁶ STL, STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 (“Decision on Applicable Law”), paras 17 *et seq.*

³⁷ Decision on Applicable Law, para. 29. In applying the general principle of effectiveness, a judge may construe provisions to comport with principles of general application and settled presumptions of law. *Id.* at para. 31, fn. 47.

³⁸ *Id.* at para. 32.

21. I note that no other provision of the Statute or Rules expressly limits the scope of contempt proceedings to natural persons. While, as I explain below, it is my view that any “person” prosecuted under Articles 2 and 3 of the Statute must be a natural person, the logic demanding this conclusion does not call for such limitation in the case of contempt.

22. In confining the primary jurisdiction of the Tribunal to persons “individually responsible for crimes” set forth in Article 2, Article 3 (1) does not distinguish between natural and legal persons. There is no question that an “individual” person can, by definition, be a distinct *legal* person. However, Article 3 (2)-(3) expressly declares superiors criminally responsible for the crimes of subordinates under “*his or her* effective authority and control” and provides that the “fact that [a subordinate] acted pursuant to an order of a superior shall not relieve *him or her* of criminal responsibility”.³⁹ Article 16 also repeatedly refers to natural persons in spelling out the rights of an accused. Moreover, there is no reference to an “it” in the context of an accused anywhere in the Statute.

23. There must in addition be a presumption that in the absence of any indication to the contrary the principle *societas delinquere non potest* applies. Since both the language of the Statute and that principle pull in the same direction, I cannot find that Articles 2 and 3 apply to legal persons.

24. However, while Rule 60 *bis* complements the aforementioned Articles, it is not necessarily limited by them. The Tribunal’s inherent power to hold persons in contempt, necessary to ensure the administration of justice, is ancillary to its primary purposes.⁴⁰ Whether a legal person can be an accused under Articles 2 and 3 of the Statute is a very different question from whether a legal person can be held in contempt for knowingly and wilfully interfering with the administration of justice. Pursuant to Article 28, the judges in plenary were authorized and obligated to adopt procedural rules “with a view to ensuring a fair and expeditious trial”. Like other international tribunals and courts, the Plenary, through Rule 60 *bis*, expressed the contempt power inherent in the Tribunal’s judicial function. This power, and the Rule which expresses it, are intended to guarantee the integrity of the judicial process. As explained below, I conclude that in order to ensure the administration of justice consonant with Article 28, Rule 60 *bis* must

³⁹ Emphases added.

⁴⁰ See above, para. 10.

be read to cover acts of contempt allegedly undertaken by legal persons. Under the highest procedural standards, corporate entities cannot be any more entitled than natural persons to interfere with the judicial process.

25. I reach this conclusion mindful of its novelty in the international criminal justice context. To date no contempt case has been brought against a legal person in an international criminal tribunal or court. Indeed, significant authority has rejected the existence of criminal liability generally for legal persons under international law.⁴¹ According to Lord Thurlow's 19th century formulation, "Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like".⁴² With the exception of certain common law States, the concept of criminal liability for corporate entities is a relatively new development.⁴³

26. Yet the last couple of decades have witnessed major change, particularly in civil law States. One recent survey of corporate liability in Europe identifies a "general trend in most countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers".⁴⁴ And, most notably for our purposes, Lebanon has embraced and codified corporate criminal liability. Article 210 of the Lebanese Criminal Code states:

Legal persons shall be criminally responsible for the actions of their directors, management staff, representatives and employees when such actions are undertaken on behalf of or using the means provided by such legal persons.

It further provides:

They may be sentenced only to a fine, confiscation and publication of the judgement.

⁴¹ See Ilias Bantekas & Susan Nash, *International Criminal Law*, 4th ed. (Hart Publishing 2010), p. 76 ("There is no doubt that *general* corporate criminal liability does not exist in international law [...] [N]ot only does it not exist in every, or most, legal systems, but even when it does exist its objective and subjective elements are significantly divergent."); Ronald C. Slye, "Corporations, Veils and International Criminal Liability", 33:3 Brook. J. Int'l L. 955 (2008) 955 ("Corporations are not presently subject to criminal liability under international law.").

⁴² John Poynder, *Literary Extracts*, Vol. 1 (John Hatchard & Son 1844), p. 268.

⁴³ See Cherif Bassouni, *Introduction to International Criminal Law*, (Transnational Publishers 2003), pp. 59-60 ("Traditionally, under the Romanist-civilist law systems, *les personnalités juridiques* (legal entities) could not be held criminally responsible, only individuals could. But recently, some changes that extend criminal sanctions to legal entities have occurred in that legal tradition, as evidenced in contemporary national criminal legislation dealing with 'organized crimes' and 'white collar crimes'. The common law tradition, which is characterized by pragmatism and is less constrained by doctrinal or dogmatic considerations than the Romanist-civilist and Germanic systems, has evolved norms for the responsibility of legal entities that include sanctions akin to those for individual criminal responsibility.").

⁴⁴ Clifford Chance LLP, "Corporate Liability in Europe", January 2012, (available at http://www.cliffordchance.com/content/dam/cliffordchance/PDF/European_Technical_Bulletin.pdf), p. 1.

Lebanon has thus, along with a growing number of civil law States, deliberately rejected *societas delinquere non potest* in favour of an approach which holds legal persons accountable for criminal behaviour attributable to them. It would be bizarre for this Tribunal to deny protection of its due process against corporate interference because of an ancient maxim that the State it serves has rejected. Article 210 also demolishes the argument based on the principle of legality that corporate decision-makers in Lebanon could expect corporate immunity from the criminal law.⁴⁵

27. The international trend toward criminal liability for legal persons further supports the case for such liability, which has developed over the past two centuries with recent adoption by civil law States, notably France, whose legal system has underlain much of Lebanon's. As legal persons, and in particular the limited liability company, have assumed ever greater prominence as actors in legal and commercial affairs, domestic jurisdictions have progressively recognized the need to hold them criminally accountable for their conduct. In the mid-19th century, Lord Denman CJ stated that, "[t]here can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority".⁴⁶

28. This reasoning is the more powerful today, and particularly in the contempt context, where corporate entities hold great power in their ability to publicly broadcast and otherwise disseminate information. It would not only be naïve but dangerous to accept that only natural persons can interfere with the administration of justice. To limit criminal liability for contempt to individual natural persons risks undermining the justice process; for the actual and most powerful culprits of any proved interference with justice would go untried. Accepting such an

⁴⁵ Decision on Applicable Law, para. 136.

⁴⁶ United Kingdom, Court of Queen's Bench, *The Queen v. The Great North of England Railway Company*, [1846] 9 Q.B. 315 (12 June 1846), p. 327; see United Kingdom, Assizes, *R. v. Gutch et al.*, 173 E.R. 1214 (22 December 1829), p. 1216 (Lord Tenterden CJ reasoned that "surely a person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable [. . .]"); see also the reasoning of Justice Farwell in the early 20th Century, applicable even though expressed in the civil litigation context: "If the contention of the defendant society were well founded, the Legislature has authorised the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents. They would be at liberty [...] to disseminate libels broadcast [...] and their victims would have nothing to look to for damages but the pockets of individuals, usually men of small means, who acted as their agents". United Kingdom, House of Lords, *Taff Vale Railway Co v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (22 July 1901), p. 430.

approach here would be contrary to the purpose of Rule 60 *bis* in light of Article 28 of the Statute and the international trend embracing corporate criminal liability. Applying the law of contempt to legal persons reflects the highest procedural standards. I decline to impute to the Plenary an intention to immunize legal persons against liability for interfering with due process. I conclude that Rule 60 *bis* extends to acts of contempt allegedly undertaken by legal persons.

II. Whether to issue an order in lieu of an indictment for contempt

29. Before issuing an order in lieu of an indictment for contempt as requested by *amicus*, I must first be satisfied that there are sufficient grounds to proceed against a person—whether legal or natural—for contempt.⁴⁷ The test of “sufficient grounds” is whether the evidence before me gives rise to a *prima facie* case of contempt.⁴⁸ If so, I must then exercise discretion to decide whether to issue an order in lieu of an indictment and direct *amicus* to prosecute the matter.⁴⁹

A. Whether sufficient grounds exist to proceed against a person for contempt

30. I first note that *amicus* was tasked to investigate three separate incidents in order to establish whether contempt was committed. While the nature of each incident was broadly similar, they occurred during different periods and the persons allegedly responsible are not identical. I therefore examine each incident separately. In this task, I have evaluated the relevant underlying evidence provided by *amicus*.⁵⁰

1. The broadcasts and publications by *Al Jadeed TV*

31. With respect to the broadcasts by *Al Jadeed TV* in August 2012 and subsequent publications on the internet (*see* paragraph 3 (i) above), *amicus* proposes charging two persons

⁴⁷ Rule 60 *bis* (F) STL RPE.

⁴⁸ *See* ICTY, *Prosecutor v. Šešelj*, IT-03-67-R77.2, Decision on the Prosecution’s Appeal Against the Trial Chamber’s Decision of 10 June 2008, Public Redacted, 25 July 2008, para. 16 (interpreting Rule 77 (D) of the ICTY Rules of Procedure and Evidence which applies the same standard as Rule 60 *bis* (F)); *see also* ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR.91, Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [A] Prosecution Witness for False Testimony” and on Motion for Oral Arguments, 22 January 2009 (“*Karemera et al.* Decision”), paras 17-19.

⁴⁹ While under Rule 60 *bis* (F) (ii) there exists the possibility that I prosecute the matter myself, I have already indicated at a previous stage that the inquiry should be performed independently of my judicial responsibilities (*see* Decision on Allegations of Contempt, para. 25). The same would apply to the prosecution stage of this case (*see also* III. below).

⁵⁰ Additional Report, Annex D, Relevant Documents Submitted by the *Amicus Curiae* Concerning the First Event; Additional Report, Annex E, Relevant Documents Submitted by the *Amicus Curiae* Concerning the Second Event; Addendum; Supplementary Addendum.

with two counts of contempt pursuant to both Rule 60 *bis* (A) and Rule 60 *bis* (A) (iii). These persons are *New TV* S.A.L, the legal person doing business as *Al Jadeed TV*, and Ms Karma Mohamed Thasin al Khayat, *Al Jadeed TV*'s Deputy Head of News and Political Programmes Manager.⁵¹ I have already decided that, in principle, charges may be brought against a company (*Al Jadeed TV*) as well as against a natural person (Ms Khayat).

a) Count 1

32. Under Count 1, *amicus* proposes to charge that both *Al Jadeed TV* and Ms Khayat knowingly and wilfully interfered with the administration of justice by broadcasting and/or publishing information on purported confidential witnesses in the *Ayyash et al.* case, thereby undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.⁵²

33. I am satisfied that this charge, even though not mentioned specifically in the enumerated list of acts constituting contempt under Rule 60 *bis* (A), falls within the general provision of the Rule, which punishes those "who knowingly and wilfully interfere with [the Tribunal's] administration of justice". As the Rule makes clear,⁵³ the list of specific offences is not exhaustive.

34. Contempt must also embrace wilful publication of names merely *asserted* to be those of alleged confidential witnesses in the Tribunal's proceedings. The reason for seeking confidentiality of witnesses' particulars is to avoid exposing them to risk. Here, *amicus* does not allege that the information published by *Al Jadeed TV* related to actual witnesses. Rather, the allegation is a different one: that *purporting* to disclose confidential witnesses' identities reduces the confidence of both actual witnesses and the public in the ability and the will of the Tribunal to protect its witnesses. Such conduct directly interferes with the Tribunal's core function of administering justice without impediment.⁵⁴

⁵¹ Further Report, para. 118.

⁵² *Ibid.*

⁵³ "This includes, but is not limited to [...]."; see above, paras 11-13.

⁵⁴ See ICTY, *Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2, Judgement, 10 March 2006, paras 49, 50 ("Any deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice. Public confidence in the effectiveness of such orders is absolutely vital to the success of the work of the Tribunal.");

i) Elements of contempt with respect to both *Al Jadeed* TV and Ms Khayat

35. I will now analyse what in my view are the essential elements of the offence in turn.

36. **(1) *Al Jadeed* TV and Ms Khayat, through their acts and/or omissions, wilfully broadcast and or published information on purported confidential witnesses in the *Ayyash et al.* case.**

Amicus has presented sufficient evidence that:

- *Al Jadeed* TV on 6, 7, 9, and 10 August 2012 broadcast five episodes titled “The Witnesses of the International Tribunal”. In each episode journalists approached individuals alleged by *Al Jadeed* TV to be confidential witnesses in the *Ayyash et al* case. The total number of these alleged confidential witnesses was eleven. In each case, certain identifying information of the alleged confidential witnesses was provided. In addition, the broadcasts purported to reveal details on the type of information given to investigators of the Tribunal by the alleged confidential witnesses. The entire tenor of the programme was the exposure of alleged confidential witnesses. The broadcasts were subsequently transferred to *Al Jadeed*’s TV’s website (www.aljadeed.tv) where they remained until at least 4 December 2012 and *Al Jadeed* TV’s YouTube channel (www.youtube.com/user/aljadeedonline) where they are still available.
- *NEW TV* S.A.L. is a legal person doing business as *Al Jadeed* TV. Ms Khayat is Deputy News and Political Programmes Manager at *Al Jadeed* TV, and also one of the company’s shareholders.
- Ms Khayat authorized the broadcasts on *Al Jadeed* TV and later their transfer onto *Al Jadeed*’s website and YouTube page. She further had the authority to remove these broadcasts. In exercising her authority, she acted on behalf of *Al Jadeed* TV.

37. **(2) The broadcast and/or publication of information on purported confidential witnesses in the *Ayyash et al.* case interferes with the administration of justice by**

see also ICTY, *Prosecutor v. Margetić*, IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007, para. 15; *Šešelji* Contempt Judgment, para. 40.

undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.

- As a matter of common sense, the publication of purported confidential witness information must reduce the public's confidence in the Tribunal and thereby interfere with its administration of justice. I note that *amicus* intends to rely on testimony by persons describing their contact with victims and witnesses. Given that some of these persons would testify as to the circumstances in which they were contacted by victims and witnesses, and in particular about the fact that they received phone calls triggered by the broadcasts, I am also satisfied that such evidence, while in part hearsay, would *prima facie* support this element.⁵⁵ It will be for the Contempt Judge hearing the case to determine which evidence to admit.

38. (3) *Al Jadeed* TV and Ms Khayat knew that broadcasting and/or publishing information on purported confidential witnesses in the *Ayyash et al.* case would interfere with the administration of justice by undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.

- I am satisfied that *amicus* has presented sufficient evidence to show that both *Al Jadeed* TV and Ms Khayat were aware that the broadcasts and subsequent publication on *Al Jadeed* TV's website and its YouTube channel would interfere with the Tribunal's administration of justice. I refer in particular to the circumstances of the broadcasts, which used hidden cameras, blurred faces and initials; an interview with *Al Jadeed* TV journalist Rami Al Amin (responsible for preparing the reports) published in *Al Akhbar*, in which he acknowledges the alleged witnesses' fear of exposure; the Registrar's Notice of Cease and Desist of 7 August 2012 directed at and received by *Al Jadeed* TV, which mentions that the broadcasts "may constitute a knowing and wilful interference with the administration of justice and may place at risk the security of those individuals that have been the subject of the *Al Jadeed* TV interviews"; Ms Khayat's knowledge of that notice; and announcements during the broadcasts themselves, such as the following statement:

⁵⁵ For the admissibility of hearsay evidence at international tribunals, *see, e.g.*, ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996 ("*Tadić* Hearsay Decision"), paras 7-19; *Tadić* Hearsay Decision, Separate Opinion of Judge Stephen on the Defence Motion on Hearsay; ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

[W]hy did the Tribunal dispense so easily with their confidential status, and how did their names reach us, and where is the protection they were promised? This is a pierced Tribunal [...]. [I]ts witnesses are out in the bare open to the media.

ii) Additional elements of contempt with respect to *Al Jadeed TV*

39. I also analyse the additional essential elements of the offence with respect to *Al Jadeed TV*.

40. **(4) Ms Khayat acted within the scope of her employment as Deputy Head of News and Political Programmes Manager of *Al Jadeed TV*.**

(5) Ms Khayat had authority from *Al Jadeed TV* to broadcast and/or publish information on purported confidential witnesses in the *Ayyash et al.* case; and

(6) Ms Khayat's wilful broadcast and/or publication of information on purported confidential witnesses in the *Ayyash et al.* case was motivated—at least in part—by an interest to benefit *Al Jadeed TV*

- On the basis of the information provided by *amicus*, in particular with respect to Ms Khayat's role and functions at *Al Jadeed TV*, I am satisfied that sufficient evidence exists to support these elements.

iii) Conclusion

41. For the foregoing reasons I am satisfied that sufficient grounds exist to proceed against *Al Jadeed TV* and Ms Khayat for contempt under Count 1 of the charges proposed by *amicus*.

b) Count 2

42. Under Count 2, *amicus* proposes to charge that both *Al Jadeed TV* and Ms Khayat knowingly and wilfully interfered with the administration of justice by failing to remove from *Al Jadeed TV*'s website and/or *Al Jadeed TV*'s YouTube channel information on purported confidential witnesses in the *Ayyash et al.* case, thereby violating the Order issued by the Pre-Trial Judge in the *Ayyash et al.* case on 10 August 2012.⁵⁶ This charge falls squarely within the scope of Rule 60 *bis* (A) (iii), which specifically punishes the disclosure of “information relating to proceedings in knowing violation of an order of a Judge or Chamber”.

⁵⁶ Further Report, para. 118.

i) Elements of contempt with respect to both *Al Jadeed* TV and Ms Khayat

43. I next analyse what in my view are the essential elements of the offence.

44. **(1) *Al Jadeed* TV and Ms Khayat, through their acts and/or omissions, failed to remove from *Al Jadeed* TV's website and/or *Al Jadeed* TV's YouTube channel information on purported confidential witnesses in the *Ayyash et al.* case.**

(2) The information on purported confidential witnesses in the *Ayyash et al.* case published on *Al Jadeed* TV's website and/or *Al Jadeed* TV's YouTube channel was covered by the Order issued by the Pre-Trial Judge on 10 August 2012.

Amicus has presented sufficient evidence that:

- Information on purported confidential witnesses related to the *Ayyash et al.* proceedings was disclosed. I refer in particular to the broadcast of the five episodes titled "The Witnesses of the International Tribunal", their content, and their transfer to *Al Jadeed* TV's website and YouTube channel as detailed above.⁵⁷
- *NEW TV* S.A.L. is a legal person doing business as *Al Jadeed* TV. Ms Khayat is Deputy Head of News and Political Programmes Manager at *Al Jadeed* TV, and also one of the company's shareholders.
- Ms Khayat had the authority to remove the broadcasts from *Al Jadeed* TV's website and YouTube channel. She had the authority to make such a decision on behalf of *Al Jadeed* TV.
- *Amicus* has presented sufficient evidence that the Pre-Trial Judge on 10 August 2012 issued an Order,⁵⁸ which was in force at the time the broadcasts were available on *Al Jadeed* TV's website and YouTube channel.⁵⁹ The Pre-Trial Judge specifically ordered "Al-Jadeed TV, its principals, employees, agents and affiliates immediately to remove any confidential information or material allegedly related to witnesses before the Tribunal, from their

⁵⁷ See above, para. 36.

⁵⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Order for Immediate Removal of Disseminated Material and Cessation of Dissemination, Confidential and *Ex Parte*, 10 August 2012 ("Removal Order").

⁵⁹ The Removal Order has neither been withdrawn or amended.

websites and from any other resource accessible to the public”.⁶⁰ This Order specifically refers to the material broadcast by *Al Jadeed TV*.⁶¹

- Ms Khayat failed to remove the broadcasts from *Al Jadeed TV*’s website and YouTube channel after the Pre-Trial Judge’s Order.

45. **(3) *Al Jadeed TV* and Ms Khayat knew of the Pre-Trial Judge’s Order of 10 August 2012 to remove the information on purported confidential witnesses in the *Ayyash et al.* case from *Al Jadeed TV*’s website and YouTube channel.**

46. *Amicus* has presented sufficient evidence that *Al Jadeed TV* and Ms Khayat were aware of the Pre-Trial Judge’s Order of 10 August 2012. In particular, the Order was sent via e-mail by an official in the Tribunal’s Registry to Ms Khayat on 11 August 2012. In addition, the Order was served by the Lebanese authorities on 14 August 2012. Ms Al Bassam, news director at *Al Jadeed TV*, signed and acknowledged receipt.

ii) Additional elements of contempt with respect to *Al Jadeed TV*

47. I also analyse the additional essential elements of the offence with respect to *Al Jadeed TV*.

48. **(4) Ms Khayat acted within the scope of her employment as Deputy Head of News and Political Programmes Manager of *Al Jadeed TV*.**

(5) Ms Khayat had authority from *Al Jadeed TV* to broadcast and/or publish information on purported confidential witnesses in the *Ayyash et al.* case; and

(6) Ms Khayat’s wilful broadcast and/or publication of information on purported confidential witnesses in the *Ayyash et al.* case was motivated—at least in part—by an interest to benefit *Al Jadeed TV*.

- On the basis of the information provided by *amicus*, in particular with respect to Ms Khayat’s role and functions at *Al Jadeed TV*, I am satisfied that sufficient evidence exists to support these elements.

⁶⁰ Removal Order, Disposition.

⁶¹ *Id.* at paras 5-9.

iii) Conclusion

49. On the basis of the foregoing I am satisfied that sufficient grounds exist to proceed against *Al Jadeed* TV and Ms Khayat for contempt under Count 2 of the charges proposed by *amicus*.

2. The publications by *Al Akhbar*

50. With respect to the publications by the *Al Akhbar* newspaper on 15 and 19 January 2013 (see paragraph 3 (ii) above), *amicus* proposes charging two persons with one count of contempt under Rule 60 *bis* (A). These persons are *Akhbar Beirut* S.A.L., the legal person doing business as *Al Akhbar*, and Mr Ibrahim Mohamed Al Amin, *Al Akhbar*'s editor in-chief and chairman of the board of directors.⁶² I recall that, in principle, charges may be brought against a company (*Al Akhbar*) as well as against a natural person (Mr Al Amin).

a) Count of Contempt

51. *Amicus* proposes to charge that both *Al Akhbar* and Mr Al Amin knowingly and wilfully interfered with the administration of justice by publishing information on purported confidential witnesses in the *Ayyash et al.* case, thereby undermining public confidence in the Tribunal's ability to protect the confidentiality of the information about, or provided by, witnesses or potential witnesses.⁶³

52. For the reasons provided above,⁶⁴ this charge, even though not mentioned specifically in the enumerated list of acts constituting contempt under Rule 60 *bis* (A), falls within the general provision of the Rule, which aims to punish those "who knowingly and wilfully interfere with [the Tribunal's] administration of justice". Indeed, contempt must also embrace wilful publications of names merely *asserted* to be those of alleged confidential witnesses in the Tribunal's proceedings.⁶⁵

i) Elements of contempt with respect to both *Al Akhbar* and Mr Al Amin

53. The following are the essential elements of the offence.

⁶² Further Report, para. 118.

⁶³ *Ibid.*

⁶⁴ See above, para. 33.

⁶⁵ See above, para. 34.

54. **(1) *Al Akhbar* and Mr Al Amin, through their acts and/or omissions, wilfully published information on purported confidential witnesses in the *Ayyash et al.* case.**

Amicus has presented sufficient evidence that:

- *Al Akhbar* on 15 January 2013 in its print edition published an article in Arabic titled “STL Leaks: The Prosecution’s Surprise Witnesses”. That same day, this article was published in Arabic on *Al Akhbar*’s official website (www.al-akhbar.com) and as an English translation on *Al Akhbar*’s English language website (english.al-akhbar.com).⁶⁶ The article contains information about 17 individuals alleged to be confidential witnesses in the *Ayyash et al.* case, including photographs and certain identifying information.⁶⁷ On 19 January 2013, *Al Akhbar* published in its print edition and on its official website an article in Arabic titled “The STL Witness List: Why We Published”. On 20 January 2013, an English edited translation was published on the English language website.⁶⁸ The article contains information on 15 individuals alleged to be confidential witnesses in the *Ayyash et al.* case (and not mentioned in the 15 January 2013 article), including photographs and certain identifying information.
- *Al Akhbar Beirut S.A.L.* is a legal person doing business as *Al Akhbar*. Mr Al Amin is the company’s chairman of the board of directors. He is also *Al Akhbar*’s Editor-in-Chief.
- Mr Al Amin co-authored the article of 15 January 2013. He also authored the article of 19 January 2013. In his capacity as Editor-in-Chief of *Al Akhbar*, Mr Al Amin was responsible for the publication of the articles, both in the paper’s print edition and on its official website. He also had the authority to remove these articles from the website.

55. **(2) The publication of information on purported confidential witnesses in the *Ayyash et al.* case interferes with the administration of justice by undermining public confidence in the Tribunal’s ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.**

⁶⁶ Only the Arabic language versions contained the identifying information on purported confidential witnesses. However, there was a link on the page of the English language version to the Arabic language version on the official website.

⁶⁷ This information is only contained in the Arabic version of the article.

⁶⁸ Only the Arabic language versions contained the identifying information on purported confidential witnesses.

56. I have stated that the publication of purported confidential witness information must reduce the public's confidence in the Tribunal and thereby interfere with its administration of justice.⁶⁹ I note that *amicus* also intends to rely here on testimony by persons describing their contact with victims and witnesses. Given that some of these persons would testify as to the circumstances in which they were contacted by victims and witnesses, and in particular about the fact that they received phone calls triggered by the publications, I am also satisfied that such evidence, while in part hearsay, would *prima facie* support this element.⁷⁰ It will be for the Contempt Judge hearing the case to determine which evidence to admit.

57. **(3) *Al Akhbar* and Mr Al Amin knew that publishing information on purported confidential witnesses in the *Ayyash et al.* case would interfere with the administration of justice by undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.**

- I am satisfied that *amicus* has presented sufficient evidence to show that both *Al Akhbar* and Mr Al Amin were aware that publication of the articles would interfere with the Tribunal's administration of justice. I refer in particular to evidence indicating that Mr Al Amin was aware that publication could endanger the lives of witnesses, including an article written by Dr Omar Nashabe and published by *Al Akhbar* on 19 January 2013, criticizing the publications for this reason, and an article published in *Al Akhbar* on 21 January 2013 by Mr Al Amin, acknowledging such criticism. Mr Al Amin also published an article in *Al Akhbar* on 22 January 2013, in which he acknowledged having been accused of publishing the 19 January 2013 article for the purpose of intimidating witnesses of the Tribunal. In addition, following publication of the first article, Mr Al Amin was served with the Registrar's Notice of Cease and Desist of 18 January 2013, which mentions that this publication "may constitute a knowing and wilful interference with the administration of justice and may place at risk the security of those individuals that have been the subject of the article".

ii) Additional elements of contempt with respect to *Al Akhbar*

58. The additional essential elements of the offence with respect to *Al Akhbar* are as follows.

⁶⁹ See above, para. 37.

⁷⁰ See above, para. 37, fn. 55.

59. **(4) Mr Al Amin acted within the scope of his employment as Editor-in-Chief and chairman of the board of directors at *Akhbar Beirut* S.A.L.**

(5) Mr Al Amin had authority from *Al Akhbar* to publish information on purported confidential witnesses in the *Ayyash et al.* case; and

(6) Mr Al Amin's wilful publication of information on purported confidential witnesses in the *Ayyash et al.* case was motivated—at least in part—by an interest to benefit *Al Akhbar*.

- On the basis of the information provided by *amicus*, in particular with respect to Mr Al Amin's role and functions at *Al Akhbar*, I am satisfied that sufficient evidence exists to support these elements.

b) Conclusion

60. On the basis of the foregoing I am satisfied that sufficient grounds exist to proceed against *Al Akhbar* and Mr Al Amin for contempt under the charge proposed by *amicus*.

3. [REDACTED]

With respect to [REDACTED] (mentioned in paragraph 3 (iii) of this Decision), [REDACTED].⁷¹ I therefore agree with his recommendation⁷² that I retain jurisdiction over this matter [REDACTED] new *amicus*⁷³ [REDACTED]. I order that newly appointed *amicus* report to me by a date to be fixed following such appointment.

4. Investigation with respect to the source of information allegedly leaked

61. In relation to all events referred to in paragraph 3, *amicus* had also been asked to investigate the source of any confidential information potentially published in the media.⁷⁴ *Amicus* consequently investigated *inter alia* whether information as to the identity of alleged confidential witnesses could have been disclosed by Tribunal personnel with access to confidential documents. I wished to consider there could be a possible defence of justification of any of the publications on the ground of malicious disclosure by Tribunal personnel of the

⁷¹ [REDACTED].

⁷² Further Report, para. 119.

⁷³ See below at V.

⁷⁴ Decision on Allegations of Contempt, para. 26.

identity of alleged confidential witnesses which might have been permitted by defective systems within the Tribunal. *Amicus* has concluded that while it was alleged that such information was leaked from inside the Tribunal,⁷⁵ the evidence gathered during *amicus*' investigation leads to the conclusion that it is "unlikely" that any such information would have been made available by the Tribunal.⁷⁶

B. Whether I should exercise my discretion in favour of contempt proceedings

62. I have found that sufficient grounds exist to proceed with contempt cases under Rule 60 *bis* against *Al Jadeed* TV and Ms Khayat and *Al Akhbar* and Mr Al Amin. This, however, is not the end of the matter because the Rule further indicates that when such sufficient grounds to proceed are established, contempt proceedings *may* be initiated. As the Appeals Chamber of the International Criminal Tribunal for Rwanda has held, the decision-maker in a contempt case "will have to consider carefully if these proceedings are the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of the case".⁷⁷ Because jurisdiction for contempt is ancillary to the primary jurisdiction of the Tribunal, the assessment of whether to actually initiate proceedings when sufficient grounds exist falls squarely within my discretion.

63. I have taken into account 1) the nature of the charges to be levelled against the individuals and companies named above and 2) the implications of initiating contempt proceedings.

64. As to 1), the main proceedings before the Tribunal concern a case of the gravest magnitude. The public interest in protecting such proceedings against undue outside influence is of the highest importance. *Amicus* charges that alleged criminal conduct in this matter had a detrimental effect on the Tribunal's administration of justice. It follows that this factor militates in favour of contempt proceedings.

65. As to 2), I am satisfied that failure by the Tribunal to respond to the publication of alleged confidential witness names would encourage further similar conduct. Contempt proceedings would reduce the risk the public will lose confidence in the ability and will of the

⁷⁵ Further Report, para. 74.

⁷⁶ Further Report, para. 72.

⁷⁷ *Karemera et al.* Decision, para. 21.

Tribunal to protect its witnesses. Further, prosecuting those who interfere with the Tribunal's administration of justice in accordance with due process will enhance public confidence in the rule of law.

66. I have given particular consideration to the circumstances of Lebanon. In the Preface to his great Digest, Justinian wrote of "the fair city of Berytus, which may well be called the nurse of laws".⁷⁸ The motto of the Beirut Bar Association maintains Justinian's phrase.⁷⁹ Lebanon was a founding member of the United Nations under whose Charter this Tribunal was created. It was party to the proliferation of international law that resulted, including the Universal Declaration of Human Rights with which Lebanon under its Constitution must abide.⁸⁰ It is wholly in keeping with these traditions that this Tribunal should apply the criteria stated in paragraphs 64 and 65 of this Decision.

C. Conclusion

67. For these reasons, I order that contempt proceedings be initiated against *Al Jadeed* TV and Ms Kharma Khayat, and *Al Akhbar* and Mr Ibrahim Al Amin and issue orders in lieu of an indictment with respect to these persons. [REDACTED].

III. Whether I should recuse myself as Contempt Judge with respect to the two matters for which I have issued orders in lieu of an indictment

68. Rule 60 *bis* does not expressly require a Contempt Judge who has found sufficient grounds to proceed with a contempt case to recuse himself or be replaced by another judge to adjudicate upon that same contempt case. Rule 60 *bis* (C) states only that, "[t]he President shall designate a Contempt Judge in accordance with the relevant Practice Direction to hear cases of contempt and obstruction of justice".⁸¹ No subsequent provision contemplates the recusal or replacement of a designated Contempt Judge. Verbally, Rule 60 *bis* may be said at least implicitly to assume that the Contempt Judge who finds sufficient grounds to proceed will continue as Contempt Judge through the conclusion of the contempt case. But interpretation turns not only on words but on application of basic principle.

⁷⁸ *Digest of Justinian* [translated by C.H. Monro], Vol. I (Cambridge University Press 1904), p. xxiii.

⁷⁹ "Berytus Nutrix Legum".

⁸⁰ Preamble, *Constitution* (Lebanon).

⁸¹ Rule 60 *bis* (C) STL RPE.

69. The settled principle *nemo judex in causa sua* (no one may be a judge in his own cause) is of quite general application.⁸² As contemplated by Rule 60 *bis* (F) (ii), by this Order I am effectively indicting the accused and directing counsel to prosecute the case. In practical terms, this means I am the prosecutor of the contempt issues. I cannot now become judge of the same issues.⁸³ The fair trial rights articulated in Article 16 of the Statute and Rules 24 and 25 mean that a person against whom a contempt case is brought is entitled to an impartial judge, and the absence of the appearance of bias, as much as any other accused. In principle it is to be expected that recusal by the Contempt Judge will occur to ensure protection of these rights.

70. I have considered the decision in the *Hartmann* contempt matter at the ICTY,⁸⁴ which involved substantially similar considerations under equivalent legal provisions.⁸⁵ At issue in the case was, as here, alleged contempt outside the courtroom and “the extent to which a Trial Chamber may involve itself in the investigation and prosecution phases of the contempt case before it becomes inappropriate for the Chamber to adjudicate the case due to an apprehension of bias”.⁸⁶ A Practice Direction of that Tribunal seemed to mandate a chamber to try such a matter unless there were exceptional circumstances. However, the majority of the Panel in *Hartmann* concluded that this “exceptional circumstances” standard should be given a wide interpretation.⁸⁷

⁸² See Code of Justinian 3.5 in: Henry Roland & Laurent Boyer, *Adages du droit français*, 4th ed. (Litec 1999), pp. 502-504; R. H. Kersley, *Broom's Legal Maxims*, 10th ed. (Sweet & Maxwell Limited 1939), pp. 68-73. Domestic law and jurisprudence bear out the principle that no one may be a judge in his own cause. See, e.g., United Kingdom, Visitors to the Inns of Court, *In re P (A Barrister) v. General Council of the Bar*, [2005] 1 W.L.R. 3019 (24 January 2005) (deciding that a lay member of an entity which had regulatory responsibility for laying and prosecuting charges was disqualified from sitting on the disciplinary tribunal—even though she had had nothing to do with any direct involvement in the charging process); United Kingdom, Court of Appeals, *The Queen v. Institute of Legal Executives*, Case No. C/2010/2924 (19 October 2011), para. 35 (“Participation in a prosecutorial capacity, even if not in the case in question, will disqualify or else raise concern in the mind of a fair minded observer about the appearance of impartial justice.”); Australia, Court of Appeals, *Livesey v. NSW Bar Association*, [1983] 151 CLR 288, pp. 293-294 (holding that “a judge should not sit to hear a case if, in all the circumstances, the parties, or the public, might entertain a reasonable appreciation that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it”); *Ponifasio v. Samoa Law Society* [2012] WSCA 4 (28 May 2012) (holding that the delegation of the hearing function to a hearing committee consisting of Law Society Council members who had previously determined that there were reasonable grounds to prosecute a legal practitioner infringed the *nemo judex* principle and setting aside the conviction it had entered).

⁸³ See *Nobilo* Contempt Judgment, para. 56 (referring to the “danger of a Chamber being both the prosecutor and the judge in relation to a charge of contempt, and the possibility in such a case that the ordinary procedures and protections for the parties are overlooked”).

⁸⁴ ICTY, *In the Case Against Hartmann*, IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009 (“*Hartmann* Disqualification Decision”).

⁸⁵ The procedure set out in Rule 77 ICTY RPE is substantially similar as the one under Rule 60 *bis* STL RPE.

⁸⁶ *Hartmann* Disqualification Decision, para. 47.

⁸⁷ *Id.* at para. 50.

71. In particular, drawing a contrast between conduct in the face of the court and conduct outside the courtroom, the Panel reasoned that, when alleged contempt occurs outside the courtroom, assignment of the case to a different chamber is warranted in more than just exceptional cases, “owing to the wide and unique power of the Trial Chamber to direct the investigative and prosecutorial phases of the case”.⁸⁸ The Panel held that the relevant Rules

must therefore be interpreted in light of an accused’s right to a fair trial [. . .] of which trial by an independent and impartial bench is an inalienable component. Whenever a Trial Chamber finds itself in a situation whereby to proceed with a case could potentially compromise the rights of an accused, the Trial Chamber must recuse itself from the case and refer the matter to another Chamber.⁸⁹

72. I respectfully disagree with the proposition that where the contempt is not in the face of the court, a judge who initiates contempt proceedings should proceed to adjudicate upon them unless there are exceptional circumstances. Rather, the *nemo judex* rule requires the disqualification of the initiator of proceedings from determining them in all such cases.

73. When however alleged contempt occurs in court, the sitting chamber or judge may have better reason to adjudicate upon the contempt case. As Lawton LJ explained in *R. v. Powell*:

[D]isruption of courts is unfortunately becoming commoner. There are some cases which, although serious, do not justify the cumbersome procedure [entailed in a formal application before another court]. In such cases, it seems to us that it is right for the judge to deal with the matter then and there.⁹⁰

74. This is not of course to say that in such situation reassignment cannot be warranted. Here, however, I need not consider such circumstances as the alleged contempt did not take place before me. In the light of the principles set out, and given the circumstances of this case, I find it necessary to disqualify myself from hearing the charges that I have directed to be brought. As mentioned above, I retain jurisdiction over *amicus*’ remaining investigations.

⁸⁸ *Id.* at para. 49.

⁸⁹ *Id.* at para. 50.

⁹⁰ United Kingdom, Court of Appeal (Criminal Division), *R v. Powell*, [1994] 98 Cr. App. R. 224 (27 May 1993), p. 226; see also ICTY, *Contempt Proceedings Against Kosta Bulatović*, IT-02-54-R77.4, Decision on Contempt of Tribunal, 13 May 2005, Separate Opinion of Judge Bonomy, para. 8 (“It is vital to the proper administration of justice that a court maintains its authority over the conduct of proceedings before it. To enable the court to enforce its authority in the face of resistance to its directions, the court must be able to take action to try to secure the implementation of its directions. One example is where a witness, having been duly sworn, endeavours to avoid his obligation to tell the whole truth by evasion [...]. That sort of conduct, prevarication falling short of lying under oath or perjury, must be addressed by the presiding court. The conduct is frequently obvious and indisputable, carried out in the face of the court, and can potentially undermine the effective exercise of the court’s jurisdiction to dispose of the primary business before it.”).

IV. Confidentiality

75. It is important to preserve confidentiality with respect to the event first mentioned in paragraph 3 (iii) of this Decision.⁹¹

76. Further, while an order in lieu of an indictment must normally be filed publicly,⁹² in exceptional circumstances the interests of justice may require such an order to be issued confidentially for the shortest possible period.⁹³ Here, such exceptional circumstances exist. Once the orders following from this Decision are certified, they must promptly be formally provided to Lebanese authorities, together with a summons to appear, for personal service on the accused.⁹⁴ Under Rule 78, and because I am recusing myself from further adjudicating upon the charges contained herein, it is for the next judge to issue such summons.⁹⁵ As of this date, the judge who will hear the contempt cases has yet to be appointed. For this reason, I order that this Decision be treated as confidential and *ex parte*, until further notice.

V. Appointment of *amicus* prosecutor/investigator

77. After submitting his latest report to me, *amicus* informed me that he will not be available for the prosecution of the contempt charges that he has proposed. Nor will he be able to finalize the remaining investigations.

78. This development requires the appointment by the Registrar of a new *amicus curiae*. I therefore instruct the Registrar to make the necessary arrangements without delay, if necessary in consultation with the Contempt Judge hearing the case. [REDACTED].

⁹¹ See Decision on Allegations of Contempt, paras 16, 19, 28.

⁹² Rule 73 STL RPE.

⁹³ Rule 74 STL RPE.

⁹⁴ Rule 76 STL RPE.

⁹⁵ Rules 68 (J) (i), 78 STL RPE.

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rule 60 *bis* (F) (ii) of the Rules;

I

ISSUE orders in lieu of an indictment for contempt with respect to the publications mentioned in paragraph 3 (i) and (ii) of this Decision and direct that these matters be prosecuted on the basis of the charges and factual allegations laid out in the orders;

RECUSE myself as Contempt Judge with respect to these two matters;

ORDER that [REDACTED];

RESERVE to myself and retain jurisdiction over that matter;

DIRECT the Registrar to appoint *amicus curiae* to prosecute the matters for which I now issue orders in lieu of an indictment and [REDACTED] with respect to the remaining matter;

ORDER that new *amicus curiae* report to me on the remaining matter by a date to be fixed following *amicus* ' appointment;

DECIDE that this Decision shall remain confidential and *ex parte* until further order.

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

Dated 31 January 2014

Leidschendam, the Netherlands



Judge David Baragwanath
Contempt Judge

